



# NEW LEGAL REALITY: CHALLENGES AND PERSPECTIVES. II

21–22 October 2021, Riga

Collection of research papers in conjunction  
with the 8<sup>th</sup> International Scientific Conference  
of the Faculty of Law of the University of Latvia



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OF LATVIA**



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## PREFACE

Compendium II includes the papers presented at the 8<sup>th</sup> International Conference “New Legal Reality: Challenges and Perspectives”.

The multitude of Latvian and foreign scholars who attended the Conference – excellently organized despite the complexity of the unusual format imposed by the pandemic – confirms the international mission of the Faculty of Law. Its biennial Conference has become a “regular round” for legal scholars from Europe and the rest of the world, in which issues and innovative regulations are discussed and exchanged. Forum, sections, speeches and now – the published pages reflect the main challenges of our societies at large. Different perspectives and various thoughts address the function of the rules in keeping values and principles alive and adequate for a fair and sustainable human development which today, more than ever, must consider the limited resources of our planet and the unknown technological horizons. These thoughts express the beauty of comparative law.

The present Compendium explores a wide and intriguing landscape of the several Conference sections with topics and issues ranging from the protection of rights in the era of pandemics to private and public interests under the Rule of Law; from human rights in the EU and Public International Law framework to the current challenges of EU arising in Private Law; from issues of Criminal Law to the first regulations in the digital world.

A variety of fields are brilliantly covered by the authors who have emphasized the complexity of our societies and economies, the challenges that they pose to legal science, therefore the suitability and rationality of regulation. The European Union and the international legal order represent the legal space, where normative solutions take place. A steady circulation of ideas, concepts and proposals is increasingly needed to foster better regulation. Never before in the history of humankind the genius of the rules has been so decisive.

Following the path of developing legal thought, the University of Latvia Faculty of Law is doing a magnificent job and we must all be proud of being part of it.

**Carlo Amatucci**  
University of Naples Federico II



# SECTION 1

*CAVEANT CONSULES:*  
THE MINIMUM OF  
INVIOLEABLE RIGHTS IN  
EMERGENCY CONDITIONS

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## IMPACT OF COVID-19 ON A SUSTAINABLE WORK ENVIRONMENT IN THE CONTEXT OF DECENT WORK<sup>1</sup>

**Keywords:** decent work, sustainability, work in the emergency situation, remote work, workplace well-being

### Summary

The aim of the study is to analyse decent work as a value stemming from human dignity. The key factors include a safe and healthy work environment and working conditions, social protection, compliance with employment law, stability of a workplace, opportunities for development, training and self-fulfilment, mutual respect, contacts with colleagues, etc. The impact of the pandemic has changed employees' views on "perfect job". Remote work is only one of the new forms of employment created by digitalization, which will increasingly enter and strengthen the labour market. However, not all employers are equally prepared for change. The study will illustrate how the concept of decent work has changed in the context of the pandemic, so that the legislator and employers can reorganize themselves, creating appropriate work environment for employees and promoting the economic sustainability of the country.

### Introduction

The independence of the Republic of Latvia was reestablished thirty years ago. The Republic of Latvia was founded and restored as a democratic state. The demand

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<sup>1</sup> The current paper has been prepared within the framework of the Latvian Council of Science project "The Impact of COVID-19 on Sustainable Consumption Behaviours and Circular Economy" (No. lzp-2020/2-0317).

for a democratic state derives from the nation's right to sovereignty. At the same time, every citizen has the right to a democratic state.<sup>2</sup> The implementation of democracy requires a state governed by the rule of law, where the principle of the supremacy of law is enshrined in the constitution and the principle of the power separation and respect for fundamental rights are ensured.<sup>3</sup> In a state governed by the rule of law, the principles of the supremacy and binding force of law are consistently implemented.<sup>4</sup> This means that even in an emergency that arose in a country during a global pandemic, the state had to take legal decisions and implement them legally.

The right to work is a fundamental human right that must be assessed in the context of human dignity. Human freedom and free work are basis of modern civil society.<sup>5</sup> "Work is an integral source of human dignity and self-actualisation in a democratic society."<sup>6</sup> In addition, work is important not only in the lives of individuals, but also in ensuring the well-being and sustainability of the whole society. The aim of our study is to find out the impact of COVID-19 on the employment and work environment by evaluating this impact from the aspect of human dignity, decent work and employee well-being. The study is interdisciplinary, combining sources and methods of law, economics, and human resource management to gain a fuller understanding of the process.

## 1. Decent work in the sustainable work environment

The modern state is formed for an individual, that is, to ensure person's right to free self-determination. In order to legally strengthen this right, the concept of human dignity is enshrined in law. Jürgen Habermas writes that human dignity is the "moral source" from which the Constitution of a democratic state obtains nourishment.<sup>7</sup> Human dignity is an inherent, integral, unconditional moral value of every individual, from which a number of human rights derive: all human beings are equal, and everyone has fundamental rights that no one should be deprived of. The right to human dignity is universal and its exercise must not be influenced by

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<sup>2</sup> Degenhart Ch. Staatsrecht I. Staatsorganisationsrecht. Heidelberg: C. F. Müller, 2017, S. 11.

<sup>3</sup> Bleckmann A. Vom Sinn und Zweck des Demokratieprinzips. Berlin: Duncker & Humblot, 2021, S. 124.

<sup>4</sup> Horn H. Einführung in die Rechtswissenschaft und Rechtsphilosophie, 4, neue bearbeitete Auflage. Heidelberg: C. F. Müller, 2007, S. 3.

<sup>5</sup> Lazdiņš J. The Origins of a Civil Society Based on Democratically Legitimate Values in the Baltics After the Abolition of Serfdom. In: Legal Science: Functions, Significance and Future in Legal Systems II. The 7<sup>th</sup> International Scientific Conference of the Faculty of Law of the University of Latvia 16–18 October 2019. Riga: University of Latvia, 2020, pp. 144, 145.

<sup>6</sup> Judgment of the Constitutional Court of the Republic of Latvia of 14 June 2007 in Case No. 2006-31-01, para. 14.2. Available in English: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2006/11/2006-31-01\\_Spriedums\\_ENG.pdf#search=2006-31](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2006/11/2006-31-01_Spriedums_ENG.pdf#search=2006-31) [viewed 01.11.2021.].

<sup>7</sup> Häbermäss J. Par Eiropas konstitūciju [On the European Constitution]. Riga: Zinātne, 2013, p. 21.

a person's origin, gender, age, religion, nationality, sexual orientation, citizenship, world view or political opinion, as this is the only way to protect every individual in today's multicultural society.<sup>8</sup> Democracy, sustainability and respect for human rights and fundamental freedoms are interrelated and mutually reinforcing values.<sup>9</sup> In Latvia, human dignity is protected as a constitutional value, as a general principle of law and as a human right.<sup>10</sup> The state must comply with the requirements arising from human dignity, including decent work environment, even in the emergency situation. It is work that allows a person to ensure a dignified life for himself, and to fully integrate into society, including working both for a living and to realize himself as an equal and useful member of society.

The fundamental rights regarding work and employment are enshrined in several articles of the Constitution of the Republic of Latvia. Art. 106 guarantees the right to freely choose employment and workplace according to person's abilities and qualifications and prohibits forced labour. Art. 107 sets out the right to receive, for work done, commensurate remuneration and the right to have a rest, while Art. 108 – the right of employees to collective labour agreement, the right to strike and the freedom of trade unions, so that everyone can defend their rights deriving from employment law.<sup>11</sup> In its case law, the Constitutional Court of the Republic of Latvia has both concretized the aforementioned fundamental rights and assessed the significance of work in human life in the scope of other fundamental rights.

The Constitutional Court of the Republic of Latvia has acknowledged: "Sustainability has three interconnected aspects: ecological, economic and social sustainability. [...] Efforts of sustainable development are aimed at people and their right to lead a healthy and productive life in harmony with nature."<sup>12</sup> Therefore, "the legislator has a duty to establish a social security system, the aim of which is to protect human dignity as the highest value of a democratic state governed by the rule of law, to equalize social inequalities and to ensure the sustainable development of the state."<sup>13</sup>

<sup>8</sup> Cotterrell R. *Sociological Jurisprudence. Juristic thought and social inquiry*. London, New York: Routledge, 2018, p. 165.

<sup>9</sup> Judgment of the Constitutional Court of the Republic of Latvia of 29 June 2018 in Case No. 2017-25-01, para. 20.2. Available in English: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/10/2017-25-01\\_Judgment\\_ENG.pdf#search=2017-25](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/10/2017-25-01_Judgment_ENG.pdf#search=2017-25) [viewed 01.11.2021.].

<sup>10</sup> Plepa D., Pleps J. *Human Dignity in Latvia*. In: *Handbook of Human Dignity in Europe*. Becchi P., Mathis K. (eds.). Berlin, Heidelberg: Springer International Publishing, 2019, pp. 502, 503.

<sup>11</sup> The Constitution of the Republic of Latvia. Available in English: <https://likumi.lv/ta/id/57980-latvijas-republikas-satversme> [viewed 01.11.2021.].

<sup>12</sup> Judgment of the Constitutional Court of the Republic of Latvia of 24 February 2011 in Case No. 2010-48-03, para. 6.1.1. Available in English: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2010/07/2010-48-03\\_Spriedums\\_ENG.pdf#search=2010%2048-01](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2010/07/2010-48-03_Spriedums_ENG.pdf#search=2010%2048-01) [viewed 01.11.2021.].

<sup>13</sup> Judgment of the Constitutional Court of the Republic of Latvia of 9 July 2020 in Case No. 2019-27-03, para. 20.1. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2019/11/2019-27-03\\_Spriedums-1.pdf#search=2019%2027%2003](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2019/11/2019-27-03_Spriedums-1.pdf#search=2019%2027%2003) [viewed 01.11.2021.].

A person spends a third of his/her life at work. Employers' concern for the well-being of employees is one form of mutual respect. Well-being is based on the feelings of a person – positive emotion, engagement, relationships, meaning, and accomplishment.<sup>14</sup> Workplace well-being is related to all aspects of the working life: from the quality and safety of physical environment and working conditions to how employees feel about their work, work environment, as well as the work organization. The goal of well-being activities in the workplace is to complement work safety measures that ensure the health, safety, satisfaction and active involvement of employees in their duties. The well-being of employees is the main factor that determines the long-term effectiveness of the organization.<sup>15</sup> In this respect, the European Green Deal also has established workplace well-being as one of its pillars and puts well-being at the workplace at the core of a sustainable workplace by setting the main goal to save and strengthen the EU's natural capital and protecting the health and well-being of citizens from environmental hazards and their negative impacts.<sup>16</sup> Thus, employee well-being is the basis for the decent work in the sustainable environment.

From December 2019 to February 2020, a study was conducted involving bachelor's and master's level students from Latvia, in order to assess the views of younger generation on the ideal workplace and conditions.<sup>17</sup> The work environment in this study was viewed from different perspectives, such as work safety and employee well-being. Interestingly, 90% of respondents were in favour of flexible working hours, and a majority desired remote work, as well. A comfortable, safe workplace with stable work relationships, communication and cooperation possibilities dominated in the value scale of respondents.

## 2. Employee well-being during pandemic

The Republic of Latvia, after restoration of its independence, has experienced several crises, both economic and political. However, prior to the COVID-19 pandemic there were no threats to the health of the society at the national level. Therefore, to take the country out of crisis, novel solutions must be applied,

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<sup>14</sup> Seligman M. PERMA (Positive Emotion, Engagement, Relationships, Meaning, and Accomplishment) and the building blocks of well-being. *The Journal of Positive Psychology*, Vol. 13, 2018, pp. 333–335.

<sup>15</sup> International Labour Organization: Workplace well-being. Available: [https://www.ilo.org/safework/areasofwork/workplace-health-promotion-and-well-being/WCMS\\_118396/lang-en/index.htm](https://www.ilo.org/safework/areasofwork/workplace-health-promotion-and-well-being/WCMS_118396/lang-en/index.htm) [viewed 01.11.2021.].

<sup>16</sup> Communication from the Commission “The European Green Deal” (2019). Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0640&from=EN> [viewed 01.11.2021.].

<sup>17</sup> Kuzmina J., Atstāja Dz., Dambe G., Kichuk Y., Bykhovchenko V. Well-being in the work environment as foundation to achieve sustainable development goal. In: International Conference on Sustainable, Circular Management and Environmental Engineering, E3S Web Conf. Vol. 255 (ISCMEE 2021). Available: <https://doi.org/10.1051/e3sconf/202125501023> [viewed 01.11.2021.].



including those in legal field. At the same time, each crisis brings lasting changes in the life of society.

In the wake of the crisis caused by the COVID-19 pandemic, companies have had to take significant decisions promptly to be able to adapt to the changing situation and to maintain their market competitiveness. One of the human resource management challenges arising from the COVID-19 pandemic was the rapid transition to remote work to limit human contact.<sup>18</sup> During the COVID-19 pandemic, the remote work model is widely used, i.e., the employees do not carry out work duties at the workplace provided by the employer, but instead work from home. As illustrated by the data from the Central Statistical Bureau of Latvia, the total number of employees working remotely during the COVID-19 pandemic vary between 70.5–140.6 thousand.<sup>19</sup> This phenomenon has been engendered by restrictions laid by state on social contacts and the movement of persons.

Researchers predict that the remote work model will continue to be widely used after the pandemic, as it allows to save resources.<sup>20</sup> The pandemic has challenged the workforce to adjust to the remote work environment, where most of the employees have to work from their sofas or kitchen tables, and this new reality is going to impact the work environment in the future, as well.<sup>21</sup> In other words, work environment will not be the same as it was before pandemic, and work in the office will not be as prevalent as before.<sup>22</sup>

Recently, a few studies conducted in Latvia clearly illustrate the trend that employees lack the appropriate equipment for remote work. For example, only 34% of respondents have their own workplace or home office, 46% of respondents have a separate table in a shared living space, 20% use kitchen table or another place intended for different necessities. Half of the respondents have admitted that they use a laptop for remote working without an additional screen or stand. When asked whether they have improved their home office in the previous year, 49% admit that there have been no improvements. Survey shows that employers have provided IT devices and support to 54% of employees working remotely, an office table or chair – to 12% of employees, and a one-off benefit for improving their

<sup>18</sup> Carnevale J. B., Hatak I. Employee adjustment and well-being in the era of COVID-19: Implications for human resource management. *Journal of Business Research*, No. 116, 2020, pp. 183–187.

<sup>19</sup> Centrālā statistikas pārvalde: Attālināti strādājošo darbinieku (darba ņēmēju) īpatsvars attiecīgā saimnieciskās darbības veida (NACE 2. red.) strādājošo darbinieku (darba ņēmēju) kopskaitā (procentos) Q2 2020–Q2 2021 [Central Statistical Bureau: Proportion of teleworkers (employees) in the total number of employees of the respective type of economic activity (NACE Rev. 2) (per cent) Q2 2020–Q2 2021]. Available: <https://stat.gov.lv/lv/statistikas-temas/darbs/nodarbinatiba/tabulas/nbl280c-attalinati-stradajoso-darbinieku-darba-nemeju> [viewed 01.11.2021.].

<sup>20</sup> Neeley T. *Remote Work Revolution: Succeeding from Anywhere*. India: HarperCollins Publishers, 2021, p. 7.

<sup>21</sup> Coggan Ph. Working life has entered a new era. *The Economist*, 30.05.2020.

<sup>22</sup> Wang B., Lui Y., Qian J., K. Parker, S. Achieving Effective Remote Working During the COVID-19 Pandemic: A Work Design Perspective. *Applied Psychology*. 2021, No. 70/1, pp. 16–59.

workspace – to 9% of employees.<sup>23</sup> Due to the COVID-19 pandemic, the values of both – employers and employees – have changed. In a study conducted in March 2021 by "Kantar", 84% of employees indicated that work is one of the most important areas that affect their mood and sense of happiness. Furthermore, 54% of employees admitted that they had been experiencing austerity measures in their workplace.<sup>24</sup>

Doctrine recognizes that labour law has been constitutionalized, thus protecting the fundamental rights of employees.<sup>25</sup> Labour and employment law was separated from civil law in the 19<sup>th</sup> century, because it was concluded that the parties in this legal relationship were not equal, and that the employee needed additional protection regarding working time, salary, work safety, etc. Employment law requirements for employers towards protection of employees varies from country to country, but over the last century there has been a trend to provide additional protection of employees' rights. The arrangement of the work environment is the duty of the employer, and it must be performed, among other things, by taking care of the employee well-being. Employee can agree to work remotely when concluding an employment contract. However, the pandemic forced to work remotely many employees, who had agreed to work at the defined workplace on-site when they concluded their employment contract. The data obtained during pandemic illustrates that only a small number of employers currently take responsibility for providing appropriate work environment for working from home, and almost no one ensures a work environment of same quality as on-site in a workplace. Consequently, in an area where there is currently no detailed regulation, it will have to be developed, primarily to protect the employee.<sup>26</sup> When introducing a new regulation, the state must consider both the requirements of fundamental rights and the adjustments introduced by the new reality.

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<sup>23</sup> Buša L. Darbs no mājām, aptaujas rezultāti [Work from home, survey results]. Available: <https://www.veselsbirojs.lv/post/darbs-no-majam-aptaujas-rezultatu-parskats> [viewed 01.11.2021.].

<sup>24</sup> Tokareva M. "Kantar" pētījums par COVID-19 ietekmi uz apmierinātību ar darbu veikts no 2021. gada 6. līdz 14. janvārim "Kantar" study on the impact of COVID-19 on satisfaction with job was conducted from 6 to 14 January 2021]. Available: <https://www.kantar.lv/84-latvijas-stradajoso-atzist-ka-darbs-ir-svarigs-un-kopuma-ir-viena-no-svarigakajam-jomam-kas-ietekme-vinu-emocionalo-noskanojumu-un-laimes-sajutu/> [viewed 01.11.2021.].

<sup>25</sup> Collins H., Lester G., Mantouvalou M. (eds.). Does Labour Law Need Philosophical Foundations? (Introduction). In: *Philosophical Foundations of Labour Law*. Oxford: Oxford University Press, 2019, pp. 8, 9.

<sup>26</sup> In other European Union countries, such as Germany, case law on employment under the impact of COVID-19 pandemic is already developing. See: Pusch T. Germany: Latest COVID-19 Related Updates to Employment Law. Available: <https://www.mondaq.com/germany/employment-and-workforce-wellbeing/1101376/latest-covid-19-related-updates-to-employment-law> [viewed 01.11.2021.].

## Conclusion

1. Human dignity is an inherent, integral, unconditional moral value of every individual. The state must comply with the requirements arising from human dignity, even in the emergency situation. The inviolable minimum of rights consistent with human dignity derives from the individual's right to free self-determination and the right to dignified life, which, *inter alia*, means full participation in society, including by working both for a living and to realize oneself as an equal and useful member of society.
2. Well-being is based on the feelings of a person – positive emotions, engagement, relationships, meaning, and accomplishment. Well-being in the workplace is related to all aspects of the working life: from the quality and safety of physical environment and working conditions to how employees feel about their work, the work environment itself, as well as the work organization. Employee well-being is the basis for decent work in sustainable environment.
3. The dynamic of remote work correlate with the course of the pandemic and restrictions imposed by governments and epidemiological safety measures introduced in workplace. Taking into account the situation highlighted by the previous studies regarding the non-compliance of the work environment with ergonomics and other aspects of workplace well-being, the issue of factors impacting well-being of employees becomes even more relevant for employers.
4. Work is a human necessity that provides both a means of subsistence and a place in society. The impact of the pandemic has changed employees' views on "perfect job". Remote work is only one of the new forms of employment created by digitalization, which will increasingly enter and strengthen the labour market. However, not all employers are equally prepared for change. The study illustrated how the concept of decent work had changed in the context of the pandemic, so that the legislator and employers could reorganize themselves, creating an appropriate work environment for employees and promoting the economic sustainability of the country.

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## **PAYMENT OF MANDATORY SOCIAL INSURANCE CONTRIBUTIONS IN A SOCIALLY RESPONSIBLE STATE AS A SAFEGUARD FOR THE INVIOABILITY OF HUMAN DIGNITY IN EMERGENCY CONDITIONS IN A STATE GOVERNED BY THE RULE OF LAW**

**Keywords:** social insurance contributions, human dignity, subsistence minimum, socially responsible state

### **Summary**

The article provides an analysis of the impact of economic crises on improving regulation on the state mandatory social insurance in Latvia following the restoration of its independence *de facto* (1990–1991), as well as of the legal principles and case law related to social insurance. In examining case law, particular attention is paid to such concepts as human dignity, a state governed by the rule of law, and a socially responsible state. The subsistence minimum, which has not been calculated by the State, is recognised as being an unsolved problem, which, effectively, prohibits from discussing the effectiveness of the system of state mandatory social insurance in the area of social security when an insured event occurs.

### **Introduction**

Socially responsible democratic states, governed by the rule of law,<sup>1</sup> have united in the European Union (hereafter – the Union). Human dignity is an

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<sup>1</sup> Latvia was established (proclaimed) as a democratic state governed by rule of law on 18 November 1918. See Osipova S. Establishing the University of Latvia. In: Legal Science: Functions, Significance and Future in Legal Systems II. The 7<sup>th</sup> International Scientific Conference of the Faculty of Law of the University of Latvia 16–18 October 2019. Riga: University of Latvia, 2020, pp. 87–89. Available: <https://www.apgads.lu.lv/izdevumi/brivpieejas-izdevumi/rakstu-krajumi/lu-juridiskas-fakultates-zinatniska-konference-2/> [viewed 15.10.2021.].

inviolable value.<sup>2</sup> The social insurance system, organised jointly by the Union and its Member States, in many ways is subordinated to the implementation of these values.

The social insurance systems of Member States are coordinated on the Union's level. Harmonisation of these systems is not envisaged. The aim is to ensure that legal acts of one Member State are applicable to a person, at the same time preventing a situation where legal acts of none of the Member States are applicable to a person who is subject to social regulations.<sup>3</sup> "Competencies in the field of social security are shared between the Member States and the EU. Member States are exclusively competent to shape the substance of their social security systems"<sup>4</sup>.

Art. 109 of the *Satversme* [Constitution] of the Republic of Latvia (hereafter – the *Satversme*) provides that "[e]veryone has the right to social security in old age, for work disability, for unemployment and in other cases as provided by law."<sup>5</sup> Thus, any person is entitled to social security at least on the minimum level, compatible with human dignity.<sup>6</sup> Social security is implemented on the basis of social insurance, as well as social assistance, benefits, and other services (hereafter – social assistance).<sup>7</sup> State social insurance, in difference to social assistance, envisages a person's participation in the social security system, by making insurance contributions.<sup>8</sup>

In Latvia, social insurance is voluntary and mandatory. Voluntarism, in principle, excludes problems of legal nature.<sup>9</sup> This, however, is not the case with

<sup>2</sup> Kirste S. Einführung in die Rechtsphilosophie [Introduction to the philosophy of law]. Darmstadt: WBG, 2010, pp. 126–132.

<sup>3</sup> Regulation (EC) No. 883/2004 of the European Parliament and the Council of 29 April 2004 on the coordination of social security systems Arts 11–16 [in the wording of 31.07.2019.]; Regulation (EC) No. 987/2009 of the European Parliament and the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems Arts 14–21 [in the wording of 01.01.2018.]; CJEU judgement of 19 September 2013 in Case C-140/12 Brey para. 40; CJEU judgement of 14 June 2016 in Case C-308/14 Commission v. United Kingdom para. 64; CJEU judgement of 8 May 2019 in Case C-631/17 Inspecteur van de Belastingdienst para. 33 etc.

<sup>4</sup> Strban G. The right to social security: from state to EU responsibility? In: Legal Science: Functions, Significance and Future in Legal Systems II (PDF). The 7<sup>th</sup> International Scientific Conference of the Faculty of Law of the University of Latvia 16–18 October 2019. Riga: University of Latvia, 2020, p. 190. Available: <https://www.apgads.lu.lv/izdevumi/brivpieejas-izdevumi/rakstu-krajumi/lu-juridiskas-fakultates-zinatniska-konference-2/> [viewed 15.10.2021.].

<sup>5</sup> Latvijas Republikas Satversme [The Constitution of the Republic of Latvia]. Available: <https://www.likumi.lv> [viewed 15.10.2021.].

<sup>6</sup> Judgment of the Constitutional Court of the Republic of Latvia (hereinafter – Judgment of the Constitutional Court) of 25 June 2020 in Case No. 2019-24-03 para. 17.3. Available in Latvian: <https://www.satv.tiesa.gov.lv/cases/> [viewed 15.10.2021.].

<sup>7</sup> Par sociālo drošību [On Social Security]. Available: <https://www.likumi.lv> [viewed 15.10.2021.].

<sup>8</sup> Judgment of the Constitutional Court of 19 October 2017 No. 2016-14-01, para. 19.2. Available: <https://www.satv.tiesa.gov.lv/cases/> [viewed 15.10.2021.].

<sup>9</sup> Par valsts sociālo apdrošināšanu [On State Social Insurance] Art. 5 (3–3<sup>4</sup>); Ministru kabineta 2010. gada 12. oktobra noteikumi Nr. 976 "Par brīvprātīgu pievienošanas valsts sociālajai apdrošināšanai" [Cabinet Regulation of 12 October 2010 No. 976 "On Joining the State Social Insurance Voluntarily]. Available: <https://www.likumi.lv> [viewed 15.10.2021.].

respect to the state mandatory social insurance (hereafter – social insurance). The mandatory contributions of the state social insurance (hereafter – mandatory contributions) can be equalled to a tax. Many employers, employees and self-employed persons do not understand or do not want to understand the meaning of social insurance. This leads to the avoidance of making mandatory contributions or to making these in the smallest possible amount. It is a problem. Material deprivation becomes obvious during the periods of economic crisis, requiring amendments to the legal regulation.

The aim of the article is to analyse the impact of economic crises on improving the legal regulation on social insurance in Latvia following the restoration of its independence *de facto* (1990–1991) with respect to an employee employed by a domestic employer (hereafter – an employer), a self-employed person, and payers of the patent fee. Employees employed by a foreign employer remain outside the scope of this article.

## **1. Impact of an economic crisis caused by financial instability on social insurance**

On 1 October 1997, the law “On State Social Insurance” was adopted. The law provided that “[a] person is socially insured and he or she shall mandatory contributions make (shall be made for him or her) from the day when this person has acquired the status of an employee or a self-employed person [...]”<sup>10</sup> The purpose of social insurance was evident, to ensure to a person replacement of revenue from work if a socially insured risk had set in. To reach the aim, the State defined the types of social insurance.<sup>11</sup> It is envisaged to provide all types of social insurance only to employees below the retirement age. For example, an employee who has reached the retirement age is not to be insured for the event of unemployment or disability<sup>12</sup>, because the source of income – pension – remains. A certain reservation regarding the basic provisions was included in the transitional provisions. These provided that “[f]rom 1 January 1998 to 1 January 2002, persons, for whom mandatory contributions have been actually made, is a socially insured person”.<sup>13</sup> The legislator’s concern regarding the capabilities of the State Revenue Service (hereafter – the tax authority) to ensure control over entities making the mandatory contributions and effective collection of these in case of non-payment was obvious.

<sup>10</sup> On State Social Insurance Art. 5 (4) [in the wording of 01.10.1997.].

<sup>11</sup> The valid law On State Social Insurance (Art. 4) defines the following types of insurance: the state pension insurance; the social insurance in case of unemployment; the social insurance against accidents at work and occupational diseases; the disability insurance; the maternity, paternity and sickness insurance; the parents' insurance; the health insurance.

<sup>12</sup> On State Social Insurance Art. 6 (1, 2).

<sup>13</sup> This does not apply to persons who must be covered by insurance against accident at work.



In 1998, the financial and economic crisis began in the Russian Federation. It affected numerous Latvian entrepreneurs involved in export.<sup>14</sup> The number of those claiming social benefits increased rapidly. Unfortunately, in many cases, benefits derived from social insurance were not granted. It transpired that employers had not made mandatory contributions for the employees.<sup>15</sup> This meant that, pursuant to the letter of law, an employee was not socially insured. The social crisis was exacerbated by the legislator's decision to prolong for two years the transitional provisions.<sup>16</sup> The Constitutional Court had to review compliance of "the principle of actual contributions" with fundamental rights.

The Constitutional Court recognised, "[i]f any social right is included in the basic law<sup>17</sup> then the State no longer can derogate from it. This right no longer is only of a declarative nature."<sup>18</sup> In reviewing the case, it was established that the employee was the only person involved in the state social insurance system who could make the mandatory contributions with the employer's mediation.<sup>19</sup> Not delving deeper into the employee's right to receive information free of charge about the status of their insurance account, i.e., to control the payment of mandatory contributions, can be regarded as a certain drawback of the legal proceedings.<sup>20</sup> A socially responsible state cannot exist without socially responsible inhabitants. Of course, an employee's irresponsibility does not cancel the tax authority's obligations. Pursuant to the social situation at the time, the Constitutional Court's judgement, in principle, was valid, i.e.: "an employee as the subject of social insurance has fully performed their obligation at the moment of entering employment relationships and starting to fulfil the duties of one's job. Disbursements [based on social insurance] may not be linked to the fact, whether other persons [employer or the State] have or have not fulfilled their statutory obligations properly"<sup>21</sup>. Hence, a norm, which links social services derived from social insurance to the mandatory contributions that have been actually made, is incompatible with the *Satversme*.<sup>22</sup>

<sup>14</sup> Par Krievijas finansu un ekonomikas krīzes ietekmi uz Latvijas nodokļu ieņēmumiem līdz 1999. gada 15. janvārim [On the impact of Russia's financial and economic crisis on Latvia's tax revenue until 15 January 1999]. Latvijas Vēstnesis, 1999, No. 32/33. Available: [www.vestnesis.lv](http://www.vestnesis.lv) [viewed 15.10.2021.].

<sup>15</sup> Lazdiņš J., Ketners K. The Effect of Court Rulings on the Dynamics of the Latvian Tax Law. Journal of the University of Latvia. Law, 2013, No. 5, pp. 28–29.

<sup>16</sup> Grozījumi likumā "Par valsts sociālo apdrošināšanu" [Amendments to the law "On State Social Insurance"] (25.11.1999.) Art. 18. Available: <https://www.likumi.lv> [viewed 15.10.2021.].

<sup>17</sup> See Art. 109 of the *Satversme* described above.

<sup>18</sup> Judgment of the Constitutional Court of 13 March 2001 in Case No. 2000-08-0109 conclusion part. Available in Latvian: <https://www.satv.tiesa.gov.lv/cases/> [viewed 15.10.2021.].

<sup>19</sup> On State Social Insurance Art. 21 (1–4); Regulation (EC) No. 987/2009 Art. 21.

<sup>20</sup> For instance, in the State Social Insurance Agency. See Par nodokļiem un nodevām [On Taxes and Fees] Art. 16 (1) pt. 9. Available: <https://www.likumi.lv> [viewed 15.10.2021.]; On State Social Insurance Art. 23 (4).

<sup>21</sup> Judgment of the Constitutional Court No. 2000-08-0109 conclusion part.

<sup>22</sup> Lazdiņš J., Ketners K. 2013, pp. 28–30.

The “historical” judgement significantly increased employees’ social security. However, this security does not apply to illegally employed persons. Therefore, pursuant to courts’ case law, a person may be recognised as being socially insured, upon identifying legal employment relations.<sup>23</sup>

Latvia experienced an unprecedentedly severe economic crisis in 2008–2010.<sup>24</sup> The total state budget revenue decreased rapidly. On 20 December 2010, with the aim of ensuring sustainable stability of the social budget, amendments were introduced to the law “On State Social Insurance”. These amendments provided, *inter alia*, that “[a] person shall be socially insured for pension insurance if mandatory contributions have been actually made”.<sup>25</sup> Returning to the principle of actual contributions in pension insurance in many ways could be substantiated by the Constitutional Court’s case law, which had recognised the State’s obligation to balance the revenue and expenditure parts of the special budget of state pensions as a legitimate aim.<sup>26</sup> Simultaneously, reinstatement of the principle of actual contributions in the case of pension insurance was contrary to the case law of the “historical” judgement.

The new legal norm defined employees’ co-responsibility for accruing the pension capital in accordance with the social insurance principle. However, also the solidarity principle as the basic “self-financing” principle of the social budget did not lose its relevance.<sup>27</sup> Mandatory contributions made by employees continue to ensure that other socially ensured persons receive social services.<sup>28</sup> Regretfully, there are plenty of people in Latvia who do not want to assume responsibility either for themselves or other persons. On the basis of a constitutional complaint submitted by their representatives, the Constitutional Court initiated the so-called “pensions case”.

Contrary to the “historical” judgement, it was recognised that a person had been ensured an effective possibility to receive information about the status

<sup>23</sup> Judgment of Supreme Court of Latvia of 31 January 2017 in Case No. A420371713 SKA-368/2017, para. 9. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi> [viewed 15.10.2021.]. On identifying legal employment relations see, for example, Judgment of Supreme Court of Latvia of 18 October 2019 in Case No. A420249614 SKA-42/2019; of 4 November 2020 in Case No. A420125216 SKA-64/2020. Available in Latvian: <https://manas.tiesas.lv/eTiesasMvc/nolemumi> [viewed 15.10.2021.] etc.

<sup>24</sup> Latvijas tautsaimniecība. Makroekonomiskais apskats [Latvian Economy. Macro-economic Overview]. 2010, No. 2 (43). Available: <https://www.em.gov.lv/lv/media/1882/download> [viewed 15.10.2021.].

<sup>25</sup> Grozījumi likumā “Par valsts sociālo apdrošināšanu” [Amendments to the law “On State Social Insurance”] (20.12.2010.) Art. 2. Available: <https://www.likumi.lv> [viewed 15.10.2021.].

<sup>26</sup> Judgment of the Constitutional Court of 11 November 2005 in Case No. Nr.2005-08-01 para. 8; Judgment of the Constitutional Court of 26 November 2009 in Case No. 2009-08-01 para. 18.1. Available in Latvian: <https://www.satv.tiesa.gov.lv/cases/> [viewed 15.10.2021.].

<sup>27</sup> Likumprojekta “Grozījumi likumā “Par valsts sociālo apdrošināšanu”” sākotnējās ietekmes novērtējuma ziņojums (anotācija) [The initial impact assessment report (annotation) regarding the draft law “Amendments to the Law “On State Social Insurance”]. Available: <http://titania.saeima.lv/LIVS10/SaeimaLIVS10.nsf/0/48F1DFEF440B97E1C22577F200267567?OpenDocument> [viewed 15.10.2021.].

<sup>28</sup> Jurušs M. Nodokļi [Taxes]. Rīga: RTU Izdevniecība, 2019, pp. 112–114.

of their insurance account. On the basis of this information, an employee may demand appropriate action from the employer or the State.<sup>29</sup> The judgement referred also to the interaction between the principles of social insurance and solidarity. Pursuant to the insurance principle, “[s]ocial insurance contributions are a person’s long-term investment, which guarantees to them social security in the future, [moreover] the amount of a person’s pension will be fair – proportional to the social insurance contributions made”<sup>30</sup>. Social solidarity, in turn, requires taking responsibility for other people by making mandatory contributions. This means that not only an employer and the State but also an employee should take social responsibility. Thus, implementation of the principle of actual contributions in pension insurance is neither contrary to the *Satversme* nor the principle of a socially responsible state.<sup>31</sup> Moreover, in accordance with the principle of a state governed by the rule of law, as was known already before “the pensions case”, “if an employee is ensured for a certain type of mandatory social insurance, he or she has the right to the respective security”<sup>32</sup>. In the case of a pension – if the social insurance contributions have actually been made. In other cases of social insurance – if legal employment relations can be identified. Although an economic crisis, as any other crisis causes problems, in Latvia they have facilitated the alignment of the social insurance system in the interests of a socially responsible employee.

## 2. Impact of COVID-19 caused economic crisis on social insurance

COVID-19 crisis revealed the urgency of a problem, well-known until then, but unresolved, in the area of social security. Several categories of persons were formally insured but actually their insurance was on a very low level. The reform of social insurance was greatly supported by the Constitutional Court’s case law. In 2020, several cases pertaining to issues of social security were reviewed. In two of them, it was noted *expressis verbis*:

“The State’s obligation to take care of just social order, decreasing social differences in society, facilitating social inclusion and providing to each group of inhabitants the possibility to lead a life that is compatible with human dignity follows from the principle of a socially responsible state, based on human dignity.<sup>33</sup> [...]

<sup>29</sup> Judgment of the Constitutional Court of 19 December 2011 in Case No. 2011-03-01 para. 24–27, 31. Available in Latvian: <https://www.satv.tiesa.gov.lv/cases/> [viewed 15.10.2021.].

<sup>30</sup> *Ibid.*, para. 16.2, 24.

<sup>31</sup> *Ibid.*, para. 24, 31.

<sup>32</sup> Judgment of the Constitutional Court of 26 March 2004 in Case No. 2003-22-01 para. 11. Available in Latvian: <https://www.satv.tiesa.gov.lv/cases/> [viewed 15.10.2021.].

<sup>33</sup> Judgment of the Constitutional Court of 9 July 2020 in Case No. 2019-27-03 para. 20.1. Available in Latvian: <https://www.satv.tiesa.gov.lv/cases/> [viewed 15.10.2021.].

Thus, human dignity as a basic value, included in the *Satversme*, has an impact on the legislator's discretion in establishing the social security system.<sup>34</sup>

The following were among persons with low-level social insurance:

- 1) payer of the patent fee;
- 2) employee of a micro-enterprise<sup>35</sup>;
- 3) part of royalties' recipients<sup>36</sup>;
- 4) part of self-employed persons;
- 5) part of part-time employees.

The patent fee was paid for the right to engage in economic activity in a certain area of crafts, i.e., footwear and clothing repair, floristics, etc.<sup>37</sup> The revenue from economic activity could not exceed a certain threshold, defined in the law<sup>38</sup>, i.e.: it was a low-income form of economic activity.<sup>39</sup> The example described below allows judging about the ineffectiveness of social insurance. Thus, in 2020, the monthly patent fee for a shoemaker outside the city of Riga was set in the amount of 50 EUR.<sup>40</sup> 67% of this amount constituted social insurance contributions. A payer of the patent fee below the retirement age was insured only for the events of disability and pension.<sup>41</sup> To compare, social contributions for an employee below the retirement age were made from all income, calculated in paid employment<sup>42</sup>, applying the rate of 35.09% (2021 – 34.09%)<sup>43</sup> The minimum salary in 2020 was 430 EUR (2021 – 500 EUR).<sup>44</sup> Such an employee was insured for all types of social insurance, *inter alia*, unemployment. The social security level of an employee, even

<sup>34</sup> Judgment of the Constitutional Court of 10 December 2020 in Case No. 2020-07-03 para. 15.1. Available in Latvian: <https://www.satv.tiesa.gov.lv/cases/> [viewed 15.10.2021.].

<sup>35</sup> I.e., an employee of an employer who is paying the micro-enterprise tax.

<sup>36</sup> I.e., recipients of copyright and neighbouring rights remuneration.

<sup>37</sup> Grozījumi likumā “Par iedzīvotāju ienākuma nodokli” [Amendments to the law “On Personal Income Tax”] (01.12.2009.) Art. 12. Available: <https://www.likumi.lv> [viewed 15.10.2021.].

<sup>38</sup> For instance, in 2019–2020, they were 15 000 EUR.

<sup>39</sup> Dārziņa L. Patentmaksājums un sociālā apdrošināšana [Patent Fee and Social Insurance]. Available: <https://lvportals.lv/skaidrojumi/285012-patentmaksajums-un-sociala-apdrosinasana-2017> [viewed 15.10.2021.].

<sup>40</sup> Ministru kabineta 2018. gada 16. janvāra noteikumi Nr. 28 “Kārtība, kādā piemērojama patentmaksas fiziskās personas saimnieciskajai darbībai noteiktā profesijā, un patentmaksas apmērs” 1. pielikums [Cabinet Regulation of 16 January 2018 No. 28 “Procedure for applying patent fee for the economic activities of a natural person in a certain profession, and the amount of patent fee”. Annex 1]. Available: <https://www.likumi.lv> [viewed 15.10.2021.].

<sup>41</sup> On State Social Insurance Art. 6 (3<sup>2</sup>) [in the wording of 2019–2020].

<sup>42</sup> Likuma “Par valsts sociālo apdrošināšanu” komentāri. 14. pants [Commentaries on the Law “On State Social Insurance”. Article 14]. Available: <https://www.dbhub.lv/rokasgramatas> [viewed 15.10.2021.].

<sup>43</sup> On State Social Insurance Art. 18 (1).

<sup>44</sup> Ministru kabineta 2015. gada 24. novembra noteikumi Nr. 656 “Par minimālās mēneša darba algas apmēru normālā darba laikā ietvaros un minimālās stundas tarifa likmes aprēķināšanu” [Cabinet Regulation of 24 November 2015 No. 656 “On calculating the amount of minimum monthly salary within the framework of regular working hours and calculating the minimum hourly tariff rate”] Art. 2. Available: <https://likumi.lv> [viewed 15.10.2021.].

in the case of minimum standard of insurance, was higher than that of a person paying the patent fee.

Employees of micro-enterprises were similarly disadvantaged. Formally, an employee of a micro-enterprise was treated as an employee. The amount of actual mandatory contributions differed from the one set for persons employed in the general regime.<sup>45</sup> It followed from a number of restrictions related to the tax regime of a micro-enterprise: the tax was paid from turnover, a certain restriction was set for the turnover, mandatory contributions constituted part of the tax, etc.<sup>46</sup> If the turnover was small or non-existent, the amounts of social insurance contributions were insignificant or a person was not socially insured at all.

Social insurance of the recipients of royalties had been a known problem in the area of social security already since *de facto* restoration of independence of the Latvian State. Strange as it might seem, “tax planning” was particularly widespread in mass media. Thus, for example, an employment contract was concluded with a journalist in the amount of one or two minimum monthly salaries, defined by the State, and the rest of the remuneration was paid as royalties. In such a case, there was no obligation to pay social insurance contributions for royalties, and the author was not obliged to register as a self-employed person. However, shortly before the economic crisis caused by COVID-19, it was provided that those disbursing royalties<sup>47</sup> had to pay, from their own resources, pension insurance for the author in the amount of 5of the disbursed royalties.<sup>48</sup> It is difficult to judge about the long-term effectiveness of these amendments because they will become invalid this year.

As the result of economic crisis, as of 1 January of the current year (2021), it is no longer possible to pay the patent fee for economic activities<sup>49</sup>; as of 1 July, all employees of a micro-enterprise are socially insured like all employees<sup>50</sup>; after expiry of the transitional period, from 1 January 2022, a recipient of royalties as a socially insured (natural) person will have to get registered as a person engaged in economic activity (as a self-employed person).<sup>51</sup>

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<sup>45</sup> Dārziņa L. *Mīkrouzņēmumu nodoklis un sociālā apdrošināšana* [Micro-Enterprise Tax and Social Insurance]. Available: <https://lvportals.lv/skaidrojumi/284772-mikrouzņemumu-nodoklis-un-sociala-apdrošinasana-2017> [viewed 15.10.2021.].

<sup>46</sup> *Mīkrouzņēmuma nodokļu likums* [Micro-Enterprise Tax Law] [in the wording of 2019–2020]. Available: <https://www.likumi.lv> [viewed 15.10.2021.].

<sup>47</sup> Except for collective management organisation.

<sup>48</sup> *Grozījumi likumā “Par valsts sociālo apdrošināšanu”* [Amendments to the law “On State Social Insurance”] (27.07.2017.) Art. 23<sup>1</sup>. Available: <https://www.likumi.lv> [viewed 15.10.2021.].

<sup>49</sup> *Grozījumi likumā “Par iedzīvotāju ienākuma nodokli”* [Amendments to the law “On Personal Income Tax”] (27.11.2020.) Art. 10. Available: <https://www.likumi.lv> [viewed 15.10.2021.].

<sup>50</sup> *Grozījumi Mīkrouzņēmumu nodokļa likumā* [Amendments to the Micro-Enterprise Tax Law] (26.11.2020.) Art. 2, 11 pt. 35. Available: <https://www.likumi.lv> [viewed 15.10.2021.].

<sup>51</sup> Amendments to the law “On Personal Income Tax” (27.11.2020.) Art. 27 pt. 163. It will be possible to receive royalties also on the basis of a work-performance contract. In this case, social insurance contributions are made just as for an employee.

Self-employed persons differ quite significantly. They can be well-remunerated lawyers, physicians or architects, whose financial means are not a cause of concern. However, the economic activities of not all self-employed persons are outside the risk of losing income. Since a self-employed person is not socially insured against unemployment, due to restrictions established in the period of COVID-19, hairdressers, masseurs, photographers and many others suddenly lost their source of income. They could rely only on the state social assistance. Likewise, many part-time employees were in the social risk group because, in such a case, the object of social insurance contributions could be below the minimum monthly salary.

The minimum object of mandatory contributions in social insurance contributions, introduced since 1 July of the current year (2021), should be considered as the most important part of social security reform. The minimum object of quarterly mandatory contributions is defined in the amount of three minimum monthly salaries, as defined by the government. This provision applies both to employees and to self-employed persons. If the contributions declared by employees are below the minimum mandatory contributions, the employer will have to cover the difference between the declared and the mandatory contributions from its own resources. This applies also to a case, where an employee is simultaneously a self-employed person. The legislator, however, has envisaged several exemptions. I.e., it will not be required to make mandatory contributions for a convicted person, who is employed in the facility for serving a sentence of deprivation of liberty, for a person who has reached the age that allows receiving the state old-age pension, etc.<sup>52</sup>

Undoubtedly, the reform increased social security, but did it reach a sufficient level? The finding made by the Constitutional Court allows assessing how far-sighted the State's social policy of the previous years had been, i.e.: "the established minimum amount of old-age pension, in conjunction with other measures of the social security system, does not ensure that every recipient of the minimum pension can lead a life that is compatible with human dignity"<sup>53</sup>.

The case law of the Supreme Court (the Senate) has started evolving by referring to the Constitutional Court's case law. In the future, lower-instance courts will have to assess whether a pension, in conjunction with other social security measures, ensures a life, compatible with human dignity.<sup>54</sup> Is it foreseeable how rational this assessment will be on case-by-case basis? For example, the finding that the fairness of a socially responsible state (*Sozialstaat*) is characterised by the guarantees of the subsistence minimum has become consolidated in the doctrine of German constitutional law

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<sup>52</sup> See On State Social Insurance, Art. 20<sup>4</sup> (4).

<sup>53</sup> Judgment of the Constitutional Court in Case No. 2020-07-03 para. 23.2.3.

<sup>54</sup> Judgment of Supreme Court of Latvia of 16 March 2021 in Case No. A420271718 SKA-259/2021 para. 14–15. Available in Latvian: <https://manas.tiesas.lv/eTiesasMvc/nolemumi> [viewed 15.10.2021.].

already long ago.<sup>55</sup> This means that any social service (benefit) or the sum total of them must amount at least to the subsistence minimum.<sup>56</sup> The subsistence minimum has not been calculated in Latvia.

Economic crises have stimulated the alignment of social insurance system in Latvia. Of course, unresolved problems remain. The most visible among these – the uncalculated subsistence minimum. Hopefully, the solution to this problem will not have to wait for the next economic crisis.

## Conclusion

1. Economic crises have forced aligning the social insurance system. In this process, the Constitutional Court's case law has been of major importance. Until now, the legally employed, socially responsible employees below retirement age have benefitted the most from social insurance reforms. They are insured for all types of social insurance at least in the amount of the object of minimum mandatory contributions.
2. The minimum monthly salary has been defined in Latvia. It is also the minimum amount of the object of minimum contributions in social insurance. However, the subsistence minimum has not been calculated in Latvia. Hence, it is not known whether the social services that follow from social insurance can ensure to anyone life that is compatible with human dignity, if an insured event occurs.
3. The social insurance of a self-employed person still legally can provide a low level of security, moreover, a self-employed person is not insured against unemployment. As the COVID-19-related economic crisis shows, upon losing income, such persons can rely only on social assistance. Thus, with respect to a self-employed person, the social insurance, organised by the State, does not reach the basic aim set for it, i.e., to ensure income replacement in all significant cases of losing income.

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<sup>55</sup> Hufen Fr. *Staatsrecht II. Grundrechte. 3. Aktualisierte und überarbeitete Auflage* [Constitutional law II. Fundamental rights. 3. Updated and revised edition]. München: Verlag C. H. Beck, 2011, pp. 137–138; Schöbener B., Knauff M. *Allgemeine Staatslehre* [General theory of the state. 2nd Edition]. 2. Auflage. München: Verlag C. H. Beck, 2013, pp. 232–233.

<sup>56</sup> Lazdiņš J. *Taisnīguma principa ievērošana iedzīvotāju ienākuma aplikšanā ar iedzīvotāju ienākuma nodokli* [Complying with the principle of justice in applying the personal income tax to inhabitants' income]. *Latvijas Universitātes Raksti. Juridiskā zinātne* [Acta Universitatis Latviensis. Law], 2008, No. 740, pp. 100–104.

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## IMPERIAL RUSSIAN RULES ON THE STATE OF EMERGENCY IN THE ESTONIAN REPUBLIC<sup>1</sup>

**Keywords:** state of emergency, Estonian Republic 1918–1940, Imperial Russian legislation, Estonian Constitution 1920

### Summary

In 1918, the Provisional Government of Estonia decided that, until new laws could be established, the legal acts of the Russian empire would continue to be valid. The rules on the state of emergency remained in force, too. At the end of November 1918, the state of emergency was declared throughout the territory of Estonia. For the entire period of its first independence, the Republic of Estonia was under some form of state of emergency either across the whole country or in certain areas. At first the state of emergency was declared using Imperial Russian norms on martial law. In 1930, the Estonian parliament adopted the State of Defence Act, which formally abolished the rules of Russian martial law. However, the Estonian Act on the State of Defence was, in essence, still largely based on the provisions of the General Act on the Governorates of the Russian Empire. The new State of Defence Act was adopted by presidential decree in 1938 and could be described as an attempt to summarise as valid law the practices that the authoritarian regime had hitherto used without legal basis.

### Introduction

Although the Estonian Republic was declared independent on 24 February 1918, in reality the young state was only able to start functioning more than half

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a year later. On the same 24 February, the German occupation army arrived in the Estonian capital Tallinn. The occupation lasted until the end of World War I. Thereafter, on 28 November 1918, the Russian Red Army attacked Estonia and a new war, the War of Independence, began. As result of this, martial law as a state of emergency was declared throughout the territory of Estonia on the 29 November 1918.<sup>2</sup> The War of Independence against Bolshevik Russia ended with the peace treaty of Tartu on 2 February 1920. Already during the war, in April 1919, the Estonian Constituent Assembly had been elected. Its most important task was to elaborate a constitution but also generally to create a basis for the new state and its legal order. The Constitution for the new republic, with a democratic parliamentary system, was adopted on 15 June 1920<sup>3</sup> and was in force in its entirety from 21 December 1920, when the first constitutionally elected parliament (Est. Riigikogu) assembled.

In this paper, we will provide an overview of the use of the state of emergency in the subsequent period in the Estonian Republic. We will also analyse the application of Imperial Russian legislation in Estonia, because it remained in force and was used to declare the state of emergency in the first decade of the Republic. In 1930 and 1938, Estonia adopted its own State of Defence Acts. The question arises as to whether the content of those acts was substantially different from Imperial Russian legislation.

## 1. State of emergency as ‘universal’ rule

In the first parliament, the extreme left-wing, the communists, demanded the abolition of martial law, as the war had ended. Martial law was abolished county by county from the beginning of 1921. After 13 February 1924, martial law remained in force only in the capital, the border regions, and on the railways.<sup>4</sup> After the communist coup attempt on 1 December 1924, a state of emergency was declared once again throughout the country,<sup>5</sup> although no longer under the term martial

<sup>2</sup> Sõjaseadus ja mobilisatsioon välja kuulutatud. Ajutise Valitsuse otsus [Martial law and mobilization have been declared. Decision of the Provisional Government]. Riigi Teataja (State Gazette, hereinafter “RT”) 1918, 3.

<sup>3</sup> Eesti Vabariigi Põhiseadus [The Constitution of the Republic of Estonia]. RT, 09.08.1920, 113/114, 243. In English: The Constitution of the Esthonian Republic (Passed by the Constituent Assembly on 15 June, 1920). London 1920; The Constitution of the Republic of Estonia: 15 June 1920. London: H.M.S.O., 1927.

<sup>4</sup> See more details in the corresponding map Luts-Sootak M., Siimets-Gross H. Eesti õiguse 100 aastat. Vene keisririigi pärandi haldajast Euroopa õiguse kaaskujundajaks [100 years of Estonian law. From the manager of the legacy of the Russian Empire to the co-designer of European law]. Tallinn: Post factum, 2019, p. 51; originally Sedman M. Military Penal Law – not only for Military Personnel: Developments in Estonian Penal Law after the First World War. In: Luts-Sootak M., Osipova S. Schäfer F. L. (eds.). Unity and Plurality in the Legal History of the Baltic Sea Area. Frankfurt am Main: Peter Lang, 2012, p. 272.

<sup>5</sup> Vabariigi Valitsuse otsus I. detsembrist 1924 a. [Order of the Government of the Republic of the 24th December 1924]. In: RT 1924, 145, II.

law but as a state of defence, the term used by the Estonian constitution (§ 26). The state of defence was enforced for the whole territory until 18 June 1926. Even after its overall validity ended, the state of defence remained in force in certain areas, as at the beginning of 1924.

In the summer of 1926, the political situation had calmed down and the danger posed by the communists was held to have sufficiently diminished, so that a state of defence was not required for the whole territory. However, there were new tensions in society: the parties in parliament presented their conflicts and personal quarrels as a constitutional crisis and prepared to change the constitution. According to all amendment drafts, the institution of the head of state or president was needed, and the power of parliament should be reduced. The worldwide economic depression, with devastating economic consequences, hit Estonia in 1930 and aggravated the political crisis. The League of Veterans of the Estonian War of Independence (Eesti Vabadussõjalaste Liit), which had started as a populist movement outside parliament, now became an important political movement and demanded revision of the constitution, too.<sup>6</sup> The League of Veterans became increasingly provocative and aggressive, thus, in the summer of 1933 the government declared another nationwide state of defence. However, that autumn parliament did not approve the state of defence and consequently it lasted only for a few months.

The governing prime minister, called State Elder (riigivanem), Konstantin Päts alleged that the League of Veterans was preparing a coup d'état and organised one himself on 12 March 1934. After the coup in 1934, a state of defence for the whole of Estonian was enacted and extended, at first for six months and then in every autumn until the occupation of Estonia by the Soviet Union.<sup>7</sup>

For the entire period of its first independence, the Republic of Estonia was under some form of state of emergency – either across the whole country or in certain areas. In 1938, as the new constitution<sup>8</sup> had already been adopted and parliament elected according to new rules, the wish of the government to extend the state of defence was criticised. The member of the first chamber of the Parliament, Karl-Arnold Jalakas, summed it up at the plenary meeting of parliament on 2 November 1938, as follows: “Our State of Defence Act is an act

<sup>6</sup> Kasekamp A. I. *The radical right in interwar Estonia*. Houndmills [etc]: Macmillan Press, 2000; Kasekamp A. I. *The Rise of the Radical Right, the Demise of Democracy, and the Advent of Authoritarianism in Interwar Estonia*. In: Fleishman L., Weiner A. (eds.). *War, Revolution, and Governance: The Baltic Countries in the Twentieth Century*. Boston: Academic Studies Press, 2018, pp.76–100.

<sup>7</sup> Kenkmann P. “Universaalne valitsemisvahend”: kaitseisukord Eesti Vabariigis aastatel 1938–1940 [“Universal Means of Governance”: the State of Defence in the Republic of Estonia in 1938–1940]. *Tuna. Ajalookultuuri ajakiri* [Past. Historical Culture Magazine] 2018, No. 1, p. 23; Kaasik P. *Kaitseisukord ja selle rakendamine okupatsioonivõimu teenistusse* [The State of Defence and its application to the service of the occupying power]. In: Tarvel E. (ed.). *Sõja ja rahu vahel. II, Esimene punane aasta* [Between War and Peace. II, The First Red Year]. Tallinn: S-Keskus, 2010, pp. 187–188.

<sup>8</sup> *Eesti Vabariigi Põhiseadus* [The Constitution of the Republic of Estonia]. RT 1937, 71, 590. *Constitution of the Republic of Estonia*. Official Edition. Tallinn: Estonian State Printing Office. 1937. Available: <https://www.digar.ee/viewer/en/nlib-digar:302852/268403/page/1> [viewed 17.10.2021.].

of governance and not an act to bridle extraordinary circumstances.”<sup>9</sup> One of the main ideologist of Päts’ authoritarian regime, Prime Minister Kaarel Eenpalu, called the state of defence a “universal means of governance that in some aspects helps to substitute the outdated acts of normal times”.<sup>10</sup> In this context, it seems rather ironic that the norms regulating the state of defence stemmed in essence in Russian Tsarist law, from which the Estonian Republic had tried to back away after gaining independence.

## 2. The legal heritage of the Russian Empire in the Estonian Republic

After the German occupation, on 19 November 1918 the Provisional Government of Estonian Republic passed a law about the transitional period<sup>11</sup>, the goal of which was to mitigate chaos and the settlement preparations of a new form of government. In principle, the laws of the Russian Empire were maintained, including the legal acts concerning the state of emergency. The legislation of Imperial Russia recognised an enhanced state of emergency (положение усиленной охраны) and exceptional state of emergency (положение чрезвычайной охраны), which could be declared in peacetime, on the one hand, and martial law, which required military action, on the other hand. Martial law was the most severe type of state of emergency. In Estonian practice, only the rules of martial law were applied. It is understandable that martial law was in force during the War of Independence. The application of the rules governing it later, in peacetime, came about because of the sense of insecurity triggered by the December 1924 rebellion.<sup>12</sup>

The grounds and procedures for the imposition of martial law were laid down in § 1–7 of the annex to Art. 23 of the General Act on the Governorates.<sup>13</sup> Based on

<sup>9</sup> Riigikogu üldkoosoleku stenograafilised aruanded ja nende lisad: I koosseis: I ja II istungjärg: 1.-5. koosolek: 1938 [Stenographic reports of the Plenary Meeting of the Riigikogu and their annexes: I composition: I and II session: 1–5 meeting: 1938]. Tallinn: s.n., 1938, p. 21. Available: <http://www.digar.ee/id/nlib-digar:371507> [viewed 16.10.2021.].

<sup>10</sup> Kaitsesiseisukorda pikendati üheks aastaks [State of defence was extended for one year]. Uus Eesti [New Estonia], 12.09.1938, No. 250 (1025), p. 1. Available: <https://dea.digar.ee/cgi-bin/dea?a=d&d=uuseesti19380912> [viewed 16.10.2021.].

<sup>11</sup> Ajutised administratiivseadused. Seadus 1. Ülemineku aja kohta [Temporary administrative laws. Statutory act 1. About the transitional period]. RT 1918, 1.

<sup>12</sup> The 1926 decision of the Supreme Court concluded that, given the extraordinary danger to national security of the events of 1st December 1924, martial law was declared as the valid type of state of emergency. Riigikohtu administratiiv-osakonna 21. septembri/1. oktoobri 1926. aasta otsus nr 32 [Decision no. 32 of the Administrative Division of the Supreme Court of 21 September/1 October 1926. In: 1926. aasta Riigikohtu otsused [Supreme Court decisions of 1926]. Tartu: Riigi trükikoja trükk, 1927, pp. 5053.

<sup>13</sup> Общее Учреждение Губернское [General Organization of Governorates]. – Свод законов Российской империй [Complete Collection of Laws of the Russian Empire]. II Volume, St. Petersburg, 1912, pp.170–174. The 1912 edition was unofficial but is easily available: <http://civil.consultant.ru/reprint/books/172/170.html> [viewed 16.10.2021.].

these provisions, martial law could be declared in areas of special importance from the point of view of national or military interests, and where hostilities were taking place, as well as in conjunction with or as a result of mobilisation. In imperial Russia, martial law could be declared by the emperor, the commander-in-chief or the army commander, depending on the legal grounds. When a martial law was declared, it was not necessary to specify for how long it would remain in force.

In Estonia, § 26<sup>14</sup> and § 60 (5)<sup>15</sup> of the Estonian Constitution of 1920 provided the constitutional basis for the establishment of a state of emergency. In summer 1919, the Constituent Assembly adopted the so-called Provisional Constitution.<sup>16</sup> This included in § 8 and § 11 (e) the predecessors of the abovementioned provisions of the Constitution of 1920. The substantive disputes about the scope of the provision on the state of defence were held and settled when § 8 of the Provisional Constitution was drafted, so § 26 of the Constitution did not give rise to much controversy or disputes during its drafting in the Constituent Assembly.<sup>17</sup> However, it was decided to use the phrase ‘state of defence’ instead of the former ‘martial law’ when drafting this provision, as ‘state of defence’ was said to have a much broader meaning.<sup>18</sup> Paragraph 26 of the Constitution allowed extraordinary restrictions on freedom and basic rights to come into force when a state of defence was declared – in accordance with law – and demanded that a clearly defined period for the state of defence be announced. The demand for a clearly defined period differed from the inherited Russian law, which included no such obligatory restriction.

<sup>14</sup> Par. 26: “[...] Extraordinary restrictions of the freedom and fundamental rights of the citizens come into force in the event of the proclamation of a State of Defence during a stated period, announced in the legal way on the basis and within the limits of the corresponding laws.” Constitution of the Estonian Republic (1920). Available: [https://en.wikisource.org/wiki/Constitution\\_of\\_the\\_Estonian\\_Republic\\_\(1920\)](https://en.wikisource.org/wiki/Constitution_of_the_Estonian_Republic_(1920)) [viewed 16.10.2021.].

<sup>15</sup> Par. 60. “The Republican Government direct the home and foreign policy, attend to the internal and external security and the observance the laws. They [...] (5) Proclaim a state of defence as well in single parts as in the whole of the State, which they submit to the State Assembly for approbation.” *Ibid.*

<sup>16</sup> The Provisional Constitution, as it was called during the drafting, was finally named Temporary Regime of Government. *Asutava Kogu poolt 4. juunil 1919. a vastuvõetud Eesti vabariigi valitsemise ajutine kord* [Temporary Regime of Government of the Republic of Estonia adopted by the Constituent Assembly on the 4 June 1919]. RT 44, 91, 09.07.1919.

<sup>17</sup> Vallikivi H. Kodanikuõiguste peatükk Eesti 1919. aasta ajutises põhiseaduses [Chapter on Citizens’ Rights in the Estonian Provisional Constitution of 1919]. *Ajalooline Ajakiri/The Estonian Historical Journal*, 2019, No. 3/4, pp. 318–319. Available in Estonian with English abstract: <https://ojs.utlib.ee/index.php/EAA/article/view/AA.2019.3-4.01> [viewed 17.10.2021.].

<sup>18</sup> Põhiseaduse komisjoni koosolekute protokollid koos lisadega [Minutes of meetings of the Constitutional Affairs Committee, with annexes]. 22.01.1920–26.03.1920. In: Estonian National Archives [hereinafter ‘ENA’] ERA.15.2.374, p. 56v. The most comprehensive source-based study on the law of the state of defence in the Republic of Estonia is available unfortunately only in Estonian: Lindmets J. *Vene keisririigi õigus kui Eesti Vabariigi algusaegade eriolukorraõigus ja 1930. aasta kaitseseisukorra seaduse eeskuju* [The law of the Russian Empire as the law of emergency in the early days of the Republic of Estonia and the example of the 1930 on the State of Defence Act]. Master’s thesis (Supervisors Luts-Sootak M., Siimets-Gross H., Vallikivi H.) Tartu, 2020. Available: <https://dspace.ut.ee/handle/10062/68537> [viewed 18.10.2021.].

According to § 60 (5) of the Constitution, the Government of the Republic could proclaim a state of defence, but had to submit its decision to the parliament for approval. In 1922, when the General Committee of parliament discussed the first draft of the Estonian State of Defence Act, a dispute about how the approval of the state of emergency should actually take place in parliament arose: should it be a simple decision by way of presentation or should the state of defence be adopted in three readings, as was the case with ordinary laws. Over the years, however, the view predominated that the decision on a state of defence should be approved in the form of a simple decision by way of a preliminary draft in only one reading.<sup>19</sup>

The rights of the Governor General contained in the annex to Art. 23 of the Russian General Act on the Governorates were in Estonia given to the Minister of Home Affairs.<sup>20</sup> This meant that the minister had the right to issue general obligatory acts for the protection of national security and public order, and to restrict a whole range of basic rights. The minister had, for example, the right to prohibit meetings, thereby restricting the freedom of assembly enshrined in § 18 of the Constitution; seize immovable property and seize movable property, restricting the right to property protected by § 24 of the Constitution; expel people from certain areas, restricting the freedom of movement enshrined in § 17 of the Constitution, etc. Another feature of martial law was the possibility of subjecting civilians who had committed certain offences during the period of martial law to military tribunals and military justice.<sup>21</sup> In addition, the law also made it possible to bring under the jurisdiction of a military court the offences not listed in the law. In the early years of the Republic of Estonia, those offences were for the Minister of War<sup>22</sup>, and later the Minister of Home Affairs<sup>23</sup>, to decide.

The martial law rules laid down in the annex to Art. 23 of the Russian General Act on the Governorates were extremely strict. The legislation of the Russian Empire was modelled on the basis of the legal systems of continental Europe, but the Russian approach to the state of emergency differed from these, giving the executive much broader powers than were customary elsewhere.<sup>24</sup> National security considerations were placed above individual freedoms and procedural guarantees. The same principles were carried over to the Republic of Estonia by Imperial Russian laws.

<sup>19</sup> Üldkomisjoni koosolekute protokollid [Minutes of General Committee meetings]. 13.03.1922-05.03.1923. In: ENA ERA.80.1.478, p. 4 (Minutes No. 6, meeting No. 6, 03.05.1922; State of Defence Act II reading).

<sup>20</sup> Äratõmme Vabariigi Valitsuse protokollist 1.12.1920 [Apograph of the Minutes of the Government of the Republic 1.12.1920]. RT 1920, 211–212.

<sup>21</sup> See for more Sedman M. 2012, 253–273.

<sup>22</sup> Äratõmme Vabariigi Valitsuse protokollist [Apograph of the Minutes of the Government of the Republic]. 01.12.1920. RT 1920, 211–212.

<sup>23</sup> Äratõmme Vabariigi Valitsuse protokollidest [Apograph of the Minutes of the Government of the Republic]. 07.01.1925. RT 1925, 9–10.

<sup>24</sup> In this way, Russian emergency law was also assessed in Estonian contemporary legal literature. Maddison E. Erakorralisest seisukorrast. III osa [About the State of Emergency. III Part]. Eesti Politseileht [Estonian Police Newspaper]. 10.03.1923, No. 10/11, p. 134.



## Conclusion

Imperial Russian rules on state of emergency continued to be in force in Republic of Estonia during the first decade of the Republic, although some aspects were confirmed by the Constitution of 1920.

On 10 July 1930, parliament adopted the State of Defence Act<sup>25</sup>, which formally abolished Russian rules of martial law (§ 18). However, the Estonian Act on the State of Defence was, in essence, still largely based on the annex to Art. 23 of the General Act on the Governorates of Russian Empire. There were now clearer rules restricting the government's right to establish a state of emergency, but during the state of emergency, the powers of the executive were even broader and restricted citizens' basic rights more than before.

In addition to the establishment of the institution of the Head of State, the constitutional amendments of 1933,<sup>26</sup> which were drafted by the League of Veterans, had given the Head of State the right to pass laws in the form of decrees "in case of urgent state need" (§ 60 (12)).

Head of State Päts used the right to pass laws in the form of decrees among other things, to adopt new State of Defence Act on 11th April 1938.<sup>27</sup> The 1934 coup and the norms adopted during and after it were often in conflict with the current constitution, and also with State of Defence Act.<sup>28</sup>

The new State of Defence Act of 1938 could be described as an attempt to summarise as valid law the practices that the authoritarian regime had hitherto used without legal basis. The reformulation of the purpose of the act in § 1 clearly shows that the need to react quickly and effectively to war or the threat of war, as well as to serious crime threatening the constitutional order and security of Estonia, was no longer emphasized. In the new act the aim of the state of defence was formulated as a vague desire to "promote the exercise of national defence and the protection of the state's internal security and public order". This helps us understand why politicians spoke of the state of defence as a universal means of day-to-day governance. In the second half of the 1930s, the practice of governing the Republic of Estonia, where the state of emergency had become the norm, did not differ much from that of the former Russian Empire in terms of its ideology and methods, and Estonia's law of emergency continued in the same tradition.

<sup>25</sup> Kaitseseisukorra seadus [State of Defence Act]. RT 1930, 61, 423.

<sup>26</sup> Rahvahääletusel vastu võetud Eesti Vabariigi põhiseaduse muutmise seadus [The Act to Amend the Constitution of the Republic of Estonia, passed by referendum]. RT 1933, 86, 628.

<sup>27</sup> Kaitseseisukorra seadus [State of Defence Act]. RT 1938, 40, 365.

<sup>28</sup> Luts-Sootak M., Siimets-Gross H. Eine rechtmäßige Diktatur? Estlands Verfassungsentwicklungen in der Zwischenkriegszeit des 20. Jahrhunderts [A legitimate dictatorship? Estonia's constitutional developments in the interwar period of the 20<sup>th</sup> century]. *Parliaments, Estates and Representation*, 2021, 41:2, 201–225, DOI: 10.1080/02606755.2021.1928863.

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## THE TEMPORAL EFFECT OF LEGAL NORMS AND CASE LAW OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

**Keywords:** temporal effect of legal norms, principles of intertemporality, principle of protection of legitimate expectations, principle of good legislation, case law of the Constitutional Court of the Republic of Latvia

### Summary

This article deals with the issue of the temporal effect of a legal norm from the perspective of the general principles of law – the principle of good legislation and the principle of the protection of legitimate expectations. The practical aspects of the identifying possible retroactive effect of a legal norm which as agreed by legal doctrine is one of the most difficult legal methods to be applied are analysed on the basis of the recent case law of the Constitutional Court of the Republic of Latvia. All three examples show that first of all the temporal effect of a contested legal norm has to be detected; and in a case if it is immediate or retroactive effect, the existence of legitimate expectations has to be identified; and following, if reasonable transitional period to a new regulation or appropriate compensation is provided by a legislator. Moreover, when determining the period for the transition to a new legal regulation or appropriate compensation, legislator according to the principle of good legislation has to ascertain fully and in a comprehensive manner the impact of a contested norm on the already existing – pending (or even more – on finished) legal relations.

### Introduction

The aim of this article is to analyse the issue of the temporal effect of a legal norm taking into account such general principles of law as the principle of good legislation and the principle of the protection of legitimate expectations. The identifying of possible retroactive effect of a legal norm is one of the most difficult legal methods to be applied in the process of the application of a legal norm. The application of this method is analysed on the basis of the recent case

law of the Constitutional Court of the Republic of Latvia. The conclusion could be made and the analyses of all three examples show that in order to check the constitutionality of a contested legal norm from the perspective of its temporal effect, first of all the temporal effect of a contested legal norm has to be detected; and in a case if it is immediate or retroactive effect, the existence of legitimate expectations is to be identified; and following, if reasonable transitional period to a new regulation or appropriate compensation is provided by a legislator. Moreover, when determining the period for the transition to a new legal regulation or appropriate compensation, the legislator according to the principle of good legislation has to ascertain fully and in a comprehensive manner the impact of a contested norm on the already existing – pending (or even more – on finished) legal relations. In the given cases, no retroactive effect of contested legal norms was detected, as none of them affected the finished legal relations, nor pending legal relations in a way that the temporal effect of a legal norm would have started before its formal validity. No acquired rights were taken away, either.

## 1. Theoretical background of intertemporality in law

According to the national doctrine of the (national) sources of law in Latvia<sup>1</sup>, there are three types of independent sources of law which have generally binding force, and where legal norms could be found, namely: general principles of law (as unwritten legal norms), normative legal acts and customary law (as unwritten legal norms in civil and commercial fields of law).

The temporal effect of the legal norms is to be established during the third stage of the process of application of legal norms – applying the legal methods of lower and higher critique – where the question whether the legal norm is in force (valid) or has lost its validity, and respectively if it is valid law is it applicable to the given factual composition as being legitimate (in compliance with a constitution) arises. At the same time, it has to be noted that validity of a legal norm is not the same as applicability of a legal norm which means that a formally valid legal norm may not be applicable and *vice versa* – an invalid legal norm may be applicable. This, in turn, is the question of the intertemporality of the written legal norms<sup>2</sup> which arises in the situations when the legislator has decided to adopt a new legal norm which regulates the same legal relations as the old legal norm.

The temporal effect of a legal norm (force of a legal norm) can be manifested in time as: 1) future force, 2) immediate force, and 3) retroactive force. In turn

<sup>1</sup> See more on this: Rezevska D. Nacionālās tiesību avotu doktrīnas attīstība gadsimta laikā [The Development of the National Doctrine of Sources of Law During the Last Century]. In: Tiesības un tiesību vide mainīgos apstākļos [Collection of research papers of the 79<sup>th</sup> International Scientific Conference of the University of Latvia]. Rīga: LU Akadēmiskais apgāds, 281.–288. lpp.

<sup>2</sup> On intertemporality issues of unwritten legal norms (rules of customary international law) see: Wheatley S. Revisiting the Doctrine of Intertemporal Law. *Oxford Journal of Legal Studies*, 2021, Vol. 41, No. 2, pp. 484–509.

legal facts can be: 1) past facts (*facta praetaria*) – facts started and ended before the new norm entered into force, 2) pending facts (*facta pendentia*) – facts started before the new norm entered into force and still continuing after its entry into force, and 3) further facts (*facta futura*) – facts started after the new norm had entered into force.<sup>3</sup> According to the principles of intertemporality, the legislator is always free to determine further temporal effect for the legal norm which then will be applicable to the future facts. It is when the legislator decides to determine the immediate or even – retroactive – temporal effect to the new legal norm the issue of the compliance of this decision with the principle of protection of legitimate expectations arises. This question is the question of constitutionality of a legal norm based on its temporal effect and as such could be brought before the constitutional court.

## 2. Intertemporality principles and protection of legitimate expectations

According to the general principles of intertemporality, retroactive temporal effect of the legal norm always is an exception either in public or private law, while immediate effect is rather an exception in private law. What does it imply from a perspective of the principles of good legislation and protection of the legitimate expectations? It means that the burden of arguments given and discussed by the legislator during the legislation process is directly connected with the decision to determine the immediate or retroactive temporal effect to the new legal norm.<sup>4</sup>

Indeed, intertemporal law involves two sets of rules: basic rules and constitutional rules. The basic rules are used to determine whether the legislator wanted the new legal norm to be applied retroactively while constitutional rules implicated by the intertemporal law set limitations on the power of the legislator to impose retroactive effect.<sup>5</sup>

Thus, the exceptional character of the retroactive effect of a new legal norm does not mean that legislator will never be able to set this effect for a legal norm, but it means that legislator is obliged according to the principle of good legislation to state reasonable and well-grounded arguments to justify such a decision from the perspective of the principle of protection of the legitimate expectations including as well as the reasonable transitional period and compensatory mechanism.

<sup>3</sup> See also on this: Kalniņš E. Tiesību normas spēkā esamība un intertemporālā piemērojamība [Validity and Intertemporal Application of Legal Norm]. *Likums un Tiesības*, 2000, Nr. 7(11), 214.–220. lpp.; Onževs M. Tiesību normu laika aspekti tiesiskā un demokrātiskā valstī [Temporal Aspects of Legal Norms in Rule of Law Based and Democratic State]. Rīga: Latvijas Vēstnesis, 2016, 38.–39. lpp.

<sup>4</sup> Regarding this, see also: Onževs M. Atpakaļejoša un tūlītēja spēka nošķiršana praksē [Separation of Retroactive and Immediate Force in Practice]. *Jurista Vārds*, 2021, Nr. 30.

<sup>5</sup> McCreary J. M. Retroactivity of Laws: An Illustration of Intertemporal Conflicts Law Issues Through the Revised Civil Code Articles on Disinheritance. *Louisiana Law Review*, 2002, Vol. 62, No. 4. Available: <https://digitalcommons.law.lsu.edu/lalrev/vol62/iss4/16> [viewed 07.11.2021.].

The same applies regarding the immediate temporal effect for the legal norm with only difference in the amount of necessary justification which largely is connected with the assessment of principle of proportionality. The ultimate issue though is the complexity of the identifying of retroactive effect of a legal norm which in legal doctrine is widely recognised as one of the most complex legal methods. Retroactive effect can be identified by: 1) the doctrine of the retroactive effect of legal consequences, 2) the doctrine of finished legal relations, and 3) the doctrine of acquired rights.<sup>6</sup> The next chapter will look into the practical aspects of the identifying possible retroactive effect of a legal norm in the recent case law of the Constitutional Court of the Republic of Latvia (henceforth – the Constitutional Court or the Court) analysing how the Court applied the abovementioned doctrines to detect the temporal effect of contested norms.

### **3. Intertemporality issues resolved in the recent case law of the Constitutional Court**

In a recent year, the Constitutional Court has faced the problem of the temporal effect of a contested legal norm in deciding on its constitutionality in several cases. This article will look into the application of the legal methods for detecting the possible retroactive effect of a legal norm in three of the Court's judgments.

**3.1.** The first example is the judgment of the Court of 5 March, 2021 in Case No. 2020-30-01<sup>7</sup> where the applicant contested the constitutionality of the legal norm included in the transitional provisions of the law on Compensation for Damage Caused in Criminal and Administrative Violations Proceedings. The norm stated that a person who was entitled to compensation for damage caused to him or her by an unlawful or unreasonable action of an institution, prosecutor's office or court before the entry into force of this Law and for which no legal proceedings are opened in the courts of general jurisdiction had the right to submit an application for compensation for damage within six months from the moment of occurrence of the legal basis for compensation for damage.

The applicant argued that according to the old norm he had the right to claim compensation for non-pecuniary damage within the 10-year limitation period, while now the term in his case was reduced to around the time frame of four months. The Court started its assessment by determining the type of the temporal effect of the contested norm and stated that it has an immediate temporal effect, and at the same time concluded that legislator has the right to adopt amendments in the laws that have immediate effect. Consequently, it is permissible to extend the adopted legal regulation also to such legal relations which were pending

<sup>6</sup> Onževs M. 2016, 147.–184. lpp.

<sup>7</sup> Judgement of the Constitutional Court of the Republic of Latvia of 5 March 2021 in Case No. 2020-30-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/05/2020-30-01\\_spriedums.pdf#search=](https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/05/2020-30-01_spriedums.pdf#search=) [viewed 15.11.2021].

(*facta pendentia*). However, the Court stressed that when adopting a legal norm, the legislator must always ascertain its impact on the existing legal relations. It is essential that in such a case the legislator provides for a lenient transition period or appropriate compensation – these are preconditions set for a legal norm with immediate temporal effect (but even more – for a legal norm with a retroactive effect) which arise from the principle of the protection of legitimate expectations.

The Court further concluded that the applicant had legitimate expectations according to the old norm and that it does not follow from the legislative materials and the content of the contested norm that the legislator would have assessed, in relation to non-pecuniary damage, how long a reasonable transition period should be for a person to reschedule his actions from a 10-year period to a much shorter period. Thus, the Court concluded that the legislator, when determining the period for the transition to the new legal regulation, has not comprehensively and fully ascertained the impact of the contested norm on the already existing – pending legal relations. Thus, this regulation does not comply with the principle of protection of legitimate expectations and does not ensure the protection of a person's right to adequate compensation for non-pecuniary damage.

The Court further stated that the situation when a person's legal position is deteriorated without appropriate justification or assessment does not ensure the principle of protection of legitimate expectations and does not ensure a reasonable transition to the new legal regulation. Such a situation is not justified by the public interest in ensuring legal stability.

From the perspective of the application of legal method of identifying whether the retroactive effect of a contested legal norm can be detected, the Court has not found in this situation that contested legal norm would either had retroactive effect of legal consequences, nor that it would have intervened the finished legal relations, nor has taken away any acquired rights. Namely, the period of formal validity of the contested norm coincides with the period of its temporal effect (force over time).

**3.2.** The second example is the Case No. 2020-49-01, where the Court adopted the judgment on 27 May 2021.<sup>8</sup> The applicant has turned to the Constitutional Court because he is of the opinion that the procedure, established by the contested norms of the Business Support Control Law, which denies his right as a creditor of subordinated liabilities to receive the principal amount of the loan, restricts his right to property. The contested norms are said to violate also the principle of legitimate expectations because they had been adopted after the credit agreement had been concluded, without establishing a lenient transition to the new regulation or compensation.

Assessing the applicant's legitimate expectations within the framework of the contested norms with the immediate temporal effect, the Constitutional Court

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<sup>8</sup> Judgement of the Constitutional Court of the Republic of Latvia of 27 May 2021 in Case No. 2020-49-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/09/2020\\_49\\_01\\_Spriedums.pdf#search=](https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/09/2020_49_01_Spriedums.pdf#search=) [viewed 15.11.2021.].



concluded that the applicant could not have legitimate, justified and reasonable expectations in the invariability of the legal regulation. The financial difficulties, potential insolvency and liquidation of JSC “Parex banka” in 2008 created an unprecedented situation in Latvia, which required the involvement of the state in rescuing this bank and providing aid. Consequently, changes in regulatory enactments were also required. In these circumstances, the applicant could not reasonably expect that the legal norms regarding the performance of the Term Deposit Agreement and control of support will not be changed, and that their amendments will not affect the legal relationship between JSC “Parex banka” (later JSC “Reverta”) and the applicant. The fact that for some time after the start of the aid to JSC “Parex banka”, there was no such national legal regulation that would restrict the use of state aid contrary to its objectives, does not mean that the applicant could reasonably have relied on these shortcomings. The Court also concluded that contested norms regarding the liquidation procedure had further effect in relation to the applicant. Consequently, at the time of the commencement of the liquidation of JSC “Reverta”, the applicant already knew what the consequences would be and he could count on these consequences.

This example of the application of the methods for the identifying of the retroactive effect of legal norms shows, that, first, regarding the Term Deposit Agreement the contested norms had an immediate effect – no retroactive effect was detected neither by retroactive effect of legal consequences, nor by intervention into the finished legal relations, nor by taking away any acquired rights. As it is concluded also in the legal doctrine although in civil law, by concluding a contract, the parties definitively and completely “acquire the right” to request an action from the other party, the rights acquired in constitutional law are only those which arise from an already performed or completed legal relationship.<sup>9</sup> Regarding the immediate effect of these contested norms the Court additionally explained that in this particular situation, when the aid was granted to a company in financial difficulties, it was a serious signal to its creditors, including the subordinated creditors, that the company was unable to meet its obligations. In those circumstances, the fact that no transitional period was laid down for the application of the contested norms is irrelevant as the legitimate expectations were not established. Secondly, regarding the contested norms on the procedure of the liquidation of the company, the Court detected the further effect as the legal norms were adopted and promulgated, and became valid before the liquidation procedure of the company was started.

**3.3.** The third example is the judgment of the Court in Case No. 2021-12-03 adopted on 3 December 2021.<sup>10</sup> The case was initiated on the basis of an application filed by the Administrative District Court. The applicant was hearing

<sup>9</sup> Onževs M. 2021.

<sup>10</sup> Judgement of the Constitutional Court of the Republic of Latvia of 3 December 2021 in Case No. 2021-12-03. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/04/2021-12-03\\_Spriedums.pdf#search=](https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/04/2021-12-03_Spriedums.pdf#search=) [viewed 15.11.2021].

an administrative case concerning cancellation of the administrative act by which the real estate tax to be paid by the claimant – a legal entity – was recalculated for the period from February 2020 to December 2020. The claimant received real estate tax benefits in 2018, as it was performing works to renovate and illuminate the façade of the building. On the basis of the previous regulation included in the binding regulations of the Riga City Council this relief was granted to the claimant for five years. On 30 January 2020, the contested provision came into effect, stipulating that the amount of the respective benefits may not exceed 10 000 euro per tax year. The applicant was of opinion that the contested provision of the binding regulations of the Riga City Council unjustifiably restricted the right to property for those individuals who had invested resources in restoration of buildings and, based on the previous regulation, developed legitimate expectations that they would be receiving the respective real estate tax benefits for five years.

The Court concluded that the rules governing tax relief are an expression of favouritism or support for certain individuals because of their situation or specific conduct. However, even when adopting legal norms that determine tax relief, the issuer of these norms must observe the general principles of law and other norms of the *Satversme* (Constitution of the Republic of Latvia).

On the basis of the contested norm, the real estate tax was recalculated in a manner unfavourable to the claimant from the moment the contested norm came into force. The Court detected the immediate effect of the contested norms, as the contested norm did not affect the already concluded relations, but had effect on the previously established – pending – legal relations. The Court also concluded that the protection of the legitimate expectations is in play as the legal framework for the real estate tax relief in question was fixed and in force for more than six years, and the persons had already benefited from the relief for several years. In addition, the relief was granted on the basis of certain criteria, namely the renovation and lighting of buildings and their façades, and was limited in time from the outset to five years.

In this judgment, the Court once again paid close attention to the legislative procedure where the issuer of the contested norm in the case where legitimate expectations are established and the contested norm has an immediate effect has to present reasonable and convincing arguments according to the principle of good legislation. Analysing the materials of adoption of the contested norm, the Constitutional Court concluded that it was not adopted with the aim to ensure the increase of tax relief applicable to other persons. Also, the Riga City Council did not find out what is the financial benefit created by the contested norm, which would allow to promote the welfare of the society. Finally, it was not considered which persons would be affected by such a provision and in what way. Thus, the Riga City Council did not fully ascertain the impact of the contested norm on the already existing legal relations. Consequently, the contested norm does not comply with the principle of protection of legitimate expectations.

## Conclusion

1. Legislator is always free to determine further temporal effect for the legal norm which then will be applicable to the future facts. It is when the legislator decides to determine the immediate or retroactive temporal effect to the new legal norm the issue of the compliance of this decision with the principle of protection of legitimate expectations arises. This question is the question of constitutionality of a legal norm based on its temporal effect and as such could be brought before the constitutional court.
2. The exceptional character of the retroactive or immediate effect of a new legal norm doesn't mean that legislator will never be able to set this effect for a legal norm, but it means that legislator, according to the principle of good legislation, is obliged to state reasonable and well-grounded arguments to justify such a decision from the perspective of the principle of protection of the legitimate expectations, also including the reasonable transitional period and compensatory mechanism.
3. Determining the constitutionality of a contested norm on a basis of its temporal effect, first of all, the temporal effect of the contested legal norm has to be detected; and in a case the temporal effect is of immediate or retroactive effect, the existence of the legitimate expectations is to be identified; then, if reasonable transitional period to a new regulation or appropriate compensation is provided by a legislator. Moreover, when determining the period for the transition to a new legal regulation or appropriate compensation, the legislator, according to the principle of good legislation, has to ascertain fully and in a comprehensive manner the impact of a contested norm on the already existing – pending (or even more – on finished) legal relations.
4. The Court had not detected the retroactive effect of contested legal norms in any of the cases mentioned, as none of them affected the finished legal relations, nor pending legal relations in a way that the temporal effect of a legal norm would have started before its formal validity. No acquired rights were taken away, either.

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## POETRY AND TAX STATUTE: TRANSLATION AS INTERPRETATION

**Keywords:** legal interpretation, translation of law, constitutional law, legal complexity

### Summary

This paper applies the literary critique of translating poetry to the field of translating statute to raise significant constitutional and practical issues. The field of focus is taxation law, an area notable for its complexity and intricacy in a large number of countries. A linguistic argument is made that the demands that are made on the words of tax law parallel those made in poetry and this necessarily creates a demand for interpretation on the part of users of the law. This aspect of interpretation is then considered in situations that demand the translation of foreign and a number of constitutional and practical issues are highlighted in relation to the role of the translator. The issues raised in the paper are of significant importance in an increasingly globalised international tax world where statutes written in very different languages are called upon to interact with one another.

### Introduction

The aim of this paper is to show that the translation of a statute will involve interpreting the law. This is important, as it is the constitutional role of the judiciary to interpret the law and not the translator. It also has practical implications for the operation of the law. Reviewing the literature on translating poetry between languages, one comes upon the assertion that any translation of a poem is an interpretation of a poem.<sup>1</sup> This observation is of fundamental significance to those who seek to interpret a poet's work but must rely upon a translation. This will

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<sup>1</sup> Coetzee J. M. *Doubling the Point: Essays and Interviews*. London: Harvard, 1992, pp. 88–90.

occur when the poet has worked in a language the reader does not understand. The question that arises when law is considered is whether the same assertion holds true in the translation of statute. If it does, it raises fundamental questions in relation to practically working with foreign law. It also raises major constitutional issues when a Court has to consider a foreign language statute.

This paper reviews issues of language translation and equivalence to understand the assertion made about poetry. It then considers to what extent the assertion may hold true in relation to tax statute. It presents an argument that while the law may be more directly expressed than poetry, this is counteracted by the demands that law, particularly tax law, put on language. It seeks to assert that normal language may simply be inadequate to meet these demands with precision and the removal of interpretative debate. It therefore argues that any translation of a tax statute is indeed an interpretation. The paper then turns to consider the impact of these arguments in legal practice and constitutionally.

## 1. Translation

In other disciplines translation is often thought of as a mechanical process. It may be acknowledged as difficult in certain contexts but the neutrality of the outcome is taken for granted. That is, it is assumed that as long as the translator can understand both relevant languages well, they can simply read the document in the primary language and put it into the secondary language. This is the implied assumption in the processes of Australian legal institutions, where it is assumed that as long as an accredited translator is employed, the translated document simply represents the source document presented in the English language.<sup>2</sup> The translator is thought to have done no more than convert the document through a mechanical process they can perform as a result of their language skills.

Translation is not, however, a mechanical process. There is a number of reasons why it can be difficult and why translation is a skilled profession and not something that can be readily done by any person who possesses excellent skills in two languages. This is not to say that it is never possible to translate on the basis of bilingual skill only. The issues arise in relation to particular languages and particular contexts.

From the translation literature, a number of core features that make translation difficult can be highlighted. These are linguistic uncertainty, lexical uncertainty and structural and syntactical uncertainty. Linguistic uncertainty refers to the fact that language is often indeterminate. This results from linguistic vagueness,

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<sup>2</sup> McComish J. Pleading and Proving Foreign Law in Australia. *Melbourne University Law Review*, 2007, No. 31(2) p. 400.

ambiguity or generality<sup>3</sup>. Commonly used words in any language<sup>4</sup> are often difficult to define precisely.<sup>5</sup> Some linguists have doubted translation can be ever possible. German philosopher and linguist W. von Humboldt wrote: “Experience and research show that no word in one language is completely equivalent to a word in another, apart from those expressions designated purely to physical objects”.<sup>6</sup>

Lexical uncertainty is the term used to highlight the phenomenon that words and phrases in one language do not always have an exactly equivalent word or phrase in another language. When the words of two different languages have the same meaning, but one word has an additional meaning which another word does not have, these words are called partial equivalents<sup>7</sup>.

For example, the Chinese word “好” will immediately be translated as “good” if any bilingual person is asked to translate it. However, the word is used in ways that are not the same as English, as well. For instance, it may mean “very”. The English verb “to come” cannot be translated adequately in Russian without defining the way of travel. Two different verbs, *пешьму* and *проехать*, are used to distinguish between walking and using public transport, a car or a bike. Partial equivalents are what makes the word choice more challenging and the translator should be particularly careful with.

There are also words that have no equivalents. Sometimes such words describe a very specific object which exists only in a certain country like sauna or samovar. They can also name a particular notion that exists only in the mind of people who speak a certain language. For example, the Finnish word *sisu* which means “extraordinary determination in the face of extreme adversity, and courage that is presented typically in situations where success is unlikely”. Obviously that the only way of translating the word is by giving a definition.

Finally, there is structural and syntactical ambiguity<sup>8</sup>. This refers to the fact that a sentence can have two or more meanings that are impossible to decide between without a wider context. For example, the sentence “the officer hit the man with the gun”. Here it may mean that the officer had the gun and hit the man with it or it may mean that the officer hit the man who had the gun. It is impossible to say which meaning is correct on the face of the sentence.

The translation professional needs to resolve these uncertainties and ambiguities to create a correct translation. It must be inferred what the words, phrases and sentences mean from the context of the text and then the meaning of the words must be expressed in the other language. This expression may depart

<sup>3</sup> Alston W. *The Philosophy of Language*. New Jersey: Prentice-Hall, 1964.

<sup>4</sup> Kashgary A. D. The paradox of translating the untranslatable: Equivalence vs. non-equivalence in translating from Arabic into English. *Journal of King Saud University – Languages and Translation*, 2011, No. 23 (1) p. 47.

<sup>5</sup> Catford J. C. A. *Linguistic Theory of Translation*. Oxford University Press, 1965.

<sup>6</sup> From introduction to his translation Aeschylus' *Agamemnon*, 1816.

<sup>7</sup> Retsker Y. *The Theory of Translation and Translation Practice*. Moscow: Valent, 1974.

<sup>8</sup> Oaks D D. *Structural Ambiguity in English: An Applied Grammatical Inventory*. United Kingdom: Bloomsbury Publishing, 2010.

from a literal translation from one language to the other when such a translation does not capture the intended meaning. Translating must primarily aim at “reproducing the message”.<sup>9</sup> For example, particular animals may have different connotations<sup>10</sup> in different languages. Calling a person a pig in English will have different connotations to calling them a pig in Chinese. This may combine with lexical uncertainty.

## 2. Poetry

The translation of poetry raises particular difficulties. Clearly, there are numerous issues around the maintenance of rhyme, rhythm, etc. However, even if these are put aside, poetry remains difficult. The essence of this difficulty is that it is in the nature of poetry that it can be difficult to understand in its own language. This is a distinguishing feature of poetry, its writer may convey a lot in few words but it is also the case that the meaning may be obscure and require significant attention to deduce. Finding and debating all the meaning in great poetry is a significant field of scholarship in its own right. Referring back to the discussion of translation then, it is clear that any translator needs to know the meaning of that which they must translate. It is not possible to do a good translation of something that you do not understand.

On the basis of this situation, scholars such as J. M. Coetzee have argued strongly that all translations of poetry also represent an interpretation of the poetry.<sup>11</sup> This is important, they argue – as readers of the translation need to be cautious of the fact that when they are interpreting a translated poem, they are interpreting an interpretation of the poem and not the original poem<sup>12</sup>. This raises significant risks in making judgements about the original poem’s meaning/s.

In response to the difficulty of interpreting poetry, some have argued that the specific or accurate originally intended meaning is not as relevant as what the poem means to different readers. This arguably tempers the issue a little but the point of all translations of a poem also being an interpretation of the poem remains an important one.

An example to illustrate the difficulties in translating poetry is the well-known poem by Alexander Blok which is named by the first line: *Night, street, streetlight* (1912).

*Ночь, улица, фонарь, аптека,  
Бессмысленный и тусклый свет.  
Живи еще хоть четверть века –  
Все будет так. Исхода нет.*

<sup>9</sup> Nida E. A. and Taber C. R. *The Theory and Practice of Translation*. Belgium: Brill, 2003.

<sup>10</sup> Arkhipov V. *Semantic Limits of Law in the Conditions of Medial Turn: Theoretical Legal Interpretation*. Available at SSRN: <https://ssrn.com/abstract=3454864> [viewed 16.09.2019].

<sup>11</sup> Coetzee J. M. 1992, pp. 88–90.

<sup>12</sup> Minyar-Beloruchev R. K. *Theory and methods of translation*. Moscow: Moscow Lyceum, 1996.



*Умрешь – начнешь опять сначала  
И повторится все, как встарь:  
Ночь, ледяная рябь канала,  
Аптека, улица, фонарь.*

One of its special features is that it consists mostly of the short nouns which create atmosphere in the first line of the poem and are again repeated in the last line framing the poet's thoughts in the middle. Besides, these words have a certain melody and rhythm which convey their own meaning as well, they can symbolize the steps of the person going down the street at night or even the irreversibility of time.

We can compare two translations of this poem and see how the translators dealt with the problem.

Translation 1

*Night, street and streetlight, drugstore,  
The purposeless, half-dim, drab light.  
For all the use live on a quarter century –  
Nothing will change. There's no way out.*

*You'll die – and start all over, live twice,  
Everything repeats itself, just as it was:  
Night, the canal's rippled icy surface,  
The drugstore, the street, and streetlight.  
Translated by Alex Cigale<sup>13</sup>*

Translation 2

*But pointlessly the light shines dimly –  
The chemist's, streetlight, street, and night.  
For quarter-century hold on grimly –  
It will not change. You can't take flight.*

*You'll die – again find all beginning,  
And as before it all will go.  
The night, canal's ice-dazzle spinning,  
The chemist's, street and streetlight's glow.  
by Rupert Moreton<sup>14</sup>*

The first translation is very precise; the translator chose the words with the meanings very close to the original ones and the word order remained

<sup>13</sup> Anthology of Russian Minimalist and Miniature Poems; Part I, The Silver Age. Available: [https://www.albany.edu/offcourse/issue41/cigale\\_translations6.html#blok](https://www.albany.edu/offcourse/issue41/cigale_translations6.html#blok) [viewed 01.03.2021.].

<sup>14</sup> Lingua Fennica. Available: <https://linguafennica.wordpress.com/2020/03/12/night-street-streetlight-chemists-ночь-улица-фонарь-аптека-alexander-blok/> [viewed 01.03.2021.].

unchanged. But the rhythm of the poem changed, the translator used more words to convey the meaning, and some of them are more difficult to pronounce. Unlike the original poem, the translation has very few rhymes, so the style of the author is partly lost.

In the second translation, some changes are made. The two first lines of the original poem are switched for the sake of rhyme. And also, the order of the nouns is changed: it doesn't start with "the night", but with "the chemist's". For the poem which was written more than 100 years ago, the word "chemist's" is a much better equivalent for "аптека" than "a drugstore". The translator successfully uses short sentences, thus retaining the style of the original poem.

### 3. Statute

On the face of it, the translation of statute should be significantly removed from the translation of poetry. Unlike a poet, the legislative draftsman should seek to draft the statutory provisions with precision to convey meaning without worrying about rhyme or rhythm and without trying to convey multiple meanings to demonstrate their literary prowess. Notwithstanding this, it remains the case that statute has often called for significant interpretative efforts and significant debate on its meaning. This is particularly the case with income tax law.

Income tax law is the subject of a very significant amount of interpretative effort. Within the profession, the academy, the executive and the courts. The long-standing definition of a resident individual for income tax purposes provides an illustration of this.<sup>15</sup>

In multiple limbs, the definition uses a range of concepts that have spawned numerous disputes notwithstanding its apparent directness and non-poetical nature. Amongst the most contested are the parameters of the concepts denoted by: resides; domicile; permanent; place of abode; & usual. These words have reached the High Court, the Federal Court and have been subject to numerous tribunal decisions. In addition, the relevant Australian decisions have referenced a number of decisions from other jurisdictions particularly in the case of "resides".

The apparent simplicity of these words is clearly not always borne out in practice. "Permanent", for example, was the subject of *Applegate*<sup>16</sup> where it was ultimately found that "permanent" did not mean "everlasting" but rather something that was not "temporary". This illustrates the linguistic vagueness of the word "permanent". It is a common word but when it is scrutinised it is found to have a spectrum of meanings from "everlasting" on the one hand to something that is simply "not temporary" on the other hand.

"Resides" has been the subject of far more debate. This follows the ruling that it carries its ordinary meaning. Questions that flow from this include extremes

<sup>15</sup> Section 6(1) of the Income Tax Assessment Act 1936 (Australia).

<sup>16</sup> F.C. of T. v. Applegate (1979) 9 ATR 899.

of whether you have to be in a country at all to reside there on the one hand to whether you can be there extensively without residing there. There are numerous other qualitative debates that have been spawned by the scope of the ordinary meaning of the word resides in tax cases.<sup>17</sup>

The wording of the section is not free of issues of structural and syntactical uncertainty either. The use of all of “resides”, “permanent place of abode” and “usual place of abode” has raised issues of what these terms mean in contrast with one another. Some decisions have explained them in a way that indicates that they are very similar. Others have sought to distinguish them. The issue that arises is whether the legislator used different terms with the intention of drawing a distinction (as would generally be thought in statutory interpretation) or whether this is an example of the human tendency to poetics even in statute. Another example is the contrast between “domicile” and “reside”. The statute clearly requires a difference between the two even though everyday language may view the two concepts as very similar.<sup>18</sup>

The issue that arises when considering the statute and comparing it to poetry is why the statute is subject to so much interpretational debate when it is not in the nature of poetry. As noted above, it is in the nature of poetry to be obscure in meaning. The obscurity arises through the poet endeavouring to instil multiple and deeper meanings into, often, relatively few words. This in itself often relies upon vagueness and suggestion to conjure meaning rather than precise exposition. At the same time, the poet seeks to fit the words to poetic devices such as, possibly, rhyme and rhythm. The demands of the latter may compromise comprehensibility. For example, an obscure or imprecise word may be employed, when a clearer one exists. However, the first one may fit the rhyme or rhythm, while the clear one does not. Ultimately, a clear exposition may simply not be poetic.

The statute writer does not have to deal with a similar array of constraints. Nevertheless, it is likely that there can be a tendency to the poetic and non-plain on the part of writers of official documents. This well observed phenomenon has been the subject of some critique in the area of tax law and law generally. It is the basis for the “plain writing” movement. However, simplification initiatives have not generally reduced interpretational debate in the area of tax law. I suggest that no amount of linguistic simplicity and precision (non-poetry) can rid tax law from interpretational debate. Rather the source of the need to interpret is in the demands that are put onto language by tax law concepts. The language itself is simply not developed enough to respond to these demands. The word and concept of “reside”, for example, did not evolve in the English language to be tested and demarcated by precise boundaries in a way demanded by tax payers and administrators. The demand in relation to the tax law arises as numerous taxpayers seek to see whether their factual circumstances are covered by the word

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<sup>17</sup> Sharkey N. *Departing Australia: A Complex Tax Situation with Possible Benefits and Hidden Traps*. *Tax Specialist*, 2016, No. 19(5), p. 180.

<sup>18</sup> Legally domicile is quite distinct from residence.

in a situation where there may be significant financial implications for them. This seeking for boundaries is not a feature of day-to-day communication where the word “reside” may be perfectly suited to purpose and precise enough. Linguistic uncertainty is a reality with most words. It only becomes a problem when a higher amount of precision is demanded from language than in more common forms of communication. A consideration of the translation of animal related terms between Chinese and English illustrates how something as apparently precise as an animal name may in fact be conceptually vague.

Above it was noted that one response to the difficulty in interpreting poetry was to not demand precise and full interpretation. Rather it may be argued that it is right that a poem may mean different things to different readers. This argument cannot be sustained when dealing with tax law given the demands placed on it in relation to precise meaning.

In relation to the issue of translation, it can now be considered if J. M. Coetzee’s assertion in relation to translation of poetry can be applied to tax statute. The assertion was that any translation of poetry was also an interpretation of the poem. That is, you cannot translate a poem without first deciding what it means in the first language. This deciding is an act of interpretation. Given that it is an act of interpreting a poem, there is the possibility that different interpretations can be made of the poem, although the translation locks in one interpretation. Once the translation is made, the poem in the new language may still be open to interpretation. However, these new interpretations are being made on the basis of an initial interpretation and the translation decisions of the translator. Ultimately, the translated poem is a different poem. Any analysis of it and its meaning may find meanings that cannot be found in the original work in any interpretation.

The discussion of the history of interpretative debate of the tax statute indicates that it will raise similar issues to a poem. If the meaning of the words was clear and precise to any reader, there would not have been the number of disputes that there have been. Therefore, any attempt to translate this statute into a different language is going to require the translator to first decide what it means. In other words, they need to interpret it. If this was done without reference to the published decisions and commentary on the section, it is clear that it is possible that different translators may decide upon different interpretations. This much is clear from the history of interpretation that has occurred. One translator, for example, may decide that “permanent” does indeed mean something substantive similar to everlasting or lifelong. This would differ from the alternative meaning of merely “non temporary”. Of course, a translator of this specific Australian law may research the relevant case law and commentary to provide an interpretation that accords with these decisions. This would lessen the translator’s own interpretation by substituting the established interpretations. There would still remain a scope for interpretation by the translator. However, a newer piece of legislation or one from a non-common law jurisdiction may not have these extra sources of interpretation available. This would result in significantly more interpretative effort on the part of the translator.

Once the translator settles on their interpretations, consciously or unconsciously, they put them into the second language. In doing this, the interpretation may be locked in or words with new interpretative possibilities may be used. For example, the translator having decided that “permanent” means “everlasting” may adopt a second language word that means “everlasting”. Due to lexical uncertainty, this word may only mean “everlasting” in the second language. It may not be open to the merely “non-temporary” interpretation. Therefore, the reader of the translated statute is forced into following the translator’s interpretation in their reading of the translated statute. In addition, the word chosen by the translator in the second language may be open to a meaning that is not available in any interpretation of “permanent”. Thus, the translated statute presents something quite different to the original statute. As with the poetry the translation of the law represents an interpretation of the law. In doing this it presents a different piece of law.

#### 4. Impact

The impact of the above analysis is relevant to practically working with a foreign statute as an advisor or taxpayer. It is also relevant to fundamental constitutional (or rule of law) principles.

The practical impact is significant. Essentially, it means that translations of even apparently simple law should not be relied upon in providing advice or doing planning. In the event that the foreign authorities dispute a tax position, the dispute will be resolved in relation to the official foreign law and not the translation. Any interpretive disputes will disregard the original translation. Clearly, this problem is worse in areas that are more subject to dispute or more ambiguous. However, a translation may even hide this ambiguity. If a law needs to be assessed by a professional who does not know the relevant other language and a translation has to be done, it would be better to have a carefully done translation produced by a competent person (in both law and the language) who is made fully aware of the issues to be considered. It would be unwise to rely upon a translation that has not been specifically prepared in this manner. Ultimately, the deep involvement of a professional person who knows the foreign language and law would be prudent. Meanwhile, it must be emphasised that the issue is not with bad translations. The essential point is that a translation may be an interpretation regardless of the talent and effort of the translator.

When the foreign language law from a particular country is relevant to a dispute being considered in the courts of another country, more fundamental issues arise in addition to some of the practical issues that have been noted above. The essence of this issue is that it is strictly the role of the judge to interpret law. Still, it has been argued above that a translation of a statute is also an interpretation of that statute. The idea that the Court and the Court alone must conduct all

interpretation of law is fundamental.<sup>19</sup> It is also manifested in common law and statutory rules in relation to the proving of a foreign law in court.

Before exploring these ideas further, it should be considered in what circumstances a foreign law may become relevant in a dispute in another country (or forum). In particular, the analysis will consider the instances when a tax law may become part of a dispute in the courts of a different jurisdiction.

There are a number of ways that, say, Chinese tax law can become part of a dispute in an Australian court. Broadly these may either be as part of a non-tax civil dispute or as part of a tax dispute between a taxpayer and the Federal Commissioner of Taxation. Non-tax civil disputes in Australia may involve an issue of Chinese tax payable, and this may require reference to a Chinese law. In a tort matter, the taxability of amounts in China may be relevant in a matter. For example, the injury of a person in Australia may be argued to have resulted in a loss of profits in a Chinese business. In this case, the Chinese taxation of these lost profits may be relevant. A contractual dispute may arise in relation to tax paying contractual responsibilities and Chinese taxation. If the contractual dispute is heard in an Australian court, the Chinese tax statute may need to be interpreted by the Australian court. These examples are not likely to be the only ways in which the statute may be part of a civil dispute in Australia.

The Chinese statute can also be the subject of an Australian tax dispute between the Federal Commissioner of Taxation and a taxpayer. This is because the Australian Income Tax Act refers to foreign tax laws through double tax agreements, and effectively makes the foreign statute part of Australian law. Notably, the China Australia double tax agreement (DTA) is incorporated into Australian law. This DTA defines Chinese and Australian residents for DTA<sup>20</sup> purposes and then restricts Australia (or China) from taxing residents of the other state on amounts that they might otherwise tax. Thus, a person may assert that the Australian Taxation Office cannot tax an amount as they are a resident of China for DTA purposes. This is an assertion under Australian law. However, to be a resident of China for DTA purposes, one preliminary requirement is that the person is a resident of China for Chinese tax law purposes. If this particular issue is the subject of the dispute, the Australian court or tribunal will need to consider the Chinese law of tax residence and apply it to the facts of the taxpayer. Therefore, the Australian court may be called to interpret the Chinese residence rules in an Australian tax case. When this happens, the relevant law will be in the Chinese language.

In Australia and many other jurisdictions, it is a fundamental tenet that it is the constitutional role of the Judge or Court to interpret statute. It is part of the separation of powers and rule of law. It should be noted that the principle

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<sup>19</sup> Speech by Chief Justice, University of Melbourne, 7 November 2001: Gleeson M. Courts and the Rule of Law. Available: [www.hcourt.gov.au/assets/publications/speeches/formerjustices/gleeson/cj\\_ruleoflaw.htm](http://www.hcourt.gov.au/assets/publications/speeches/formerjustices/gleeson/cj_ruleoflaw.htm) [viewed 01.11.2021.].

<sup>20</sup> Article 4.

extends to it being the exclusive role of the Judge or Court to interpret statute. The role is carefully protected to ensure that no other party engages in the relevant statutory interpretation in a dispute.

Common law and statute in relation to evidence and the proving of a foreign law support this principle. At law, the content of the foreign law is a question of fact to be proved by evidence. Notwithstanding, no evidence can be adduced on the application of the foreign law in the foreign country.<sup>21</sup> Proving of content of a foreign law in litigation is a question of fact. Judicial notice cannot be taken in relation to a foreign law. The Court cannot make its own enquiries as to the nature of the law. Parties must prove the content of the foreign law.

However, application of proved foreign law to the facts is a question of law. Evidence in relation to application cannot generally be received. Proving of foreign law is normally done through expert evidence but when this leads to absurd results, the Court may make its own enquiries. If inadequately proved by a party, the Court will generally presume that the foreign law is identical to the local law. This presumption may not apply in significantly inappropriate circumstances. Judgments of foreign courts are treated with caution and are not regarded as proving the foreign law. They are another form of evidence that may play a part in proving the foreign law.

It can be seen that with the above principles, the common law has ensured that the Court alone can interpret a foreign statute. This is why evidence cannot be adduced as to the application of the law in the foreign jurisdiction. It is to ensure that the judge interprets the statute and is not swayed by foreign practice. The reluctance to allow case law also reflects this principle. Case law may hold more where the foreign jurisdiction is a common law jurisdiction and the case law reflects the law rather than the application of the law. This common law position is reflected in a slightly relaxed manner in sections 175 and 175 of the Evidence Act (1995).

In reality, the manner in which the foreign language evidence is dealt with in the Australian Court is to have the document translated into English by an appropriately qualified and registered translator. The Court then uses this translated document in the place of the statute.

It is in this allowance for translation that the problem at issue arises. This allowance is based upon the idea that the translation is a neutral mechanical process. The requirement for a qualified translator assumes that as long as the translator is skilled, the translation will represent the original document in the second language. However, it has been argued above that a translation of statute is an interpretation of statute. This does not refer to the competence of the translator. Rather, it refers to the fact that linguistic and lexical ambiguity ensure that any translation requires and initial act of interpretation. It was also argued that statute in areas such as tax are no different to poetry in the possibilities that arise in interpretation. It is therefore the case that the translator is usurping the constitutional role of the judge

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<sup>21</sup> National Mutual Holdings Pty Ltd v. Sentry Corp (1989) 22 FCR 209. Damberg v. Damberg & Ors [2001] NSWCA 87. Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2) HL 1966.

in translating the statute. In addition, the translated statute that the judges do seek to interpret is already an interpretation. Hence, the final interpreted outcome is an interpretation of an interpretation.

The point is a salient one in a context where the common law has otherwise jealously protected the judge's interpretative role when dealing with foreign statute by disallowing evidence on application of the foreign law or (non-official commentary) to be adduced. This core principle is strongly challenged in allowing translated statute.

It was noted earlier that one way to improve a translation of a law was to have a translator that is familiar with all the relevant principles of the law and who does detailed research as to how the law works. In doing this they can prepare a more informed translation of the actual nature of the law. While this may improve a translation, although it is problematic. This is because such a process would appear to not only usurp the judge's role but also involve the translator going to sources that would not be allowed to be adduced to the judge in other circumstances. We have noted how the common law and Evidence Act provide strict rules on what can be adduced in relation to proving a foreign law. If the Judges would not be referred to wider sources on information when dealing with an English language foreign law, the translator should not go to these sources when interpreting the foreign language statute in preparing the translation.

It can therefore be seen that the exposure of translation as an act of interpretation raises a number of issues and contradictions in law. A significant contradiction is that it might be suggested that to get a better translation, the translator should do more appropriate secondary research to inform their interpretation on which to base their translation. The contradiction is that it might also be suggested that to better comply with constitutional principles the translator should do the exact opposite and avoid reference to materials that pushes the interpretation in a particular direction.

It is, of course, the case that this entire problem may be argued to be a necessary evil. For there does not seem to be an obvious solution to the overall problem other than having a judge who speaks the other language. That said, awareness of the issue is critical. Arguably, Courts and process should pay more attention to translations for accuracy and compliance with principles of law. They should not be assumed to be a neutral process when dealing with complex statute that is subject to detailed and nuanced interpretation in situations when significant outcomes can turn on the interpretation that is adopted.

## **Conclusion**

This paper has applied to tax statute the idea formulated by J. M Coetzee, proposing that all translations of poetry are necessarily an interpretation of the poem. The basis for this assertion was investigated and shown to be relevant to the law due to the demands placed on words in tax law – it was concluded that translating



a tax statute requires that the translator commence by interpreting the statute. The practical and constitutional implications of this conclusion were investigated and found to be significant and serious. Translators necessarily engage in interpretation of the law before translating. This means that they are at risk of doing it erroneously and that they are engaging in the Court's constitutional role.

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## LEGAL SUBJECTIVITY AND ABSOLUTE RIGHTS OF NATURE

**Keywords:** nature as a subject of law, right to water, right to restoration, right to biodiversity

### Summary

The anthropocentric approach that characterizes all human knowledge has led to a distortion of the relationship with Nature and a view of it as a mere object of law. This approach, presumably originating with Socrates, had solid support in Plato, Aristotle, Ptolemy, and finally, in Catholic patristics, hinging on all disciplines starting from philosophy, psychology, economics, up to law. Dwelling on the latter, examples of legislation that qualify Nature as an object of law are, increasingly over time, the Forest Charter of 1217, the Italian Law No. 1766 of 1927 on civic uses, and furthermore – Art. 812 of the Italian Civil Code, and finally – the cd. Consolidated Environmental Law. This view is, however, changing in some states such as Bolivia, New Zealand, India, Ecuador, Uganda, – the states that through either legislative acts or rulings of supreme courts have begun the process of granting both to Mother Earth in general, and rivers in particular, the status of juridical persons which are endowed with series of very personal rights, which are recognized. This is not the case in Europe, where the relevant legislation continues to consider Nature (or, better, the Environment) as an object of law, therefore as a “thing” from which to draw, albeit within certain limits, utilities of all kinds. By analysing legal instruments potentially useful for a Copernican revolution on this point – in particular, the Kelsenian concept of “legal person”, the meaning of “company” and the European provisions on Artificial Intelligence – the first conclusion is reached: in a relationship that is not only theoretical, but also practical and utilitarian, it would be opportune to start considering, also through acknowledgments in constitutional sources, the Nature as a subject and no longer an object of rights. In this regard, following the general theories of people’s rights, it could be granted certain absolute rights, of which the right to water, restoration and biodiversity are examined in the current article. Hence, we come to the second conclusion, namely, the contrasts that, in Western law, such an approach could suffer, analysing in particular the problems of neo-naturalism and representation.

“... all the more so because this land  
it was made by nature”

(Lucretius T. C. *De rerum natura*, 1058)

## Introduction

In a previous work<sup>1</sup>, I had the opportunity to examine the theme of the subjectivisation of Nature, that is, the hypothesis of granting to the latter, in its various forms and representations, a full juridical subjectivity without, on the other hand, reducing it to a mere object of law. Here, in addition to retracing the main features of that antecedent, I will also attempt, and in broad terms, to hypothesize certain absolute rights of which Nature, as a subject of law, would be the holder.

The starting point must be Art. 812 of Italian Civil Code according to which trees, springs and watercourses constitute immovable property rooted in the ground, so that, according to Art. 810 CC, “may be the subject of rights”. The legislator of 1942, imbued with a totally anthropocentric conception, then opted for the cataloguing of trees (and of nature in general) in the broader concept of “everything”, hence, of objects from which to derive some economic utility<sup>2</sup>. The past doctrine did the same thing, just as the recent one still does<sup>3</sup>, which, at most, considers placing Nature (or, rather, the Environment) within the vast concept of “collective good”. This concept, although at the first glance it might appear more concrete, seems, on the other hand, to be at variance with the principles that will be stated at the end and, in any case, not in line with the new supranational guidelines. Suffice it to say that even the use, indeed constant, of the term “environment” appears reductive, where it must be pointed out that, if Nature means “what is about to be born<sup>4</sup>”, the environment means “what surrounds someone<sup>5</sup>” while, therefore, the first term exalts the subjective element, the second presumes the man around whom something revolves.

However, and in a dutiful heliocentric process of subjectivisation, it is mandatory to discuss the problem from the opposite perspective: no longer “what is a tree” (and, therefore, what is nature), but “who is a tree” (and, therefore, who is nature), giving rise to an equivalence for nothing theoretical between living beings of different substance that can frame the man not only as a mere “spectator – user – destroyer” of earthly resources, but, above all, as part of a whole that must

<sup>1</sup> Referral to Cioria M., is permitted, La “sujetividad jurídica” de la Naturaleza [The “legal subjectivity” of Nature]. In: Cuadernos de Gobierno y Administración Pública, Madrid, 8–1, 2021, 35-0.

<sup>2</sup> On this point, cf. Pugliatti S. v. Beni (teoria generale) [Goods (general theory)]. In: Enc. Dir., V, Varese, 1959, 164 ff.

<sup>3</sup> Pàstina D. v. Alberi [Trees]. In: Enc. Dir., I, 1958, 1011; Bianca M.C., Diritto Civile [Civil Law], 6, The property, Milan, 1999, 55; Micciché C. L'ambiente come bene a utilità collettiva e la gestione delle lesioni ambientali [The environment as a collective good and the management of environmental injuries] In: The right of the economy, 2018, 1, with extensive references.

<sup>4</sup> Notably, “nature” is the future participle of the Latin verb *nasci* (to be born). This term is well suited, from a terminological point of view, to the idea of the vital force that is the foundation of the world. The term then derives from the Latin translation of the Greek φύσις (=of nature), that is the first and fundamental reality, principle and cause of all things.

<sup>5</sup> Present participle of the Italian verb *ambire* (encompass, surround).

be exploited, but with limitations, reasoning and the obligation of custody. This heliocentric procedure would lead, in some ways, to a return to the past and hence – to strengthening the ancestral relationship that man had with Nature which, gradually over the course of time has waned in favour of the predominant culture, in a contrast – all literary – which led man to claim domination of the entire planet<sup>6</sup> (and now the Universe as the object of expeditions and research). In this sense, the journey, starting from the Presocratics and up to the present ecologists, appears in a circular manner, and the expression of millennial at the centre overlaps with the perpetuate need of man to create rational categories through which to systematise, catalogue and explain every slightest natural event. Among the four terraqueous elements, referred to by Thales of Miletus or Anaxagoras<sup>7</sup>, arises the topical need to safeguard creation through the use of alternative energy sources. This stands, then, as a cumbersome, stratified and confused mass, which bears the name of human culture, – the set of rules, ideas, reasoning, orientations, interpositions, overlapping, subsumptions and whatever else through which the man has intended to regulate his own vital course or rather the process of civilization.

## 1. Philosophical and normative notes

Given the established naturistic thought of the Presocratics, the path that has gradually led to culture being opposed to nature can commence with Socrates<sup>8</sup>. Beyond what Plato relates regarding his master in “Phaedrus”<sup>9</sup> and “Phaedo”<sup>10</sup>, the testimonies of Diogenes Laertius about Socrates are interesting: “...convinced

<sup>6</sup> The reference to Genesis 9: 2 is to the point: “And God blessed Noah and his sons and said to them, “Be fruitful and multiply and fill the earth. The fear of you and the dread of you shall be upon every beast of the earth and upon every bird of the heavens, upon everything that creeps on the ground and all the fish of the sea. Into your hand they are delivered. Every moving thing that lives shall be food for you. And as I gave you the green plants, I give you everything”. Available: <https://www.biblegateway.com/passage/?search=Genesis+9&version=ESV> [viewed 28.12.2021.].

<sup>7</sup> And Anaximenes, Anaximander or, again, Parmenides and Zeno, the doctrines of which are excellently summarized in AA.VV., I Presocratici, Testimonianze e frammenti [The Presocratics, Testimonies and fragments], 1, Rome-Bari, 1993, 79 ff.

<sup>8</sup> The question could also be analysed from an anthropological and religious point of view. On this point, see the considerations of Carducci M. v. Natura (diritti della) [Nature (rights of the)], in Digest, Disc. Priv., Agg., 2017, 486 ff.

<sup>9</sup> In Fedro in Opere complete, 3, Parmenide, Filebo, Simposio, Fedro [“Phaedrus” (Complete Works, 3, “Parmenides”, “Philebus”, “Symposium”, “Phaedrus”)] Bari, 1993, p. 216) Socrates reports: “I am a lover of knowledge, and the men who dwell in the city are my teachers, and not the trees or the country”. Available: <http://www.classicallibrary.org/plato/dialogues/> [viewed 28.12.2021.].

<sup>10</sup> In Fedone (in Opere complete, 1, Eutifrone, Apologia di Socrate, Critone, Fedone, [“Phaedo” (Complete Works, 1, “Euthyphro”, “Apology of Socrates”, “Crito”, “Phaedo”)], Bari, 1993, p. 161) Socrates specifies, with regard to the philosophy of Anaxagoras and the ‘true causes’ at the foundation of the world: “But as I have failed either to discover myself or to learn of anyone else, the nature of the best, I will exhibit to you, if you like, what I have found to be the second best mode of inquiring into the cause”.

that naturist speculation does not concern us at all, he discussed moral issues in the workshops and in the market” and again – “It seems to me that Socrates also speaks of nature, since he sometimes spoke of providence, as Xenophon says, but he says that his conversations focused solely on ethics”<sup>11</sup>. Essentially, in western civilization Socrates marks the limen between the analysis of the four naturist elements and the concepts of beauty, justice, morality, goodness, friendship and so on, therefore, the clear boundary between nature and culture. This gap was further marked by Plato and Aristotle. The first, in “Phaedrus” (as well as in “The Republic”, “Cratylus” and “Gorgias”), deepens the concepts of ‘reminiscence’ and ‘pre-existence of the soul’, both referable to the so-called “World of ideas”, i.e., to the reality itself, different from naturist reality, not perceptible by the senses, but attainable only with pure thought. He clarifies that the true cause of the occurrence of things does not lie in the elements of natural science, but in the idea itself of which only sensitive realities participate<sup>12</sup>. For his part, Aristotle, detaching himself from this approach, in “Metaphysics”, as well as in “Nicomachean Ethics” and in Book III of “De anima”, emphasizes that nature – “the substance of those things which have a principle of movement in themselves”<sup>13</sup>, is a pyramidal construction, in which the lower step forms the matter for the development of the upper one. The apex of this hierarchical scale is man, lord of nature, able to transform into action all the potentialities contained in the lower degrees. It takes, in this way, in the cradle of Western civilization, the geocentric theory takes shape that, gradually borrowed from the most distant astronomy, leads up to Ptolemy with the well-known concept of the Earth at the centre of the entire Universe.<sup>14</sup>

This approach is then further borrowed from the Catholic religion, in particular – from the patrist Thomas Aquinas who emphasized that it was also well-suited to the reading of the Old Testament<sup>15</sup>. However, if in the Platonic-Aristotelian view the centre of the cosmos was not a privileged place, according to the church, the geocentric system assigned to the Earth a favoured position, making man the apex and the end of creation, sanctioning the predominance of culture over nature. Since this period, all sciences – philosophy, anthropology, economics

<sup>11</sup> Diogenes Laertius, *Vita di Socrate*, in *Vita dei filosofi* [Life of Socrates. In: Life of the Philosophers], II, pp. 18–47. The references are given in AA.VV. *Socrate, Tutte le testimonianze da Aristofane e Senofonte ai Padri cristiani* [Socrates, All the testimonies from Aristophanes and Xenophon to the Christian Fathers], Rome-Bari, 1986, pp. 377 and 387.

<sup>12</sup> Plato, *Fedro*, [“Phaedrus”]. In: *Opere complete* [Complete Works], 3, “Parmenides”, “Philebus”, “Symposium”, “Phaedrus”, Bari, 1993, pp. 248a–249d.

<sup>13</sup> Aristotele, *Metafisica* [Metaphysics], Bari, 1984, E, 1.

<sup>14</sup> To be precise, the first Greek astronomer to consider that this approach was correct was Eudoxus of Cnidus, a pupil of Plato’s (Diog. Laertius, *Vite dei filosofi* [Lives of the philosophers], cited work, VIII 86) and a little older than Aristotle. Presumably, it was he who led Aristotle himself to the conclusions reported in “De Coelo”, a work that, composed of four books and translated from Arabic, dominated both ancient and medieval Christian and Islamic culture for about two millennia.

<sup>15</sup> In particular, in the Psalms: “He set the earth on its foundations; it can never be moved” (104,5); and in Joshua: “Joshua said to the Lord in the presence of Israel: “Sun, stand still over Gibeon, and you, Moon, over the Valley of Aijalon.” So the Sun stood still, and the Moon stopped, till the nation avenged itself on its enemies” (Chapter 10).

and therefore law – have always analysed nature as an “object”, a productive good or a means by which to generate forms of profit. Examples are Locke<sup>16</sup>, Darwin<sup>17</sup>, Marx<sup>18</sup> and Puchta<sup>19</sup>, who, each in his own field, have consolidated this approach. Areas and settings that, with the passage of time, have further expanded and solidified during the period of the industrial revolution and, more recently, the so-called globalization.

Limiting ourselves to the law not recent, two examples are to be explored. The first is Henry III's<sup>20</sup> Charter of Forest of 1217 which, addressed to all free men, specified that

*every free man shall agist his wood in the forest as he wishes and have his pannage. We grant also that every free man can conduct his pigs through our demense wood freely and without impediment to agist them in his own woods or anywhere else he wishes.*

Apart from balancing of the opposing interests between sovereign and subjects, this document notes the concept of “forest”<sup>21</sup> as a good to be exploited, then in one of the first constitutional sources follows the transposition of nature as an object of utility. The second example to be analysed is the law No. 1766 of 1927 regulating the civic uses, i.e., the rights which are not due to the individual, but instead – to the collectivity, to “draw some elementary usefulness from the lands, woods or waters of a specific territory”<sup>22</sup>. Although the law does not define the concept of civic use, it separates into two the “properly usable land” (Art. 11),

<sup>16</sup> “God, who gave the world to men in common, also gave them the reason, to make the most advantageous and most comfortable use of it to life. The earth and all that is found therein is given to men for the subsistence and comfort of their existence. But although all the fruits which it produces naturally and the animals which it feeds, insofar as they are produced spontaneously by nature, belong to men in common, and although none originally has, with the exception of other men, private dominion over any of them as long as they are that way in the natural state, however, since they are given for the use of men, there must necessarily be a means of appropriating them in some way”. Locke, *The Second Treaty on Government*, p. 26.

<sup>17</sup> In “*The Origin of Species*”, Darwin introduced the concept of “natural selection” between individuals of the same species. If, however, the selection between individuals of the same species took place by “interference”, the selection between different species took place by “competition” or, in the case of man towards other living species, by “appropriation”, given the scarcity of natural resources.

<sup>18</sup> “First of all, work is a process that takes place between man and nature, in which man, through his own action, mediates, regulates and controls the organic exchange between himself and nature: he opposes himself, as one of the powers of nature, to the materiality of nature. He sets in motion the natural forces belonging to his corporeality, arms and legs, hands and head, to appropriate the materials of nature in a usable form for his own life” in “*The Capital*”, I.

<sup>19</sup> Putcha C. F. *Corso delle Istituzioni*, trad. it., di Turchiarulo [Course of Institutions]. Trans. It. by Turchiarulo A., Naples, 1854, II, 6: “the right serves only to man”.

<sup>20</sup> On this point, cf. Carducci M. cited work, p. 500, as well as Calderale A. *La Carta della Foresta ai tempi di Enrico III Plantageneto* [The Forest Charter at the time of Henry III Plantagenet]. LB Edizioni, 2020.

<sup>21</sup> It should be noted that in the Charter of Forest the term ‘forest’ had to be interpreted as ‘common natural resources’, therefore – pasture, wood, springs, etc.

<sup>22</sup> Thus, Flore, Siniscalchi, Tamburrino, *Rassegna di giurisprudenza sugli usi civici* [Review of jurisprudence on civic uses]. Rome, 1956, p. 3.

i.e., the land used for forest and permanent pasture, and the land for agricultural cultivation. For the purposes of our investigation, two points are relevant. The law indicates at the outset, in the first paragraph of Art. 3, such uses as “rights of nature” where the legislator should have used the term “rights over nature”. The second fact is that these rights are divided by Art. 4 into essential and useful. The first are the “rights to feed and water one’s own livestock, collect wood for domestic use or personal work, sow by payment to the owner”, the second – those “to collect or draw from the fund other products to be able to trade in it, the rights to feed in communion of the owner and also for the purpose of speculation; and in general, the rights to use the fund in order to obtain economic benefits, which exceed those that are necessary for personal and family sustenance”. In both cases, the legal classification of nature and its products as mere economic goods emerges<sup>23</sup>.

## 2. Recent and new directions

The same conclusions are reached by analysing the most recent legislation and precisely both the Ronchi<sup>24</sup> decree, both the Environment Code<sup>25</sup>. In both texts, the word “nature” is mentioned only once<sup>26</sup>, preferring the term “environment” instead. Already such datum, as mentioned at the beginning, appears relevant, since the visual angle is always anthropocentric. Wanting to dwell on the current legislation, hence – the Environment Code, suffice to say that the first paragraph of Art. 1 states that the decree “has as its primary objective the promotion of the levels of quality of human life”, consequently – not the protection of nature. This promotion always specifies the same rule, it must be realized “through the safeguard and the improvement of the conditions of the atmosphere and the prudent and rational utilization of the natural resources”. The element of use, then better explained in the substantial legislative text, suggests that the environment must still be understood as an asset to be exploited although compatibly to the principle of the “sustainable development”<sup>27</sup>.

These clarifications, equal to those referred to in the previous paragraph, indicate that it is not possible in any way to share the substantial doctrine, which considers that the process of juridification of the environment, i.e., its

<sup>23</sup> In this sense, even the doctrine has had the opportunity to clearly distinguish, in the structure of civic uses, the subjective element (i.e., the individual or the community holders of the right) from the objective one (i.e., the land, belonging to the private, to the collective or to the Municipality): thus, *Petronio U. v. Usi civici* [Civic uses]. In: *Enc. Dir.*, XLC, Milan, 1992, p. 931.

<sup>24</sup> Legislative Decree of 5 February 1997, No. 22 (in the General Gazette No. 38 of 15 February 1997 – SO No. 33) entitled “Implementation of directives 91/56/EEC on waste, 91/698/EEC on hazardous waste and 94/62 / EC on packaging and on packaging waste”. Notably, the Ronchi decree was repealed by Art. 264 of the Environmental Code.

<sup>25</sup> Legislative Decree of 3 April 2006, No. 152 (in the Official Gazette No. 88 of 14 April 2006) containing “Environmental Regulations”.

<sup>26</sup> Art. 3 quarter, third paragraph of the Environmental Code.

<sup>27</sup> Cit. Art. 3 quarter, third paragraph of the Environmental Code.

classification as an object of law, has been, all in all, minted recently. Hence, in a historical analysis, one A. stated that climate change and the new environmental sensitivities of the 1960s of the 900 have “pushed doctrine and jurisprudence to (re)think the relationship of man with the environment, qualifying the latter, at first, as a constitutional value, then, even, as a good in the legal sense<sup>28</sup>” and, in particular, as a common good. This result, according to this doctrine, would have been reached also through the constitutional interpretation given by the Council which, in the note judgment No. 641 of 1987<sup>29</sup>, had to specify that the environment “has been considered a unitary intangible asset although to various components, each of which can also constitute, but all, on the whole, are attributable to unity”<sup>30</sup>. However, as has been pointed out previously, the objective representation of nature, and therefore its reification, has very ancient and hidden roots. This approach, at least at a supranational level, is gradually changing even if for individual entities or macrosystems. In this sense, the Constitution of Ecuador has stated, in the second paragraph of Art. 10, the legal nature of nature, in particular by ruling that “the naturalness will be subjected to the rights recognized by the Constitution”<sup>31</sup>. Again, in Bolivia, Art. 5 of L. No. 71 of 2010<sup>32</sup> defined Mother Earth as a “collective subject of public interest” to be granted, as per Art. 7, the right to life, to the diversity of life, to water, to clean air, to balance, to restore and to live free from contamination. Likewise, in New Zealand, the Whanganui River has been recognised as a legal entity through the Whanganui River Claims Settlement (*Whanganui Te Awa Tupua*) Act 2017 which, in Subpart 2 of Part 2, states: “the Te Awatupua is a legal person and has all the rights, powers, duties and responsibilities of a legal entity”<sup>33</sup>. And again, in Uganda, The National Environment Act 2019 establishes, in Art. 4, Sub. 1, that “nature has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its evolutionary processes<sup>34</sup>”. Similarly, the Constitutional Court of Colombia in

<sup>28</sup> Micciché C. cited work, 1 (in part 3). The greatest difficulty encountered was the non-unity of the environmental phenomenon that was divided into material and immaterial factors.

<sup>29</sup> Ponzanelli G. Corte costituzionale e responsabilità civile: rilievi di un privatista (nota a C. cost. 30 dicembre 1987, No. 641, Tavanti c. Proc. gen. Corte Conti) [Constitutional Court and civil liability: findings of a private owner (note to C. cost. 30 December 1987, No. 641, Tavanti v. Proc. Gen. Corte Conti)]. In: *Foro It.*, 1988, I, 1057.

<sup>30</sup> The court – after having specified that the protection of the environment should not be marked by abstract “naturalistic or aesthetic” purposes, but by practical actions aimed at protecting the habitat in which man lives and acts – stressed that it “rises to primary and absolute value” and more precisely not only as a “legal good as recognized and protected by rules”, but as a “free” good and therefore not subject to a subjective legal situation, but usable by the community and by individuals.

<sup>31</sup> Constitution of Ecuador, Art. 2, para. 2. Available: [https://www.oas.org/juridico/pdfs/mesicic4\\_ecu\\_const.pdf](https://www.oas.org/juridico/pdfs/mesicic4_ecu_const.pdf) [viewed 13.03.2021.].

<sup>32</sup> L. No. 71 of 2010, Art. 5. Available: <https://bolivia.infoleyes.com/norma/2689/ley-de-derechos-de-la-madre-tierra-071> [viewed 18.03.2021.].

<sup>33</sup> Whanganui River Claims Settlement, Act 2017 which, Part 2, Subpart 2. Available: <https://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html> [viewed 18.03.2021.].

<sup>34</sup> The National Environment, Act 2019, Art. 4, Sub. 1. Available: [https://nema.go.ug/sites/all/themes/nema/docs/National%20Environment%20Act,%202019%20\(1\).pdf](https://nema.go.ug/sites/all/themes/nema/docs/National%20Environment%20Act,%202019%20(1).pdf) [viewed 18.03.2021.].



judgment T-622/16 stated that “the Atrato River is subject to the rights that imply its protection, conservation, maintenance and [...] restoration” (paragraphs 9.25 and 9.32). In India the High Court of Uttarakhand Nainital, in the decision on the Mohd case *Salim v. State of Uttarakhand & others* established, on 20 March 2017 in paragraph 19, that “the rivers Ganges and Yamuna, all their tributaries, streams, any natural water flowing with continuous or intermittent flow of these rivers, are declared as legal person/legal entity/living entity having the status of legal entity with all the corresponding rights, duties and responsibilities of a living person<sup>35</sup>”. Finally, in 2019 the High Court Division of the Supreme Court, Bangladesh, recognised the Turag River as a legal person/legal entity/living entity and stated that all the rivers in Bangladesh will have this same status<sup>36</sup>.

All these experiences have led a doctrine that “the tendency that subjectivizes nature and its individual components is, indisputably, a phenomenon of worldwide in its scope<sup>37</sup>”.

### 3. Food for thought

What, then, is missing to qualify nature in general or certain natural entities in particular not as mere objects in Europe, but as subjects of law endowed with legal subjectivity? So, as persons or centres of imputation of legal effects that have substantial and procedural ownership and, above all, power to protect a general right of resistance against today’s intensive exploitation?

The question must also be asked in the light of the European legislation of reference and, in particular, both the provisions of Art. 37 of the Charter of Fundamental Rights of the European Union, and of the recent proposal for a Regulation of the European Parliament and of the Council establishing

<sup>35</sup> The same court had the opportunity to grant, a few days later, “The quality of legal entity, legal person, juristic person, juridical person, moral person, artificial person”, to the “glaciers including the Gangotri and the Yamunotri, rivers, streams, torrents, lakes, air, meadows, valleys, jungles, forests, wetlands, prairies, springs and waterfalls, therefore – of subjects to whom to grant the right to exist, persist and maintain their ecological system (case *Lalit Miglani v. State of Uttarakhand*, Writ Petition – GDP – No. 140 of 2015).

<sup>36</sup> These examples are deepened by Perra L. *L’antropomorfizzazione giuridica*, in *Diritto e Questioni pubbliche*, XX, 2020 / 2 [Legal anthropomorphization, in *Law and Public Issues*, XX, 2020/2], pp. 47–70, as well as previously in Baldini S. *I diritti della natura nelle costituzioni di Ecuador e Bolivia* [The rights of nature in the constitutions of Ecuador and Bolivia]. In: *Visioni Latino Americane* [Latin American Views], 2014, 10, pp. 25–39.

<sup>37</sup> Nunez R. M. *Subjectivizing Nature?* In: *The Cardozo Electronic Law Bulletin*, 2019, Vol. 25, No. 1 (part 5). Of the same A., cf. *Nature, damage, subjects. Reflections on the subject of ecological justice*, in *Supreme Courts and Health*, 2019, p. 2. See also the considerations of Gaeta M. A. *Il problema della tutela giuridica della natura: un’analisi comparata tra Italia e Stati dell’America Latina* [The problem of the legal protection of nature: a comparative analysis between Italy and Latin American States]. In: *Nuovo Diritto Civile* [New Civil Law], 2020, 4, 313, as well as ID., *Principio di solidarietà e tutela di nuovi ‘soggetti’ deboli. La Foresta Amazzonica quale soggetto di diritto* [Principle of solidarity and protection of new weak ‘subjects’. The Amazon Forest as a subject of law]. In: *Familia*, 2019.

the framework for achieving climate neutrality and amending Regulation (EU) 201/1999. Art. 37, contained in Title IV of the Charter (the title devoted to the principle of solidarity), states that “a high level of environmental protection and the improvement of its quality must be integrated into Union policies and guaranteed in accordance with the principle of sustainable development<sup>38</sup>”. Regarding the proposal for a Regulation<sup>39</sup>, it aims to achieve the so-called climate neutrality within and no later than 2050, necessary “to transform the EU into a just and prosperous society that improves the quality of life of current and future generations, a society with a modern, efficient and competitive economy that in 2050 will not generate net greenhouse gas emissions and in which economic growth will be dissociated from the use of resources”. In both texts, no reference is made to Nature, but rather to the resources to be exploited according to the principles of proportionality and sustainability<sup>40</sup>. This figure seems rather disheartening, since it continues to analyse the theme of what still remains to be exploited, how and above all – who is the beneficiary of this exploitation.

In any case, and by attempting to give a minimum support to the contrary heliocentric theory, three provocations are allowed. At the end of the 19<sup>th</sup> century, the diatribe around the concept of “person” was illuminated by the “pure doctrine” of Kelsen who, analysing the concept first understood as a “mask”<sup>41</sup> and, then, as an “individual”<sup>42</sup>, condemned the naturalistic man by the juridical man Kelsen, in short, pointed out that the human being was not a juridical concept, but only biological and psychological and that “If one has to distinguish the naturalistic concept of man from the juridical concept of person, this does not mean that the person is a particular species of man, but that the two concepts represent two completely different units”. Furthermore: “The juridical concept of person or subject of law expresses only the unity of a plurality of obligations and authorizations, that is, the unity of a plurality of rules establishing obligations and authorizations.

<sup>38</sup> In GUUE C 326/391 of 26 October 2012. The principle of sustainable development enshrined in Art. 37 is based on Arts 2, 6 and 174 of the EC Treaty, now replaced by Art. 3, para. 3 of the Treaty on European Union and Arts 11 and 191 of the Treaty on the Functioning of the European Union.

<sup>39</sup> Available: <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52020PC0080&from=EN> [viewed 21.06.2021.].

<sup>40</sup> A less dramatic judgment must be given to the Paris Agreement on climate (in GUEE of 19 October 2016, Law 282/4) which, at the first “Noting”, underlines “the importance of ensuring the integrity of all ecosystems, including the oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth”.

<sup>41</sup> Guarino A. *Diritto privato romano* [Roman private law]. Naples, 2001, 288: “the original meaning of the word was that of “mask”, and precisely for this reason person presumably passed to indicate all those who have form, human aspect, regardless of legal subjectivity” (22.5.1). The term “person” derives from “per” – “sonus-i”, that is “through sound” or “through the voice”: the latter, in fact, reached the spectators in Greek and Latin theatre through wooden masks that they amplified the sound.

<sup>42</sup> Guarino A. *ibid.*, p. 288: “persona” was a term used starting from advanced classical law, for clear influence of Stoic philosophy, in order to designate man, with the exclusion of immaterial juridical subjects and with the inclusion, *vice versa*, of servants, peregrines, the *fili familiarum*”. Regarding person, see also Bessone M. – Ferrando G. v. *Persona fisica*. a) *Diritto privato* [Physical person. a) Private law]. In: *Enc. dir.*, Milan, 1983, p. 193.

The “physical” person corresponding to the individual man is the personification, i.e., the unitary expression personified, of the norms that regulate the behaviour of a man<sup>43</sup>. From this approach emerged the distinction between man, that is, natural reality, and “person”, that is, *representation* of juridical knowledge, unitary expression personifying a group of obligations and juridical authorizations, that is, of a set of rules. An approach from which derived a wider citizenship in the codes of the juridical person and, above all, the possibility of considering a *person* also a “non man”, that is, a living being different from the human canons. So, the consequence should be that nothing to prevent a further superfetation, wanting to consider Nature as a person of law endowed with its centre of imputation.

At this point, it could be argued that a macrosystem is too vast, complex, unequal to assign to it some “juridical subjectivity”. But, in hindsight, the problem was already posed years ago for several *universitas* among which the most recent was the company. In this sense, the opposing theories (unitary and atomistic) are known and they mean the company either as “a single good<sup>44</sup>, a new and distinct good with respect to the individual goods” or “simple plurality of goods functionally connected to each other<sup>45</sup>”. Beyond the doctrinal dispute, the one most relevant from the current normative data, in particular from the provisions of Art. 2555 and ss. c.c., is the will of the legislator to safeguard the company in its unity and functionality, to the point of being able to speak, also for the explicit reference made by Art. 670 Code of Civil Procedure<sup>46</sup> of a sort of atypical universality of movable and immovable property. Furthermore, the question of the *universitas* is well founded in the macroeconomic concept of State, Regions, Provinces, Municipalities and so on. Hence, a very similar discourse could *cum grano salis* operate also with respect to Nature or to well-identified parts of it.

Finally, on 16 February 2017, the European Parliament approved the Resolution with recommendations to the Commission concerning civil law rules on robotics (2015/2103(INL))<sup>47</sup> pursuant to Art. 59, lett. F), Parliament also called on the Commission to explore, examine and assess the implications of all possible legal solutions, including “the establishment of a specific legal status for robots in the long term, so that at least the most sophisticated autonomous robots can be considered as electronic persons responsible for compensating for

<sup>43</sup> Kelsen H. *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (trad. It., *Lineamenti di dottrina pura del diritto*, a cura di Treves R. [Outlines of pure doctrine of law. Treves R. (ed.). Turin, 1952]), 88 ff.

<sup>44</sup> Campobasso G. F. *Diritto commerciale, 1, Diritto dell'impresa* [Commercial Law, 1, Business Law]. Turin, 1993, p. 145, which indicates “Ferrara as coryphaeus” (The legal theory of the company, Florence, 1945, p. 112).

<sup>45</sup> Campobasso G. F. cited work, p. 146, which refers to Colombo. *L'azienda* [The company]. In: *Tratt. Galgano, III*, p. 61.

<sup>46</sup> “The judge can authorize the judicial seizure: 1) of movable or immovable property, companies or other universality of goods, [...]”.

<sup>47</sup> Resolution with recommendations to the Commission concerning civil law rules on robotics (2015/2103(INL)), Art. 59, lett. F). Available: <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52017IP0051&from=IT> [viewed 02.11.2021.].

any damage caused by them, as well as possibly the recognition of the electronic personality of robots that make autonomous decisions or interact independently with third parties<sup>48</sup>. Beyond the legal disquisitions, the point is that if it is assumed that some subjectivity or juridical personality to robots would be acknowledged at some point in the future, hence granting this status to technologies without their own life, clearly, this equal dignity should also be granted to living entities other than man.

#### 4. Initial conclusions

A possible recognition, on a global or territorial scale, of the juridical subjectivity status of Nature, understood either in its entirety or in its precise and limited manifestations, could give rise to other consequential problems: the need for a representative body, the limits of power that such body must exercise, who appoints this body and who controls it, in addition to the rights, what are the duties of Nature, and so on. However, such problems are easily solved in a like manner as with respect to legal persons or local authorities. The point is that the now atavistic contrast between culture and nature, as well as the necessary predominance of man over natural events, have no future. The Leopardian idea of a stepmother nature<sup>49</sup> has no reason to be where it is found that mother earth supports us and has supported us since the beginning and, in general, that the problems plaguing the earth will inevitably befall also to human beings.

Art. 20 of the Finnish Constitution, entitled “Responsibility for the Environment”, states that “nature and biodiversity, the environment and national heritage are the responsibility of each and every one” and that “Public authorities do everything in their power to ensure that everyone has the right to a healthy environment, as well as the possibility of contributing to decisions concerning the environment in which they live”. Even if these principles, enshrined in a nation that has a certain ancestral relationship with the earth, represent an important step forward in the process of rapprochement between culture and nature (since they “constitutionalize” the second concept), they are still far from a current and dutiful vision of things. In short, man’s attention to nature cannot be reduced or limited to the notions of “responsibility” or “damage”, since this view suggests that the concept of nature continues to be framed as a mere object of human activity potentially harmful to the ecosystem. It is necessary, therefore, to begin a process of *subjectivation* of nature which, as a subject of law, can exercise and protect its own rights including, as we shall see, those of diversity, restoration and water.

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<sup>48</sup> The question is examined by Santosuosso A. *Intelligenza artificiale e diritto, Perché le tecnologie di IA sono una grande opportunità per il diritto* [Artificial intelligence and law. Why AI technologies are a great opportunity for law]. Milan, 2020, p. 198.

<sup>49</sup> “Oh Nature, Nature/ why do you not give now/ what you promised then? Why/ do you so deceive your children?” (Leopardi G., *A Silvia* [To Silvia], pp. 36–39).

Far from being futuristic<sup>50</sup> this process does not seem to be not properly developed in Italy where, even in the presence of parliamentary initiatives<sup>51</sup>, evidently (especially in the parliamentary work) that there is confusion between the subject and the object. In particular, in the report to a recent draft constitutional reform, it first reads that, in the complex protection of the environment, even animals are “subjects that make up the ecosystem”, then that “the concept of environment is finally a relational good that implies the material interaction between the man and nature, the complexity of which necessitates identification of rights and duties teleologically oriented toward the enhancement of this relationship”. These assertions are an obvious example of conceptual confusion between subjects and objects. Needless to say, a simple and direct wording such as “The Republic protects Nature as a subject of law” would be better. This would involve *de relato* the application to Nature of all the proliferating doctrine on the natural person and his rights.

## 5. The right to water

The ecosystem does not feed on meat, but mainly on water. Compared to a resource that is already scarce for man<sup>52</sup>, the discourse is twofold: how the human being must rationally exploit water for his needs and how he must guarantee to Nature the necessary quantities of water. The theme of interest here is not summarised in the well-known questions of the administration of water to the mankind or the equitable distribution of water between the different parts of the hemisphere or the private or public nature of water nor in the constitutional nature or the right to water<sup>53</sup>, but instead it enquires, how to manage, with respect to Nature, problems like

<sup>50</sup> Regarding this, see “Universal Declaration of the Rights of Mother Earth” presented by the President of Bolivia Evo Morales to the United Nations on 21 June 2012, in which Mother Earth is qualified as a “living being” (Art. 1) to which the rights referred to in Art. 2 must be granted.

<sup>51</sup> See the draft constitutional law No. 1203, aimed at amending Art. 9 of the Constitution by adding the paragraph: “The Republic protects the environment and the ecosystem, protects biodiversity and animals, promotes sustainable development, also in the interest of future generations”, filed in the Senate on 2 April 2019. Available: <https://www.senato.it/service/PDF/PDFServer/DF/344113.pdf> [viewed 12.06.2021.]. Note the further proposals filed with the Chamber of Deputies, in particular – the Muroli constitutional law No. 2174, containing “Amendments to articles 9 and 117 of the Constitution, regarding the protection of the environment, biodiversity, ecosystems and animals”. Available: <https://www.came-ra.it/leg18/126?pdI=2174> [viewed 12.06.2021.] and the Constitutional Law Proposal Barba and others No. 240, containing “Amendments to articles 2, 9 and 41 of the Constitution, on environment protection and the promotion of sustainable development”. Available: <https://www.camera.it/leg18/126?idDocumento=240> [viewed 12.06.2021.].

<sup>52</sup> It should be noted that the water useful for man, that is, the fresh one, constitutes only 2.5% of all the water on the planet. Of this 2.5%, 70% is kept in glaciers and polar caps. These data are reported in the European Water Resources Charter adopted by the Committee of Ministers of the Council of Europe. Available: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=0900001680504d85](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680504d85) [viewed 03.08.2021.].

<sup>53</sup> Regarding this point, Carapezza Figlia G. *Oggettivazione e godimento delle risorse idriche. Contributo a una teoria dei beni comuni* [Objectification and enjoyment of water resources. Contribution to a theory of common goods]. ESI, Naples, 2008.

desertification and “the degradation of arid, semi-arid and dry sub-humid lands attributable to various causes including climatic variations and human activities<sup>54</sup>”. This degradation is manifested, as specified by the new Ministry of Ecological Transition “with the decrease or disappearance of productivity and biological or economic complexity of cultivated land, both irrigated or not, grasslands, pastures, forests or woodland caused by land use systems, or by one or more processes, including those deriving from human activity and its settlement methods, including water and wind erosion, etc.<sup>55</sup>”. A process, now known for a long time, that afflicts the entire planet and, as far as Italy is concerned, at least 30% of its territory with increasing risk for the major islands. Likewise, the Ministry of the Ecological Transition indicates the three main causes of natural<sup>56</sup>, anthropogenic<sup>57</sup> and morphological<sup>58</sup> origin. These causes have been drawn up by the National Committee for the Fight against Drought and Desertification (CNLSD), established by DPCM of 26 September 1997<sup>59</sup>.

As to supranational and national legislation, it is elephantiac, redundant and sometimes unclear. Furthermore, it is aimed at analysing the problem from the point of view of “the sustainable exploitation” of water resources, thereby disregarding Nature as a potential subject to be protected. The starting point can be the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (UNCCD), – the Convention signed by 196 countries<sup>60</sup> and aiming to “fight against desertification and mitigate the effects of drought in severely affected countries” (Art. 2). To this end, Art. 4 and 5 identifies the obligations of the signatory countries, as well as the plans of action and cooperation on international, national and local level (Arts 9 to 15); finally, permanent bodies are established, namely, the Conference of the Parties (Art. 22), the Permanent Secretary (Art. 23) and the Committee of Science and the Science and Technology Committee (Art. 24). Notably, the European Union has also signed the Convention

<sup>54</sup> According to Art. 1 of the United Nations Convention to combat desertification (UNCCD) signed in Nairobi in 1977.

<sup>55</sup> Available: <https://www.mite.gov.it/pagina/la-desertificazione> [viewed 03.08.2021.].

<sup>56</sup> The causes of natural origin can be summarized in aridity (i.e., in the simultaneous scarcity of precipitation in one with strong evaporations), in drought (i.e., in the reduction, albeit significant, of the levels of precipitation compared to the normality of the season), and finally, in the erosivity of the rain (i.e., in the disintegration of the soil due to short but intense rains, which fall on areas without vegetation capable of absorbing them).

<sup>57</sup> The anthropogenic ones are those related to socio-economic activities and their impacts and are, in an absolutely generic way, identifiable in agriculture, zootechnics, water management, forest fires, industry, urbanization, tourism, landfills and mining activities.

<sup>58</sup> Finally, the morphological ones are the slopes of the ground, the solar exposures of the Mediterranean slopes and the type of certain vegetal coverings.

<sup>59</sup> In the Official Gazette No. 43 of 21.02.1998.

<sup>60</sup> Italy has ratified the Convention by the Ratification and execution of the United Nations Convention to Combat Desertification in countries seriously affected by drought and/or desertification, in particular in Africa, with annexes, made in Paris on 14 October 1994 (in GU General Series No.142 of 20.06.1997, Ordinary Suppl. No. 122).

since 26 March 1998<sup>61</sup> and that the Conference of the Parties, with the recent document of 14 September 2017<sup>62</sup>, decided “to adopt the UNCCD 2018 2030 Strategic Framework”, postulating five strategic objectives essentially inspired by the so-called the principle of sustainability in the management of territories and water<sup>63</sup> some provisions of the domestic legislation are also dedicated to desertification and, in particular, of the Legislative Decree of 3 April 2006, No. 152<sup>64</sup> which reserves the entire Part 3, to the protection of water from pollution, to the management of water resources and, finally, to the fight against desertification. The activities aimed to achieve these purposes are numerous and punctually listed in Art. 56, *inter alia*, those referred to in part (d) support our reasoning, particularly – parts (d) (contemplating extractive activities in waterways, lakes, lagoons and in the sea) and (h) (considering the rational use of surface and deep-water resources). However, it should be noted that the primary objective of the entire legislation is “the promotion of the levels of quality of human life, to be achieved through the preservation and improvement of the conditions of the environment and the prudent and rational use of natural resources” (Art. 2). The opposing interests are balanced between, on the one hand, the environment (never called Nature) and, on the other, – the man that that environment must learn to exploit according to principles now known. Ultimately, the Nature is always understood as an object, thus, we arrive at the analysis of the so-called “river contracts” introduced, in the Environmental Code, by Art. 59 of the recent Law No. 221<sup>65</sup>. It is a genuine legal protocol signed between public and private bodies and aimed at the protection, correct management of water resources and the enhancement of river territories, together with the protection against hydraulic risk and the local development of such areas. The object of these protocols are the waterways in a perpetuated anthropocentric representation<sup>66</sup>.

<sup>61</sup> 98/216/EC: Council Decision of 9 March 1998 concerning the conclusion, on behalf of the European Community, of the United Nations Convention on Combating Desertification in Countries severely affected by drought and/or desertification, in particular in Africa (in OJ L 83 of 19.03.1998, pp. 1–2).

<sup>62</sup> Available: [https://www.unccd.int/sites/default/files/inline-files/ICCD\\_COP%2813%29\\_L.18-1716078E\\_0.pdf](https://www.unccd.int/sites/default/files/inline-files/ICCD_COP%2813%29_L.18-1716078E_0.pdf) [viewed 17.08.2021].

<sup>63</sup> Another source of reference is Directive 2000/60/EC of 23 October 2000 which establishes a framework for community action in the field of water policy (in G.U.C.E. L 327 of 22.12.2000, pp. 1–73). Therein, no reference is made to Nature itself, but instead – to the exploitation of water resources: the European legislator, borrowing Art. 174 of the Treaty (now 191), specifies that the Community’s environmental policy also in terms of water must be based “on the principles of precaution and preventive action, on the principle of correction, first of all, at the source of the damage caused to the environment, as well as based on the ‘polluter pays’ principle”.

<sup>64</sup> Cfr. nt. 25.

<sup>65</sup> On “Environmental provisions to promote green economy measures and to limit the excessive use of natural resources” (in the Official General Series No. 13 of 18.01.2016).

<sup>66</sup> The latest arrest of the United Sections of the Court of Cassation should therefore be viewed favourably, which, in the recent sentence no. 11291 of April 29, 2021 (in Sole 24 Ore, 31.05.2021, 24, with an article by Zerman P. M. Corso d’acqua ‘fragile’: legittimo lo stop a impianti idroelettrici [‘Fragile’ watercourse: Suspension of hydroelectric plants is legitimate]) explicitly refers to “small mountain waterways” that characterize “a particularly fragile ecosystem”. In a dutiful balancing of interests,

## 6. The right to restoration

The problems of desertification, as well as those of wild urbanization and deforestation, are a source of reflection for a further right that should be up to the Nature, namely, that of restoration. The theme is, already known to doctrine and jurisprudence since it is the subject of a specific regulatory provision and, in particular, of Art. 302, para. 9, of the aforementioned Environmental Code. However, the problem always appears to be addressed from the same point of view – Nature as a legal good.

Starting from the legal reference normative data, para. 9, states that “restoration”, even “natural”, means: in the case of waters, protected species and habitats, the return of damaged natural resources or services to their original condition; in the case of damage to soil, the elimination of any risk of harmful effects for human health and environmental integrity. In any case, the restoration must consist of the requalification of the site and its ecosystem, through any action or combination of actions, including mitigation or temporary measures, aimed at repairing, rehabilitating or, where it is deemed acceptable by the competent authority, to replace damaged natural resources or natural services. It should be noted that the paragraph in question, therefore the notion in itself of restoration, has not undergone changes on the occasion of the novelties, indeed already previously absorbed<sup>67</sup>, made by Art. 25 of the 2013<sup>68</sup> Community Law which, conversely, has affected other provisions contained in Part Six of the CDA, therefore in the part

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the aforementioned watercourses are considered by the Court to be worthy of greater protection than the so-called renewable sources. In particular, the judges of legitimacy, in examining the relationship between the precautionary principle and the principle of support for renewable sources, consider “the precautionary principle prevails to protect the maintenance of water quality and indeed the creation of a system that increases it the possibilities for qualitative improvement”. Although the Court never refers to the concept of ‘nature’, remarkably, the separation of fragile watercourses from the environment in general seems to begin to mark a path of subjectivization that separates the part from the whole.

<sup>67</sup> For the punctuality of speech, it is true that Directive 2004/35/EC, although transposed in Italy only in 2013, was an implicit primary source of reference for the 2006 news of the Board of Directors and, in fact, is referred to several times in Part 6.

<sup>68</sup> L. 6 agosto 2013, n. 97 (in G.U. 20 agosto 2013) [L. 6 August 2013, No. 97 (in Official Gazette of 20 August 2013)] with Art. 25, in particular, Directive 2004/35 / EC of 21 April 2004, of the European Parliament and of the Council on environmental liability with regard to the prevention and reparation on environmental damage, was implemented. The aforementioned Directive contemplates in point 15 of Art. 2 a much more limited notion of “restoration”, namely: “in the case of water, protected species and natural habitats, the return of damaged natural resources and/or services to their original conditions and, in the case of damage to the soil, the elimination of any significant risk of causing harmful effects to human health”. Regarding this, Pozzo B., *La responsabilità per danno ambientale [Liability for environmental damage]*. In: Rossi G. (ed.), *Diritto dell’Ambiente [Environmental Law]*, Giappichelli, Turin, 2015, pp. 215–228. For the previous legislation, see ID, *La nuova direttiva 2004/35/CE del Parlamento europeo e del Consiglio sulla responsabilità ambientale in materia di prevenzione e riparazione del danno*, in *Riv. giur. amb.*, fascicolo 1 [the new Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of damage, in *Riv. jur. amb.*, issue 1], Giuffrè Editore, Milan, 2006, pp. 1–18 e ID., *La direttiva 2004/35/CE e il suo recepimento in Italia*, in *Riv. giur. ambiente*, fascicolo 1 [Directive 2004/35/EC and its implementation in Italy, in *Riv. jur. environment*, issue 1], Giuffrè Editore, Milan, 2010, pp. 1–80.



dedicated precisely to precautionary and restoration activities and, in particular, on the introduction of Art. 298a which, in the third paragraph, refers to Annex 3 regarding repairs. This annex, fully based on Annex II to Directive 2004/35/EC, is relevant and clarifying, since it “establishes a common framework to be respected in order to choose the most appropriate measures to be followed to ensure the repair of environmental damage”. It divides the repairs according to whether the damage is caused to the water, protected species and natural habitats (the first part) or to the soil (the second part), in a sequence of punctual remedies that tends to bring the damaged environment back to its original condition. With regard to the first repairs, they are subdivided into primary, complementary and compensatory reparation measures and are also punctually represented in their respective purposes, options<sup>69</sup> and choices<sup>70</sup>. Conversely, for land-related repairs, restoration activities expressly include “human health” as an interest to be protected, in any case by considering as a reference option that of “natural restoration, which is an option without a direct human intervention in the restoration process”.

If these provisions appear punctual and stringent, certain doubt has been expressed regarding the person entitled to the protection of the environment, namely, the person with the underlying legal interest. In particular, Art. 309 of the CDA states that “the regions, the autonomous provinces and the local authorities, including the associated ones, as well as natural or legal persons who are or are could be affected by environmental damage or who have a legitimate interest in participating in the precautionary measures procedure, complaints and observations, accompanied by documents and information, concerning any case of environmental damage or imminent threat of environmental damage and request State intervention to protect the environment pursuant to Part 6 of this decree”. The standard, as structured, presents a multiplicity of readings with respect to the interested parties or involved and must be analysed in conjunction with the subsequent Art. 311<sup>71</sup>. First of all, the regions, autonomous provinces, including associated local authorities and finally the natural or legal persons

<sup>69</sup> In this sense, the purpose of primary repair is to “restore damaged natural resources and/or services to or towards their original conditions”, whereas complementary repair is to counterbalance, where appropriate, also through the use of an alternative and preferably adjacent site, the positive effects which, however, were not achievable by primary repair. Finally, the purpose of compensatory repair is to compensate for the loss until primary or complementary reparations are implemented.

<sup>70</sup> Notably, there is no decreasing principle. In choosing the option to use, a series of criteria listed in detail must be followed. However, primary reparation measures can also be taken that do not restore the damaged environment to its original conditions or which bring it back more slowly to those conditions. This is on the condition, however, that “the natural resources and/or services lost on the primary site [...] are compensated by increasing the complementary or compensatory actions to provide a level of natural resources and/or services similar to that lost”. The competent authority is also provided: “not to undertake further reparation measures” if there is no longer “a significant risk of causing harmful effects to human health, water, species and natural habitats protected” or if “the costs of the remedial measures [...] are disproportionate to the environmental benefits sought”.

<sup>71</sup> Para. 1 thereof establishes that “the Minister of the Environment and of the Protection of the Territory and the Sea acts, also by exercising civil action in criminal proceedings, for the compensation of environmental damage in a specific form and, if necessary, for an equivalent patrimonial, or proceeds in accordance with the provisions of the sixth part of this decree”.

affected by the environmental damage or holding a legitimate interest, are listed. These persons are “affected” by environmental damage and, therefore, potentially holders of a claim for compensation and/or restoration, therefore of an interest to be protected. Then, it is recalled the Minister of the Environment and of the Protection of the Territory and the Sea, to whom not only to present denunciations or observations, but also to “ask for state intervention”, therefore subject obviously entitled of legitimacy and representative power. Finally, the rule explicitly links state intervention to “environmental protection”, as if to signify that the environment is the holder of the interest to be protected. However, such a last interpretation is evidently distorted by the reading of entire text of the law, since it, even in recent novels, is always aimed at identifying the environment as a mere object and not holder of rights in itself. Consequently, the only certainty is that the subject entitled to exercise the compensation and/or restoration is the Ministry, and this is in mind of Art. 311 CDA, both by virtue of what was established by the recent arrest on the subject by the Constitutional Court<sup>72</sup>. The judges of the laws, particularly in addition to sanctioning – in compliance with the general regulatory provision referred to in art. 117 Cost., as well as the aforementioned Art. 311 CDA – the exclusive competence of the State in relation to the judicial protection of the environment as provided by Directive EC<sup>73</sup>, continue to indicate the environment as “a unitary immaterial good although with various components, each of which may also constitute, in isolation and separately, the object of care and protection; but all, taken as a whole, are attributable to unity<sup>74</sup>”.

<sup>72</sup> Judgment 126 of 19 April 2016, Pres. Grossi – Red. Coraggio (in G. U. 8 June 2016 No. 23). The sentence is published in *Giur. Const.*, 4, 2016, 1509, with a note by Betzu M. – Aru S., *Il risarcimento del danno ambientale tra esigenze unitarie e interessi territoriali* [Compensation for environmental damage between unitary needs and territorial interests], as well as in *Foro it.* 2016, part I, col. 3409.

<sup>73</sup> The Court, in fact, is keen to clarify that there is also a subsidiary competence of additional subjects: “this does not exclude – as we have seen – that pursuant to Art. 311 of the legislative decree No. 152 of 2006, there is the power to act of other subjects, including the representative institutions of local communities, for the specific damages suffered by them. The Court of Cassation has repeatedly stated in this regard that the special legislation on environmental damage is flanked (since there is no real antinomy) to the general discipline of damage laid down by the Civil Code, therefore not being able to doubt the legitimacy of territorial authorities to become a civil party *iure proprio*, in the trial for crimes that have caused damage to the environment, not the compensation for damage to the environment as a public interest, but instead (like any individual or associated person) – for the damage directly suffered: direct and specific damage, further and different from the general, public one, of the damage to the environment as a public good and a fundamental right of constitutional significance”.

<sup>74</sup> The Court continues, specifying that: “the fact that the environment can be used in various forms and different ways, as well as be the subject of various rules that ensure the protection of the various profiles in which it is expressed, does not diminish and does not affect its nature and its substance as a unitary good that the legal system takes into consideration. The recognition of the existence of a “unitary intangible good” is not an end in itself, but functional to the affirmation of the increasingly felt need for uniformity of protection, a uniformity that only the State can guarantee, nevertheless, allowing that other institutions could and should also take charge of the undoubted interests of the communities that directly benefit from the good”.

## 7. The right to biodiversity

The normative reference is the so-called Habitat Directive, implemented in Italy in 1997<sup>75</sup>, which highlighted the concepts of “environmental conservation” and “natural habitat”. The first is intended as the “set of measures necessary to maintain or restore natural habitats and populations of species of wild fauna and flora in a satisfactory state”; the second in “terrestrial or aquatic areas distinguished by their geographical, abiotic and biotic characteristics, entirely natural or semi-natural” (Art. 1). The function and tools adopted by the entire Directive revolve within these two concepts, among which the main need is the need to “contribute to safeguarding biodiversity through the conservation of natural habitats as well as wild fauna and flora, in the European territory of the Member States to which Treaty applies. In this regard, the main obligations of the Member States and, in particular, the obligations to protect animal species (Art. 12) and plants (Art. 13) and to regulate the collection or exploitation of flora and fauna (Art. 14). The two points that, however, concern the present work are the concept of “Community interest” and the provision of Art. 22. The Community interest is analysed by Art. 1 in combination with the concept of natural habitat. In this regard, natural habitats of Community interest are those which in the territory of the European Union are either at risk of disappearing from their natural distribution or have a reduced natural distribution as a result of their regression or restriction area or finally, they are notable examples of typical features of one or more of the biogeographical regions of the Alps, Atlantic, Black Sea, Boreal, Continental, Macaronesic, Mediterranean, Pannonian and Steppe. Habitats, both in general and in the Community interest, are punctually listed by the Directive in Annexes I, II, IV and V. As far as for Art. 22, this establishes two principles both aimed at conservation of biodiversity. The first is the opportunity to reintroduce, within a given territory, local species if such a measure can contribute to their conservation; the second is the control over the intentional introduction of a non-local species. The difference between these two prerogatives is that while the first refers to native species that were obviously at risk or have been extinguished, the second has as its object allogeneic species that could cause some prejudice and, therefore, justify, in addition to control, also the ban on introduction.

Thus, Member States should be able to protect habitats in general and Community habitats in particular. This obviously implies that the Directive recognizes a right to biodiversity, i.e., to the need, for environmental and also human reasons, to maintain in certain places certain fauna or flora species regulating their conservation, use, reintroduction and, finally, prohibition to introduce certain species. This right is, in some respects, also clear from Recital 3

<sup>75</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural and semi-natural habitats and wild flora and fauna (in Official Journal L 206 of 22.07.1992, page 7) implemented in Italy by Presidential Decree 8 September 1997, No. 357. The Directive 2009/147/EC of the Parliament and of the Council of 30 November 2009 on the conservation of wild birds (in the Official Journal of the European Union 20 January 2010, Law 20/7) is relevant to the subject.

which, explicitly, states that “this Directive, the main purpose of which is to promote the maintenance of biodiversity, while taking into account economic, social, cultural and regional needs, contributes to the general objective of sustainable development”. Thereby the two opposing needs of development and preservation are reconciled.

Likewise, the Convention on Biological Diversity (CBD) signed in Rio de Janeiro on 5 June 1992<sup>76</sup> is moving both on a supranational scale, and on an internal scale, the Regulation implementing the Habitats<sup>77</sup> Directive which, in para. 2 of Art. 1 points out that “the procedures governed by this Regulation are intended to ensure the maintenance or restoration, in a satisfactory state of conservation, of natural habitats and species of wild fauna and flora of community interest”. The powers of monitoring (Art. 7), protection (Arts 8 and 9), levies (Art. 10)<sup>78</sup> and the powers of introduction and reintroduction of species (Art. 12)<sup>79</sup> are also clarified by regional particularities.

Nevertheless, the recognition of a right, in this case – of biodiversity, does not clarify who is the real owner (therefore, the subject with respect to the object). Hence, both the aforementioned items of legislation specify that the Member States are only and simply obliged to exercise powers of protection and regulation. The Directive and the National Regulation are aimed at the protection of fauna and flora – entities that seem to acquire the status of real subjects of law.

<sup>76</sup> The Convention, to which 192 countries adhere (including the European Union since February 2011), was ratified in Italy with Law No. 124, introducing “Ratification and execution of the convention on biodiversity, with annexes (Rio de Janeiro, 5 June 1992) (in the Official Gazette 23.02.1994, No. 44, S.O.). In Art. 1, the Convention specifies that “The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding”.

<sup>77</sup> See note 74. It must be added that, as already mentioned in note 50, biodiversity is also referred to in the draft constitutional law No. 1203, filed in the Senate on 02.04.2019.

<sup>78</sup> The Directive, in fact, referred (Art. 14) to the Member States to regulate the measures and methods of taking and exploiting species of flora and fauna. In Italy it was specified that the Ministry of the Environment, after consulting the Ministry of Agricultural Policies and the National Institute for Wildlife, issues a decree establishing “adequate measures for the withdrawal, in the natural environment, of specimens of the species of wild fauna and flora referred to in Annex E, as well as their exploitation, are compatible with the maintenance of the aforementioned species in a satisfactory conservation status”. In any case, the use of sampling methods that involve the disappearance or serious disturbance of the indicated species is prohibited.

<sup>79</sup> The principles are now established by the Decree of 02.04.2020, containing “Criteria for the reintroduction and repopulation of native species referred to in Annex D of the Decree of the President of the Republic 08.09.1997, No. 357, and for the introduction of non-native species and populations” (in the Official Gazette General Series No. 98 of 14.04.2020).

## Conclusion

Such a representation brings with it multiple conceptual and framing problems, first of all that of a philosophical, so to speak. The need to recognize to Nature its own entity, consistency and juridical dignity could appear the attempt, in a liquid society<sup>80</sup>, to replace the theological datum of a dead God with an equal or totemic entity to which cling or that, worse, it must be deified and declared untouchable in an almost pantheistic vision of Spinozian memory<sup>81</sup>. And, on the contrary, a prudent Doctrine has been able to point out that “The detachment between nature and theology, between the matter of scientific observation and the creative will of a God, has placed nature in itself, as simple and pure objectivity, ‘which stands before the thought of man<sup>82</sup>’”. However, if on the one hand it is evident that the world exists because man exists and that he cannot be separated from it, on the other – it seems reductive (and now anachronistic) both to consider given and certain the unique relationship God – Nature given and certain the univocal relationship God – Nature, and to consider the world as one and simple will and representation<sup>83</sup>.

As a consequence, the second problem is the danger of a neogiusnaturalism, opposed to the structured and currently flourishing building of legal positivism. Hence, the question of another prudent Doctrine<sup>84</sup> appears to be modern: “Where do we want to stop? Faced with a doctrine that continues to be reborn, there are two possible explanations: 1) it is continually reborn because it is always alive; 2) it is continuously reborn because it has a difficulty to grow<sup>85</sup>”. But if this alternative is, therefore, opposable to the fact that, in both hypotheses, the giusnaturalism has existed and continues to exist (in the first hypothesis because it is always alive, in the second because it is alive, but not well developed), two points are to be analysed in relation to our dialogue path. Right-naturalism served, above all, as an objectivistic theory of ethics, therefore bearer of superior principles that could not be exceeded even by sovereign power. In this sense, it was a remedy that led to the birth of modern constitutionalism, to the liberal conception of the state, to

<sup>80</sup> The reference is to Bauman Z., *Consumo, dunque sono* [I consume, therefore I am]. Rome-Bari, 2010, as well as ID. *L'etica in un mondo di consumatori* [Ethics in a world of consumers], Rome-Bari, 2010 and ID. *Per tutti i gusti. La cultura nell'età dei consumi* [For all tastes. Culture in the age of consumption]. Rome-Bari, 2016. The current relativism was, in truth, already anticipated by Nietzsche F. with his famous phrase “God is dead” in “The joyful wisdom” (125).

<sup>81</sup> In this sense, the adage *Deus seu Natura* which appears several times in the five books of Spinoza's *Ethics* (in *Ethics – Demonstrated according to the geometric order*, Bollati Boringhieri, 2006) is well known.

<sup>82</sup> Irti N., *L'uso giuridico della natura* [The juridical use of nature]. Editori Laterza, Rome-Bari, 2016, p. 30. The Master, in the entire study, categorically rejects the hypothesis of a nature in itself and regardless of man and classifies it as an object that is no longer and only in front of us, but that “appears instead submissive and enslaved”.

<sup>83</sup> I recklessly borrowed the title of the well-known work by Schopenhauer A.

<sup>84</sup> On this point, the reference to Bobbio N., *Giusnaturalismo e positivismo giuridico* [Natural Law and juridical positivism]. Milan, 1977, *passim*.

<sup>85</sup> ID. *Op. cit.*, 180.

the rule of law against the police state, and finally and ultimately to the theories of guaranteeing universal rights<sup>86</sup>. So, a return, albeit limited, to natural laws could well help to support the Copernican work that from a pure reification of nature leads to its subjectivization, hence – to the fixation of the fact that Nature is as such and that it has superior and absolute rights as each entity legally recognized by the *ius positum*. This leads to the second exception: the idea of a juridification of Nature is evidently posed by the juridical formalism, that is, the elaboration of the juridical technique and, therefore, of the positive law. Thus, no contradiction or opposition arises between the borrowing, so to speak, higher or naturalistic principles and implementing them, through legal technique, within the regulatory landscape.

Finally, another problem is that of superfetation in itself: the hypothesis of subjectivizing Nature would entail the creation, in the legal context, of an additional subject of law which, in addition to the natural person and the legal person (whether private or public), would cause duplication and potentially useless gatherings. Let it be clear that this is not the same logical path that centuries ago led to the creation of the juridical person, but of the usefulness or not of subsuming another subject as the centre of imputation of legal interests. The question, however, is whether the State or the citizen in itself can be considered not simply as representatives of the rights of nature, but instead – as holders of the same rights which, in the event of infringement, can be protected. The point is that a clear conflict of interest exists between the aforementioned subjects and Nature, since the State and the citizen are certainly and by law already the holders of rights over nature, such as those (partly examined) which grant them the right to exploitation of various resources<sup>87</sup>. Thus, the question should be changed to the following: whether or not the State and/or the citizen (who have the rights over nature) can also consider themselves to be the holders of the (potentially contrary) rights of Nature. To such a question every discreet civil lawyer would answer negatively or, alternatively, would hypothesize not the intervention of the Public Prosecutor (because this would protect the interest of State), but the designation of a special administrator (because this would protect the interest of Nature). This hypothesis, however, itself appears as a superfetation with respect to the most desired and simple recognition of Nature, – its juridical subjectivity.

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<sup>86</sup> ID. Op. cit., 180.

<sup>87</sup> The problem should also be analysed from the point of view of the relationship between Nature and business activity. An interesting food for thought could be the concept of 'sustainable success' referred to in the Corporate Governance Code of January 2020 (Available: <https://www.borsaitaliana.it/comitato-corporate-governance/codice/codice.htm> [viewed 23.09.2021.]) according to which, for listed companies, 'sustainable success can be defined as the objective "which guides the action of the management body and which is substantiated in the creation of long-term value for the benefit of shareholders, taking into account of the interests of other stakeholders relevant to the company". Among the stakeholders of primary importance, it is known, environmental responsibility assumes importance (Mazzucato M., Il valore di tutto. Chi lo produce e chi lo sottrae nell'economia globale [The value of everything. Who produces it and who subtracts from the global economy]. Laterza, 2018).

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## SECTION 2

# CURRENT CHALLENGES TO HIGHER EDUCATION

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## LEGAL ASPECTS OF REVOCATION OF DEGREES

**Keywords:** revocation of diploma, academic integrity, evaluation of plagiarism

### Summary

This article discusses the legal issues regarding revocation of a diploma (degrees). As the revocation of a diploma is a matter that falls within the scope of a person's private life, the revocation must be subject to a certain regulatory framework. In Latvia, this regulation has shortcomings, so it needs to be improved. Getting acquainted with the case law of Latvia and other countries, Latvian legal regulation, legal literature and rules of other countries, problems of Latvian legal regulation have been identified and solutions have been proposed. They concern the applicable law, the competent institution, the period of time that has elapsed since the defence of the diploma.

### Introduction

When issuing a diploma, the higher education institution indicates that the graduate has completed certain tasks and has acquired a certain level of knowledge. Unfortunately, there are cases when soon after obtaining the diploma or at some later point in time it is revealed that the graduate has not performed all the necessary tasks or has not performed them with sufficient quality, therefore the award of the diploma is not justified. For example, the results of research have been fabricated or other fraudulences committed, or a plagiarism has been allowed<sup>1</sup>.

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<sup>1</sup> More about plagiarism: Sudmale S. Kompleksas plāģiāta ierobežošanas nepieciešamība Latvijas augstskolās jeb noklusētais par plāģiātu [The need to limit complex plagiarism in Latvian universities or the default for plagiarism]. *Jurista Vārds*, 2016, No. 22 (925); Gulbis R. Rēģu rakstnieku darbība akadēmiskajā jomā – autortiesību un tikumības apsvērumi [Ghost Writers in the Academic Field – Copyright and Virtue Considerations]. *Jurista Vārds*, 2016, No. 22 (925).

There are also cases when the work is original, but it has been written by another person on behalf of a student, who later submits it as his own.<sup>2</sup>

The discovery of such circumstances may lead to the revocation of the previously awarded qualifications or confirmation of a scientific degree (hereinafter – also a diploma).

This article discusses the legal circumstances to be considered when deciding to revoke a diploma. After getting acquainted with the case law of Latvia and other countries, Latvian legal regulation and legal literature (mostly foreign, as this topic is not much discussed in Latvia), the problems of Latvian legal regulation have been identified and solutions have been proposed.

## 1. Re-examination of the qualification awarded

In general, an in-depth examination of a qualification is final when the diploma is awarded. Deficiencies in the study process or final theses should be identified and most often they are identified before the decision to award a diploma is made. Judgments found in Latvian court practice, searching the website “manas.tiesas.lv” with the word “plagiarism” or “diploma revocation/cancellation”, are mostly related to non-awarding a diploma due to non-completion of the study program or use of unauthorized funds.<sup>3</sup>

However, there is also a judgment in which the plaintiff has brought an action against a service provider with whom a contract for the development of a bachelor's thesis had been concluded; the service provider had not completed the work, therefore the plaintiff had to complete it himself. It should be noted that the court in this case upheld the claim on the basis of the provisions of the Civil Law, according to which a contract that promotes something illegal, immoral or unfair does not bind, and that no one has the right to live unjustly for and at the expense of another.<sup>4</sup>

The database of court rulings also contains the decision of the Supreme Court to terminate the criminal proceedings in the case of misappropriation of copyright. It followed from the decision that the person had included a part of the original work written and defended by another person in his/her diploma thesis, making insignificant changes, but with no reference to the original work or the author, and

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<sup>2</sup> For example, there are offers to buy a master's thesis on the Internet: <https://academized.com/writing-services/buy-thesis-online>, <https://thesisforme.com/purchase-phd-and-masters-thesis/> [viewed 15.10.2021.].

<sup>3</sup> See, for example, Regional Administrative Court judgement of 18 July 2014.in case no A420440911, 18 February 2014 in Case No. A420445411, Riga City Kurzeme District Court judgement of 23 December 2014 in Case No. C28242314. Available in Latvian: <https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi> [viewed 10.09.2021.].

<sup>4</sup> Riga City Pardaugava Court judgement of 13 September 2018 in Case No. C-1934-18/25. ECLI: LV:RPPT:2018:0913.C68518617.5.S Available in Latvian: <https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi> [viewed 10.09.2021.].

in year 2007 defended this work at the Faculty of Economics and Management of Rēzekne Academy of Technologies.<sup>5</sup>

No information has been found that any of these individuals have subsequently been deprived of their qualifications. It is possible that this has happened, only this fact has not been made public. At the same time, it cannot be ruled out that these persons continue to enjoy the benefits of unfoundedly obtained diplomas.

Later examination after obtaining a diploma is often in the interest of others. For example, a person whose work has been used illegally, may draw the university's attention to the fact that someone has received a university or doctoral diploma unreasonably (as may have been done by the above-mentioned author, whose work was used at the Rezekne Academy of Technologies).

Attention may also be drawn by the graduate's political competitors or other people with a negative attitude. For example, working in the politics gives others a reason to look and examine the work of a person that has been defended a long time ago.<sup>6</sup> For example, in Germany in 2011 the review of the dissertation of the Minister of Defense Karl-Theodor zu Guttenberg and in 2012 the review of the dissertation of the Minister of Education Annette Schavan was initiated by their political competitors. In the first case, the dissertation was largely copied from another source, while in the second case, several parts of the dissertation coincided with the works of other authors or closely resembled them.<sup>7</sup> The University of Latvia also received two applications of a possible plagiarism in the final thesis of a graduate (who completed his master's studies 10 years ago), as a result of which the commission decided that the bachelor's thesis contained plagiarism and that the author of the thesis had seriously violated the principles of academic integrity.<sup>8</sup> Quite possibly, the authors of the revealing applications were driven by goals that were not of the noblest nature, because the said graduate was a prosecutor investigating the activities of one of the applicants.<sup>9</sup>

However, if the reviewed thesis had significant flaws, because of which the applicant should not have been awarded the diploma in the first place, the circumstances of why the examination was initiated is not significant.

<sup>5</sup> Decision of the Supreme Court of 12 March 2014 in Case No. 11330035509. Available in Latvian: <https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi> [viewed 10.09.2021.].

<sup>6</sup> Bailey J. Revoking Degrees: How and Why Schools Do It. Why schools bother revoking degrees... Available: <https://www.plagiarismtoday.com/2018/09/27/revoking-degrees-how-and-why-schools-do-it/> [viewed 15.10.2021.].

<sup>7</sup> Brumfield B. German education minister loses Ph.D. over plagiarized thesis. Available: <https://edition.cnn.com/2013/02/06/world/europe/german-minister-plagiarism/index.html> [viewed 15.10.2021.].

<sup>8</sup> Par LU Juridiskās fakultātes Domes 15. marta lēmumu [On the decision of the Council of the Faculty of Law of the University of Latvia on March 15]. Available in Latvian: <https://www.jf.lu.lv/lv/par-mums/mediji/zinas/zina/t/65260/> [viewed 15.10.2021.].

<sup>9</sup> Leitāns L. Prokurora Cinkmaņa akadēmiskos darbus LU vērtēja arī pēc viņa apsūdzētā Sprūda iesniegumiem [The academic works of the prosecutor Cinkmanis at the University of Latvia were also evaluated according to the submissions of his accused Sprūds]. Available in Latvian: <https://www.lsm.lv/raksts/zinas/zinu-analize/prokurora-cinkmana-akademiskos-darbus-lu-verteja-ari-pec-vina-apsudzeta-spruda-iesniegumiem.a398478/> [viewed 15.10.2021.].

## 2. Legal considerations for revoking a diploma

It is harder to revoke a diploma than not to award one.<sup>10</sup> The withdrawal of a diploma from the addressee of this decision could have a serious impact on his or her life – career or education. The European Court of Human Rights has recognized that the annulment of a diploma is a matter which falls within the scope of a person's privacy.<sup>11</sup>

Thus, a decision to revoke a diploma, even if the diploma has been awarded unfoundedly, must pass a human rights restriction test.

First of all, the restriction has to be set by a law.

Neither Law on Higher Education Institutions<sup>12</sup>, nor Law on Scientific Activity<sup>13</sup> regulate issues related to the consequences in the event of a serious breach of academic integrity. Art. 17 of the Law on Scientific Activity only mentions that the Latvian Council of Science is entitled to raise questions, in accordance with the procedures specified in laws and regulations, in the responsible institutions regarding the withdrawal of a doctoral degree. Although the law states that questions are raised in accordance with the procedures specified in regulatory enactments, such a specified procedure cannot be found in the database. As also noted by *Dr. iur. I. Veikša*, the Law on Higher Education Institutions does not envisage any obligations for a student – either studying in good faith, or acquiring knowledge, skills, achieving competence in the chosen study programme and profession, or anything else. Educational institutions try to fill this gap by adopting internal regulations, but this is not always sufficient.<sup>14</sup>

With the amendments to the Law on Higher Education Institutions of 16 August 2021, Art. 15<sup>1</sup> has been included, para. 6 of which mentions that the Senate of a higher education institution shall determine the requirements and procedures related to the observance of academic integrity.<sup>15</sup>

Looking at the regulatory enactments of three higher education institutions, it can be concluded that the issues regarding the possibility to inspect the work after its defense are provided in two of them.

<sup>10</sup> Bailey J. Revoking Degrees: How and Why Schools Do It. Why schools bother revoking degrees... Available: <https://www.plagiarismtoday.com/2018/09/27/revoking-degrees-how-and-why-schools-do-it/> [viewed 15.10.2021.].

<sup>11</sup> See ECHR judgment of 3 March 2020 in Case *Convertito v, Rumania* (application No. 30547/14). para. 37. Available: <https://hudoc.echr.coe.int/> [viewed 15.10.2021.].

<sup>12</sup> Law on Higher Education Institutions. Available in English: <https://likumi.lv/ta/en/en/id/37967-law-on-higher-education-institutions> [viewed 15.10.2021.].

<sup>13</sup> Law on Scientific Activity. Available in English: <https://likumi.lv/ta/en/en/id/107337-law-on-scientific-activity> [viewed 15.10.2021.].

<sup>14</sup> Veikša I. Plāģiātisms un akadēmiskais godīgums studējošo darbos Latvijas augstskolās [Plagiarism and academic honesty in students' work in Latvian universities]. *Acta Prosperitatis*. 9. Journal of Turība University, Riga: Turība, 2018, p. 75.

<sup>15</sup> Amendments to the Law on Higher Education Institutions. The law of 08.06.2021. Available in Latvian: <https://likumi.lv/> [viewed 15.10.2021.].

It follows from para. 24 of the Regulations on Academic Integrity at the University of Latvia<sup>16</sup> that, if an application is received concerning a violation of academic integrity in the final thesis after a person has been awarded a degree or qualification, an examination is performed and the application is reviewed in accordance with the Administrative Procedure Law. Pursuant to Clause 6.3.3.1 of the document “Academic Integrity Policy” of Riga Stradiņš University<sup>17</sup>, in cases when a serious violation of academic integrity has been established after awarding a diploma, the university may decide to annul the diploma in accordance with the procedures specified in regulatory enactments.

The regulations of the Turība University on academic honesty and plagiarism<sup>18</sup> include norms only for actions in cases if dishonesty is established during studies, but do not provide for actions to be undertaken after the person’s graduation.

However, the fact that the withdrawal of a diploma is not provided for in the special norms regulating education does not in itself mean that such a possibility is not provided by law. Namely, if the qualification awarded with a diploma is recognized by the state, the decision on awarding the relevant qualification is considered an administrative act and the legal norms included in the Administrative Procedure Law<sup>19</sup> apply to it, insofar as the related procedural issues are not regulated by other laws. Thus, the provisions of Art. 86, para. 2, Clause 4 of the Administrative Procedure Law are applicable, which provide that a favourable unlawful administrative act may be revoked if the addressee has obtained it by providing false information or other unlawful actions. It should be noted that in Germany the withdrawal of a diploma is also based on Art. 48, para. 1, Clause 1 of the Administrative Procedure Law, which regulates essentially the same issues as Art. 86 of the Latvian Administrative Procedure Law.<sup>20</sup>

Thus, it can be concluded that in Latvia, in principle, the possibility to withdraw a diploma is provided by a legal norm. At the same time, it should be noted that the law states “may be revoked”, not “revoked”. This means that the authority

<sup>16</sup> Noteikumi par akadēmisko godīgumu Latvijas Universitātē [Regulations on Academic Integrity at the University of Latvia]. [Regulations on Academic Integrity at the University of Latvia]. Available: [https://www.lu.lv/fileadmin/user\\_upload/LU.LV/www.lu.lv/Par\\_mums/Akademiskas\\_etikas\\_komisija/SL\\_2-3-48-2021\\_akd\\_godigums\\_noteikumi.pdf](https://www.lu.lv/fileadmin/user_upload/LU.LV/www.lu.lv/Par_mums/Akademiskas_etikas_komisija/SL_2-3-48-2021_akd_godigums_noteikumi.pdf) [viewed 15.10.2021.].

<sup>17</sup> Akadēmiskā godīguma politika [Academic Integrity Policy]. Approved by the minutes of the meeting of Riga Stradins University No. 16-1 / 6/2020 of June 16, 2020. Available: [https://www.rsu.lv/sites/default/files/imce/Dokumenti/RSU\\_Akademiska\\_godiguma\\_politika.pdf](https://www.rsu.lv/sites/default/files/imce/Dokumenti/RSU_Akademiska_godiguma_politika.pdf) [viewed 15.10.2021.].

<sup>18</sup> Biznesa augstskolas Turība nolikums par akadēmisko godīgumu un plaģiātismu [The regulations of the School of Business Administration Turība on academic honesty and plagiarism include norms only for actions if dishonesty is established during studies, but do not provide for actions after graduation]. Approved by the Senate on 24.04.2019, Protocol No. 4. Available: [https://www.turiba.lv/lv/Reglamentējošie\\_dokumenti](https://www.turiba.lv/lv/Reglamentējošie_dokumenti) [viewed 15.10.2021.].

<sup>19</sup> Administrative Procedure Law. Available: <https://likumi.lv/ta/en/en/id/55567-administrative-procedure-law> [viewed 15.10.2021.].

<sup>20</sup> See, for example, the Law on Universities in North Rhine-Westphalia [Gesetz über die Hochschulen des Landes Nordrhein-Westfalen] Art. 66, para. 4. Available: [https://recht.nrw.de/lmi/owa/br\\_text\\_anzeigen?v\\_id=1000000000000000654](https://recht.nrw.de/lmi/owa/br_text_anzeigen?v_id=1000000000000000654) [viewed 15.10.2021.].

may issue an administrative act of choice but not a mandatory one. Accordingly, the decision must be made by evaluating the usefulness of issuing an administrative act in accordance with the provisions of Art. 66 of the Administrative Procedure Law. That is, the institution must decide on the necessity of the administrative act to achieve the legitimate aim, the suitability to achieve this aim, the need to achieve the revocation of the diploma and proportionality, balancing the interests of the individual and society.

There is no doubt that the restriction has a legitimate aim. As stated in an Ohio Supreme Court judgment, academic degrees are a university's certification to the world at large of the recipient's educational achievement and fulfilment of the institution's standards. To hold that a university may never withdraw a degree, effectively requires the university to continue making a false certification to the public at large of the accomplishment of persons who in fact lack the very qualifications that are certified. Such a holding would undermine public confidence in the integrity of degrees, call academic standards into question and harm those who rely on the certification which the degree represents.<sup>21</sup>

A degree from a university is supposed to indicate to those outside it that the person had completed some level of work and achieved some level of expertise. If students who do not meet that criterion hold degrees, then it devalues the degree for other students who have completed what has been demanded of them. When a school rescinds a degree, it is done not to retroactively punish the student involved, but to preserve the integrity of their institution and the degrees it issues. In short, it is done for the students who have earned their degrees. For students, earning an academic degree typically involves years of work and many thousands spent. In exchange for that, they expect a degree that will help them in their careers.<sup>22</sup>

As recognized in German case law, a university may rely on academic integrity as a public interest when withdrawing a diploma. The issue is extremely important for the protection of the functionality of the scientific process, which is constitutionally enshrined in the first sentence of Art. 5, para. 3 of the German Basic Law (guarantees the freedom of art and science, research and learning).<sup>23</sup>

There is no doubt that the legitimate aim of withdrawing a diploma is achievable, hence, it is appropriate.

The most difficult question to answer is whether the objective cannot be achieved by less restrictive means and whether it is always proportionate.

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<sup>21</sup> The Supreme Court of the State of Ohio decision 95.02. of 05.02.1986. in case 22 Ohio St.3d 55, 488 N.E.2d 850, WALIGA Bd. of Trustees of Kent State Univ, No. 85-133 Available: <https://www.ahcuah.com/lawsuit/newsuit/ohio/waliga.htm> [viewed 15.10.2021.].

<sup>22</sup> Bailey J. Revoking Degrees: How and Why Schools Do It. Why schools bother revoking degrees... Available: <https://www.plagiarismtoday.com/2018/09/27/revoking-degrees-how-and-why-schools-do-it/> [viewed 15.10.2021.].

<sup>23</sup> See Judgment of the Administrative Court of Düsseldorf of 20 March 2014 in Case 15 K 2271/13 (Schavan), paragraph 170. Available in German: <https://openjur.de/u/685638.html> [viewed 15.10.2021.].



As already mentioned, the withdrawal of a diploma can have serious negative consequences for the individual. Therefore, it is not enough that there have been some shortcomings in the scientific work to recognize that the diploma is revocable because its award was unjustified. It is necessary to assess the significance of these shortcomings and whether they call into question the qualifications of the person awarded the diploma.

In German case law, the following considerations need to be considered: the social and professional disadvantages suffered by the person concerned, the public interest, the time that has elapsed since the diploma was awarded and the possibility of more lenient means, such as the possibility to rework the work.<sup>24</sup>

Plagiarism is the most common reason for revocation of the diploma. According to a German study on the case law concerning plagiarism disputes, it is difficult to draw an objective line when it comes to plagiarism. It goes without saying that the omission of individual references alone does not indicate this. It is usually assessed how much text there is without references, as well as how this has affected the work as a whole.<sup>25</sup> There is a consensus in German case law that scientific papers must contain references, if the text is taken from another source. It should be clear from the work when the author of the work speaks to the reader himself, expresses his thoughts, and when he uses what someone else has to say. Therefore, mentioning another author in the bibliography is not enough. Any text that has been changed, supplemented or translated must always be clearly indicated. Using content, paraphrasing text in other words is a violation.<sup>26</sup> The objections that the dissertation is written on the basis of the author's knowledge and in good faith without the intention of misleading are irrelevant. It is important that a scientific paper that meets the requirements of independent work is submitted.<sup>27</sup>

In this context, it should be noted that a group of Russian scientists fighting for academic integrity has recently reported the creation of a plagiarism database containing at least 11 000 doctoral dissertations. In the experience of researchers, such dissertations are usually ordered for money on the black market. This summer, a Latvian judge, who is also a lecturer at Daugavpils University, also was included in the Russian plagiarism database. In his doctoral dissertation, 75% of the text was found to be plagiarism. There were only three references, but more than 100 pages had been copied. However, the author of the work considers that the content of this dissertation is different, because in his opinion the main ones

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<sup>24</sup> Esposito A.C., Schäfer A. Überblick über die Rechtsprechung zu Plagiaten in Hochschule und Wissenschaft, [Overview of the jurisprudence on plagiarism in universities and academia]. S. 27. Available in German: [https://kops.uni-konstanz.de/bitstream/handle/123456789/37223/Esposito\\_0-393641.pdf?sequence=7](https://kops.uni-konstanz.de/bitstream/handle/123456789/37223/Esposito_0-393641.pdf?sequence=7) [viewed 15.10.2021.].

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid., S. 25.

are references, but the regulatory enactments do not specify how many references there should be.<sup>28</sup>

In such a situation, only a rhetorical question should be asked: what is the quality of the works supervised or reviewed by the students of this docent, if this lecturer has once considered that such a practice is permissible?

The answer to the question of the necessity and appropriateness of withdrawing the diploma thus obtained does not seem to raise any questions. However, the question arises as to whether and to what extent the time elapsed since obtaining the diploma should be taken into account.

### 3. The time elapsed since obtaining the diploma

Section 86 of the Latvian Administrative Procedure Law, which provides for the annulment of an administrative act, does not provide for an absolute limitation period for the annulment of a decision to award a diploma. As the purpose of withdrawing a diploma is not to penalize a student, the time that has elapsed since obtaining the diploma should also be considered as one of the circumstances.

The problem is that plagiarists who are detected promptly, typically get punished much less severely than those who are caught much later. If plagiarism is detected in a dissertation during the editing process, depending on severity, the student may be reprimanded or ordered to rewrite relevant portions. However, if it is detected years later, the same plagiarism can result in the degree be revoked and that, in turn, can put the work the former student has put into their career since college to waste. This can create a strange situation where a lucky plagiarist is one whose misdeeds are recent, but the further away in time one gets from their actions, the worse the potential threat grows.<sup>29</sup>

As mentioned above, in Germany, too, the time that has elapsed since the award of the diploma is one of the factors to be assessed. The laws of at least some German states provide for a limitation period of five years for the re-examination of bachelor's and master's theses.<sup>30</sup> The statute of limitations for

<sup>28</sup> Pētnieki no Krievijas atklāj, ka tiesnesim un universitātes pasniedzējam no Daugavpils doktora disertācijā 75% teksta veido plāgiāts [Researchers from Russia reveal that 75% of the text of a doctoral dissertation for a judge and a university lecturer in Daugavpils is plagiarism]. Available in Latvian: <https://skaties.lv/zinas/latvija/neka-personiga/petnieki-no-krievijas-atklaj-ka-tiesnesim-un-universitates-pasniedzejam-no-daugavpils-doktora-disertacija-75-teksta-viedo-plagiats/> [viewed 15.10.2021.].

<sup>29</sup> Bailey J. Should There Be a Statute of Limitations on Plagiarism Claims? Available: <https://www.plagiarismtoday.com/2013/03/19/should-there-be-a-statute-of-limitations-on-plagiarism-claims/> [viewed 15.10.2021.].

<sup>30</sup> For example, Gesetz über die Hochschulen des Landes Nordrhein-Westfalen [Law on the universities of the state of North Rhine-Westphalia], Art. 66, para. 4. Available in German: [https://recht.nrw.de/lmi/owa/br\\_text\\_anzeigen?v\\_id=10000000000000000654](https://recht.nrw.de/lmi/owa/br_text_anzeigen?v_id=10000000000000000654) [viewed 15.10.2021.].

the evaluation of bachelor's and master's degrees in the University of Heidelberg<sup>31</sup>, North Rhine-Westphalia<sup>32</sup> is also five years.

On the other hand, there has been a debate about the limitation period for withdrawing doctoral degrees in Germany, but the limitation period is only provided for in the regulations of some universities.<sup>33</sup> Shavan, whose case was mentioned above, had 33 years between defending her doctoral dissertation and being deprived of her diploma. She also mentioned this fact in the administrative court, appealing the decision of the university. However, the court rejected this argument, acknowledging that the withdrawal of a diploma also has a deterrent effect. Therefore, the risk of detecting plagiarism persists over time. The higher education institution may also rely on this preventive objective, unless other circumstances to be taken into account in the case are insignificant.<sup>34</sup> The university would be vulnerable to deliberate fraud if the sword of Damocles did not hang over dishonest dissertations.<sup>35</sup>

In Russia, there is a limitation period of 10 years for revoking a doctoral degree. An application for revocation of an academic degree may be submitted by a person to the Ministry of Science and Higher Education of the Russian Federation within 10 years from the day when the dissertation council has made a decision on awarding the degree.<sup>36</sup> Discussions have taken place in Russia and a bill to abolish this statute of limitations has even been tabled<sup>37</sup>, but so far it has not been repealed. Thus, at least in Russia, the decision to revoke the doctoral degree of the mentioned lecturer at Daugavpils University cannot be made due to the statute of limitations. At the same time, however, this does not mean that a Latvian institution that has recognized a diploma obtained in Russia unreasonably could never overturn its decision. The decision to award a diploma and the decision to recognize it in another country are interlinked, but separate decisions.

<sup>31</sup> Abgabe von Prüfungsunterlagen [Submission of examination papers]. Available: <https://www.uni-heidelberg.de/uniaarchiv/pruefabgabe.html> [viewed 15.10.2021.].

<sup>32</sup> Löwer W. Verjährungsfrist für Plagiatsvergehen? [Statute of limitations for plagiarism?] Available in German: [https://www.wissenschaftsmanagement-online.de/sites/www.wissenschaftsmanagement-online.de/files/migrated\\_wimoarticle/forschung-und-lehre\\_07-2012\\_Dannemann.pdf](https://www.wissenschaftsmanagement-online.de/sites/www.wissenschaftsmanagement-online.de/files/migrated_wimoarticle/forschung-und-lehre_07-2012_Dannemann.pdf) [viewed 15.10.2021.].

<sup>33</sup> Rieble V. Plagiatverjährung. Zur Ersitzung des Doktorgrades [Statute of limitations for plagiarism. To determine the doctoral degree]. Available in German: [https://ordnungderwissenschaft.de/wp-content/uploads/2020/03/03\\_rieble\\_plagiatverjaehrung\\_odw\\_ordnung\\_der\\_wissenschaft\\_2014.pdf](https://ordnungderwissenschaft.de/wp-content/uploads/2020/03/03_rieble_plagiatverjaehrung_odw_ordnung_der_wissenschaft_2014.pdf) [viewed 08.11.2021.].

<sup>34</sup> Düsseldorf Administrative Court judgement of 20 March 2014 in Case 15 K 2271/13 (Shavan), paras 176–177, with reference to the Federal Supreme Administrative Court judgement of 21 October 1980 in Case 1 C 19/78. Available in German: <https://openjur.de/u/685638.html> [viewed 15.10.2021.].

<sup>35</sup> *Ibid.*, para. 178.

<sup>36</sup> Постановление Правительства РФ от 24 сентября 2013 г. N 842 "О порядке присуждения ученых степеней" с. 66 [Decree of the Government of the Russian Federation of September 24, 2013 N 842 "On the procedure for awarding academic degrees" para. 66]. Available in Russian: <https://base.garant.ru/70461216/> [viewed 15.10.2021.].

<sup>37</sup> У плагиата не будет срока давности [Plagiarism will not have a statute of limitations]. Available in Russian: [https://thallophyta59.rssing.com/chan-39100210/all\\_p4.html](https://thallophyta59.rssing.com/chan-39100210/all_p4.html) [viewed 15.10.2021.].

In Latvia, as already mentioned, there is no deadline for the cancellation of a diploma certifying the acquisition of higher education, nor a diploma certifying a doctoral degree. That fact must therefore be assessed in the light of both the principle of legal certainty and the public interest in the award of a diploma to a person who has not earned it properly.

#### 4. Competent authority

Pursuant to Art. 85, para. 3 of the Administrative Procedure Law, an administrative procedure may be re-initiated by the institution to which the matter is competent, regardless of which institution has issued the relevant administrative act in the initial administrative procedure. Thus, the decision to award a diploma is revoked by the higher education institution that awarded it or its successor.

At the same time, the question of what to do if the higher education institution that awarded the diploma in question has been wound up without a successor is not regulated. Nor is the issue of who can take such a decision resolved if the diploma is manifestly unreasonably awarded by a higher education institution in another country where the procedure for revoking the diploma is not or cannot be initiated due to legal circumstances (e.g., time limitation). The question of revoking a diploma recognition decision could be raised by the higher education institution where the person concerned is continuing his or her education or teaching, but this higher education institution may not always be interested in doing so.

The Cabinet of Ministers of Ukraine has recently approved regulations governing the issue of revocation of a diploma and they also address the issue of the competent authority. The regulations stipulate that in cases where an educational institution has been liquidated without transfer of rights, the higher education institution, which must consider issues related to the revocation of the higher education degree, shall be determined by the Ministry of Education.<sup>38</sup>

A similar regulation should be adopted in Latvia, stipulating that in the event that information is received that suggests that one of the holders of a higher education or doctoral degree has been unduly awarded, the Ministry of Education or the State Education Quality Service shall determine the competent higher education institution for examination and decision. Alternatively, *ad hoc* council may be set up. At the same time, it is important that the ministry or the inspectorate is not given any rights other than initiation, leaving the assessment and decision-making to the respective higher education institution or council.

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<sup>38</sup> С. 9, Порядок скасування рішення про присудження ступеня вищої освіти та присвоєння відповідної кваліфікації. Затверджено постановою Кабінету Міністрів України від 26 серпня 2021, р. № 897 [The procedure for revoking the decision on awarding a degree of higher education and awarding the appropriate qualification. Approved by the resolution of the Cabinet of Ministers of Ukraine of August 26, 2021]. Available in Ukrainian: <https://zakon.rada.gov.ua/laws/show/897-2021-%D0%BF#Text> [viewed 15.10.2021.].

## 5. Judicial review of the decision

Like any administrative act, the addressee may appeal against the decision to revoke the diploma to an administrative court. The typical type of application in such a case is the annulment of the decision to restore the annulled administrative act.

However, the scope of judicial review is lower than in typical cases. Firstly, it is because the provision confers a discretion, the right to annul an administrative act, rather than an obligation to do so. Secondly, the higher education institution has a relatively wide discretion (freedom of appreciation) in assessing the shortcomings. In most cases, the court can only verify that the procedural requirements have been met.

German case law also recognizes that the institution deciding on the withdrawal of a diploma has a wide margin of appreciation as to the extent or weight of the plagiarism and the consequent harm to the public interest.<sup>39</sup> The conclusions of a competent higher education institution can be reviewed by the court only if the text coincides with the text of another author one by one or with very slight differences. However, if only the ideas are rewritten without reference and not the text, the court will normally recognize the examiners' discretion (freedom of appreciation). The same applies to whether an infringement exceeds a threshold where it is considered to be serious.<sup>40</sup>

## Conclusion

1. As the withdrawal of a diploma is a matter which falls within the scope of a person's private life, the withdrawal must be prescribed by law, necessary to achieve a legitimate aim and be proportionate.
2. There are no special legal norms in Latvia that would provide for revocation of a diploma, therefore the provisions of Art. 86, para. 2, Clause 4 of the Administrative Procedure Law apply, which provides that a favourable unlawful administrative act may be revoked if the addressee has obtained it by providing false information or other unlawful activities.
3. Latvia has no limitation period for withdrawing a diploma, so the time that has elapsed since the diploma has been awarded must be assessed taking into account both the principle of legal certainty and the public interest that the diploma should not be awarded to a person who has not earned it properly.

<sup>39</sup> Düsseldorf Administrative Court judgement of 20 March 2014 in Case 15 K 2271/13 (Shavan), para. 129. See also: Esposito A. C., Schäfer A. Überblick über die Rechtsprechung zu Plagiaten in Hochschule und Wissenschaft, S. 29. Available in German: [https://kops.uni-konstanz.de/bitstream/handle/123456789/37223/Esposito\\_0-393641.pdf?sequence=7](https://kops.uni-konstanz.de/bitstream/handle/123456789/37223/Esposito_0-393641.pdf?sequence=7) [viewed 15.10.2021.].

<sup>40</sup> Supreme Administrative Court of Lower Saxony judgement of 15 July 2015 in Case 2 LB 363/13, ECLI:DE:OVGNI:2015:0715.2LB363.13.0A. Available in German: <https://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psm1?doc.id=MWRE150002198&st=null&showdoccase=1> [viewed 15.10.2021.].

4. The law should provide for the competent authority to refer the re-examination of a diploma to a higher education institution or to a specially constituted council.

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# SECTION 3

## EUROPEAN UNION LAW AND PRIVATE INTERNATIONAL LAW: CURRENT CHALLENGES



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## THE CHALLENGES OF THE “RIGHT TO REPAIR” IN THE EU LEGAL FRAMEWORK

**Keywords:** right to repair, planned obsolescence, circular economy, environmental impact, energy-related products, consumer rights

### Summary

Manufacturers largely offer disposable products, and most products actually are not built to last and cannot be easily repaired or recycled. Often manufacturers actually design products to quickly become obsolete, forcing consumers into constant upgrades.

Replacing this production model with a system that, by providing access to the necessary information, encourages consumers to repair and reuse products, would offer many advantages. In addition to the environmental benefits, promoting repairable products is good for the local economy and the labour market, particularly small businesses, which consumers typically turn to for repairs. Consumers also benefit by having access to longer lasting and more cost-efficient products.

In view of these objectives and within the scope of a wider framework established by Directive 2009/125/EC, the European Community has adopted certain measures, including regulations for the ecodesign of energy-related products, which came into effect on 1 March 2021. Although they refer to a limited number of consumer goods, these regulations have essentially introduced the “right to repair.” This marks a first step, which will have to be followed by other initiatives but could open the door to a new system.

Starting from this EU legislation and the objectives it pursues, the author in this paper intends to investigate the “right to repair,” taking into account the various regulatory areas likely to be affected by it and highlighting, among other things, any limitations and possible challenges posed by its implementation.

## Introduction: the “right to repair” with a view to building a “circular” economy

While most consumers would rather repair a product than buy a new one<sup>1</sup>, most consumer goods in fact are not built to last and cannot be easily repaired. When consumers do not have access to spare parts or the necessary information, they are often left with no choice but to replace the product.

Some manufacturers intentionally design products to break or become unusable. Studies show that<sup>2</sup> some consumer products are specifically created to have a short lifespan that often coincides with the legal warranty period, after which the products become inefficient and obsolete, forcing consumers to constantly replace them. Despite what many believe, planned obsolescence is not a recent phenomenon. As early as 1925, the world’s leading lightbulb manufacturers had organized a cartel to drastically shorten the lifespan of bulbs from 2500 hours to no more than 1000. “General Electric” shortened it even further in an effort to boost sales. During the Great Depression some economic studies theorized that planned obsolescence was the answer to overcoming economic hardships and a way to incentivise consumption<sup>3</sup>.

Over the years, products that not only have a short life but are also not easy to repair have led to an economy based on disposable goods. The adverse effects have been far-reaching and have most notably impacted the environment. It is common knowledge that disposable products have led to energy waste in manufacturing, and because these products cannot easily be reused, recycled or repaired, they clog up our landfills.

Faced with this situation, Europe’s institutions have adopted a series of measures to create a “circular” system that promotes durable and repairable products. Putting into place such a system, however, requires a concerted effort. A first important step in this direction has been the recent implementation of the “right to repair.” Originally a response to the call for an eco-friendly economy, the “right to repair” seems destined to reverberate in other contexts too, particularly in the business world, the labour market and the field of consumer rights.

<sup>1</sup> A 2014 Eurobarometer survey revealed that 77% of European citizens would rather repair their goods than buy new ones and a study by the European Economic and Social Committee of 29 March 2016, entitled “The Influence of Lifespan Labelling on Consumers”, also found that 92% of Europeans want lifespans to be labelled on products. Available: <https://op.europa.eu/en/publication-detail/-/publication/13cac894-fc83-11e5-b713-01aa75ed71a1/language-en/format-PDF> [viewed 12.10.2021.].

<sup>2</sup> Schridde S. Kreiss C. “Geplante Obsoleszenz”, Entstehungsursachen, Konkrete, Beispiele, Schadensfolgen [“Planned obsolescence”, causes of emergence, actual examples, consequences of damage]. Handlungsprogramm, 2013, a study commissioned by the German green party Bündnis90. Available: [https://scholar.google.co.uk/citations?view\\_op=view\\_citation&hl=en&user=8b1HY90AAAAJ&citation\\_for\\_view=8b1HY90AAAAJ:d1gkVwhDpl0C](https://scholar.google.co.uk/citations?view_op=view_citation&hl=en&user=8b1HY90AAAAJ&citation_for_view=8b1HY90AAAAJ:d1gkVwhDpl0C) [viewed 12.10.2021.].

<sup>3</sup> London B. Ending the Depression Through Planned Obsolescence. 1932. Available: [https://upload.wikimedia.org/wikipedia/commons/2/27/London\\_%281932%29\\_Ending\\_the\\_depression\\_through\\_planned\\_obsolescence.pdf](https://upload.wikimedia.org/wikipedia/commons/2/27/London_%281932%29_Ending_the_depression_through_planned_obsolescence.pdf) [viewed 15.10.2021.].

## 1. Directive 2009/125/EC and the regulatory framework for the ecodesign of energy-related products

The need for a greener system has been particularly pressing for energy-related products, which are notorious for their intensive use of resources and requiring environmentally unsound methods of disposal. In an effort to remedy this situation, the European Union issued Directive 2009/125/EC<sup>4</sup>, which has affirmed the need to regulate the design phase in order “to achieve a high level of protection for the environment by reducing the potential environmental impact of energy-related products, which will ultimately be beneficial to consumers and other end-users”<sup>5</sup>.

Having acknowledged that designs needed to be more eco-friendly, the next step was to put the principles laid down in Directive 2009/125/EC into practice. To this end, the Commission approved several regulations to set ecodesign requirements for products that represent significant volumes of sale and trade in the EU.

By focusing on a well-defined category of products – servers and data storage products, electric motors and variable speed drives, light sources, electronic displays, washing machines, dishwashers, refrigerators, etc. – these ecodesign regulations have established, in addition to design rules intended to ensure product durability, a number of other obligations that apply to products even after they have been put on the market. The obligations, which apply to manufacturers, as well as importers and their authorized representatives, include, for example, making specific repair information and instructions available to users and maintenance and repair providers and making replacements easier by ensuring that spare parts are accessible and that replacements can be made using common tools; providing adequate information, whether printed or online, on how to access and order spare parts, ensuring delivery to the consumer within 15 working days; guaranteeing the ready availability of spare parts for a minimum number of years after purchase of the product<sup>6</sup>.

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<sup>4</sup> Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products. Available: at the official website of the European Union <https://eur-lex.europa.eu/> [viewed 18.10.2021.].

<sup>5</sup> See Directive 2009/125/EC, recital 10.

<sup>6</sup> See Commission Regulation (EU) 2019/424 of 15 March 2019, laying down ecodesign requirements for servers and data storage products; Commission Regulation (EU) 2019/1781 of 1 October 2019, laying down ecodesign requirements for electric motors and variable speed drives; Commission Regulation (EU) 2019/2019 of 1 October 2019, laying down ecodesign requirements for refrigerating appliances; Commission Regulation (EU) 2019/2020 of 1 October 2019, laying down *ecodesign* requirements for light sources and separate control gears; Commission Regulation (EU) 2019/2021 of 1 October 2019, laying down ecodesign requirements for electronic displays; Commission Regulation (EU) 2019/2022 of 1 October 2019, laying down ecodesign requirements for household dishwashers; Commission Regulation (EU) 2019/2023 of 1 October 2019, laying down ecodesign requirements for household washing machines and household washer-dryers; Commission Regulation (EU) 2019/2024 of 1 October 2019, laying down ecodesign requirements for refrigerating appliances with a direct sales function. Available: at the official website of the European Union <https://eur-lex.europa.eu/> [viewed 18.10.2021] and on the Official Journal of the European Union 5.12.2019.

These obligations, which came into effect on 1 March 2021, ushered in the entry into force of the “right to repair.”

## **2. The implications of the “right to repair” for companies, the labour market and consumer rights**

The principles underlying these Community rules stem from a desire to use resources that are not only effective, but also environmentally sustainable. While neither Directive 2009/125/EC nor related regulations have expressed the pursuit of any other objectives, it is certain that the effects of the right to repair will inevitably extend beyond the environment.

It is easy to foresee that the right to repair will affect, for example, production and the labour market<sup>7</sup>. In all likelihood, product reparability will lead to new opportunities for artisans and small businesses, segments that have suffered over the last decades. A prime example in the energy field is the decreasing number of firms specialized in electronics repair, the drastic disappearance of radio and TV repair shops despite the increase in ownership of these types of goods, and the general decrease in the number of workers in this sector<sup>8</sup>.

And yet, the area in which the impact of the right to repair should be most evident is that of consumer rights. The bulk of the costs arising from the reduced lifecycle of goods and the difficulties arising from limited repair possibilities are shouldered by consumers, who are thus forced to constantly replace products. The burden is even heavier for consumers who have less spending power and are unable to buy higher-quality products. They are forced to settle for lower-quality, shorter-life goods and make repeated purchases, often in instalments and in many cases becoming over-indebted.

<sup>7</sup> See European Commission Taking stock of the Europe 2020 strategy for smart, sustainable and inclusive growth. March 2014. COM(2014) 130 final/2. Available: [https://ec.europa.eu/info/sites/default/files/europe2020stocktaking\\_annex\\_en.pdf](https://ec.europa.eu/info/sites/default/files/europe2020stocktaking_annex_en.pdf) [viewed 20.10.2021.]. DEFRA – Department for Environment, Food and Rural Affairs UK Longer Product lifetimes. Final Report, p. 41 *et seq.* 2011. Available: <http://sciencesearch.defra.gov.uk/Default.aspx?Menu=Menu&Module=More&Location=None&Completed=0&ProjectID=17254> [viewed 18.10.2021.].

<sup>8</sup> See Montalvo C., Peck D., Rietveld E. A Longer Lifetime for Products: Benefits for Consumers and Companies. June 2016, p. 40 (a document commissioned by the European Parliament’s Committee on Internal Market and Consumer Protection), which states, among other things, that in the Netherlands, over 10 years, the number of specialized electronics repair firms went down from 4 500 to 2 500. In Germany, in one year, 13% of radio and TV repair shops closed down (Ask and Axe 1997). In Poland, between 2008 and 2010, the number of enterprises repairing and servicing consumer and household goods decreased from 16 793 to 14 070, a decrease of 16% in two years. The number of employees dropped in this period from almost 28 000 to about 21 000 (Central Statistics Office of Poland 2012). In the US, shoe-repair shops decreased from 60 000 in 1995 to some 7 000 today. In the US in 1963, some 110 000 people were employed as radio/TV repairmen. In 1982 there were 80 000, and in 2006, only 4 000. This is despite the doubling of TV ownership per household. Available: [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/579000/IPOL\\_STU\(2016\)579000\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/579000/IPOL_STU(2016)579000_EN.pdf) [viewed 20.10.2021.].

Confirming the tight link with consumerism, many Member States have addressed this matter in their legislation by explicitly invoking the right to repair within the context of consumer rights.

In March 2014, France strengthened consumer rights by passing legislation that requires manufacturers and importers of movable goods to provide information on the availability of spare parts, to make this information available to consumers, and to provide retailers or professional repairers with *the spare parts that are indispensable for the use of the goods on the market*<sup>9</sup>. Instead, the Swedish government has supported the right to repair through a fiscal stimulus, by lowering the VAT rates on repairs of certain goods, allowing the cost of labour incurred in the repair of domestic appliances to be partially deducted from taxes, and taxing products which contain materials that are difficult to repair or recycle. Belgium, Spain and Austria have also been active in combatting planned obsolescence and increasing product reparability<sup>10</sup>. Regulatory amendments have also been undertaken in Italy with a view toward raising consumer empowerment.

### 3. (Continued): Consumer-related legislative proposals in Italy

In Italy, the right to repair has been taken into consideration in various pieces of draft legislation, presented to Parliament since 2017<sup>11</sup> and providing for modifications to the Italian Consumer Code<sup>12</sup>. To date, however, none of these drafts have passed through all Parliamentary stages.

<sup>9</sup> See Law No. 2014-344 of 17 March 2014 on consumer protection whose Art. 6 defines the contents of Art. L. 111-3 of the French Consumer Code and, among other things, specifically requires that (i) manufacturers and importers of movable goods notify professional sellers of the period during which the spare parts that are indispensable for the use of the goods will be available on the market; (ii) this information be issued mandatorily to the consumer by the seller in a legible form before the conclusion of the contract; (iii) within two months, retailers or professional repairers be provided with *the spare parts that are indispensable for the use of the goods sold*. In confirmation of its support of consumer rights, in August 2015 the French government also took a stand on the problem of planned obsolescence and held that this latter essentially constitutes consumer fraud subject to criminal penalties. This rigorous approach also took account of the results of a survey conducted by the French environmental agency, which revealed that the purchase of electronic appliances increased six-fold between 1990 and 2007, while, during the same period, expenditure to repair appliances fell by 40%. As a result, most of these electronic appliances end up in landfills without any attempted repair.

<sup>10</sup> References on this initiative can be found in the Report of the European Parliament, of June 9 2017, on a longer lifetime for products: benefits for consumers and companies (2016/2272(INI)), p. 17, also containing indications on other legislation. Available: [https://www.europarl.europa.eu/doceo/document/A-8-2017-0214\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-8-2017-0214_EN.html) [viewed 25.10.2021.].

<sup>11</sup> Among the initiatives undertaken in Italy, all of which entail changes to the Italian Consumer Code, special mention should be given to Draft Law no. 4559 of 22 June 2017, presented to the Italian Parliament, Draft Law no. 872 of 5 July 2018, presented to the Italian Parliament, and Draft Law 615 of 9 July 2018, presented to the Italian Senate. Available: at the official website of the Parliament [www.camera.it](http://www.camera.it) and of the Senate [www.senato.it](http://www.senato.it) [viewed 30.10.2021.].

<sup>12</sup> Contained in D.lgs. 6 settembre 2005, No. 206.

Among these, Draft Law No. 615/2018 (presented to the Senate) proposes to introduce, among other things, a specific obligation for manufacturers, or importers, to guarantee buyers an adequate technical service for long-lasting consumer goods. It also proposes to require manufactures and importers to provide spare parts for at least five years after goods go out of production or, in the case of spare parts for household appliances, for different periods of time, proportionate to cost. Moreover, the draft law sets out that spare parts and non-renewable components of consumer goods should be made available to consumers at a “fair price and in proportion to the value of the goods.” Along with right to repair provisions, the draft law includes a series of other provisions on planned obsolescence and, like the laws in France, envisages criminal penalties.

In addition to these proposals, aimed at defining precise modes of conduct, the other important change introduced by Draft Law No. 615/2018, and emphasising more strongly the issue of repairs, is that regarding the provision of the Italian Consumer Code which lays down the fundamental rights of consumers. It does so by proposing amendments to the provision listing the fundamental rights of consumers<sup>13</sup> and suggests the following addition to the list: “product and service repair at affordable costs.”

Approval of this draft law would mark an important step in shining a light on the “right to repair” as an essential tool for furthering consumer interests. However, it should also be noted that, despite this formal acknowledgement of the right to repair as a fundamental right, the principle does not automatically provide consumers with concrete safeguards. Being classified as a fundamental consumer right does not make it a directly applicable individual right nor does it necessarily or automatically guarantee and protect individuals. Not all fundamental rights have the same value: their value depends on further legislation<sup>14</sup> and it is widely held that, at least where certain rights are concerned, they are simply principles that should in turn be defined more clearly by further regulations, which it is up to the legislator to enact<sup>15</sup>. In other words, affirming the “right to repair” as a fundamental right of consumers, without introducing specific rules and penalties as well, is unlikely to result in certainty about individual rights, and therefore about the initiatives that can be taken by individuals; it would merely enable class

<sup>13</sup> Art. 2 of the Italian Consumer Code.

<sup>14</sup> Among the fundamental rights of consumers, the Italian Consumer Code mentions some which are even protected under the Constitution, such as the “right to health” and “right to safety”; together with others, such as the “right to consumer education” and the “right to fair advertising”, which do not enjoy this protection and which academics, highlighting the fact that their declaration simply serves to promote their importance, have deliberately classified as “social” rights.

<sup>15</sup> See Vettori G. *sub* art. 2. In: Capobianco E. and Perlingieri G. (eds.). *Codice del consumo* [Consumption Code]. Naples: Edizioni Scientifiche Italiane, 2019, p. 11 *et seq*; Alpa G. *sub* art. 2. In: Alpa G. and Rossi Carlo L. (eds.). *Codice del consumo* [Consumption Code]. Naples: Edizioni Scientifiche Italiane, 2006, p. 22 *et seq*; Chinè G. *sub* art. 2. In: Cuffaro V. (ed.). *Codice del consumo*<sup>3</sup> Milan: Giuffrè, 2012, p. 11 *et seq*. Benucci S. *sub* art. 2. In: Vettori G. (ed.). *Codice del consumo* Padova: Cedam, 2007, p. 23 *et seq*.

actions led by consumer protection associations or interventions by competition authorities.

With regard to the initiatives taken by these authorities, it is worth noting that, in Italy, measures connected in some way to the issue of product repair have been taken by the Italian Competition Authority (AGCM) in its capacity as the authority responsible, also according to Regulation 2006/2004/EC<sup>16</sup>, for the enforcement of Community legislation protecting consumer interests. In September 2018, the AGCM fined Apple and Samsung for “planned obsolescence” and ordered them to respectively pay EUR10 million and EUR5 million for having released firmware updates for their mobile phones which caused serious malfunctions and significantly reduced their performance, in this way speeding up product replacement<sup>17</sup>. This was the world’s first decision to have tackled planned obsolescence and it also highlighted the problem of repairs. Indeed, a key factor in AGCM’s decision was that the assistance offered to consumers was inadequate and overpriced. After updating the software, consumers requested the repair of their damaged products, but then had to backtrack due to the high repair costs. The AGCM supported its decision by stating that the conduct of Apple and Samsung violated the “unfair commercial practice prohibition” contained in the Italian Consumer Code enacting Directive 2005/29/EC<sup>18</sup>, which pursues the well-known objective of promoting commercial practices that are within the boundaries of good faith and fairness and prohibiting behaviour that is contrary to professional diligence and likely to distort consumer behaviour.

Since, albeit in the wider context described above, company behaviour during the repair of consumer goods has already been taken into account in the past to determine whether commercial practices were fair, affirmation of the “right to repair” as a fundamental right of consumers should at least have an effect in this regard. Moreover, that there is a close link between the right to repair and obligations of fairness and good faith in commercial practices can be clearly seen from the fact that the rules banning unfair commercial practices already include explicit references to aspects – such as the “main characteristics of the product,”

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<sup>16</sup> Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws. Available: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32004R2006> [viewed 28.10.2021.].

<sup>17</sup> See the twin decisions of 25 September 2018. Available: at the official website of the AGCM <https://www.agcm.it/> [viewed 25.10.2021.]. The Regional Administrative Court of Lazio rejected the appeals against AGCM’s decisions brought by the tech companies on 29 March 2020 (Apple) and on 18 January 2021 (Samsung). Available: [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it) [viewed 25.10.2021.].

<sup>18</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market. Available: at the official website of the European Union <https://eur-lex.europa.eu/> [viewed 18.10.2021.].

“after-sale customer assistance,” “need for a service, part, replacement or repair”<sup>19</sup> – that are clearly connected with the issue of product repairs.

## Conclusion and next steps

It follows from the above that affirmation of the “right to repair” is taking two parallel paths. On the one hand, certain Member States have taken steps that highlight the issue, adopting non-superimposable approaches that sometimes reflect more than just environmental concerns. On the other, Community institutions, by framing the issue within the wider issue of the need for a circular system, have, through regulation, introduced a whole series of obligations that are already in and of themselves binding<sup>20</sup>.

While much progress has been made, there is still ample room for Europe’s institutions to take bolder action.

Considering the narrow scope of application of the regulations described above, the first move should be to expand existing obligations to include all consumer goods. This would mark a first and important step, considering that current Community regulations do not apply to key products like computers and mobile phones. Indeed, initiatives aimed at widening the scope of application have already been taken by the Commission, which in its communications has underlined the need for a generalized extension of the scope of application of the ecodesign directive, with the aim of creating a circular economy framework within which the “right to repair” is “applicable to the broadest possible *range of products*.”<sup>21</sup>

What consequences non-compliance with “right to repair” obligations should lead to, poses another possible challenge, given that Community regulations do not seem to mention the repercussions. Identifying these could prove useful in guiding Member States towards harmonization and “effective” application of

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<sup>19</sup> See Art. 6 (1) (b) and (e) of Directive 2005/29/EC and Art. 2 (1) (b) and (e) of the Italian Consumer Code.

<sup>20</sup> Investigating to what extent EU regulations are binding is not the aim of this paper. However, it is worth noting that such regulations are directly applicable to and binding on all parties of the Member States (Conforti B. *Diritto internazionale*<sup>11</sup>. Naples: Editoriale Scientifica, 2018, p. 373). Even so, EU regulations may leave the States a margin of discretion or require the establishment of competent bodies or, in any case, have content that is insufficient for them to be directly and automatically implemented and, in such cases, it is necessary for another institution to pass implementing or supplementary measures. CJUE decision of 11 January 2001, Case No. C-403/98. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=ecli:ECLI%3AEU%3AC%3A2001%3A6> [viewed 18.10.2021.].

<sup>21</sup> See the Communication from the Commission “New Circular Economy Action Plan for a cleaner and more competitive Europe” of 11 March 2020. See also the Communication from the Commission “European Green Deal” of 11 December 2019; the Communication from the Commission “Ecodesign Working Plan 2016–2019” of 30 November 2016; the Communication from the Commission “Closing the loop – An EU action plan for the circular economy” of 2 December 2015. Available: at the official website of the European Commission <https://ec.europa.eu/> [viewed 25.10.2021.].



European rules. Obviously, on the understanding that even if EU regulations do not specify the legal consequences, “right to repair” obligations remain binding and any non-compliance should be taken into consideration by national courts, whose duty it is to guarantee the application of Community obligations and, also based on the principles of their national legal system, impose the legal consequences.

The biggest challenge might, however, be a cultural one, and it could be even more difficult to overcome as a result of the recent events brought about by the pandemic. By this, I mean the exponential growth, in all social contexts and in relation to all types of goods, of online sales. It cannot be ruled out that these may influence the future choices of consumers and prompt them, at least in certain cases, to take the easy option of replacing a product by simply purchasing it online rather than searching for a qualified repairer to mend the item properly.

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## EUROPEAN SMALL CLAIMS PROCEDURE: IS IT SO SIMPLIFIED?

**Keywords:** Regulation No. 861/2007, European small claims, civil procedure

### Summary

The European Small Claims Procedure is an alternative to national similar procedures and intended to simplify and speed up the litigation in the cross-border cases. The Regulation has proven to have a potential in settling small claims' disputes within European Union. However, the more frequently the Regulation is applied in Member States, the more challenging issues are found, making application of Regulation not as simple as it might appear. This article analyses some of those issues arising from the practical application of the Regulation. Firstly, it is discussed whether the concept contained in Regulation "other claim" may also include a supplementary declaratory claim (not only the claim that can be expressed in money). Secondly, it is further argued that the Regulation should be amended to have a more uniform and autonomous character, as much as possible limiting the reference to the national procedural rules. For instance, in accordance to Regulation, the concept "clearly unfounded" claim shall be determined pursuant to national law. However, in some jurisdictions (i.e., Latvia) such concept is unknown. There is a need for further reform of the Regulation to introduce a new level to facilitate its popularity, effectiveness and uniform application in Member States.

### Introduction

Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing European Small Claims Procedure (further – the Regulation)<sup>1</sup>

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<sup>1</sup> Regulation (EC) No 861/2007 of the European Parliament and of the Council (11 July 2007) establishing a European Small Claims Procedure. L 199, Official Journal of the European Union, 31.07.2007, pp. 1–22. The greater amendments were made by Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No. 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No. 1896/2006 creating a European order for payment procedure.

is applicable since 1 January 2009<sup>2</sup> to cross-border<sup>3</sup> civil and commercial cases, where the value of a claim does not exceed EUR 5000.<sup>4</sup> Denmark is not bound by the Regulation or subject to its application.<sup>5</sup> The procedure is conducted by means of four standard forms.<sup>6</sup> At this point of time, there are only two European Court of Justice cases interpreting this Regulation.<sup>7</sup>

The Regulation is intended to simplify and speed up litigation concerning small claims in cross-border cases, and to reduce costs.<sup>8</sup> However, in practice, is it so simplified and cost effective?

In accordance with Art. 28 of the Regulation, by 15 July 2022 the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the operation of this Regulation. Thus, this is good time to ascertain how the Regulation operates in practice and whether there is a need for the further reform of the Regulation. The limits of the current article will not allow to discuss all the problematic issues regarding application of the Regulation, and thus the author has selected only a few of problems that may rise in practice.

## 1. Concept “Monetary claim and/or other claim”

In accordance with the Regulation the claimant may lodge the claim where the value does not exceed EUR 5000, excluding all interests, expenses and disbursements.<sup>9</sup> The Regulation does not define the concept of “claim”, nor does it refer to the law of the Member States on the issue. According to the settled case law, the need for uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope, must normally be given an autonomous and uniform interpretation throughout the EU.<sup>10</sup> Thus, the concept “claim” shall be interpreted autonomously within the system of this Regulation. Still, as shown below, in some cases there might be difficulties to interpret this concept.

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<sup>2</sup> Except Art. 25 – applicable as from 1 January 2008. See: Art. 29.

<sup>3</sup> See: Art. 3.

<sup>4</sup> Art. 2 of the Regulation.

<sup>5</sup> Recital 38 of the Regulation’s Preamble.

<sup>6</sup> Form A – Claim form, Form B – Request by the court or tribunal to complete and/or rectify the claim form, Form C – Answer form, Form D – Certificate concerning a judgment in the European small claims procedure or a court settlement.

<sup>7</sup> European Court of Justice judgment in the Case No. C-627/17 ZSE Energy, 22 November 2018 and judgment in the case No. Bo C-554/17, Jonsson, 14.02.2019.

<sup>8</sup> Art. 1 of the Regulation.

<sup>9</sup> Art. 2(1) of the Regulation.

<sup>10</sup> European Court of Justice Judgment in the Case No. C-627/17 ZSE Energy, 22 November 2018, § 22 and the case law cited thereof.

The claimant shall commence the European Small Claims Procedure (hereinafter – the ESCP) by filling in a standard claim form A (Annex I of the Regulation). In the section 7 of this claim form, the claimant shall indicated whether she/he is “claiming money and/or something else (non-monetary claim)”:

7. About your claim

7.1. Claim for money

7.1.1. Amount of principal (excluding interest and costs): \_\_\_\_\_

7.1.2. Currency: \_\_\_\_\_

7.2. Other claim:

7.2.1. Please specify what you are claiming: \_\_\_\_\_

7.2.2. Estimated value of the claim: \_\_\_\_\_

Currency: \_\_\_\_\_

For example, if the defendant has a debt towards the claimant for the non-payment of the delivered goods, in the section 7.1 of the claim form the claimant indicates the principal amount. Section 7.2 of the claim form “other claim” requires to indicate what is claimed (for example, the delivery of goods, replacement of goods etc.) and what is the estimated value of such claim. In other words, it is not required that the case involved a monetary claim, although it is necessary that the claim can be valued in order to assess whether it falls within the scope of the Regulation.<sup>11</sup>

Notably, the online form A contains a mandatory requirement to also fill in section 7.2.2, it cannot be left blank, but the explanatory note of the section 7 provides that the claimant can “claim money and/or something else”, thus, “other claim” can be both alternative or additional claim to “claim for money”.

However, if the claimant claims not only debt in certain amount but also requests to terminate the contract with the defendant? In one court case, the court has established that the claim also requesting termination of the contract cannot be expressed in a specific amount of money, hence, the claim does not fall within the scope of the Regulation,<sup>12</sup> even though Art. 2(2) of the Regulation does not exclude such matters from its scope.

Therefore, the question arises, whether the concept “other claims” could also include declaratory claim (*actiones sine condemnatione*), not only the action for

<sup>11</sup> Kramer X. E. Small Claim, Simple Recovery? The European Small Claims Procedure and Its Implementation in the Member States, Spingerlink.com, 22 March 2011, p. 121.

<sup>12</sup> Kurzeme District Court Decision in the case No ECLI:LV:KUAT:2019:0508.CA016919.4.L, 8 May 2019. See also: Jelgava Court Decision in the case of 6 July 2011, cited in Rudevskas B., Kačevska I., Mizaras V., Brazdeikas A., Torga M. Practical Application of European Union Regulations Relating to European Union Level Procedure in Civil Cases: The Experience in Baltic States. Ministry of Justice of the Republic of Latvia and European Commission, 2012, § 491. Available: [http://petijumi.mk.gov.lv/sites/default/files/file/TM\\_Petij\\_ES\\_regulu\\_attiec\\_uz\\_ES\\_limena\\_proced\\_civillietas\\_pratiska\\_piemoseros\\_Baltijas\\_pieredze\\_ENG.pdf](http://petijumi.mk.gov.lv/sites/default/files/file/TM_Petij_ES_regulu_attiec_uz_ES_limena_proced_civillietas_pratiska_piemoseros_Baltijas_pieredze_ENG.pdf) [06.01.2022.].

performance (*actiones cum condemnatione*)?<sup>13</sup> Indeed, if in form A the claimant has indicated only a claim for termination of the contract, one could consider that such claim is not within the scope of the Regulation, whereas the two claims – monetary and for termination – are so closely connected and mutually related, shall it fall within the scope of the Regulation? In opinion of the author, the answer is affirmative.

There are situations when separate adjudication of claims is not appropriate, or the claims expressed in them conform to the respective substantive norm, i.e., action for performance goes hand in hand with declaratory action in accordance with the applicable material law. For example, a seller may request the buyer to pay the price of the delivered goods and declare the contract void<sup>14</sup> or a debtor may avoid the credit contract and request to pay the unduly transferred monies if the contract had been concluded by the creditor's fraudulent representation<sup>15</sup>, or a consumer, to whom were delivered goods that did not conform with the provisions of a contract, should be entitled to request cancellation of the contract and repayment of the sums paid to the trader.<sup>16</sup>

Namely, there are situations where is no need to preserve the contract or if the contract is not acknowledged void, the party cannot request compensation. In such cases, there is a claim ancillary to, supplemented to or dependent from that of a principal claim, and both claims have common issues of law or fact. Thus, under the Regulation, the claimants should be allowed to submit such related claims in order to respect the rights to a fair trial<sup>17</sup> and the court cannot decide that this matter is outside the scope of the Regulation, if the claimant additionally has a declaratory claim.

## 2. Counterclaim

Pursuant to Art. 5(6) of the Regulation, the defendant can submit the counterclaim. The Regulation gives some guidance – that counterclaim “should be interpreted within the meaning of Article 8(3) of the Brussels Ibis Regulation<sup>18</sup>

<sup>13</sup> See: Rudevska B., et al., 2012, § 487. Available: [http://petijumi.mk.gov.lv/sites/default/files/file/TM\\_Petij\\_ES\\_regulu\\_attiec\\_uz\\_ES\\_limena\\_proced\\_civillietas\\_pratiskas\\_piemeros\\_Baltijas\\_pieredze\\_ENG.pdf](http://petijumi.mk.gov.lv/sites/default/files/file/TM_Petij_ES_regulu_attiec_uz_ES_limena_proced_civillietas_pratiskas_piemeros_Baltijas_pieredze_ENG.pdf). [viewed 06.01.2022.].

<sup>14</sup> See, for example, Art. 64 of United Nations Convention on Contracts for the International Sale of Goods. United Nations, Treaty Series, Vol. 1489, p. 3.

<sup>15</sup> Art. 3.2.5 of the UNIDROIT Principles of International Commercial Contracts, 2016. See also: Kurzeme District Court Decision in Case No. ECLI:LV:KUAT:2019:0508.CA016919.4.L 8 May 2019.

<sup>16</sup> Rudevska B., et al., 2012, § 492–494.

<sup>17</sup> Recital 9 of the Regulation's Preamble.

<sup>18</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council (12 December 2012) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. L 351 Official Journal, 20.12.2012, pp. 1–32.

as arising from the same contract or facts on which the original claim was based.”<sup>19</sup> However, if the counterclaim exceeds the limit of EUR 5000, that claim and counterclaim shall not proceed in the ESCP but instead shall be dealt with in the relevant national procedural law.

Let us consider: a consumer lodged the claim within the scope of the Regulation against the foreign bank, and the bank, in turn, submitted the counterclaim five times exceeding the principal amount of the consumer’s claim. Thus, at the first sight, it falls outside the scope of the Regulation. However, in this case according to the Regulation, the court shall initially decide whether the counterclaim is not clearly unfounded and the application inadmissible.<sup>20</sup> If it is so, the counterclaim shall be dismissed.

The concepts of “clearly unfounded” in the context of the dismissal of a claim and of “inadmissible” in the context of the dismissal of an application should be determined in accordance with national law.<sup>21</sup> But what happens, if there are no such similar concepts in the national procedural law and it only allows to decide on the “validity or invalidity of the claim” in the final judgment?<sup>22</sup> Consequently, in practice it might lead to a situation when the court omits this step as provided in the Regulation, and moves on with considering of the case on merits in accordance with domestic national rules.<sup>23</sup> Thus, the apparently simplified case becomes very complicated indeed, especially for the weaker party. In this regard, it can be asked why the national legislator has not foreseen such situation<sup>24</sup> and allows an opportunity for the possible abuse of the proceedings.

Meanwhile, it also raises a question as to whether this European procedure is as an alternative to the procedures existing under the laws of the Member States<sup>25</sup> – could it be amended so that there were outstandingly minimal references to the national procedures<sup>26</sup>, because the courts tend to refer to the Art. 19 of the Regulation<sup>27</sup> as a great excuse to apply more familiar – the national law?

<sup>19</sup> Recital 16 of the Regulation’s Preamble.

<sup>20</sup> Art. 4(4) of the Regulation.

<sup>21</sup> Recital 13 of the Regulation’s Preamble.

<sup>22</sup> The Civil Procedure Law of the Republic of Latvia. See: Art. 193(5).

<sup>23</sup> Kurzeme Regional Court Judgment in the case ECLI:LV:KURT:2020:0925.C69339219.14.S, 25 September 2020. Moreover, in this case at hand the court proceeded right a way to the national procedure without requiring the claimant to submit the full statement of claim as provided in the Civil Procedure Law. Namely, pursuant to Art. 131(3) of the Civil Procedure Law of the Republic of Latvia, the court shall leave the case not proceed with and require to submit the statement of claim accompanied with all relevant documents and evidences.

<sup>24</sup> It must be noted that some Member States have enacted extensive implementations laws (Germany, France, etc.). See: Kramer X. E., 2011, p. 128.

<sup>25</sup> Art. 1 of the Regulation.

<sup>26</sup> For example, Art.17 provides that Member States shall inform the Commission whether an appeal is available under their procedural law against a judgment given in the ESCP, i.e., that means that the appeal shall be lodged in accordance with national rules, there are no uniform rules regarding appeal under the Regulation.

<sup>27</sup> Subject to the provisions of this Regulation, the European Small Claims Procedure shall be governed by the procedure law of the Member State in which the procedure is conducted.



For example, in one case the court dismissed the ESCP application because, in the opinion of judge, the claimant had to provide the law on which the claim was based as provided in the national civil procedure.<sup>28</sup> But the Regulation provides for autonomous claim form and its content.

Moreover, in according to Art. 12(1) of the Regulation, the court should not require the parties to make any legal assessment of the claim. This, in turn, may lead to the question, for example, how to establish the applicable law to the dispute on its merits,<sup>29</sup> if the parties have no agreement on the applicable law. In one ESCP case, the Latvian court established jurisdiction between a person domiciled in Latvia and a person domiciled in Italy regarding a ski-accident in Italy. Claimant – the injured person from Latvia – claimed the compensation.<sup>30</sup> By finding itself competent, the court did not consider that, firstly, it will have to determine the applicable law and, secondly, it may lead on application of the law of the other country.<sup>31</sup> Thirdly, in such case, the content of the foreign law should also be established. For instance, the Latvian Civil Procedure Law requires a party to submit a translation of the text of foreign law to the court.<sup>32</sup> The question is – shall one apply this rule also under the Regulation? Will the litigation be as simplified, cost-effective and speedy as provided for by the Regulation?

Interpretation of concepts “claim and/or other claim” and “clearly unfounded [counter]claim”, excessive and often unnecessary filling of Regulation’s gaps by national law and unusual active role of judge are just a few problematic matters in practical application of the Regulation. The case law shows that the use of state language of the court<sup>33</sup>, translations, different bank accounts, systems, calculations and amounts of the court fees in each Member State do not fully facilitate a simplified and cost-effective application of the Regulation. Thus, this might be time to take the Regulation to a new level – completely independent from the national law.

## Conclusion

The European Small Claims Procedure is intended for a simplified, speedy and cost-effective litigation in the cross-border cases. Over the years, the procedure has gained popularity, it is applied more often and it has its potential; however, the current case law shows that there is a need for additional reforms in the Regulation to reach the aims of the Regulation and to take the Regulation to a new, more uniform level.

<sup>28</sup> Art. 128 of the Civil Procedure Law of the Republic of Latvia. Kurzeme District Court Decision in Case ECLI: LV:KUAT:2019:0628.CA023619.11.L, 28 June 2019.

<sup>29</sup> See also discussion in Rudevska B., et al., 2012, § 552–555.

<sup>30</sup> Zemgale Regional Court Case No. C73301118, unpublished.

<sup>31</sup> Art. 4 of European Parliament and Council Regulation (EC) No. 864/2007 (11 July 2007) on the law applicable to non-contractual obligations (Rome II). OJ L 199, 04/07./2008, pp. 40–49.

<sup>32</sup> Arts 654–655 of the Civil Procedure Law of the Republic of Latvia.

<sup>33</sup> Art. 6(1).

For example, some concepts within the Regulation should be interpreted in accordance with the national rules (“clearly unfounded”, “inadmissible” claim), or with reference to other European civil procedure rules (“counterclaim”) or autonomously (“claim”), however, such fragmentation does not facilitate a uniform interpretation of the Regulation. Moreover, the concept “claim” under the Regulation should be interpreted as including not only the claims that can be valued in money but also declaratory claims. However, they have to be closely connected and mutually related. Furthermore, the Regulation’s co-existence with national procedural law is not always clear, and the reference to national procedural rules should be limited as much as possible in order to guarantee uniform and autonomous rules for cross-border litigation of the small claims. For instance, the Regulation could directly deal with the concept “clearly unfounded” or “inadmissible” claim/counterclaim to limit the possibility of abuse of the process in accordance with the national law. Also, at this stage, it could be reconsidered whether it is possible to set a single court fee in all Member States and to facilitate using not only the state’s official language as the language of the court in these proceedings, but also permit, for example, English or another option as a language commonly spoken in Member States. Thus, making the procedure under the Regulation more predictable and hence, simplified and cost-effective.

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## SETTING ASIDE NATIONAL RULES THAT CONFLICT EU LAW: HOW *SIMMENTHAL* WORKS IN GERMANY AND IN LATVIA?

**Keywords:** *Simmenthal*, national law, conflict, EU law

### Summary

At the centre of this article is the *Simmenthal* line of cases of the Court of Justice of the European Union, which establish the duty of every national court or administrative authority not to apply any national law that conflicts with the EU law. The article provides a brief overview of the evolution of the *Simmenthal* case law at the EU level. It then proceeds to assess how *Simmenthal* is applied at national level through comparative analysis of experience from Germany and Latvia. A particular emphasis in that regard is placed on the role of constitutional courts, as well as on the role of administrative authorities. Research from both countries points to a general adherence to the obligation established by *Simmenthal*. However, it also indicates certain discrepancies in national legislation, which obscure strict application of *Simmenthal*, especially for national administrations. Particularly in Latvia administration is not entitled to disapply national law on its own motion, whereas – explicitly following the *Simmenthal* doctrine – it would (theoretically) be entitled to do so in Germany.

## Introduction

The 1978 *Simmenthal*<sup>1</sup> judgement of the Court of Justice of the European Union (CJEU, at that time – European Court of Justice) is one of the EU law classics that constructed the constitutional order of the European Union (EU) as we know it today. Building on the earlier case law of *Van Gend*<sup>2</sup> and *Costa*<sup>3</sup> (in which the CJEU pronounced direct effect and primacy of EU law), in *Simmenthal* the CJEU proceeded to spell out the role of national courts in upholding this new legal order. According to *Simmenthal*, every national court has an obligation to protect EU rights of individuals. To fulfil this mandate, national courts of all levels must by themselves set aside any national law that conflicts with the EU law.<sup>4</sup> Consequently, Member States must not limit the power of any national court to immediately disapply national provisions that are incompatible with the EU law.<sup>5</sup>

Thus, *Simmenthal* provided for a fundamental shift in the competences of national courts. Courts of all levels were to apply EU law directly and if they found a national provision that was contrary to EU law, they were to set it aside by themselves, without first turning to a constitutional or any other higher court. This shift was to have a twofold effect. Firstly, it empowered national courts of all levels by entrusting them with a duty to ensure that rights under EU law are protected. Secondly, it also gave the power of judicial review of national law, that in many Member States was reserved only for constitutional or supreme courts, to all national courts.

Over the years, the CJEU has generally remained loyal to *Simmenthal*.<sup>6</sup> In subsequent cases, the Court clarified and somewhat softened the original pronouncement – the primacy of the EU law did not require annulment of conflicting national rules – the courts merely had to disapply the national rule,<sup>7</sup>

<sup>1</sup> CJEU judgement of 7 March 1978 in Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* (*Simmenthal 2*).

<sup>2</sup> CJEU judgement of 5 February 1963 in Case 26/62 *Van Gend & Loos v. Netherlands Inland Revenue Administration*.

<sup>3</sup> CJEU judgement of 5 July 1964 in Case 6/64 *Flaminio Costa v. E.N.E.L.*

<sup>4</sup> *Simmenthal*, para. 21: “It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.”

<sup>5</sup> *Simmenthal*, para. 22: “Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.”

<sup>6</sup> CJEU judgement of 19 November 2009 in Case C-314/08 *Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu*. See also Pernice I. *Costa v. ENEL and Simmenthal: Primacy of European Law*. In: Maduro, M. P., Azoulai L. (eds.). *The Past and Future of EU Law*. London: Hart Publishing, 2010, pp. 47–58.

<sup>7</sup> CJEU judgement of 22 October 1998 in joined cases C-10/97 to C-22/97 *Ministero delle Finanze v. IN.CO.GE.'90 Srl*, para. 20.

whereas in *Melki and Abdeli* the CJEU elaborates on *Simmenthal* and further encourages a certain dismantling of national judicial hierarchies.<sup>8</sup> According to *Melki and Abdeli*, in order to ensure the primacy of EU law, any national court is free to refer to the CJEU any question at any stage of proceedings, even at the end of an interlocutory procedure with a national constitutional court, thereby opening a possibility that CJEU would override the conclusions reached by the constitutional court. However, the practical importance of *Simmenthal* seems to have decreased with national courts opting to focus on the duty of consistent interpretation rather than on the obligation to set aside national rules.

A further issue that emerges from *Simmenthal* is its scope of applicability in terms of subjects that are obliged to set aside conflicting national rules – is it only the courts or administrative authorities as well? The pronouncement from the CJEU in *Simmenthal* itself states that any provision of a national legal system and any legislative, administrative or judicial practice may not withhold from a *national court* the power to do everything necessary to set aside conflicting national provisions. Thus, the initial *Simmenthal* dictum places the mandate to disapply conflicting national law specifically on national courts – whereas the legislator and the administration are obliged not to prevent courts from discharging this mandate. However, national administrative authorities anyhow and in parallel to the *Simmenthal* mandate – as a combined result of direct effect and primacy of EU law – have the duty to immediately apply directly effective EU law provisions and ensure that these provisions have full effect.<sup>9</sup> In *Costanzo*, the CJEU specifically argues that it would be “contradictory to rule that an individual may rely upon the provisions of a directive [...] in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive *and refrain from applying provisions of national law which conflict with them*” (emphasis added).<sup>10</sup> In subsequent cases, the CJEU has repeatedly confirmed that the duty to disapply conflicting national provisions applies also to national administrative bodies.<sup>11</sup> This preposition is conceptually accepted in both

<sup>8</sup> CJEU judgement of 22 June 2010 in joined cases C-188/10 and C-189/10 Aziz Melki and Sélim Abdeli. In para. 53 of the judgment, the Court states: “In so far as national law lays down an obligation to initiate an interlocutory procedure for the review of constitutionality, which would prevent the national court from immediately disapplying a national legislative provision which it considers to be contrary to EU law, the functioning of the system established by Art. 267 TFEU nevertheless requires that that court be free, first, to adopt any measure necessary to ensure the provisional judicial protection of the rights conferred under the European Union’s legal order and, second, to disapply, at the end of such an interlocutory procedure, that national legislative provision if that court holds it to be contrary to EU law.”

<sup>9</sup> CJEU judgement of 12 January 2010 in Case C-341/08 Petersen, para. 80.

<sup>10</sup> CJEU judgement of 22 June 1989 in Case 103/88 Costanzo, para. 31.

<sup>11</sup> For a clear endorsement of this duty see CJEU judgement of 15 November 2016 in Case C-628/15 The Trustees of the BT Pension Scheme, para. 54; also CJEU judgement of 29 April 1999 in Case C-224/97 Ciola, para. 26 and 30.

Germany and in Latvia – however, in terms of actual practice, as we shall see, its application remains rather problematic.

The purpose of this article is to assess how the *Simmenthal* doctrine, i.e., the obligation to set aside national law that conflicts with the EU law, actually works in Germany and in Latvia some 40 years after its pronouncement by the CJEU. In particular, the article will explore whether national law in both countries allows courts and administration to disapply national law that conflicts with the EU law. This ability of national courts depends on both direct effect and the recognition of primacy of EU law (more specifically, on the place afforded to the EU law in the hierarchy of national norms), i.e., on the limits that national law attempts to place on the primacy of EU law.

## 2. *Simmenthal* in Germany

With regard to these aspects, it is worthwhile to analyse how far German courts and administration comply with the *Simmenthal* doctrine. Firstly, this part will focus on the general legal framework (2.1.) before exploring the application by German courts in their corresponding practice (2.2.) and finally, the German administration and its practice (2.3.).

### 2.1. The corresponding legal framework: The German Grundgesetz

Given that the *Simmenthal* doctrine mainly deals with the obligation for state institutions to apply EU law, the following elaborations will only superficially touch upon the complex relation between German constitutional law and EU law, which involves various decisions of the BVerfG<sup>12</sup> and which has triggered a continuous and controversial scholarly debate. However, it is necessary to indicate some aspects of the constitutional legal framework before briefly dealing with the *Simmenthal* doctrine in court practice, i.e., the use of Art. 267 TFEU by German courts.

In *Simmenthal*, the ECJ ruled:

*Accordingly, any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community Law by withholding from the national court [...] to set aside national legislative provisions which might prevent Community Rules from having full force and effect are incompatible with those requirements which are the very essence of Community Law.*<sup>13</sup>

<sup>12</sup> Schmitz T. Constitutional jurisprudence in the member states on the participation in the process of European integration, provides a very condensed overview. Available: <http://www.iuspublicum-thomas-schmitz.uni-goettingen.de/Lehre/Jurisprudence-on-integration-2.htm> [viewed 08.010.2021.].

<sup>13</sup> ECJ, *Simmenthal*, *supra* note 1, para. 22.

One of the constitutional principles laid down in Art. 20 (3) *Grundgesetz* (GG, German Basic Law), is the so-called *Rechtsstaatsprinzip* which, *inter alia*, implies the legality of all acts of state institutions and which largely corresponds to the *rule of law*.<sup>14</sup> This principle is directed towards all three powers which are explicitly separated, as stipulated in Art. 20 (2), the 2<sup>nd</sup> sentence GG.

Besides German law, national courts apply EU law. Art. 23 (1) and 24 (1) GG form the legal basis for the Federal Republic of Germany to integrate in international organisations and in the EU. Furthermore, the interpretation of these provisions – particularly 23 (1) GG – holds that, by consenting to the creation of the EU, this act generally comprises the primacy of EU law over German law, as long as it can be derived from the Treaties. Accordingly, with some peculiarities regarding constitutional law, EU law enjoys primacy over German law (laws, regulations and statutes). This is understood as a primacy in application, i.e., conflicting German law is not declared as void but will not be applied when conflicting with EU law.<sup>15</sup>

The architecture of the GG further completes the principle of legality, stipulating in Art. 19 (4) GG:

*Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph.*

As a consequence of the separation of powers, courts and administration alike are not entitled to autonomously declare the laws of the legislative (*formelle Gesetze*) as void. In most cases, one may assume that judges face a conflict of laws, i.e., that the national judge decides on the mere application of a norm (e.g., when applying the rules of private international law). However, in cases where a law is incompatible with other legal norms, Art. 100 GG facilitates the practical compliance with both the *Rechtsstaatsprinzip* and the separation of powers, in so far as it provides the *Bundesverfassungsgericht* (BVerfG) with the power to declare norms that are deemed to be incompatible with the constitution as void.<sup>16</sup> This procedure thus resembles the preliminary ruling procedure of Art. 267 TFEU in EU law and facilitates the constitutional review of *acts by the state*.

Accordingly, the German system foresees that the BVerfG exclusively holds the competence to declare acts of the legislative as void (*Normenverwerfungskompetenz*). With regard to its competence, the BVerfG is limited to reviewing the legality of German legal acts and their compatibility with the German GG. Consequently, given that EU primary and secondary law does not qualify as

<sup>14</sup> See Schewe C., Blome T. “The Rule of Law Mechanism” and the Hungarian and Polish Resistance: European Law Against National Identity? *Journal of the University of Latvia “Law”* No. 14, 2021, pp. 49–67. Available: <https://doi.org/10.22364/jull.14>, <https://www.apgads.lv/juridiska-zinatne/-law-nr-14/03> [viewed 08.10.2021.].

<sup>15</sup> BVerfGE 31, p. 145 ff, 173 ff.

<sup>16</sup> Degenhart C. *Staatsrecht I, Staatsorganisationsrecht*, C.F. Müller, 30. Aufl. 2014, p. 335, para. 837, in case of a conflict with constitutional law, the BVerfG usually declares the corresponding legal act as void in the sense that it becomes invalid *ex tunc*, *ibid.*, p. 343, para. 855 f.



a national legal act, Art. 267 TFEU is the provision applicable for legal review in the case of a conflict of national law with EU law. In theory, there thus is a clear distinction between the competence of the BVerfG regarding the review of the constitutionality of acts and the competence of the CJEU concerning the compatibility of national legal acts with EU law. Accordingly, for courts there is no need for requesting a ruling by the BVerfG when the matter concerns compatibility with EU law.<sup>17</sup>

In practice, however, there may be overlaps, for instance, given that the fundamental rights granted under the GG largely correspond to those of the CFEU and given the fact that legal acts, despite seemingly being enacted by the German legislator, may go back to EU law (for instance, in the case of directives (Art. 288 (3) TFEU). Legal acts thus may have a hybrid nature establishing the competence of both courts, rendering a strict distinction difficult. In this case, there may arise doubts for judges whether a norm conflicts with EU law or constitutional law.<sup>18</sup> In order to avoid that national courts might have to decide on this matter, the BVerfG ruled that these matters may also be subject of Art. 100 (1) GG claims.<sup>19</sup>

With regard to the above, national judges apply EU law in relative independence. If a judge deems that EU law is in conflict with the core provisions of the German *Grundgesetz*, the BVerfG has ruled that this ultimately is a question of German constitutional law.<sup>20</sup> Accordingly, the BVerfG is exclusively entitled to decide whether a provision of EU law is not applicable in Germany, or if the respective act is to be seen as an *ultra vires* act.<sup>21</sup> One may take note that a decision in the latter direction leads to a major conflict with EU law in practice, and will thus become a matter of the CJEU.<sup>22</sup> This, however, is not an aspect regarding the application of the *Simmenthal* doctrine.

Despite this aspect, one may conclude that the Germany's system of legal review distinguishes between the compatibility of legal acts with constitutional and EU law, which generally seems to comply with the *Simmenthal* doctrine.

<sup>17</sup> BVerfGE 31, p. 145 ff, 173 ff.

<sup>18</sup> Regarding these aspects see, e.g., Degenhart C. Staatsrecht I, Staatsorganisationsrecht, C. F. Müller, 30. Aufl. 2014, p. 103, para. 266 ff.

<sup>19</sup> Dederer H.-G. Art. 100 GG. In: Dürig G., Herzog R., Scholz R., Grundgesetz, Kommentar, 95. Auflage, München: Beck 2021, para. 52.

<sup>20</sup> Schweizer M., Dederer H.-G. Staatsrecht III, C. F. Müller, 12. Aufl. 2020, p. 44, para. 160, provide a good overview.

<sup>21</sup> This was the case in BVerfG, Judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15 –, paras. 1, 95 ff, [http://www.bverfg.de/e/rs20200505\\_2bvr085915en.html](http://www.bverfg.de/e/rs20200505_2bvr085915en.html); for earlier judgments of the BVerfG in a similar direction, see footnote 34 below.

<sup>22</sup> See, for instance: Letters of formal notice, Primacy of EU law: Commission sends letter of formal notice to Germany for breach of fundamental principles of EU law at: [https://ec.europa.eu/commission/presscorner/detail/en/inf\\_21\\_2743](https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743) and earlier, CJEU judgement of 17 December 1970 Case 11/70 Internat. Handelsgesellschaft or CJEU judgement of 22 October 1987 in Case 314/85 Foto-Frost v. Hauptzollamt Lübeck-Ost.

## 2.2. *Simmenthal* in German court practice: The use of Art. 267 TFEU

Regarding the review of the compatibility of German law with EU law, recent statistics seem to illustrate that the bifurcation seems to work in German court practice. In the period 2016–2020, around 20% of all preliminary rulings enacted by the CJEU stem from German courts.<sup>23</sup> This number indicates that judges generally respect the bifurcation illustrated above. Furthermore, more detailed research in databases<sup>24</sup> reveals that, where applicable, German courts quote the *Simmenthal* doctrine and decide the case accordingly. Interestingly, this concerns the first instance courts, as well as the higher and highest courts, indicating a prevailing acceptance of the *Simmenthal* doctrine. Only occasionally the BVerfG itself has requested preliminary rulings of the CJEU. However, it is worth noticing that it fostered the use of Art. 267 TFEU by national judges, insofar as it ruled that the CJEU is to be considered as the lawful judge (*gesetzlicher Richter*) in the sense of Art. 101 (1) sentence 2 GG and that the refusal by a court to request a preliminary ruling may be considered an infringement of the judicial rights protected under the GG.<sup>25</sup>

## 2.3. *Simmenthal* and the German administration

Besides courts, also the national administration has to apply the law, i.e., including EU law. As far as EU law has a direct effect, it forms part of the German legal order. Accordingly, the German administration is obliged to apply EU law in the same way as it would apply a German national legal provision, provided that EU law does not require specific rules for the application of the law compared to merely internal national cases.<sup>26</sup>

Given that it is generally accepted that, in case of a conflict, EU law prevails over national law, one may assume that German administrative practice usually corresponds to *Simmenthal*. In detail, however, it is contested how the administration should deal with a collision between German and EU

<sup>23</sup> CJEU, Annual Report – Court of Justice of the European Union 2020, p. 211. Available: [https://curia.europa.eu/jcms/jcms/Jo2\\_7000/en/](https://curia.europa.eu/jcms/jcms/Jo2_7000/en/) [viewed 10.10.2021.].

<sup>24</sup> [www.Beck-online.de](http://www.Beck-online.de) and [www.juris.de](http://www.juris.de).

<sup>25</sup> BVerfG, Beschluss der 2. Kammer des Zweiten Senats vom 06. Oktober 2017 – 2 BvR 987/16 –, para. 3. Available: [http://www.bverfg.de/e/rk20171006\\_2bvr098716.html](http://www.bverfg.de/e/rk20171006_2bvr098716.html) [viewed 12.10.2021]; recently confirmed by BVerfG, Beschluss der 2. Kammer des Ersten Senats vom 14. Januar 2021 – 1 BvR 2853/19 –, para. 8. Available: [http://www.bverfg.de/e/rk20210114\\_1bvr285319.html](http://www.bverfg.de/e/rk20210114_1bvr285319.html) [viewed 12.10.2021.].

<sup>26</sup> Comprehensive on the relationship between European Union law and national administration law see: Stelkens, *Europäisches Verwaltungsrecht, Europäisierung des Verwaltungsrechts und Internationales Verwaltungsrecht* [European administrative law, Europeanization of administrative law and international administrative law]. In: Stelkens P., Bonk H.J., Sachs M. *Verwaltungsverfahrensgesetz*, München: C.H. Beck, 2018, para. 1 ff.

law.<sup>27</sup> The reason for this dispute is that – as has been noted above regarding German courts – the German administration does not hold the competence to declare legal norms as void. Furthermore, it has been stated above that, only the constitutional courts (also the *Bundesländer* have constitutional courts) are entitled to declare laws – in the sense of acts of parliament – as void, while other courts only may declare other German legal provisions as void, e.g., ordinances (*Satzungen, Rechtsverordnungen*). Therefore, should the administration come to the conclusion that a German act of parliament or a German ordinance is void, it may become problematic to solve the situation. As a general guideline for such cases, the administration is obliged to stay the proceedings and to try internally to ensure that the norm in question is amended or brought into conformity either by the parliament, the competent body or – regarding ordinances – courts.<sup>28</sup> This general guideline, however, does not help in urgent matters.<sup>29</sup>

While this is not precisely what the *Simmenthal* doctrine requires, it illustrates an interesting deviation in Germany between cases without any EU law context (where the administration must not decide on the validity of norms) on the one hand, and in case of a conflict between EU law and German national law (where *Simmenthal* applies) on the other. In that regard, it is important to note that both scenarios are not directly comparable: it is something different to declare a legal norm as void or only not to apply a legal norm in an individual case – as required according to the principle of primacy of European Union law (primacy in application).<sup>30</sup> Similar cases of disapplication of legal norms are also known and generally accepted in other cases, for instance, regarding the rule of *lex specialis and lex posterior*. Furthermore, it has been noted above, that, in case of a collision between European Union law and German legislation, the conflicting German law is not declared as void but will simply not be applied in cases having an EU context.<sup>31</sup>

<sup>27</sup> See, for instance: Dettner, A. IV. Unionsrecht und nationales Recht. In: Dausen M., Ludwig M. Handbuch des EU-Wirtschaftsrechts, München: C. H. Beck 2021, para. 15; Gärditz, § 35 Verhältnis des Unionsrechts zum Recht der Mitgliedstaaten. In: Rengeling H-W, Middeke A., Gellermann M. (Hrsg.) Handbuch des Rechtsschutzes in der Europäischen Union, München: C. H. Beck, 2014, para. 13; Ruffert, Art. 288 AEUV. In: Callies C., Ruffert M. (Hrsg.). EUV/AEUV, München: C. H. Beck, 2016, para. 73 f., all with further references. See also very critical with regard to competencies of the administration to disapply national norms in case of a conflict with EU law – Semmroth W. DocMorris als Einfallstor für Normverwerfungskompetenz der Verwaltung, NVwZ 2006, p. 1378. Likewise, instructive is Demleitner A. Die Normverwerfungskompetenz der Verwaltung, NVwZ 2009, p. 1525 ff.

<sup>28</sup> See, for example, Demleitner A. Die Normverwerfungskompetenz der Verwaltung, NVwZ 2009, p. 1528. See also with further references Sachs M. VwVfG § 44 Nichtigkeit des Verwaltungsaktes, In: Stelkens P., Bonk H. J., Sachs M. Verwaltungsverfahrensgesetz, München: C. H. Beck, 2018, para. 89 ff.

<sup>29</sup> Demleitner A. Die Normverwerfungskompetenz der Verwaltung, NVwZ 2009, p. 1528 f.

<sup>30</sup> Insofar, see, for example Nettessheim M. Recht der Europäischen Union, München: C. H. Beck, 2021, Art. 1 AEUV para. 79 ff. and, in particular, para. 81.

<sup>31</sup> This can be assumed as generally accepted. See Streinz R. EUV/AEUV, München: C. H. Beck, 2018, Art. 4 EUV para. 37. From EU perspective see, for instance, CJEU judgement of 22 October 1998 in joined Cases C-10/97 to C-22/97 Ministero delle Finanze, para. 21.

Therefore, only if German law is obviously not in accordance with EU law, the administration is obliged to explicitly pronounce the primacy of EU law. A different question is how to deal with critical cases which are not “crystal clear”. In these cases – despite the explicit CJEU case law – numerous arguments speak in favour of leaving some discretion to the German administration and rather to apply German national legislation.<sup>32</sup> Accordingly, this might be regarded as a presumption which might be named “*in dubio pro national law*” which, however, *à priori* stands in conflict with the *Simmenthal* doctrine; at the same time, from a different angle, it might also be considered as a consequence following from the principle of subsidiarity. However, so far there do not seem to be completely satisfying solutions for this dilemma.<sup>33</sup> It is usually the administration that bears the risk of incorrectly applying the law and accordingly triggering consequences, such as state liability.

In practice, problematic cases of this type are highly unlikely. One important reason is the fact that the German administration often acts on the basis of internally binding administrative provisions (*Verwaltungsvorschriften*). These originate from specialised institutions within the German administration, are internally binding and regulate the practically most important constellations. Moreover, administrative provisions are continuously monitored and updated. Accordingly, they normally reflect the applicable EU law and ensure that administrative practice does not conflict with EU law. Notwithstanding, there are three particular constellations, in which problematic cases might arise: (1) The competent German administration is not aware of conflicting EU law. (2) There is a misinterpretation of either national law or European Union law, that causes a legally incorrect decision and (3) the application of the law is simply complex in an individual case, wherein – from the perspective of EU law – the administrative body decides incorrectly. All these three cases are not what *Simmenthal* refers to but rather result from the fact that, sometimes, the correct application of the law may be complex.

<sup>32</sup> See also Gärditz K. F. § 35 Verhältnis des Unionsrechts zum Recht der Mitgliedstaaten. In: Rengeling H-W, Middeke A., Gellermann M. (Hrsg.). Handbuch des Rechtsschutzes in der Europäischen Union, München: C. H. Beck, 2014, para. 13; Ruffert, Art. 288 AEUV. In: Callies C., Ruffert M. (Hrsg.). EUV/AEUV, München: C. H. Beck, 2016, para. 74 f., with further references. Instructive – Demleitner, Die Normverwerfungskompetenz der Verwaltung, NVwZ, 2009, p. 1525 ff.

<sup>33</sup> See in particular Streinz, R. EUV/AEUV, München: C.H. Beck, 2018, Art. 4 EUV para. 39, with a very interesting reference to ECJ cases C-171/07 and C-172/07 (DocMorris II). In these cases *Verwaltungsgericht des Saarlandes* referred to the Court explicitly the following question: “Having regard in particular to Art. 10 EC and to the principle of effectiveness of Community law, is a national authority entitled and obliged under Community law to disapply national provisions it regards as contrary to Community law even if there is no clear breach of Community law and it has not been established by the Court of Justice [...] that the relevant provisions are incompatible with Community law?” (para. 15). This question was finally not answered by ECJ (para. 62). Also Gärditz K. F. § 35 Verhältnis des Unionsrechts zum Recht der Mitgliedstaaten. In: Rengeling H-W, Middeke A., Gellermann M. (Hrsg.). Handbuch des Rechtsschutzes in der Europäischen Union, München: C. H. Beck, 2014, para. 13, and Sachs M. VwVfG § 44 Nichtigkeit des Verwaltungsaktes. In: Stelkens P, Bonk H. J., Sachs M. Verwaltungsverfahrensgesetz, München: C. H. Beck, 2018, para. 89 ff., argue (with further references) in a similar direction.

Accordingly, one may conclude that there are no general conflicts between the *Simmenthal* doctrine and administrative practice in Germany. An (open) conflict could normally only arise in the very rare cases of an *ultra-vires* act of the European Union. It needs to be stressed that this decision may only be taken by the BVerfG, which explicitly ruled to have the sole competence to declare an EU law act as not applicable.<sup>34</sup> One may therefore say that also these rare cases do not – from the perspective of German public administration – incur any conflict with the *Simmenthal* doctrine.

### 3. *Simmenthal* in Latvia

#### 3.1. General legal framework

The ability of Latvian courts to set aside conflicting national provisions is conditioned by two related aspects: the direct effect of EU law and the extent to which Latvian legal system recognizes the primacy of EU law, i.e., the place afforded to EU law in the hierarchy of Latvian norms.<sup>35</sup> As far as primacy and direct effect are concerned, the obligations of Latvian courts and administration from the perspective of EU law are rather clear. Both courts and administration are to apply EU law to the cases they decide. Should there be a conflict between Latvian and EU law, EU law overrides any provision of Latvian law.<sup>36</sup> Although Latvian courts have never challenged the case law of the CJEU on primacy of EU law, the legal force of EU law within Latvian legal system is ambivalent.

At the statutory level, the main documents that mandate Latvian courts and administration to apply EU law are the three major Latvian procedural laws (Administrative Procedure Law, Civil Procedure Law and Criminal Procedure Law).<sup>37</sup> With Latvia's accession to the EU all three were amended entitling Latvian courts (and administration) to apply EU law, as well as emphasizing the importance of CJEU's case law and the possibility to make a reference for preliminary rulings. These norms in all three procedural laws were constructed as blanket norms with

<sup>34</sup> See *Bundesverfassungsgericht*, Urteil vom 30. Juni 2009, 2 BvE 2/08 et al., para. 240 and in particular para. 241 (Decision on Treaty of Lisbon) and *Bundesverfassungsgericht*, Urteil vom 12. Oktober 1993, 2 BvR 2134/92 et al., para. 112 (Decision on the Treaty of Maastricht). Regarding the problem, whether and under which circumstances a European Union law is not applicable as it constitutes an *ultra vires* act, see Skouris V. Der Vorrang des Europäischen Unionsrecht vor dem nationalen Recht. Unionsrecht bricht nationales Recht, EuR 2021, p. 3 ff.

<sup>35</sup> Whether primacy of the EU law is an issue of legal force or merely of application is a contested topic, see Avbelj M. Supremacy or Primacy of EU Law – (Why) Does it Matter? European Law Journal, 2011, Vol. 17(6), pp. 744–763.

<sup>36</sup> CJEU judgement of 17 December 1970 in Case 11/70 *Handelsgesellschaft*; CJEU judgement of 26 February 2013 in Case C-399/11 *Melloni*.

<sup>37</sup> Administrative Procedure Law. Available in English: <https://likumi.lv/ta/en/en/id/55567-administrative-procedure-law> [viewed 28.11.2021.]; Civil Procedure Law. Available in English: <https://likumi.lv/ta/en/en/id/50500-civil-procedure-law> [viewed 28.11.2021.]; Criminal Procedure Law. Available in English: <https://likumi.lv/ta/en/en/id/107820-criminal-procedure-law> [viewed 28.11.2021.].

direct reference to the EU law itself.<sup>38</sup> However, Latvian Administrative Procedure Law, unlike Civil Procedure Law and Criminal Procedure Law, contains a detailed exposition of the relationship between EU law and national law and therefore deserves a closer examination. For example, Art. 15 of the Latvian Administrative Procedure Law states that:

*(1) An institution and a court shall apply in the administrative proceedings the external legal acts, provisions of international law and European Union law, and also general principles of law.*

*(4) Provisions of European Union law shall be applied in accordance with the place thereof in the hierarchy of legal force of external legal acts. In applying the provisions of European Union law, an institution and a court shall take into account the case law of the Court of Justice of the European Union.*

Thus Latvian Administrative courts are obliged to apply the EU law in accordance with “the hierarchy of legal force of external legal acts”. The ambivalent point is that neither this law nor any other Latvian law specify where exactly the EU law dwells in this hierarchy. There are several Latvian laws that address the hierarchy of norms in the Latvian legal system. For instance, Art. 16 of the Law on the Constitutional Court states that the Constitutional court reviews compatibility of Latvia’s international agreements with the Constitution, thus implying supremacy of the Constitution. The same article provides that the Constitutional Court is entitled to review any national law that may be incompatible with Latvia’s international agreements, thereby implying primacy of international agreements over national laws. Together, these two propositions suggest that as a matter of Latvian law (at least as far as international treaties are concerned – including EU treaties), they are below Latvia’s Constitution, but above any other Latvian legal act. However, the above quoted Art. 15 of the Administrative Procedure Law also states that courts must take into account the case law of the CJEU, which uncompromisingly provides for primacy of EU law over all national law, including over national constitutions.<sup>39</sup>

The reason why the Administrative Procedure Law was left so equivocal is that it needs to reconcile primacy of EU law (stemming from the CJEU case law) with supremacy of Latvia’s Constitution (stemming from national legal order itself). Which is the law that ultimately enjoys primacy – EU law or the national constitution – is a perennial question, which is perhaps best left unanswered.<sup>40</sup> The result is a purposefully vague formulation which neither clearly acknowledges primacy of EU law, nor denies it, nor tells Latvian courts what exactly to do when finding a national rule that conflicts with an EU rule. However, the conciliatory

<sup>38</sup> Similar approach was used by several other post-2004 new Member States – regarding this, see, e.g., Bobek M. Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice. *Common Market Law Review*, Vol. 45, 2008, pp. 1611–1643.

<sup>39</sup> CJEU judgement of 26 February 2013 in Case C-399/11 *Melloni*.

<sup>40</sup> See Weiler J. Van Gend en Loos: The individual as subject and object and the dilemma of European legitimacy. *International Journal of Constitutional Law*, Vol. 12(1), 2014, pp. 94–103; Alter K. *Establishing the supremacy of European law: The making of an international rule of law in Europe*. Oxford: Oxford University Press, 2010.

view of Latvian scholarship is that EU law enjoys primacy over all national law with the exception of foundational constitutional norms.<sup>41</sup> Thus, in terms of actual application of *Simmenthal* doctrine, the primacy of EU law is not an obstacle for Latvian courts to set aside conflicting national rules, except for the narrow category of cases where there would be a conflict with the Latvian Constitution.

Another key provision that determines application of *Simmenthal* doctrine by Latvian courts is Art. 104 of the Administrative Procedure Law. This article provides for an obligation of every administrative court in cases of doubt to verify whether the applicable national legal provision conforms to the legal provisions of higher legal force. In cases when the administrative court comes to the conclusion that indeed there is a conflict between legal provisions, Art. 104 provides two alternative scenarios how an administrative court should proceed. In cases of municipal regulations or governmental regulations, administrative courts have a right not to apply those regulations if they contradict norms of higher legal force. Yet in cases where “a legal provision does not conform with the Constitution or provision (act) of international law, it shall suspend court proceedings in the case and send a substantiated application to the Constitutional Court”.

If one interprets “provision (act) of international law” as covering also the EU law, as well, then this provision of the Administrative Procedure Law seems to contradict the *Simmenthal* judgement, since it forces Latvian administrative courts not to apply the EU law immediately, but instead to suspend the proceedings and turn to the Constitutional Court first. However, there are at least two arguments why the Art. 104 of the Administrative Procedure Law should be interpreted as not covering the EU law and, therefore, not breaching the *Simmenthal*. Firstly, Art. 1 of the Administrative Procedure Law provides a definition of the international law, which does not cover the EU law<sup>42</sup>, thus suggesting that the obligation to turn to the Constitutional Court does not apply to cases of conflict with EU law. Also, EU law *expressis verbis* is not mentioned anywhere in the text of Art. 104 of the Administrative Procedure Law and the Law in majority of articles (albeit not always)<sup>43</sup> makes a deliberate distinction between international law and EU law.<sup>44</sup>

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<sup>41</sup> Commentary to the Administrative Procedure Law points to primacy of EU law, while at the same time stating that primacy would not apply to the core norms of the Constitution, see: Briede J. (ed.). *Administratīvā procesa likuma komentāri*. Rīga: Tiesu Namu Aģentūra, 2013, p. 239. This, however, does little to clarify what place in the hierarchy of legal norms is occupied by EU's secondary law, which national courts are also obliged to apply.

<sup>42</sup> Art. 1 of the Administrative Procedure Law: “(7) A provision of international law consists of international agreements binding on Latvia, customary international law, and general principles of international law.”

<sup>43</sup> See Art. 11 of the Administrative Procedure Law: “An institution may issue an administrative act or perform an actual action unfavourable to a private person on the basis of the Constitution, laws or the provisions of international law.”

<sup>44</sup> The best example here is another part of the same Art. 1 that lists all types of external legal acts: “(5) An external legal act is the Constitution (*Satversme*), laws, Cabinet regulations, and binding regulations of local governments, and also international agreements and original Treaties of the European Union and legal acts issued on the basis thereof.”

Secondly, Art. 104 of the Administrative Procedure Law is followed by Art. 104.1, which mirrors Art. 267 of the TFEU and mandates administrative courts to request preliminary rulings from the CJEU. Such placement of articles suggests that in cases when a court finds a conflict between Latvian law and EU, its obligations differ from the standard mode of Art. 104 and the national court in case of doubt must rather turn to CJEU rather than to the Constitutional Court.<sup>45</sup> Thus, it seems that the overall system of the Administrative Procedure Law supports the view that there is no duty for Latvian administrative courts to refer to the Latvian Constitutional Court in cases of conflicts between EU law and Latvian law, and, therefore, the obligations under the Administrative Procedure Law would seem not to contradict *Simmenthal*. Yet, the very possibility of the above discussion shows that the Administrative Procedure Law is ambivalent both regarding the general status of the EU law in the hierarchy of the Latvian legal system, as well as the duties of administrative courts in the context of their obligation to immediately give full effect to EU law.

### 3.2. *Simmenthal* in Latvian courts

#### 3.2.1. Administrative courts and courts of general jurisdiction

Regarding the application of the *Simmenthal* doctrine by Latvian administrative, as well as general courts, the examples are rather scarce. On the one hand, there are no cases where Latvian courts would have blatantly ignored the duty to immediately set aside national rules that conflict with EU law. Furthermore, there are no cases where, for instance, administrative courts would have used Art. 104 of the Administrative Procedure Law in relation to the EU law, thereby breaching their obligations under *Simmenthal*. However, on the other hand, the willingness of Latvian courts to use the *Simmenthal* doctrine in practice remains somewhat doubtful. In accordance with the publicly accessible database of Latvian court judgments and decisions,<sup>46</sup> *Simmenthal* judgement itself has been generally ignored by Latvian courts. There are only 3 judgments where *Simmenthal* is mentioned, and in all three cases the courts do not set aside Latvian laws in favour of directly applicable EU law – the *Simmenthal* is mentioned rather just as a side note reference.<sup>47</sup>

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<sup>45</sup> Such a scenario would, however, potentially create procedural “parallel routes” – when Latvian administrative court deems the provision of the Latvian law to be contrary to both EU law and a provision of higher Latvian law, e.g., a norm of the Latvian law contradicts an EU regulation and the Latvian Constitution. It is unclear whether in such cases administrative courts should use the *Simmenthal* doctrine and pass the judgment by themselves; or if they are under an obligation to stop the proceedings and submit an application to the Latvian Constitutional Court under the Art. 104 of the Administrative Procedure Law.

<sup>46</sup> Available in Latvian: <https://manas.tiesas.lv/eTiesasMvc/nolemumi> [viewed 28.11.2021.].

<sup>47</sup> See judgement of the Administrative Court of Appeals of 30 October 2008 in Case AA43-1111-08/13; judgement of the Administrative Court of Appeals of 29 May 2009 in case AA43-2025-09/11; judgement of the Administrative Department of the Supreme Court of Latvia of 5 March 2009 in Case SKA – 175/2009.



Yet at the same time there generally is no doubt regarding the overall willingness of Latvian courts, especially administrative courts, to use EU law and to adhere to the case law of the CJEU, particularly to the direct and indirect effect of EU law. For instance, in some judgments the Supreme Administrative Court has deployed quite extensive argumentation not only regarding applicable directives, but also has rather accurately elaborated on general principles of how the directives should be used by Latvian courts.<sup>48</sup> An indirect indication that Latvian courts do attempt to give full effect to rights protected under EU law is that courts, especially administrative courts, make extensive use of preliminary rulings procedure. So far, there have been more than 100 references to the CJEU from Latvian courts, which is more than from jurisdictions of comparable size, for example, from Lithuania and Estonia.<sup>49</sup> The absence of actual use of Art. 104 of the Administrative Procedure Law by administrative courts regarding EU law, is another indicator that Latvian courts apply EU law directly and recognize its supremacy rather than turn to the Constitutional Court for annulment of Latvian law that contradicts EU law. However, as in other Member States, the indirect effect of EU law seems to be the preferred option, with Latvian courts choosing rather to avoid direct confrontation between EU law and national law,<sup>50</sup> and to interpret national law in the light of EU law.

### 3.2.2. The Constitutional Court of Latvia

Regarding the Constitutional Court of Latvia and the *Simmenthal* doctrine, at the first glance there seems to be no room for controversies. As previously mentioned, there are no cases where the administrative courts would have used Art. 104 of the Administrative Procedure Law and made a reference to the Latvian Constitutional Court with a request to evaluate the validity of a Latvian law in light of EU law. Moreover, the Latvian Constitutional Court is well aware of *Simmenthal* and has mentioned the judgment in their request for a preliminary ruling, but in the context of their own duty to use EU law and seeking possible exceptions to the *Simmenthal* doctrine.<sup>51</sup> However, there is no clear case law of the Constitutional Court on particularities of their competence regarding EU law. So far, the Constitutional Court has been silent on whether requests

<sup>48</sup> Judgment of the Administrative Department of the Supreme Court of Latvia of 24 March 2010 in Case SKA-293/2010. See also Buka A., Bērziņa L. Application of the EU Directives in the Latvian courts: tendencies and challenges. Collected Papers “Constitutional Values in Contemporary Legal Space”. Riga: University of Latvia, 2016.

<sup>49</sup> Data on the number of references for the preliminary rulings collected from the CJEU annual reports (available: [https://curia.europa.eu/jcms/jcms/Jo2\\_11035/rapports-annuels](https://curia.europa.eu/jcms/jcms/Jo2_11035/rapports-annuels)) and from the CJEU case law search form (available: <https://curia.europa.eu/juris/recherche.jsf?language=en>) [viewed 28.11.2021.].

<sup>50</sup> Rodin S. Back to Square One—the Past, the Present and the Future of the *Simmenthal* Mandate. European Constitutional Law Network, The 8<sup>th</sup> Annual Conference. 2010. Available: [https://repositorioinstitucional.ceu.es/bitstream/10637/3456/1/back\\_rodin\\_2011.pdf](https://repositorioinstitucional.ceu.es/bitstream/10637/3456/1/back_rodin_2011.pdf) [viewed 28.11.2021.].

<sup>51</sup> CJEU judgement of 21 June 2021 in Case C-439/19 Latvijas Republikas Saeima (Soda punkti).

by administrative courts under Art. 104 of the Administrative Procedure Law (suspecting Latvian law to contravene EU law) would breach *Simmenthal*.

Similarly, it is unclear whether the Constitutional Court is entitled to review legality of Latvian law solely on the basis of EU law. The jurisdiction of the Constitutional Court is set out in the Art. 16 of the Constitutional Court Law. The most likely sections of that article, which may imply such jurisdiction, are:

*The Constitutional Court shall adjudicate matters regarding:*

[...]

3) *conformity of other laws and regulations or parts thereof with the norms (acts) of a higher legal force;*

[...]

6) *conformity of Latvian national legal norms with those international agreements entered into by Latvia that are not in conflict with the Constitution.*

So far, the Constitutional Court has used EU law in a variety of cases and is rather active in communication with the CJEU (five references for preliminary rulings during the last five years)<sup>52</sup>. However, there are no cases where the Constitutional Court would have used exclusively EU law as the yardstick in its judicial review of national law – all the previous cases that involved EU law issues were adjudicated on the basis of Latvian Constitution or Latvian laws and the EU law was used only as an additional argument. On the other hand, the Constitutional Court has not explicitly denied its right to review the legality of Latvian law in light of EU law. The issue of jurisdiction of the Constitutional Court to perform judicial review of national law with the EU law as the only yardstick deserves separate in-depth analysis and is not the main focus of this article. Taking into account general openness of the Latvian Constitutional Court towards the EU law, one can expect that the future case law will shed light on this grey area of application of the EU law.

### 3.3. *Simmenthal* and the Latvian administration

There is no practice (to the best knowledge of authors) of any administrative institution in Latvia which would have made direct reference to the *Simmenthal* doctrine or disapplied Latvian law on its own motion. This is hardly surprising since Latvian Administrative Procedure Law contains a clearly formulated prohibition to do so in the Art. 15:

*(11) If an institution is required to apply a legal provision but has reasonable doubts as to whether this legal provision is compatible with a legal provision of higher legal force, the institution shall apply such legal provision but shall immediately inform a higher institution and the Ministry of Justice of its doubts by means of a reasoned written report.*

<sup>52</sup> Cases of the Latvian Constitutional Court 2016-04-03, 2018-18-01, 2019-28-0103, 2020-24-01, 2020-33-01.

Therefore, in comparison with courts, a different procedure is set for the administrative authorities in the process of examining the constitutionality of a legal norm, namely, even if there are reasonable doubts as to whether the applicable norm is in conformity with a provision of higher legal force, the authority still must apply that norm.<sup>53</sup> The article is formulated rather broadly and does not distinguish amongst various kinds of legal provisions, therefore, it covers national law, as well as international and EU law.

This provision contradicts the very purpose of *Simmenthal* doctrine. Not only does it preclude administration from following the *Simmenthal*, but it also directly threatens effective application of EU law. Compared with the German approach to the competence of administrative authorities to immediately apply EU law, Latvian approach in effect precludes supremacy and direct effect of EU law until the discrepancy of national law is resolved by the legislator. In contrast German administrative authorities are precluded from declaring legislative norms void, but they are not precluded from disapplying those norms in certain situations, whereas Art. 15(11) of the Latvian Administrative Procedure Law not only prohibits declaring a legislative norm void (which is presumed self-evident and therefore is not even stated in the article), but also contains a prohibition to disapply the national legal provision, even if it contradicts EU law.

It is hard to estimate how big of an issue it is in practice. On the one hand, similarly as with the application of the *Simmenthal* doctrine in practice by courts, Latvian administrative authorities still can use the indirect effect of EU law and do their best in interpreting the Latvian laws in accordance with the EU law – Art. 15(11) of the Latvian Administrative Procedure Law does not preclude that. However, that obviously does not ensure full effectiveness of EU law. What somewhat alleviates the problem is that there is a well-developed internet portal, maintained by the Ministry of Justice, that covers, among other things, topical information on how the EU law has been implemented in Latvia.<sup>54</sup> Additionally, in some areas there are internal guidelines (similarly as in Germany) that help administrative authorities to interpret Latvian laws in accordance with the EU law. Typical institutions of Latvian public administration that use internal guidelines (at times also in areas covered by the EU law) are State Revenue Service, Competition Council, State Data Inspection and Consumer Rights Protection Centre.<sup>55</sup> However, in comparison with Germany, the obligations and culture of applying internal guidelines in Latvia are not that common and developed.

<sup>53</sup> Briede J. (ed.). *Administratīvā procesa likuma komentāri*. Rīga: Tiesu Namu Aģentūra, 2013, p. 248.

<sup>54</sup> See: <https://www.estiesibas.lv/> [viewed 28.11.2021.].

<sup>55</sup> On detailed analyses of how the system of internal guidelines in Latvia works and what are the challenges in that regard, see: Pastars E., Novicka S., Priekulis J. *Iestāžu vadlinijas – labā prakse vai likuma atrunas principa pārkāpums*. *Jurista Vārds*, 24.01.2017, No. 4(358).

## Conclusion

In the case of Germany this research concludes that court practice largely is in conformity with *Simmenthal*. Accordingly, courts frequently refer questions to the CJEU or explicitly refer to the *Simmenthal* jurisprudence. While court practice is relatively well accessible and transparent, it is more difficult to review administration. However, the practice in German administration to work with administrative provisions which are continuously brought in line with developments in EU law, helps to provide overall adherence to the *Simmenthal* doctrine. It is more on an academic level that this analysis has illustrated a dilemma between the strict application of the *Simmenthal* doctrine and German constitutional law. This scenario would eventually require the administration to interfere with the judiciary and thus act contrary to the (German) rule of law.

The analysis with regard to Latvia indicates that, as far as courts are concerned, legislation and court practice generally complies with *Simmenthal* requirements. However, duties of Latvian courts in relation to the application of the EU law (its place in the legal hierarchy and the duty to refer to the Constitutional Court) seem to be purposefully vague. The reason for such ambivalence is that the Latvian Administrative Procedure Law needs to reconcile the primacy of EU law with the supremacy of the Latvian Constitution. The result is an indistinct formulation which neither clearly acknowledges primacy of EU law, nor tells Latvian courts or administration what exactly to do when finding national rule that conflicts with EU law.

One avenue for solving this legislative tentativeness would be to amend the Latvian Administrative Procedure Law. Those amendments could, firstly, attempt to take on the uncomfortable task of defining the place of EU law in the Latvian hierarchy of norms and, secondly, clarify the scope of duty of administrative courts to refer to the Constitutional Court under Art. 104 of the Administrative Procedure Law. Another, alternative solution would be a more conceptual legislative shift mirroring the approach used in the Latvian Civil Procedure Law and Latvian Criminal Procedure Law, which, instead of spelling out the details of interaction between national and EU law, emphasizes the primacy of EU law and the case law of the CJEU. Finally, instead of legislative amendments, the Constitutional Court is in the position to provide in its case law an authoritative interpretation of existing Latvian law in the light of *Simmenthal* and the primacy of EU law.

To conclude, one might wonder whether the *Simmenthal* doctrine needs revision on the EU level by the CJEU itself. Of course, *Simmenthal* line of cases fit within the general framework of the CJEU's efforts to ensure maximum efficiency of EU law and utmost possibilities for individuals to use EU law at the national level. Yet, as the present research shows, the application of the *Simmenthal* doctrine to national administrative authorities, i.e., their duty to disapply national legislation, is a far cry from the reality of national practice and may sit uneasily with the principle of separation of powers.

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## EFFECTIVE MEASURES AGAINST HARMFUL DISINFORMATION IN THE EU IN DIGITAL COMMUNICATION

**Keywords:** disinformation, digitalization, European Union, big data, rights to privacy, freedom of speech

### Summary

Digitalisation has opened new technological horizons before society in terms of creating a better physical world and personal life. Impact of technologies on medicine, reduction of environmental pollution, resource savings and other areas is obvious. Digital technologies kept Latvian parliament (*Saeima*), government, public institutions, schools and business open or working remotely during pandemic to ensure running of the state, economy and society under restrictions and preventing close contact. Pandemic would have made our lives significantly harder 30 years ago.

Digital revolution is on the rise. Global data output is doubling every year. Just picture hundreds of thousands of *Google* searches and *Facebook* entries we generate every minute. They convey valuable information about what we think and experience.

It has also become apparent that technological euphoria has clouded our vision and we have failed to spot the threats to democracy, human rights and freedoms. Digitalisation come with great opportunities, but it also poses enormous risks, especially for democracy and rule of law.

On 15 December 2020, European Commission announced two new legislative proposals (proposals for regulation) – Digital Services Act<sup>1</sup> and Digital Markets Act<sup>2</sup>. Their main objective is to make internet safer for people who use it, in particular, for buying goods and services, and for the first time ever these regulations also contain provisions regarding reduction of threats to democracy and rule of law emanating from digital tools.

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<sup>1</sup> Available: <https://eur-lex.europa.eu/legal-content/LV/TXT/HTML/?uri=CELEX:52020PC0825&from=LV> [viewed 24.01.2022.].

<sup>2</sup> Available: <https://eur-lex.europa.eu/legal-content/LV/TXT/HTML/?uri=CELEX:52020PC0842&from=LV> [viewed 24.01.2022.].



This paper analyses two significant legal risks associated with digitalisation that need to be mentioned: Big Data threats to fundamental human rights such as privacy (I) and threats to freedom of speech on social media (II), which are then evaluated from the perspective of interconnected legislative proposals announced by the Commission on 15 December 2020 (Digital Services Act and Digital Markets Act), followed by an assessment of how well they address (or not) the aforementioned risks (III). In conclusion, paper offers several proposals on how Latvia should address these issues during consultation process (IV).

## 1. Big Data and privacy risks

### 1.1. Big Data

Digitalisation generates Big Data.<sup>3</sup> Big Data comes from two main sources. Firstly, it is collected, and harvesting happens at an ever-increasing pace. And it is also generated by conflating the data – by stringing the data together to multiply its informational value.<sup>4</sup>

Big Data is characterised by three Vs: the enormous volume (*Volume*), enormous speed at which data is collected and processed (*Velocity*), and diversity (*Variety*).<sup>5</sup>

Big Data is primarily about the volume. Within the Social Media space, for example, *Volume* refers to the amount of data generated through websites, portals and online applications. *Volume* encompasses the available data that are out there and need to be assessed for relevance. *Facebook* has 2 billion users, *YouTube* 1 billion users, *Twitter* 350 million users and *Instagram* 700 million users. Every day, these users contribute to billions of images, posts, videos, tweets etc., thus generating huge volumes of data. It all becomes part of these large data sets.<sup>6</sup>

Collecting and processing speed (*Velocity*) reflects the rate at which data is produced. Staying with our social media example, every day 900 million photos are uploaded on *Facebook*, 500 million tweets are posted on *Twitter*, 0.4 million hours of video are uploaded on *YouTube* and 3.5 billion searches are performed in *Google*. Big Data helps these companies accept the incoming flow of data and at the same time process it fast, so that it does not create bottlenecks.<sup>7</sup>

*Variety* in Big Data refers to all data that has the possibility of getting generated either by humans or by machines (computers, gadgets, etc.). The most commonly added data are structured – texts, tweets, pictures & videos. However, unstructured data like emails, voicemails, hand-written text, audio recordings etc,

<sup>3</sup> Pääkkönen P, Pakkala D. Architecture and Classification of Technologies, Products and Services for Big Data Systems, Big Data Research. Vol. 2, Issue 4, December 2015, pp. 166–186. Available: <https://www.sciencedirect.com/science/article/pii/S2214579615000027> [viewed 24.01.2022.].

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Understanding the 3 vs of Big Data – Volume, Velocity and Variety. 8 September 2017. Available: <https://www.whishworks.com/blog/data-analytics/understanding-the-3-vs-of-big-data-volume-velocity-and-variety/> [viewed 24.01.2022.].

<sup>7</sup> Ibid.

are also important elements under *Variety*. *Variety* is all about the ability to classify the incoming data into various categories.<sup>8</sup> All this enormous diversity of data contributes to the *Variety* of Big Data.

The three Vs describe the data to be analysed. Analytics is the process of deriving value from that data for the user.<sup>9</sup>

## 1.2. Data sources

Big Data have significant impact on our social processes and personal life, and this influence is bound to increase even further. The question is: what do we want to extract or get from such data?

Data sources can be broadly attributed to two groups in terms of origin: data generated technologically, and data linked to humans. For example, modern supercomputers, and soon also quantum computers, are able to detect magnetic waves from distant galaxies, trace COVID-19 mutations or test strength of materials, and such data, which is technologically generated, collected and processed, is less sensitive from societal and legal point of view than non-anonymised data linked to humans. And that is as far as technologically-generated and anonymised human data will be analysed here.

However, when non-anonymised data about a particular person is being collected, stored and processed to identify their behaviour, location, contacts with others, or biological features, that is an entirely different case. It is no longer a concern from scientific and technological perspective, it becomes a concern for the society, democracy, politics and law.

## 1.3. Rights to privacy

Democratic countries that uphold the rule of law have created privacy safeguards.

These rights were first described by Louis Brandeis, associate justice on the Supreme Court of the United States, in his 1890 article “Right to Privacy” for the Harvard Law Review.<sup>10</sup> “The right to be left alone”, coined by Brandeis, is a perfect representation of the purpose and intent of these rights. They are about the right to be left alone, to be yourself.

Although this article was published 130 years ago and, while the practical and theoretical scope of privacy laws has significantly broadened and deepened, their content, purpose and mission has remained unchanged. These rights, which are closely connected with human dignity and subjectivity, give you an opportunity

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<sup>8</sup> Understanding the 3 vs of Big Data – Volume, Velocity and Variety. 8 September 2017. Available: <https://www.whishworks.com/blog/data-analytics/understanding-the-3-vs-of-big-data-volumevelocity-and-variety/> [viewed 24.01.2022.].

<sup>9</sup> Volume, velocity, and variety: Understanding the three V's of big data, 2018. Available: <https://www.zdnet.com/article/volume-velocity-and-variety-understanding-the-three-vs-of-big-data/> [viewed 24.01.2022.].

<sup>10</sup> Warren S., Brandeis L. The Right to Privacy. Harvard Law Review, 4, 193, 15 Dec. 1890.

to be yourself, have personal space where you can be free from outside influences or can independently form your beliefs, identity and be treated with respect as a subjective individual and equal member of society who interacts with public domain and is part of a public discourse.<sup>11</sup>

In Latvia, such rights are guaranteed by Art. 96 of the constitution, *Satversme*. Without these rights, democracy, which is essentially meant to provide any person a chance to establish themselves in the public domain, will simply not work. Any undue restrictions of such rights may undermine the constitution, government and social processes of democratic countries, which uphold the rule of law.

#### 1.4. Threats to privacy rights

Digital surveillance of humans or *tracking*, or as one might describe it spying, which allows compiling and aggregating huge Big Data sets, human profiling<sup>12</sup>, which makes use of algorithms to predict human behaviour in different information contexts (*prediction*) and uses such predictions about human response to create custom information contexts or filter bubbles to trigger the desired human reactions (micro-targeting) are at the core of the business model employed by big well-known global online platforms.<sup>13</sup>

Threats to privacy rights in digital domain come from such business models. In today's world, once you go online, you are constantly monitored and profiled. It is virtually unavoidable<sup>14</sup>, unless you are ready to significantly limit your online opportunities, which means that you are actually excluded from social interactions. Surveillance, conducted against your rights to privacy, serves a very clear purpose from the perspective of global online platforms, their business and other entities. The purpose is to label you, or micro-target you into specific behaviour.

<sup>11</sup> Benn S. Privacy, freedom, and respect for persons. In: Schoeman F. (ed.). *Philosophical Dimensions of Privacy: An Anthology*. Cambridge University Press, 1984, p. 223.

<sup>12</sup> Definition of 'profiling' in Art. 4(4) of the General Data Protection Regulation: 'profiling' means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements.

<sup>13</sup> Zubov S. *The Age of Surveillance Capitalism. The Fight for a Human Future at the New Frontier of Power*. New York, Public Affairs, 2019.

<sup>14</sup> Following the adoption of EU General Data Protection Regulation and CJEU judgement (of 1 October 2019 in the Case C-673/17, Planet 49), online websites visited by users are now required to ask for visitor's consent for cookies that trace online activities of users. Definition of 'consent' in Art. 4(11) of the General Data Protection Regulation: 'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her. It is debatable from the human rights perspective, whether consent without an actual alternative is legally a real choice, especially when there are sites that you can actually visit only when *clicking* 'agree' (for example, public institutions or private monopolies). Anyhow, this should be subject to 'meaningful consent' from the user and pushing 'agree' should not be considered adequate consent. Collection, Targeting and Profiling of Consumers Online. BEUC Discussion paper, 2020. Available: <https://www.beuc.eu/publications/2010-00101-01-e.pdf> [viewed 24.01.2022.].

People are usually oblivious or unaware of such manipulation. It can be used to trigger particular financial behaviour, but it becomes very dangerous once it is used to influence personal or collective political beliefs and corresponding political action. It raises questions about compatibility of such business models with democratic governments and rule of law.<sup>15</sup> It is a major data protection challenge, which prevents us from finding an efficient solution.<sup>16</sup>

## 2. Social media threats to freedom of speech

Global digital space has created numerous new opportunities at the local, national, regional and global level. This includes all types of political activism, cultural exchanges and human rights advocacy. Global online conglomerates have created human communication platforms. Most people, public bodies and private businesses prefer to communicate mostly online. Until now, there has been very little regard for the fact that global communication platforms created by these global conglomerates are run according to house rules defined by their owners.

This has led to potential abuse of global communication platforms: to spread hate speech or child pornography, incitement to violence, and other activities that are prohibited in the real world. Authorities can apply fines and even criminal penalties for such violations. However, when it comes to digital domain, the lines between freedom of speech, expression and privacy are less distinct, more blurred and subject to great many interpretations.

Democratic countries that maintain the rule of law do guarantee freedom of speech and expression. In the case of Latvia, it is the Art. 100 of *Satversme*. It is one of the fundamental rights available to citizens. Respect for it is a precondition for efficient democracy as a form of government. Notably, like many other human rights, this freedom is not absolute. Its scope is defined in Art. 116 of *Satversme*. It may be restricted to achieve legal balance with the rights of others and alleviate real and direct threats to public safety.<sup>17</sup>

Eradication of hate speech serves public interests, but it is equally as important to ensure that digital domain does not restrict freedom of speech. Any such restrictions should only be applied as the last resort. As European Court of Human Rights indicates in one of its judgements, freedom of speech also applies to information and ideas “that offend, shock or disturb the State or any sector of

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<sup>15</sup> Cf.: Bennett C. J., Smith O.-M. Privacy, Voter Surveillance and Democratic Engagement: Challenges for Data Protection Authorities. 2019. Available: [https://privacyconference2019.info/wp-content/uploads/2019/11/Privacy-and-International-Democratic-Engagement\\_finalv2.pdf](https://privacyconference2019.info/wp-content/uploads/2019/11/Privacy-and-International-Democratic-Engagement_finalv2.pdf) [viewed 24.01.2022.].

<sup>16</sup> Witzleb N., Paterson M. Micro-targeting in Political Campaigns: Political Promise and Democratic Risk. Available: [https://www.researchgate.net/publication/344839124\\_Micro-targeting\\_in\\_Political\\_Campaigns\\_Political\\_Promise\\_and\\_Democratic\\_Risk](https://www.researchgate.net/publication/344839124_Micro-targeting_in_Political_Campaigns_Political_Promise_and_Democratic_Risk) [viewed 24.01.2022.].

<sup>17</sup> Constitutional Court judgement in Case 2003-05-01, (22).

the population”.<sup>18</sup> This means that any attempts to restrict free speech that does not violate rights of other persons are to be considered a violation of people’s right to freedom of expression.

Large online platforms, global digital conglomerates are part of private businesses mostly headquartered in the US and governed by American laws, which allow them to **control** and delete content uploaded by users when they *suspect* that such content contains, for instance, false medical facts, hate speech or incitement to violence.

However, user-generated content uploaded to these websites is also part of Latvia’s public discourse, i.e., part of democratic and political process.<sup>19</sup> Any lines between legal and illegal content can only be defined by legislature democratically elected by people. Furthermore, such lines may differ from one country to another. Given its past experience, Latvian society is extremely sensitive to any freedom of speech issues.

Global online giants have created digital communication platforms that have become the main communication media for people. Without them our civic participation is almost impossible. These companies “govern” our online social lives.<sup>20</sup> The extent to which a democratic state can restrict its citizens’ rights to free speech is expressly defined in constitution. Any such restrictions are an exclusion and impact determination should remain a prerogative of independent courts,<sup>21</sup> whereas private companies, these enormous global internet giants, are unrestricted in their choice of how to limit freedom of speech because they operate in an unregulated or grey area. Their direct, and more importantly, indirect influence on humans, political discourse in a democratic society and personal communication is immense. Global online giants have amassed huge power. Power, which is beyond the reach and control of democratic institutions.

Hence, the very fact that global internet giants are controlling key democratic discourse platforms by deleting, preventing or otherwise limiting free speech on their privately owned websites that are designed for profit purposes is quite alarming.<sup>22</sup> It is a threat to common fundamental values and democracy and rule of law as a form of government.

President of Latvia Egils Levits has noted that social media algorithms or unknown anonymous individuals should not be allowed to decide how to limit the free speech provided by *Satversme* of Latvia. In a democratic country governed

<sup>18</sup> ECtHR judgement in *Handyside v. United Kingdom*, C-5493/72, (49).

<sup>19</sup> Comp.: Levits E. National information and democratic discourse space as an element of democratic government. *Jurista Vārds*, Issue 9, 1 March 2016.

<sup>20</sup> Suzor N. P. *Lawless: the secret rules that govern our digital lives and why we need new digital constitutions that protect our rights*. Cambridge University Press, 2019. Available: file:///C:/Users/konto-2/Downloads/Suzor%202019%20Lawless-2018-11-19T13\_55\_25.098Z.pdf [viewed 24.01.2022.].

<sup>21</sup> See: Šņepste I. Default restrictions on free speech online: concept and legitimacy. *Jurista Vārds*, Issue 1, 5 January 2021.

<sup>22</sup> Comp.: Stjernfelt F., Lauritzen A. M. *Your Post has been Removed*. Springer Open., 2020, p. 83. Available: <https://link.springer.com/content/pdf/10.1007%2F978-3-030-25968-6.pdf> [viewed 24.01.2022.].

by the rule of law, legal boundaries of free speech are defined by legislature, whereas courts decide whether such boundaries have been overstepped.<sup>23</sup>

That is why Europe has moved from a debate on necessity to regulate<sup>24</sup> internet business, and especially global online conglomerates or the big online platforms, to action. It has become rather apparent that traditional data protection paradigms, including the most sophisticated forms of data protection such as the General Data Protection Regulation, are falling short of protecting privacy, free speech and thus also the democracy itself.

### 3. Digital Services Act and Digital Market Act packages

European Commission announced these two proposals for regulation, the Digital Services Act and Digital Market Act, on 15 December 2020.

Digital Services Act package defines basic requirements and principles applicable to online platforms and how they publish and distribute content. In addition to offering a framework for holding platforms liable for inappropriate content posted by their users, it also defines the main features of content moderation (a term substituting the less appealing censorship<sup>25</sup>) policies and their enforcement.<sup>26</sup> Proposal, *inter alia*, provides:

- actions against illegal content posted by users, including mechanisms allowing users to notify presence of such content and platforms to cooperate with trusted flaggers;
- protection of recipients of the service and their right to appeal content blocking;
- partial algorithm transparency obligation for online platforms.

<sup>23</sup> President of Latvia: we must prevent attempts to appropriate freedom of speech. Available: <https://www.president.lv/lv/jaunumi/zinas/valsts-prezidents-varda-un-maksas-briviba-nedrikst-tikt-sasaurinata-26622#gsc.tab=0> [viewed 24.01.2022.].

<sup>24</sup> Dobber T., Ó Fathaigh R., Zuiderveen Borgesius F. J. The regulation of online political micro-targeting in Europe. *Internet Policy Review*. Vol. 8, Issue 4, 31 December 2019. Available: <https://policyreview.info/articles/analysis/regulation-online-political-micro-targeting-europe> [viewed 24.01.2022.].

Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, 15 December 2020. Available: <https://eur-lex.europa.eu/legal-content/LV/TXT/HTML/?uri=CELEX:52020PC0825&from=en> [viewed 24.01.2022.].

Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 15 December 2020. Available: <https://eur-lex.europa.eu/legal-content/LV/TXT/HTML/?uri=CELEX:52020PC0842&from=en> [viewed 24.01.2022.].

Dobber, T., Ó Fathaigh, R., Zuiderveen Borgesius, F. J 2019.

<sup>25</sup> See also: Stjernefelt F., Lauritzen A. M. *Facebook and Google as Offices of Censorship*. 2020. Available: [file:///C:/Users/konto-2/Downloads/Facebook\\_and\\_Google\\_as\\_Offices\\_of\\_Censorship.pdf](file:///C:/Users/konto-2/Downloads/Facebook_and_Google_as_Offices_of_Censorship.pdf) [viewed 24.01.2022.].

<sup>26</sup> Barata J. The Digital Services Act and the Reproduction of Old Confusions. 2 March 2021. Available: <https://verfassungsblog.de/dsa-confusions/> [viewed 24.01.2022.].

Notably, Regulation offers specific and more stringent requirements for big online platforms, as opposed to online business of other sizes, because these huge platforms are the biggest *users* of tracking, profiling, prediction and micro-targeting tools. They are defined as very large online platforms “that provide services to at least 10% of the Union’s population” (Art. 25).

Digital Market Act, *inter alia*, stipulates criteria for designating very large online platforms as gatekeepers who control access:

- dominant market position, significant impact on internal market and presence in several Member States;
- strong intermediary power, i.e., wide reach to masses of users;
- it has (or is likely to acquire) entrenched and durable position on the market, i.e., secure long-term position.

Providers (mainly global internet giants) designated as gatekeepers are required to ensure fair conditions for all, especially small and medium size enterprises and start-ups. For example, to prevent online search engines like *Google* from ‘pushing up’ its products or products marketed by its affiliated companies and partners in the search results.

Commission’s proposals are currently being debated in a number of European countries. Latvia is not yet among them. There is a considerable number of critical voices. According to them, there are two major conceptual weaknesses:

Firstly, Digital Services Act is focused on removing illegal content, with online providers having primary responsibility for such removal. In other words, providers are responsible for detecting illegal content posted by their users. Other users may flag such content for provider. They are called trusted flaggers. Companies can search for it themselves, which raises an immediate question: are these companies now allowed in fact to censor the content they upload? Is it compatible with free speech, which in democratic countries upholding the rule of law is regulated by democratically elected legislature? It must be considered that almost any decision to label content illegal and delete it may be contested on the grounds of legitimacy of such assessment. Should we really let algorithms make such legal determination?<sup>27</sup> And how would appeal procedures be set up considering the huge volume of potential protests? How does the rule of thumb or the existing list of banned words, which is not publicly available anywhere and is being used by algorithms of these platforms, fit into the concept of rule of law, given that it may lead to self-censorship undesirable in free and democratic society?<sup>28</sup>

<sup>27</sup> Use of algorithms in AI-assisted adjudication, comp: Kucina I. Algorithms in Courts and Predictive Justice. In: Iliopoulos-Strangas J., Levits E., Potacs M., Ziller J. (Hrsg.): Die Herausforderungen der digitalen Kommunikation für den Staat und seine demokratische Staatsform [The Challenges of Digital Communication for the State and its Democratic State Form]. Nomos, Baden-Baden; Stämpfli, Bern; Sakkoulas, Athens, 2021.

<sup>28</sup> Comp.: Benesch S. But *Facebook’s* Not a Country. How to Interpret Human Rights Law for Social Media Companies. Yale Journal on Regulation Online Bulletin, 2020. Available: <https://digitalcommons.law.yale.edu/jregonline/3/> [viewed 24.01.2022.].

Secondly, European Commission failed to muster sufficient courage (with a little nudge from lobbyists, most probably) to impose any serious restrictions, or better yet, ban, on profiling and micro-targeting.<sup>29</sup> As argued previously, digital human surveillance infrastructure with tracking and profiling that feed into micro-targeting is designed to infringe upon our privacy and find better handles for manipulating our behaviour. The very foundations of democracy are attacked, whenever these tools are directly or indirectly applied to achieve political influence.

However, one of the main achievements of the Digital Market Act is that it, albeit carefully, does address the issues surrounding surveillance, profiling and micro-targeting systems for the first time ever. Art. 29 of the Act stipulates a specific obligation in case of very large online platforms to specify in their terms and conditions the main parameters used in their recommender systems, as well as any options for the recipients of the service to modify or influence those main parameters that they may have made available, including at least one option which is not based on profiling. Users would benefit from greater transparency and opportunities to determine the extent of influence that very large internet platforms have over their choices. That is a large step forward in solving this rather complex problem.

The scope of the Digital Services Act is also raising some issues. Articles 5 and 14 apply to all kinds of services offered by platforms – not only social media, but also e-mails, cloud services, and so on. Does that mean censorship will also apply to private e-mails and information stored by users on cloud servers?<sup>30</sup>

Neither of the new legislative initiatives talks about accountability of very large internet platforms towards users for leakage of data. User information of 533 million *Facebook* users, including personal data and phone numbers, was leaked online in early April of 2021.<sup>31</sup> How was *Facebook* held liable? Did it have to notify its users about data leakage? Can users claim from *Facebook* a compensation for moral and material damage?

#### 4. What should Latvia do?

Like any other European Union Member State, Latvia is about to embark on a digital transformation. European Union is planning to invest major funds into digital transformation of Member State economies, work environments, communications and other systems.

What should Latvia do in this regard?

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<sup>29</sup> At a Glance: Does the EU Digital Services Act protect freedom of expression? Available: <https://www.article19.org/resources/does-the-digital-services-act-protect-freedom-of-expression/> [viewed 24.01.2022.].

<sup>30</sup> Ibid.

<sup>31</sup> 533 million *Facebook* users' phone numbers and personal data have been leaked online. *Business Insider*, 3 April 2021. Available: <https://www.businessinsider.com/stolen-data-of-533-million-facebook-users-leaked-online-2021-4> [viewed 24.01.2022.].



First of all, it should keep in mind that digitalisation is not just a technical exercise, there is also the social and legal dimension to it. Legal scientists should ensure that transformation positively benefits society and protects it from any adverse effects.

Secondly, investment decisions linked to digitalisation should consider the existing and growing trend of regulating digital environment in a way which safeguards individual rights to privacy from eroding and protects independent, autonomous decision-making. Current business models that are based on user tracking and conditioning through micro-targeting will most probably have to be discontinued in near future, although the above acts of the EU have been rather sparing towards existing practices.

Thirdly, instead of just waiting for 'things to happen', going with the flow, Latvia can become a key stakeholder in this discussion and contribute through very clear position and being vocal about proposals of the European Commission. The author of the current article believes Latvia should take the position that protects users and their fundamental rights and freedoms, while online businesses must adopt, and European Union legislation should support business models that respect these rights and freedoms.

Fourthly, Latvia should find its own innovative national-level legal tools that clearly define the line between desired and undesired effects of the digital transformation. Legal environment and legal infrastructure are just as important in the economy as capital, labour and other financial factors. Latvia is well positioned to create a sustainable legal environment and ensure that digital transformation happens faster and offers better opportunities, thus also boosting the economy.

## Conclusion

1. Digital revolution is on the rise. Global online giants which are mostly private companies have created digital communication platforms that have become the main communication media for people.
2. These enormous global internet giants are controlling key democratic discourse platforms by deleting, preventing or otherwise limiting free speech. And it is a threat to common fundamental values and democracy and rule of law as a form of government. Indeed, digitalisation comes with great opportunities, but it also poses enormous risks, especially for democracy and rule of law.
3. Considering the significance of these packages for the future European digital space, and rights and opportunities of users in this space, there is still a lengthy and scrupulous debate on various levels ahead of the adoption of these acts. Interests of the global online conglomerates and other internet players will certainly clash with individuals' interests. Citizens expect their privacy and freedom of speech to be regulated by national laws, which define the scope of these rights. They do not expect these matters to be governed by corporate interest and understanding of what is and what is not acceptable.

4. Latvia's and Europe's opportunity is to create an innovative legal approach towards accountability to platforms and make sure regulations protect their users instead of leaving them and their business models to their 'own devices' and creating regulatory framework around such *modus operandi*.
5. This is also a good time to lay down the fundamental constitutional elements, which will form the common European social fabric in the digital age. Debate on the digital constitutionalism is growing stronger by day. Rule of law and good governance are the basic elements of a new constitutional concept for managing and doing business online. These companies and their risks should be subject to a democratically legitimate scrutiny.

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## HOW MAY COVID-19 BE (MIS)USED AS A JUSTIFICATION FOR UNCOMPETITIVE TENDERING? CASE STUDY OF SLOVAKIA<sup>1</sup>

**Keywords:** COVID-19, public procurement, uncompetitive tendering, extreme urgency, proportionality

### Summary

The COVID-19 pandemic caused disaster in every area of life, public procurement notwithstanding. This article considers the problem of possible misuse of COVID-19 pandemic as a cover to justify uncompetitive tendering of public contracts. It contains the analysis of general conditions set by the EU law and also by national legislation, which must be met while using the method of direct awarding of contracts by contracting authorities, as well as specific conditions clarified by the European Commission in its 2020 Guidance for emergency situation procurement related to COVID-19. It also deals with the Slovak law applicable in this area, and the real practice of Slovak contracting authorities. In this regard, a quantitative analysis was realised to answer the question, whether Slovakia complies with the Union's rules in both levels – legislative, as well as in practical.

### Introduction

COVID-19 has indeed brought unpredictable challenges to the whole world. Amongst them, public procurement plays an important role. In this regard, various reports<sup>2</sup> from countries or international organizations indicate the consequences in the form of the loss of transparency or even worse, increase of frauds and

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<sup>1</sup> This paper was prepared within the project APVV-17-0641 "Improvement of effectiveness of legal regulation of public procurement and its application within EU law context".

<sup>2</sup> See, for example, FREE Network: Combating Misuse of Public Funds in COVID-19 Emergency Procurement. Available: <https://freepolicybriefs.org/2020/09/28/covid-19-emergency-procurement/> [viewed 08.11.2021.].

corruption. Other impacts led to disruption of certain supply chains, which caused a huge increase of demand for specific goods and services. Some governments therefore have been using COVID-19 as an unforeseeable event, which provide a justification for them to procure goods, services and even works without any call for competition, arguing that it is the case of extreme urgency. Clearly, that might have been the case of 2020. However, is this justification still applicable in 2021? European Commission was aware of possible abuse of the situation to evade competitive procurement rules within the European Union. As Ceocea et al. have aptly pointed out, [procurement] process that takes place under conditions of uncertainty and risk can be influenced by factors that are difficult to anticipate, which may disrupt both the conduct of public procurement processes carried out at the level of contracting authorities and the functioning of the public procurement system as a whole<sup>3</sup>. Therefore, soon after this pandemic bomb blasted, European Commission provided a Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis (hereinafter – COVID-19 Procurement Guidance). Research in this article is focused mainly on the two following questions:

- Does Slovakia comply with EU's COVID-19 Procurement rules?
- Has the situation in Slovakia changed during the particular waves of the pandemic?

The hypothesis presumes, that the Slovak Republic complies with the Union's public procurement rules applicable to COVID-19 uncompetitive tendering.

Methods such as doctrinal analysis, quantitative analysis, comparison, deduction, and synthesis were used in the research. For the purposes of this article, negotiated procedure without publication and direct awarding have the same meaning.

## 1. Conditions for uncompetitive tendering

The fundamental goal of the public procurement is to ensure the most efficient use of public funds and increase the efficiency of public spending.<sup>4</sup> This is to be ensured through the bidding procedure open to the widest competition possible. Competitive tendering simultaneously is the prerequisite for the sound application of the principle of non-discrimination in public procurement. As such, it presents the basic method of procuring goods, services and works under

<sup>3</sup> Ceocea C., Ceocea R. A., Vatamaniuc A., Mihălaş V. Organization of the Public Procurement Process at the Level of the Contracting Authorities in Romania. Particularities and Solutions for the management of Public Procurement Procedures organized in the Context of Emergency of COVID-19 Crisis. Studies and Scientific Researches. Economics Edition, 2020, No. 32, p. 42

<sup>4</sup> To objectives of the procurement, see for example Blažo O. and Kováčiková H. Access to the Market and the Transparency as Principles of Public Procurement in the Legal Environment of the EU Neighbourhood Policy. International and Comparative Law Review, Vol. 18, No. 2, 2018, pp. 218–236. <https://doi.org/10.2478/iclr-2018-0048>, p. 224.

EU public procurement law, regulated by the Public Procurement Directive<sup>5</sup> (hereinafter – PPD). However, PPD recognises particular derogations from open procedures of procurement. In these cases, contracting authorities do not publish prior calls for tender, contract terms are negotiated directly only with one supplier, formal procedural requirements are lowered or not applied, minimum time limits as well as stand-still clause are not applied, too. CJEU therefore have established that derogation from the duty to buy goods, services or works in competitive manner “must be interpreted strictly, and the burden of proof lies on the procuring authority” (Commission v. Greece<sup>6</sup>). Exemption therefore can be used only in very exceptional circumstances. Moreover, four general and four specific conditions have to be cumulatively met for approbation of such derogation:

Firstly, the procured supplies must be used for legitimate goal. Legitimacy of the goal can be verified through the assessment of competences and roles exercised by the contracting authority in comparison with those, which were entrusted to it in its statute. Consequently, procurement of goods, services or works, which do not serve for fulfilment of entrusted tasks of contracting authority, cannot be considered to be a tool for achievement of a legitimate goal.

Secondly, derogation must be [explicitly] established in applicable law. Legal background for COVID-19 justification can be found in the Article 32:2:c) PPD.<sup>7</sup> This provision sets further set of [specific] conditions which need to be simultaneously met alongside of general ones during direct awarding:

- there are reasons of extreme urgency;
- extreme urgency was brought about by events unforeseeable by the contracting authority;
- the minimum time limits applicable in competitive procurement cannot be kept;
- the situation of extreme urgency was not caused by contracting authority.

And, of course, they must also be met cumulatively (Commission v. Germany<sup>8</sup>). As pointed out by Roberto Caranta,<sup>9</sup> these requirements are drafted to make sure not every kind of urgency will do, and that contracting authorities cannot avail themselves of their sloppiness.

Thirdly, although the uncompetitive tendering, in fact, means the direct awarding of contract without any call for competition to selected undertaking,

<sup>5</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

<sup>6</sup> CJEU judgement of 4 June 2009 in Case C-250/07 Commission v. Greece, para. 34.

<sup>7</sup> “The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority.”

<sup>8</sup> CJEU judgement of 15 October 2009 in Case C-275/08 Commission v. Germany, para. 69.

<sup>9</sup> In Steinicke M., Vesterdorf P. L. EU Public Procurement Law. Baden-Baden: Nomos Verlagsgesellschaft, 2018, p. 437.

procurement regulation even in such cases requires a compliance with a special procedure – negotiation. Whilst direct awarding, the contracting authority always must unquestionably prove and duly record the reason of the use of such procedure. At the same time, it must also comply with the public procurement principles. Only the due application of principles of transparency and effectivity should guarantee that directly awarded contract is of the best quality and at the best price.

Finally, proportionality test shall ensure that contracting authority by direct awarding of contract does not overstep the limit, which is necessary for securing the attainment of the legitimate objective and the pursued objective of procurement – the purchase of goods, services or works of the best quality and at the best price. Necessity test, which must be done, shows, “whether there exists an alternative measure which achieves the same degree of satisfaction for the first value while entailing a lower degree of non-satisfaction of the second value”.<sup>10</sup> CJEU also pointed out, that

*health and life rank foremost among the assets and interests protected by the FEU Treaty and that it is for the Member States to determine the degree of protection which they wish to afford to public health and the way in which that degree of protection is to be achieved. Since the degree of protection may vary from one Member State to another, Member States must be allowed a measure of discretion (Medisanus<sup>11</sup>).*

However, as also reminded by the Slovak Public Procurement Office (hereinafter – PPO) in tender *Príprava strategického parku Nitra*,<sup>12</sup> direct awarding is an “ultimate solution in situations, where it is not possible to procure supply requested by contracting authority in any other way.” It may not be overused by applying it in any case. It may be used only on those occasions when it is not possible to procure the required supply in “classic” procedure in usual open (competitive) procedure. The contracting authority should therefore, actively and with the due diligence, assess the market situation. If there exists a possibility of competitive procurement and there are not cumulatively met conditions set in Article 32:2:c) of Public Procurement Directive, it must use one of the competitive procedures.

## 2. Conditions for COVID-19 justification

As aptly said by Sánchez Graells,<sup>13</sup> pandemic procurement may be characterised by: “procure what we need as best as you can, and worry not about the rules for now.” Surely, such approach is highly undesirable for effective functioning of Internal

<sup>10</sup> Pirker B. *Proportionality Analysis and Models of Judicial Review*. Amsterdam: Europa Law Publishing, 2013, p. 29.

<sup>11</sup> CJEU judgement of 8 June 2017 in Case C-296/15 *Medisanus d.o.o. v. Splošna Bolnišnica Murska Sobota*, para. 82.

<sup>12</sup> PPO decision of 29 September 2020 No. 13139-6000/2018-OD/5 *Príprava strategického parku Nitra*, para. 53.

<sup>13</sup> Sanchez-Graells A. *Procurement in the Time of COVID-19* (April 6, 2020). Forthcoming, Northern Ireland Legal Quarterly. Available: <http://dx.doi.org/10.2139/ssrn.3570154> [viewed 02.11.2021.].



Market. Hence, Commission swiftly reacted to pandemic situation by providing a COVID-19 Procurement Guidance. In this guidance, the Commission verified the flexibility of above-mentioned Article 32:2:c) PPO for use even in COVID-19 emergency procurements. However, it prioritizes the usage of other procedures – those which restrict the competition in the lowest possible way, providing the possibility to substantially reduce the deadlines in order to accelerate open or restrictive procedures. Only if such flexibility is not sufficient, direct awarding can be envisaged. Commission to this regard approves direct awarding for satisfying the immediate and short-term needs. Their purpose is to fill the gap until more stable solutions will be applied. In the medium term, [competitive] procedures with shortened deadlines<sup>14</sup> are considered to be “more reliable means” of getting the best quality at the best price, while ensuring the competition between bidders and greater choice of procured items.

For direct awarding, Commission requires the exceptional use applicable “if only one undertaking is able to deliver within the technical and time constraints imposed by the extreme urgency” (point 2.3). It also imposed a duty upon the contracting authorities to evaluate whether the conditions for direct awarding are met, and to justify the usage of this method in an individual report. In such report, contracting authority is obliged to clarify the unforeseeable event, extreme urgency, which makes compliance with general or shortened deadlines impossible, the causal nexus between the unforeseen event and the extreme urgency.

On the other hand, procurements to satisfy potential future needs or cover the needs not related to, or affected by, the pandemic “do not justify a direct award, unless there is, in each case, a demonstrable justification linked to emergency reasons”.<sup>15</sup>

Relevant case law of the CJEU relating to COVID-19 pandemic is not available yet. However, there is a pending case C-274/21 EPIC Financial Consulting v. Republik Österreich and Bundesbeschaffung<sup>16</sup> – a preliminary question submitted by an Austrian Federal Administrative Court on 28 April 2021 relating, *inter alia*, to direct purchase of antigen tests by some Austrian contracting authorities in the autumn of 2020.

### 3. Case of Slovakia

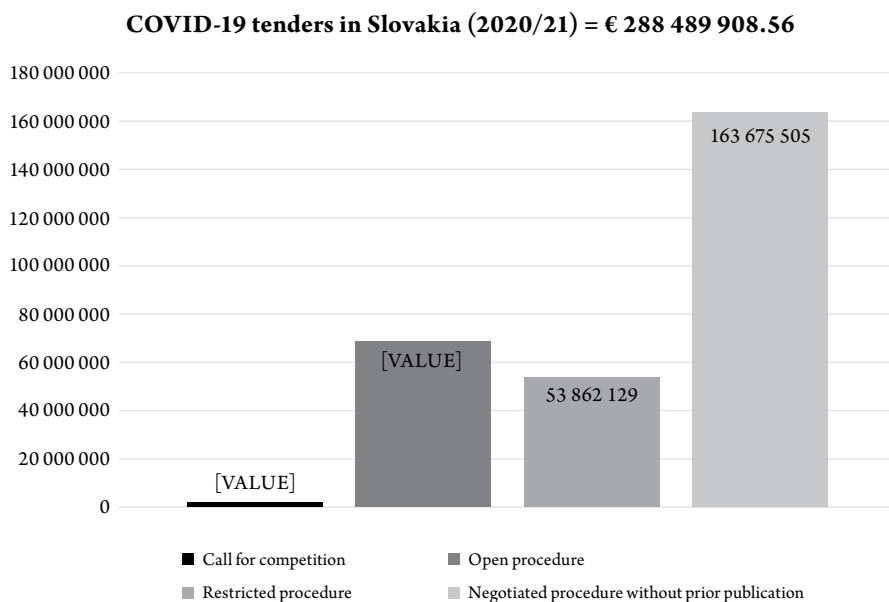
Slovakia regulates public procurement in Public Procurement Act, which complies with the Public Procurement Directive. Therefore, conditions which need to be met when using the uncompetitive method of procurement are the same as

<sup>14</sup> See part 2.2 of the COVID-19 Procurement Guidance.

<sup>15</sup> OECD: COVID-19 Competition and emergency procurement, p. 1. Available: <https://www.oecd.org/competition/COVID-19-competition-and-emergency-procurement.pdf> [viewed 03.11.2021.].

<sup>16</sup> Only the request for preliminary ruling from the Bundesverwaltungsgericht (Austria) lodged on 28 April 2021 is available: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=244552&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=39156653> [viewed 08.11.2021.].

the Union's ones. Thus, the research was focused on findings that helped to establish whether the real practise of procuring authorities follows those rules, as well. With this in mind, the author examined all public procurements with reference to "COVID-19", "coronavirus", or "pandemic" noticed in the Journal of Public Procurement provided by the Slovak Office for Public Procurement in the period from March 2020 (when the COVID-19 pandemic started) until October 2021. 104 results were found. The value of all these procurements in EUR without VAT was 288 489 908,56 EUR. Out of these, 36 procurements representing the 57% of the value (163 675 504,59 EUR) of all procurements, were procured without a prior publication, through direct award of the contract to a selected company. The rest of the tenders were procured through (more or less) competitive procedures, such as open procedure, restricted procedure or call for tenders (see Figure 1 below).



**Figure 1. Public procurements related to COVID-19 from March 2020 to October 2021 in EUR**

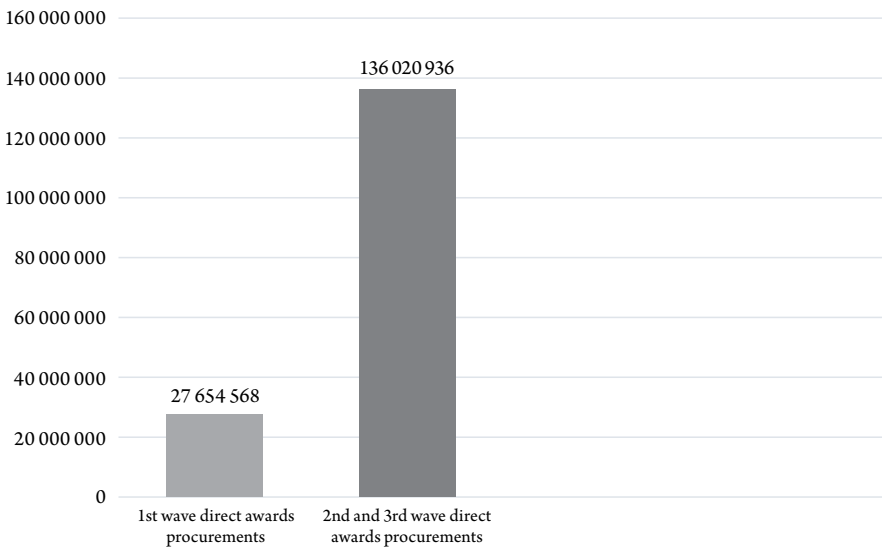
Source: processed by the author, data retrieved from <https://www.uvo.gov.sk/vyhľadavanie-zakaziek-4dd.html>

Such result was a surprise, yet, since it still could be explained by the urgency brought by unexpected situation brought on by the pandemic, further research was required. Justification of the direct awards due to an "extreme urgency" incurred by the "unexpected" pandemic situation surely might be applicable during the 1<sup>st</sup> wave of pandemic, which in Slovakia lasted from March 2020 to September 2020. However, the analysis proved that only 15 procurements from 36 of the total value of 27 654 568.33 EUR were realised during this period and therefore might comply with the COVID-19 procurement rules. The rest of procurements without

prior publication were realised during the 2<sup>nd</sup> wave or later (from October 2020 onwards).

The opinion of the author is, that after 6 months of pandemic, any reasonable contracting authority could not sufficiently prove that due to the ongoing pandemic situation there (still) exists a situation, which it could not foresee.

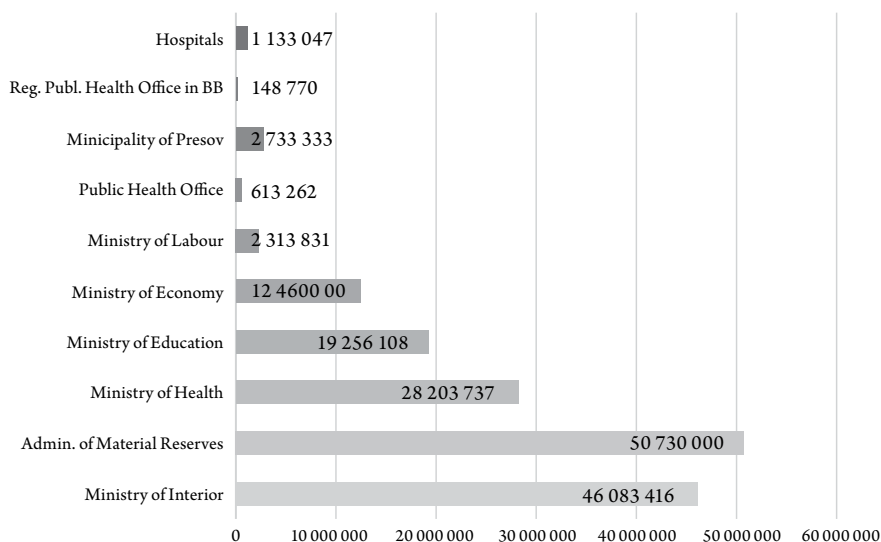
Worse yet, the total value of these procurements amounted to 136 020 936.26 EUR, i.e., 5 times higher than the value of the 1<sup>st</sup>-wave procurements (see Figure 2) and all central bodies (their representatives) were the members of Central Crisis Board, which decided on emergency situation in Slovakia.



**Figure 2. Procurements without prior publication in Slovakia from March 2020 to October 2021 in EUR**

Source: processed by the author, data retrieved from <https://www.uvo.gov.sk/vyhladavanie-zakaziek-4dd.html>

The substantiation behind the procedure was therefore analysed, too. Under the principle of proportionality, the contracting authority should prove that no other suitable and less competition-restricting possibility to obtain the procured goods or services was available. However, none of the analysed procurements contained such justification and almost all of them just briefly stated that such procedure was applied due to the emergency situation related to COVID-19. Further analysis was aimed at finding out the character of contracting authorities which used this uncompetitive method. The aim was to establish, whether such disputable action could be attributable to lower-level authorities, or, worse still, even to the central administration. The structure of contracting authorities together with the total value of procured tenders are presented in Figure 3 below:



COVID-19 Direct awards (2020/21) = € 163 675 504.59

Figure 3. Structure of contracting authorities using direct awarding in EUR

The analysis proved that the most valuable tenders were directly awarded by the ministries and the Administration of the State Material Reserves, i. e., the authorities on the central level of administration, which simultaneously are the members of Central Crisis Board<sup>17</sup>.

Therefore, it will be interesting to follow, whether Slovak Public Procurement Office will dare to hold a survey on these tenders to verify whether they comply with the rules for uncompetitive tendering, or will it remain passive, not daring to open this Pandora's box of dubious governmental purchases.

## Conclusion

The uncompetitive tendering should remain the last option for obtaining goods, services or works by public contractors. Even in the true absence of competitive alternative of procured commodity, the contracting authority must approach this purchase with the due care and remember to apply the principles of transparency, proportionality and non-discrimination, as well as follow the relevant procedural rules. Such approach guarantees gaining of the best value for money by contracting authority, preservation of functional and transparent

<sup>17</sup> Under Article 2 of the Statute of Central Crisis Board, it is composed also from the representatives of Ministries of Health, Economy, Interior, Labour, Education, as well as State Material Reserves Administration.

business environment and, at the same time, compliance with the Internal Market rules, of which the public procurement is an integral part.

The COVID-19 pandemic strongly affected public procurement. Release from strictness of competitive procedures surely helped states to handle the pandemic situation. On the other hand, it opened the door to undesirable space for misusing the situation to achieve other [barely legal] purposes. Therefore, for contracting authorities it is crucial to stay disciplined, strictly and objectively assessing, whether there exists a situation of extreme urgency, which has been unforeseeable and has not been caused by themselves, and even minimum time limits necessary for competitive procurement cannot be kept. Guidance of the Commission, despite its soft-law character, presents not only a helpful tool but, furthermore, the best practice to this regard.

However, the situation in Slovakia shows, what happens when contracting authorities do not follow the rules for uncompetitive regulations and best practice, or follow them just ostensibly. Obviously, COVID-19 situation can be misused. Despite the protracted duration of the pandemic, Slovak authorities still frequently procured goods and services through direct awarding, barely providing substantiation for such actions. The usual formula – “because it is COVID time” is no longer acceptable, since the claim that after almost 2 years of COVID-19 presence, it is still an “unforeseeable” event, is no longer plausible. Especially when the most valuable direct procurements are realised by contracting authorities which simultaneously are the members of Central Crisis Board. The results of the analysis has proved that Slovakia does not comply with the EU’s COVID-19 procurement rules. The initially advanced hypothesis therefore has not been confirmed.

However, final recommendation does not call for new legislation. The existing one is sufficient. The need for change lies in approach of contracting authorities towards purchasing goods and services and in exercising effective control by regulatory bodies.

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## SECTION 4

BALANCING THE INTERESTS  
OF THE INDIVIDUAL,  
SOCIETY AND THE STATE  
IN A STATE GOVERNED  
BY THE RULE OF LAW



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## LEGAL STANDARD FOR A NATIONWIDE ADMINISTRATIVE TERRITORIAL REFORM

**Keywords:** local municipalities, European Charter of Local Self-Government, administrative territorial reform

### Summary

The article reviews the procedural and substantial standards developed by the Constitutional Court of the Republic of Latvia regarding the nationwide administrative territorial reform, which took place in 2019–2020. The article analyses the development of interpretation of Art. 5 of the European Charter of Local Self Government, as well as content and application of the principle of prohibition of arbitrariness in evaluating legality of a law, which outlines the administrative territorial division.

### Introduction

Since regaining independence, the Republic of Latvia has performed two nationwide administrative territorial reforms, both aimed at creating larger and more efficient local municipalities. The first reform took place from 1998 to 2008, ending with adoption of the Law on Administrative Territories and Populated Areas<sup>1</sup> and eventually reducing the number of local municipalities from 522 to 119.<sup>2</sup> The second administrative territorial reform was commenced in 21 March 2019, when the Parliament adopted decision to “continue” the reform<sup>3</sup> and formally

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<sup>1</sup> Law on Administrative Territories and Populated Areas. Adopted 18.12.2008. Available: <https://likumi.lv/ta/en/en/id/185993-law-on-administrative-territories-and-populated-areas> [viewed 30.10.2021.].

<sup>2</sup> See Vilka I. Administratīvi teritoriālais iedalījums un pašvaldības [Administrative territorial division and local municipalities]. In: Akadēmiskie raksti 4 sējumos “Latvieši un Latvija”, III sējums “Atjaunotā Latvijas valsts”. Rīga: Latvijas Zinātņu akadēmija, 2013, pp. 217–220.

<sup>3</sup> Par administratīvi teritoriālās reformas turpināšanu. Available: <https://likumi.lv/ta/id/305738-par-administrativi-teritorialas-reformas-turpinasanu> [viewed 30.01.2021.].

ended in 10 June 2020, when the Parliament adopted a new Law on Administrative Territories and Populated Areas, reducing the number of local municipalities from 119 to 42.<sup>4</sup> Both reforms were very different. If the procedure of the first reform was regulated by a particular law, initially stipulated a framework for free mergers and lasted for nearly 10 years,<sup>5</sup> then the second reform was implemented without adopting any special procedural regulations, did provide only centralized solutions and was completed in 15 months' time. Both laws, which prescribed the administrative territorial reform have been reviewed by the Constitutional Court in 2009 and 2021 respectively.

The aim of this article is to analyse the procedural and substantial standard set by the Constitutional Court of the Republic of Latvia, particularly regarding the interpretation and application of the Art. 5 of the European Charter of Local Self-Government (hereinafter – the Charter).<sup>6</sup> The article is intended as a tool for facilitating comparative analysis regarding administrative territorial reforms, since the approach taken by the Constitutional Court in interpreting the Art. 5 of the Charter is a novel approach and lessons drawn from the Latvian experience. Furthermore, an analysis of the constitutional case law might also be of interest to foreign legal scholars.

The research of the article is based mainly on judgments of the Constitutional Court of Latvia, outlining the ratio of the judgments and analysing its implications.

## 1. Procedural standards of administrative territorial reform

The legal requirements for procedure of administrative territorial reform can be prescribed both by international legal acts and national legislation. The most notable requirement of international law is prescribed in the Charter. Art. 4, para. 6 of the Charter prescribes that “local authorities shall be consulted, insofar as possible, in due time and in an appropriate way in the planning and decision-making processes for all matters which concern them directly.” In addition, Art. 5 of the Charter stipulates that “changes in local authority boundaries shall not be made without prior consultation of the local communities concerned, possibly by means of a referendum where this is permitted by statute.”

Both Articles of the Charter are ambiguous regarding the subject that has to be consulted with. Words “local communities concerned” can be interpreted either as local citizens or local authorities, i.e., official representatives of the local municipality. The Constitutional Court had to deal with this ambiguity in its

<sup>4</sup> Law on Administrative Territories and Populated Areas. Adopted 10.06.2021. Available: <https://likumi.lv/ta/en/en/id/315654-law-on-administrative-territories-and-populated-areas> [viewed 30.10.2021.].

<sup>5</sup> Law on Administrative Territorial Reform. Available: [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Administrative-Territorial\\_Reform\\_Law.doc](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Administrative-Territorial_Reform_Law.doc) [viewed 30.10.2021.].

<sup>6</sup> European Charter of Local Self-Government. Available: <https://rm.coe.int/168007a088> [viewed 30.10.2021.].

judgement of 2009, in which two local municipalities contested that during the administrative territorial reform of 2008 the government and the parliament had not complied with the Art. 5 of the Charter. It should be noted that additional ambiguity regarding the interpretation of the Article 5 of the Charter was added by the official translation of the Charter in Latvian, which regarding English phrase “local communities” uses term *vietējā vara* (“local power”).<sup>7</sup> The Constitutional Court was aware of these various variants of interpretation and even had received an opinion from the Commission of Terminology of the Academy of Sciences, which stated that the words “local communities” used in the English version of the Charter should not be interpreted as “local power”. Instead, these words should be interpreted in the meaning of “entirety of all citizens of the respective administrative territory”. The Constitutional Court added, that, when “using grammatic interpretation, the Constitutional Court, if necessary, will take this opinion into account”.<sup>8</sup>

However, the Constitutional Court did not follow this interpretation, and there were no further references to this opinion in the judgment. The Constitutional Court concluded that the rights to be consulted should be interpreted in conjunction with Article 3, para. 2 of the Charter, which states that the right of self-government “shall be exercised by councils or assemblies composed of members freely elected [...], and which may possess executive organs responsible to them.” In addition, the Constitutional Court referred to Art. 101 of the Constitution, which, *inter alia*, states that “local governments shall be elected by Latvian citizens and citizens of the European Union who permanently reside in Latvia”. Thus, the Constitutional Court concluded that “consultations with the local communities in the meaning of the Article 5 of the Charter, first and foremost means consultations, where opinion of directly elected local council has been considered.”<sup>9</sup> It was not contested that during the reform of 2008 consultations with local residents were not mandatory and had not been organized with regard to local municipalities, which submitted the petition to the Constitutional Court.

The same conclusion regarding the Art. 5 of the Charter reached the Supreme Court of Estonia in 2016, when evaluating the legality of the administrative territorial reform. The Supreme Court concluded: “The duty to establish the opinion of residents does not arise from § 158 of the Constitution. The Chamber is of the opinion that § 158 gives rise to a duty on the part of the executive to hear the opinion of a local authority body. The Chamber notes that the European Charter of Local Self-Government also does not require hearing the opinion of

<sup>7</sup> Eiropas vietējo pašvaldību harta [European Charter of Local Self-Government]. Available: <https://likumi.lv/ta/lv/starptautiskie-ligumi/id/1173> [viewed 30.10.2021.].

<sup>8</sup> Judgment of the Constitutional Court of the Republic of Latvia of 30 October 2009 in Case No. 2009-04-06, para. 6. Available: <https://likumi.lv/ta/id/200047-par-administrativo-teritoriju-un-apidzivotu-vietu-likuma-2pielikuma-novadi-un-to-teritoriala-iedalijuma-vienibas-103punkta-vardu-dzerbenes-pagasts-un-kaives-pagasts-taurenes-pagasts-atbilstibu-1985gada-15oktobra-eiropas-vietejo-pasvaldibu-hartas-Spantam> [viewed 30.10.2021.].

<sup>9</sup> *Ibid.*, para.12.2.

local residents. Article 5 of the Charter stipulates: [...] Thus, the Charter leaves it to the State Party to decide whether to hold a referendum, which is binding under the Estonian legal order, or an opinion poll, which has no binding legal force in the Estonian legal order, or whether to give the competence of expressing the residents' opinion to a local authority body representing the community."<sup>10</sup>

In 2020, "A contemporary commentary by the Congress on the Explanatory Report to the European Charter of Local Self-Government" was published by the Committee on the Honouring of Obligations and Commitments by member States of the European Charter of the Council of Europe. The commentary reflected on different versions of the English and French text of the Article 5 of the Charter and gave a conclusion that "the term "local communities" should be interpreted in a way that also includes citizens and local civil society in general."<sup>11</sup>

However, the administrative territorial reform had already been decided upon in 2019 and the draft Law on Administrative territories and populated areas had already been submitted by the Cabinet of Ministers to the Parliament in 21 October 2019.<sup>12</sup> Although the ministry responsible for local municipalities organized various meetings with local councils and local residents, an assumption, based on the previous judgment of the Constitutional Court, was that although consultations with the local residents are desirable, they are not mandatory. In the cases decided by the Constitutional Court, it established that local municipalities have been consulted with in a following manner:

- 1) before or after the ministry had drafted the new territorial division, many municipal councils had decided to organize surveys of local residents, often asking an opinion, whether the local municipality should remain as a separate municipality. There were no uniform guidelines regarding such surveys (some were organized as a simple web survey in internet and some – even in a form similar to a referendum<sup>13</sup>);
- 2) the ministry responsible for local municipalities and drafting the new law had organized meetings with all municipal councils, which were affected by

<sup>10</sup> Judgment of the Constitutional Review Chamber of the Supreme Court of 20 December 2016 in Case No. 3-4-1-3-16, para. 136. Available: <https://www.riigikohus.ee/en/constitutional-judgment-3-4-1-3-16> [viewed 30.10.2021.].

<sup>11</sup> A contemporary commentary by the Congress on the Explanatory Report to the European Charter of Local Self-Government. 2020, p. 24. Available: <https://rm.coe.int/a-contemporary-commentary-by-the-congress-on-the-explanatory-report-to/16809cbf8c> [viewed 31.10.2021.].

<sup>12</sup> Register of the Laws of the 13<sup>th</sup> Saeima. Available: <http://titania.saeima.lv/LIVS13/SaeimaLIVS13.nsf/webSasaiste?OpenView&restricttcategory=462/Lp13> [viewed 31.10.2021.].

<sup>13</sup> The legality of such a survey was contested by the minister supervising local municipalities, and he suspended the legal act adopted by the municipal council to organize such a survey. Although the Latvian law did not provide a legal regulation for local referendums, the Constitutional Court decided that the local municipality was entitled to organize surveys in a manner similar to referendum. See judgment of the Constitutional Court of the Republic of Latvia of 15 May 2020 in Case No. 2019-17-05. Available: <https://likumi.lv/ta/id/314770-par-vides-aizsardzibas-un-reģionalas-attistibas-ministra-2019-gada-25-aprila-rikojuma-nr-1-259-par-ikskiles-novada> [viewed 31.10.2021.].

- the reform. However, often no minutes had been taken and therefore neither content, nor participants of these meetings had been identified;
- 3) in some instances, the ministry or the local municipality had organized special meetings with local residents;
  - 4) during the legislative process in the Parliament, all municipal councils were invited to the sittings of the committee responsible for the draft law and representatives of municipal councils, as well as residents of municipalities had an opportunity to present their arguments.

Before the proceedings in the Constitutional Court, there were no doubts that the standard of consultations outlined in the judgment of the Constitutional Court of 2009 was met. However, if the Charter would have been interpreted in a way that obliged the State party to consult with local citizens, then it was doubtful that any proof on meaningful consultations (for instance, minutes including opinions and proposals of the citizens) could be presented before the Constitutional Court.

In the judgment, the Constitutional Court somehow tried to align its previous conclusions with regard to Art. 5 of Charter with the Commentary of the Charter of 2020. The Constitutional Court gave its merits regarding compliance of the procedure with Art. 5 of the Charter with a simple reference to its judgment made in 2020 regarding the legality of survey conducted by Ikšķīle municipality.<sup>14</sup> In that judgment, in turn, the Constitutional Court, with a reference to point 6 of the judgment of 2009, where the opinion of the Terminology Council of the Academy of Sciences was outlined (see above), simply stated as a fact that the wording in Art. 5 of the Charter “local communities” means “local residents”, without giving any further explanations.<sup>15</sup> However, after this conclusion, the Constitutional Court made a reference to its judgment of 2009, where it gave the interpretation that the consultations with local communities “first and foremost means consultations, where opinion of directly elected local council has been considered”.<sup>16</sup> Having emphasized the importance of opinions of local residents, the Constitutional Court elaborated a test in order to evaluate the compliance of the consultation proceedings with Art. 5 of the Charter. The Constitutional Court stated that the purpose of consultations within the reform was to find out opinion of local residents and the local councils on various solutions of the administrative

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<sup>14</sup> Judgment of the Constitutional Court of the Republic of Latvia of 12 March 2021 in Case No. 2020-37-0106, para. 21.2. Available: <https://likumi.lv/ta/id/321703-par-administrativo-teritoriju-un-apdzivoto-vietu-likuma-pielikuma-administrativas-teritorijas-to-administrativie-centri-un-teritoriala> [viewed 31.10.2021.].

<sup>15</sup> Judgment of the Constitutional Court of the Republic of Latvia of 15 May 2020 in Case No. 2019-17-05, para. 16.3. Available: <https://likumi.lv/ta/id/314770-par-vides-aizsardzibas-un-reģionalas-attīstības-ministra-2019-gada-25-aprila-rikojuma-nr-1-259-par-ikšķīles-novada> [viewed 31.10.2021.].

<sup>16</sup> Judgment of the Constitutional Court of the Republic of Latvia of 30 October 2009 in Case No. 2009-04-06, para. 6. Available: <https://likumi.lv/ta/id/200047-par-administrativo-teritoriju-un-apdzivoto-vietu-likuma-pielikuma-novadi-un-to-teritoriala-iedalījuma-vienības-103punkta-vardu-dzerbenes-pagasts-un-kaives-pagasts-taurenas-pagasts-atbilstību-1985gada-15oktobra-eiropas-vietējo-pasvaldību-hartas-5pantam> [viewed 31.10.2021.].

territorial division, and to ensure that the state institutions managing the reform were informed about these opinions and evaluated them. Therefore, in order to evaluate, whether the consultations with the respective local municipalities during the process of drafting and reviewing the contested legal provisions, it shall be determined: 1) whether the municipal council had an opportunity, also by determining opinions of residents of the administrative territory, to prepare its own opinion regarding the planned reform and to submit proposals and objections to the relevant state institutions; 2) whether the time frame for these actions were reasonable; 3) whether the proposals and objections of local municipalities had been considered.<sup>17</sup> The Constitutional Court in three cases examined petitions from 19 local municipalities and did not find any breaches of this standard.

The first criterion is the most important novelty of the interpretation of Art. 5 of the Charter. On one hand, the Constitutional Court interpreted Art. 5 of the Charter as requiring consultations with local residents. On the other hand, it decided that the task of consulting with local residents lies within the competence of the municipal council. The Constitutional Court directly expressed a view that “it is the municipal council, who has the competence of finding out opinions of local residents within the preparation of the reform in order to present them to the state institutions.”<sup>18</sup> Although some municipal councils had organized surveys of local residents, there were instances, when the municipal council had not organized consultations with local residents. For example, the Constitutional Court determined that the municipality of Garkalne had not organized consultations with the local residents. However, the local residents had had the opportunity to express their views in the gathering organized with members of municipal councillors by the ministry. Both councillors and local residents had the opportunity to express their opinions in the sitting of the committee of the Parliament, as well. Therefore, local residents and the municipal council had the opportunity to present their views.<sup>19</sup> Similar situation was with municipality of Sala, which had not organized any surveys. However, the Constitutional Court determined that a petition to the ministry have been signed and submitted by 585 residents. The Constitutional Court again concluded that local residents have had an opportunity to express their proposals and objections.<sup>20</sup>

<sup>17</sup> Judgment of the Constitutional Court of the Republic of Latvia of 12 March 2021 in Case No. 2020-37-0106, para. 23.2. Available: <https://likumi.lv/ta/id/321703-par-administrativo-teritoriju-un-apidzivotu-vietu-likuma-pielikuma-administrativas-teritorijas-to-administrativie-centri-un-teritoriala> [viewed 31.10.2021.].

<sup>18</sup> *Ibid.*, para. 23.3.

<sup>19</sup> Judgment of the Constitutional Court of the Republic of Latvia of 28 May 2021 in Case No. 2020-43-0106, para. 10.1. Available: <https://likumi.lv/ta/id/323518-par-administrativo-teritoriju-un-apidzivotu-vietu-likuma-pielikuma-administrativas-teritorijas-to-administrativie-centri-un-teritoriala> [viewed 31.10.2021.].

<sup>20</sup> Judgment of the Constitutional Court of the Republic of Latvia of 21 June 2021 in Case No. 2020-41-0106, para. 17.1. Available: <https://likumi.lv/ta/id/324203-par-administrativo-teritoriju-un-apidzivotu-vietu-likuma-pielikuma-administrativas-teritorijas-to-administrativie-centri-un-teritoriala> [viewed 31.10.2021.].

This emphasis on opportunities to express proposals and objections is a very reasonable approach. The Constitutional Court acknowledged the importance of opinions of local residents and the manifestation of democracy in such consultations by referring to several documents of the Council of Europe, namely, the Recommendation Rec(2004)12 of the Committee of Ministers to Member States on the processes of reform of boundaries and/or structure of local and regional authorities<sup>21</sup> and the Resolution No. 437 (2018) of the Congress of Local and Regional Authorities on the consultation of local authorities by higher levels of government.<sup>22</sup> Opinions of citizens are welcomed in any policy decision making process, and they are of particular importance, when local matters are to be affected. However, there is a great difference in terms of purposefulness when the changes of local boundaries are made in a particular instance, affecting only several municipalities, and when they are made within a national administrative territorial reform. If the changes of borders have only local implications, then opinions of the residents are usually more direct and exact. However, within a nationwide territorial reform the consultations with local residents usually result in only general statements in opinion polls or a vast collection of very different arguments, starting with general objections against the purposes and necessity of reforms and ending with various comments on existing local problems and often contradicting proposals to their solutions. Although such a vast factual material might be useful in order to evaluate general attitude of the population, taking into account all such opinions, often based on a mixture of rational and emotional arguments, would often contradict to broader national interests, as well as uniform and rational approach towards policy decisions.

Another aspect, which somewhat diminishes the importance of consultations with local residents when introducing a national administrative territorial reform, is the fact that such consultations usually are organized only once and reflect opinions toward a project that can later be altered. When the draft project submitted for consultations is subsequently altered, then a new round of consultations is not mandatory. The Constitutional Court rightly argued that it was both acceptable and reasonable that the ministry, when consulting with the municipality, justified the purpose of reform, explain the criteria behind the administrative territorial division and submitted an already drafted proposal. Thus, a constructive process of the consultations and a purposeful hearing of opinions of local residents and the council are facilitated.<sup>23</sup> If changes to the borders of municipalities are made

<sup>21</sup> Recommendation Rec(2004)12 of the Committee of Ministers to member states on the processes of reform of boundaries and/or structure of local and regional authorities. Available: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805dbeda](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805dbeda) [viewed 30.10.2021.].

<sup>22</sup> Resolution No. 437 (2018) of the Congress of Local and Regional Authorities on the consultation of local authorities by higher levels of government. Available: <https://rm.coe.int/the-consultation-of-local-authorities-by-higher-levels-of-government-g/16808ecb38> [viewed 30.10.2021.].

<sup>23</sup> Judgment of the Constitutional Court of the Republic of Latvia of 28 May 2021 in Case No. 2020-43-0106, para. 9.1. Available: <https://likumi.lv/ta/id/323518-par-administrativo-teritoriju-un-apdzivoto-vietu-likuma-pielikuma-administrativas-teritorijas-to-administratiev-centri-un-teritoriala> [viewed 31.10.2021.].

within a nationwide administrative territorial reform, then the interests of local municipalities to be heard again and again on new solutions must be adjusted with interests of the state and other municipalities to conclude the reform in a reasonable time frame.<sup>24</sup>

Therefore, the ratio of the judgments of the Constitutional Court regarding interpretation of Art. 5 of the Charter is, as follows: when altering the boundaries of the local municipality, “local community”, i.e., local residents must be given an opportunity to express their proposals and objects to the draft of the reform. The competence to organize such consultations with the local residents lies with the municipal council. This does not preclude that state institutions, which are responsible for the reform, may provide for a more elaborate procedures of consultations or to organize such consultations on their own initiative. Failure of the local municipality to organize such consultations does not mean that Art. 5 of the Charter has been breached, insofar as the local residents have had the opportunity to express their views to institutions responsible for the reform.

Regarding the second criterion – the reasonability of the time frame from consultations – the Constitutional Court did not provide any stringent guidelines, but concluded that the timeframe had been reasonable. The opportunities to express opinions both for local residents and municipal council were available at least from 14 of May, when the Cabinet of Ministers approved the draft proposal of the administrative territorial division, up to the beginning of 2020 when the parliamentary committee started to review proposals for the second reading of the draft law.

The third criterion – consideration of the proposals and objections – was evaluated by the Constitutional Court mainly with references to the fact that the opinions and proposals had been submitted to the parliamentary committee and that they have been debated in the sitting of the committee. Nearly all surveys conducted by the municipalities showed that more than 85% of all residents expressed objections against mergers of their municipalities with other municipalities. The Constitutional Court already in 2009 stated that the Charter does not grant rights of veto and that a positive decision of the municipality is not a precondition of legality of a reform.<sup>25</sup> In the judgment of 2021 the Constitutional Court emphasized – the mere fact that opinion of the local community has not

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<sup>24</sup> Judgment of the Constitutional Court of the Republic of Latvia of 12 March 2021 in Case No. 2020-37-0106, para. 23.4.1. Available: <https://likumi.lv/ta/id/321703-par-administrativo-teritoriju-un-apidzivotu-vietu-likuma-pielikuma-administrativas-teritorijas-to-administrativie-centri-un-teritoriala> [viewed 31.10.2021.].

<sup>25</sup> Judgment of the Constitutional Court of the Republic of Latvia of 30 October 2009 in Case No. 2009-04-06, para. 8. Available: <https://likumi.lv/ta/id/200047-par-administrativo-teritoriju-un-apidzivotu-vietu-likuma-2pielikuma-novadi-un-to-teritoriala-iedalijuma-vienibas-103punkta-varదు-derbenes-pagasts-un-kaives-pagasts-tauresnes-pagasts-atbilstibu-1985gada-15oktobra-eiropas-vietejo-pasvaldibu-hartas-5pantam> [viewed 31.10.2021.].



been supported in the parliament, does not mean that proposals and objections have not been considered.<sup>26</sup>

## 2. Substantial standard of the administrative territorial reform

In 2009, when the Constitutional Court evaluated the legality of the previous administrative territorial reform, the Constitutional Court did not set any substantial standards that would impede the powers of the legislator. On the contrary, the Constitutional Court stated that the Constitutional Court “decided the case on the basis of legal arguments, in order to evaluate, whether any illegal decisions manifesting significant legal breaches, have been committed. In turn, choices on political decisions are within the competence of democratically elected legislator. [...] In this case as well the Constitutional Court abstains in evaluating arguments put forward by the municipal councils and which are targeted on political and economic utility [...] The task of the Constitutional Court in this case is only to evaluate, if, by adopting the contested provisions, due procedure has been observed.”<sup>27</sup> The only substantial argument regarding the reform was a conclusion of the Constitutional Court that municipal councils and their territorial scope in broad terms should be decided solely by the legislator and not delegated to the Cabinet of Ministers. This conclusion was made on the basis of the so-called theory of essentiality, i.e., that the most important issues in the state should be decided only by the legislator.<sup>28</sup>

However, while evaluating the reform of 2020, the Constitutional Court established a new standard regarding substantial constitutionality of the law on the administrative territorial division. Although the Constitutional Court acknowledged that the legislator had a broad discretion in deciding upon the administrative territorial division, it could not use this discretion contrary to the general principles of law, including the principle of prohibition of arbitrariness.<sup>29</sup> In order to evaluate whether the legislator has not acted arbitrarily,

<sup>26</sup> Judgment of the Constitutional Court of the Republic of Latvia of 12 March 2021 in Case No. 2020-37-0106, para. 23.7. Available: <https://likumi.lv/ta/id/321703-par-administrativo-teritoriju-un-apdzivoto-vietu-likuma-pielikuma-administrativas-teritorijas-to-administrativie-centri-un-teritoriala> [viewed 31.10.2021.].

<sup>27</sup> Judgment of the Constitutional Court of the Republic of Latvia of 30 October 2009 in Case No. 2009-04-06, para. 7.2. Available: <https://likumi.lv/ta/id/200047-par-administrativo-teritoriju-un-apdzivoto-vietu-likuma-2pielikuma-novadi-un-to-teritoriala-iedalijuma-vienibas-103punkta-vardu-dzertenes-pagasts-un-kaives-pagasts-tauresnes-pagasts-atbilstibu-1985gada-1Soktobra-eiropas-vietejo-pasvaldibu-hartas-Spantam> [viewed 31.10.2021.].

<sup>28</sup> Decision of the Constitutional Court of the Republic of Latvia of 20 January 2009 on termination of proceedings in Case No. 2008-08-0306, para. 16.3. Available: <https://likumi.lv/ta/id/186836-par-tiesvedibas-izbeigsanu-lieta-nr-2008-08-0306> [viewed 31.10.2021.].

<sup>29</sup> Judgment of the Constitutional Court of the Republic of Latvia of 12 March 2021 in Case No. 2020-37-0106, para. 19. Available: <https://likumi.lv/ta/id/321703-par-administrativo-teritoriju-un-apdzivoto-vietu-likuma-pielikuma-administrativas-teritorijas-to-administrativie-centri-un-teritoriala> [viewed 31.10.2021.].

the Constitutional Court should determine: 1) if the purpose of the reform has been established and it is directed toward the common good of society; 2) if the criteria used as a basis of the reform are directed towards reaching the purpose of the reform; 3) whether the legislator has followed the purpose of the reform and the criteria when adopting the regulation; 4) whether the legislator has weighed the interests of the local community, i.e., pros and cons of the particular solutions of the administrative territorial division, including the rights of democratic participation of the local community.<sup>30</sup> Additionally, the Constitutional Court emphasized that taking into account the doctrine of essentiality and the principles of parliamentary democracy, as well as the margin of appreciation of legislator to decide on the administrative territorial reform, the parliament in exceptional cases can alter the proposed draft of the Cabinet of Ministers. Therefore, the Parliament in exceptional cases can step back from the criteria of the reform, if such exception is based on rational considerations and conforms with the purpose of the reform.<sup>31</sup>

There are no doubts that the prohibition of arbitrariness as a general principle of law binds the legislator, including, when deciding upon administrative territorial division. However, this is the first case in the Constitutional Court, where this principle has been applied towards a law. In general, the formulations of the test seem to be reasonable, with the exception of the fourth criteria (the rights of democratic participation). The Constitutional Court used these criteria to underline that by creating larger municipalities, possibilities for democratic participation in local matters may be diminished if no supplementary mechanisms to enhance democratic participation are added. However, this aspect may be relevant in the context of the principle of democracy, and not as a special criterion within the principle of prohibition of arbitrariness.

The most controversial issue, however, is not the test of prohibition of arbitrariness, but its application in the cases before the Constitutional Court. In general, the principle of prohibition of arbitrariness is breached, when no reasonable arguments have been put forward by the legislator, when adopting one decision or another. In most cases the Constitutional Court did not establish arbitrariness. However, the Constitutional Court declared that this principle had been breached, when the territory of a new municipality did not comply with one of the criteria of the reform – a national or regional centre of development is situated within the territory of a municipality. The Constitutional Court decided that this criterion was one of the most important criteria of the reform.<sup>32</sup> During the parliamentary

<sup>30</sup> Judgment of the Constitutional Court of the Republic of Latvia of 12 March 2021 in Case No. 2020-37-0106, para. 25. Available: <https://likumi.lv/ta/id/321703-par-administrativo-teritorijuun-apdzivoto-vietu-likuma-pielikuma-administrativas-teritorijas-to-administrativie-centri-unteritoriala> [viewed 31.10.2021.].

<sup>31</sup> *Ibid.*, para. 28.

<sup>32</sup> Judgment of the Constitutional Court of the Republic of Latvia of 28 May 2021 in Case No. 2020-43-0106, para. 14.1. Available: <https://likumi.lv/ta/id/323518-par-administrativo-teritorijuun-apdzivoto-vietu-likuma-pielikuma-administrativas-teritorijas-to-administrativie-centri-unteritoriala> [viewed 31.10.2021.].

procedures, the parliamentary committee supported a proposal to restore in the division the already existing Saulkrasti municipality, which is located in the seaside, has a port and significant turnaround of citizens during the summer season. However, this territory did not have a status of regional development centre. It should be noted that the concept of “regional development centre” is mentioned in the Latvian National Strategy 2030 adopted by the *Saeima* in 2010. In this document, the whole concept is outlined in one page and the regional centres are 21 regional cities and 9 cities of national importance – they are expressed in a rather primitive map.<sup>33</sup> The concept of the regional centres was used previously as a political tool to concentrate EU funds in the most promising municipalities, and the whole approach to the concept of such centres was a political one. The entire concept of such centres has not been included in any law.

The members of parliament presented various arguments to support the idea of several municipalities, which did not comply with the abovementioned criteria. In the case of Saulkrasti municipality, it was argued that the municipality was a perspective centre of development, taking into account socio-economic data, dynamics of the number of residents, the strategic importance of the Saulkrasti as a seaside resort, as well as the necessity to expand the Skulte Port, which is located in the already existing Saulkrasti municipality.<sup>34</sup> The Constitutional Court dismissed these arguments, because these arguments have been too vague and were not based on exact data and research. The Constitutional Court refused to evaluate “projections about development of particular administrative territory”.<sup>35</sup>

The consequences of such an approach are harsh – it does seem that the Constitutional Court has rejected the reasons and arguments delivered by the members of parliament both in committee and plenary sittings solely because there are only “projections”, and these reasons and arguments are not based in exact data and research. Such a stringent approach, though, has created tensions between the Constitutional Court and the Parliament, and even brought about a constitutional crisis, when the Parliament decided to contradict the judgment in one of the cases.<sup>36</sup> Even at the time of drafting this article, there is no clear political solution on how to react in cases when the Constitutional Court has declared some territories of the newly established municipalities unconstitutional. Although

<sup>33</sup> Sustainable Development Strategy of Latvia until 2030, p. 62. Available: [https://www.pkc.gov.lv/sites/default/files/inline-files/LIAS\\_2030\\_en\\_0.pdf](https://www.pkc.gov.lv/sites/default/files/inline-files/LIAS_2030_en_0.pdf) [viewed 31.10.2021.].

<sup>34</sup> Judgment of the Constitutional Court of the Republic of Latvia of 12 March 2021 in Case No. 2020-37-0106, para. 28.1. Available: <https://likumi.lv/ta/id/321703-par-administrativo-teritoriju-un-apidzivoto-vietu-likuma-pielikuma-administrativas-teritorijas-to-administrative-centri-un-teritoriala> [viewed 31.10.2021.].

<sup>35</sup> Ibid.

<sup>36</sup> *Saeima sliecas nepildīt ST spriedumu un vēlas Varakļanus atstāt Rēzeknes novadā* [The *Saeima* leans towards in compliance with the judgment of the Constitutional Court and votes to leave Varakļani in the municipality of Rēzekne]. Available: <https://www.delfi.lv/news/national/politics/saeima-sliecas-nepildit-st-spridumu-un-velas-varaklanus-atstat-rezeknes-novada-plkst-1945.d?id=53252431> [viewed 07.11.2021.].

the test of prohibition of arbitrariness developed by the Constitutional Court is notable, its application in practice does seem to limit discretionary powers of the parliament to such amount that seems unjustified and, at least in the case of Latvia, has even created a constitutional crisis.

## Conclusion

1. The ratio of the judgments of the Constitutional Court regarding interpretation of Art. 5 of the Charter is, as follows: when altering the boundaries of the local municipality, “local community”, i.e., local residents must be given an opportunity to express their proposals and objects to the draft of the reform. The competence to organize such consultations with the local residents lies with the municipal council. This does not preclude that state institutions, which are responsible for the reform, may provide for a more elaborate procedures of consultations or to organize such consultations on their own initiative. Failure of the local municipality to organize such consultations does not mean that Art. 5 of the Charter has been breached, insofar as the local residents have had the opportunity to express their views to institutions responsible for the reform. This is a novel interpretation of Art. 5 of the Charter and is noteworthy addition to the practice of interpretation of the Charter by constitutional courts.
2. Consultations during a nationwide administrative territorial reform are less productive and therefore less significant, than consultations which are carried out in particular instances of border changes outside a nationwide administrative territorial reform.
3. The Constitutional Court has elaborated a novel substantial standard regarding evaluations of principle of prohibition of arbitrariness. Although the test elaborated by the Constitutional Court is well reasoned and does require the legislator to provide reasoned arguments, when altering the administrative territorial division, the standard set by the Constitutional Court does seem to be too stringent, and in practice significantly eliminates the discretion of the Parliament.

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## CONTROL OVER LEGALITY OF PARLIAMENTARY ELECTIONS IN A STATE GOVERNED BY THE RULE OF LAW

**Keywords:** *Saeima* elections, election disputes, approval of election results, Supreme Court, Constitutional Court

### Summary

The article examines the genesis of control over the legality of the *Saeima* (the parliament of the Republic of Latvia) elections, particularly focusing on the judicial review of the *Saeima* elections. The particularities of the control over elections, which differentiate them from typical administrative legal proceedings, are highlighted in the publication. The article presents findings of the case law regarding the limits of controlling the legality of elections and the cases when the court could revoke a decision by the Central Election Commission on approving the results of the *Saeima* elections. In view of the fact that sometimes the regulation set out in the *Saeima* Election Law has been criticised in the Latvian legal science, namely, that the legality of elections is controlled by the Department of Administrative Cases of the Supreme Court's Senate rather than the Constitutional Court, the authors examine the models of controlling the legality of elections found in various states and provide their assessment of whether the control functions should be transferred into the jurisdiction of the Latvian Constitutional Court.

### Introduction: Importance of the parliamentary elections in the state

Elections are an integral element in forming the state institution of political representation. Political representation, in turn, is the core of democracy.<sup>1</sup>

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<sup>1</sup> Wessels B., Schmitt H. Meaningful Choices: Does Parties' Supply Matter? In: Elections and Democracy: Representation and Accountability. Thomassen J. (ed.), Oxford: Oxford University Press, 2014, p. 38.

Moreover, democratic elections are an important form of citizens' participation in governing of the state<sup>2</sup>, which, *inter alia*, builds persons' trust in the public power and also in the state in general. One can uphold the statement that elections without democracy are possible, but it is hard to imagine democracy without elections.<sup>3</sup>

Elections cannot be regarded as democratic, nor their results as legitimate if elections are held by ignoring the constitutional principles of democratic elections and by violating electoral procedures.<sup>4</sup> However, as practice shows, sometimes elections are held by violating legal norms. This, in turn, means that legal remedies must be in place that would help to prevent possible violations.<sup>5</sup>

In general, elections are amongst the oldest legal institutions; however, they are constantly developing. For example, in view of all the digital challenges and possibilities, the transfer of elections to the digital environment has become one of the topics debated in Europe and worldwide.<sup>6</sup> Still, the issue of controlling the legality of elections, which is an indispensable part of the rule of law, has always remained relevant.

The choice of legal remedies for the resolution of election disputes is under the state's discretion. At the same time, the state's choice in defining legal remedies must be compatible with its international commitments. At this point, it is important to foreground the European regional system of fundamental human rights, which is binding upon Latvia, more precisely, the European Convention for the Protection of Fundamental Human Rights and Freedoms as "the constitutional instrument of European public order" in the field of human rights<sup>7</sup> and the case law of the European Court of Human Rights on Art. 3 of Protocol No. 1. Namely, it provides that the existence of a domestic system for effective examination of individual complaints and appeals in matters concerning electoral rights is one of the essential guarantees of free and fair elections.<sup>8</sup> Such a system ensures effective realization of the rights to vote and to stand for elections, maintains general confidence in the state's administration of the electoral process and constitutes an

<sup>2</sup> Conclusion of the Constitutional Court of the Republic of Lithuania on 10 November 2012, para. III. Available: <https://www.lrkt.lt/en/court-acts/search/170/ta1047/content> [viewed 15.10.2021.].

<sup>3</sup> Pildes R. H. Elections. In: The Oxford Handbook of Comparative Constitutional Law, Rosenfeld M. and Sajó A. (eds.). Oxford: Oxford University Press, 2012, p. 529.

<sup>4</sup> Conclusion of the Constitutional Court of the Republic of Lithuania on 7 November 2008, para. III. Available: <https://www.lrkt.lt/en/court-acts/search/170/ta1421/content> [viewed 15.07.2021.].

<sup>5</sup> See, for example, ECHR judgement of 8 April 2010 in Case *Namat Aliyev v. Azerbaijan* (Application No. 18705/06).

<sup>6</sup> European Commission Democracy through Law. Principles for a fundamental rights-compliant use of digital technologies in electoral processes. Opinion No. 974/2019, CDL-AD(2020)037-e, pp. 7–8. Available: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)037-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)037-e) [viewed 15.07.2021.].

<sup>7</sup> ECHR judgement of 30 June 2005 in Case *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (application No. 45036/98), para. 156.; ECHR judgement of 13 July 2021 in Case of *Fedotova and others v. Russia* (application No. 40792/10), para. 52.

<sup>8</sup> ECHR judgement of 20 December 2016 in Case *Uspaskich v. Lithuania* (application No. 14737/08), para. 93.



important device at the state's disposal in achieving the fulfilment of its positive duty under Art. 3 of Protocol No. 1 to hold democratic elections.<sup>9</sup>

The European Commission for Democracy through Law of the Council of Europe (hereafter – the Venice Commission) has repeatedly focused on the regulation on reviewing the legality of elections in the Member States of the Council of Europe. The Venice Commission has published, for example, “Code of Good Practice in Electoral Matters”, presenting the criteria for democratic elections. It is noted in the Code that two variants of reviewing election results are possible – appealing before a court (general, specialised or constitutional) or contesting at the election commission (noting that, in this case, further appeal before a court is desirable).<sup>10</sup> As regards reviewing the election results before the parliament, it is noted that in some countries such a procedure has been envisaged; yet it is admissible in those countries where it has been established a long time ago and also in such cases further appeal before a court should be envisaged. In addition, it has been recognised in the opinion prepared by the Venice Commission “Europe’s Electoral Heritage” that appealing before a parliament could be a safe solution in old democracies; for all that, new democracies should avoid this procedure and, undoubtedly, appealing before a court is the best choice<sup>11</sup>; however, appealing before an independent and objective election commission is also admissible.

It has been recognised also in the German constitutional law doctrine that election control should be considered as being an imperative manifestation of the principle of democracy, since it ensures legal review with respect to the composition of the parliament compatible with the electors’ will. At the same time, it ensures the right of voters and candidates to equal opportunities for being elected.<sup>12</sup>

This publication will proceed to examine the Latvian legal regulation on controlling the outcome of the parliamentary elections, assessing in a comparative context also the models of election control encountered abroad in order to (possibly) initiate a discussion on some changes in this area in Latvia. Since the establishment of the Constitutional Court, proposals have often been made to transfer election control to the Constitutional Court, as conclusions have been made that the jurisdiction,

<sup>9</sup> ECHR judgement of 10 July 2020 in Case *Mugemangango v. Belgium* (application No. 310/15), para. 69.

<sup>10</sup> European Commission for Democracy through Law (Venice Commission). Code of good practice in electoral matters. Adopted guidelines and draft explanatory report, pp. 29–30. Available: <https://rm.coe.int/090000168092af01> [viewed 30.08.2021.]; Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 31 October 2014 in Case No. SA-5/2014, para. 15. Available in Latvian: <http://at.gov.lv> > files > files > sa-5-2014 [viewed 31.10.2021.].

<sup>11</sup> Council of Europe. European electoral heritage – 10 years of the Code of Good Practice in Electoral Matters, p. 15. Available: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-STD\(2013\)050-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(2013)050-e) [viewed 03.08.2021.].

<sup>12</sup> Brocker L. In: Epping V., Hillgruber C. (Hrsg.). Beck’scher Online-Kommentar. Grundgesetz. 48<sup>th</sup> edition, München: C. H. Beck, 2021, GG. Art. 41; Judgment of the Federal Constitutional Court of the Federal Republic of Germany of 15 January 2009 in Case No. 2 BvC 4/04.

currently granted to the Supreme Court to review the correctness of elections is incompatible with the *Satversme* [Constitution].<sup>13</sup> The Constitutional Court has recognised that, although the election issues are the matters of constitutional law rather than of administrative procedure, the *Saeima* has the right to transfer into the jurisdiction of an administrative court also review of such cases, the nature of which is not narrowly that of administrative law.<sup>14</sup>

It must be noted that, in Latvia, persons are also made criminally liable for violations of election law, and these issues are examined by courts of general jurisdiction (belonging to the system of courts). Section 90 of the Latvian Criminal Law defines liability for the hindrance to exercise the right to vote, whereas Section 92 envisages criminal liability for falsification of election documents, miscount of votes and violations of secret ballot,<sup>15</sup> however, criminal offences related to elections will remain outside the range of issues researched in this publication.

## 1. Control over the legality of parliamentary elections in Latvia

In Latvia, the basic rules on parliamentary elections are included in the *Saeima* Election Law, which was adopted in 1995.<sup>16</sup> Pursuant to this law, the Central Election Commission (hereafter – CEC), the court and also the *Saeima* are involved in the supervision and control of the course of elections in various stages and with different tasks.

CEC is the institution, which is responsible for organising and holding elections in the state and ensures implementation of the *Saeima* Election Law, ensures uniform and correct application of this law and controls accurate enforcement of it.<sup>17</sup> Likewise, CEC, on its own initiative, examines the election results in some electoral districts or polling stations, examines complaints and submissions in respect of the decisions and work of election commissions and revokes unlawful decisions thereof. The *Saeima* Election Law sets out, in addition, that in those cases where a court has delivered a convicting judgement regarding violations of election law, CEC, pursuant to Section 52<sup>1</sup>, has to perform a more complicated task, i.e., examine, whether these violations had influenced the allocation of

<sup>13</sup> See Pleps J. Saeimas vēlēšanu rezultāti: kā tos pārsūdzēt? [*Saeima* election results: How to appeal them?]. <https://providus.lv/raksti/saeimas-velesanu-rezultati-ka-tos-parsudzet/> [viewed 21.10.2021.]; Pastars E. Spriedums par Saeimas vēlēšanām: vai tā ir juridiska kļūda [Judgment on the *Saeima* elections: Is it a legal mistake]. *Jurista Vārds*, 2016, No. 50 (453).

<sup>14</sup> Judgement of the Constitutional Court of the Republic of Latvia of 18 December 2013 in Case No. 2013-06-01, para. 15.1. Available: <https://www.satv.tiesa.gov.lv/en?s=2013-06-01> [viewed 20.10.2021.].

<sup>15</sup> Criminal Law. Available: <https://likumi.lv/ta/en/en/id/88966-criminal-law> [viewed 20.10.2021.].

<sup>16</sup> *Saeima* Election Law. Available in Latvian: <https://likumi.lv/ta/id/35261-saeimas-velesanu-likums> [viewed 20.10.2021.].

<sup>17</sup> On the Central Election Commission. Art. 4; 6. Available: <https://likumi.lv/ta/id/S7703-par-centralo-velesanu-komisiju> [viewed 20.10.2021.].

mandates in the respective elections and make a decision on whether to re-allocate or not the mandates among the candidates registered for the respective elections.

Art. 18 of the *Satversme* of the Republic of Latvia, in turn, provides “The *Saeima* itself shall review the qualifications of its members”, retaining the traditional form where the parliament itself reviews the results of parliamentary elections.<sup>18</sup> This means that the mandate of a Member of the *Saeima* should not be approved for a person, who has been elected by violating the provisions of regulatory enactments and would not have the right to become a Member of the *Saeima* due to requirements set in regulatory enactments (e.g., does not have the required proficiency level in the official language or, on the date when the mandate needs to be approved, a convicting sentence with respect to this person had entered into force). Hence, it is possible to differentiate between the competence of CEC, the court and the *Saeima* in reviewing the mandate of the *Saeima* Member – CEC and the court review the legality of the course of election procedure and determination of results, whereas the *Saeima* acquaints itself with the results of CEC and the court’s review, and makes a decision on approving the mandates of deputies on the basis thereof.<sup>19</sup>

However, the courts are the ones that perform the most direct and detailed review of the legality of elections. In 1995, when the parliament adopted the *Saeima* Election Law, neither the administrative courts nor the Constitutional Court existed, and Section 51 of the *Saeima* Election Law provided that the submitter of the list of candidates and the announced candidates had the right to appeal, within seven days from the day when the decision by an election commission had been made, a decision by the Central Election Commission before a court in accordance with the location of the election commission.<sup>20</sup> Thus, at the time, this competence had been granted to courts of general jurisdiction.

In February of 2004, after the Administrative Procedure Law entered into force, administrative courts commenced their work in Latvia, and a couple of years later, in March of 2006, amendments were introduced to the *Saeima* Election Law<sup>21</sup>, entrusting in the future the control over the legality of elections to the Department of Administrative Cases of the Supreme Court’s Senate. Shortly afterwards, already on 3 November 2006, the Department of Administrative Cases of the Supreme Court’s Senate delivered its first judgement on election matters, i.e., on the legality of the election of the 9<sup>th</sup> *Saeima* (Case No. SA-5/2006), stating important findings and establishing still relevant principles regarding election control, which will be examined in the next section. Also, over the coming years,

<sup>18</sup> Rodiņa A., Kļaviņa I., Plepa D. Latvijas Republikas Satversmes 18. panta komentārs [Commentary on Article 18 of the *Satversme* of the Republic of Latvia]. LR Satversmes komentāri. II nodaļa. Saeima. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2020, p. 293.

<sup>19</sup> Ibid., p. 299.

<sup>20</sup> *Saeima* Election Law. Available in Latvian: <https://likumi.lv/ta/id/35261-saeimas-velesanu-likums> [viewed 20.10.2021.].

<sup>21</sup> Amendments to the *Saeima* Election Law. Available in Latvian: <https://likumi.lv/ta/id/131058-grozījumi-saeimas-velesanu-likuma> [viewed 20.10.2021.].

after elections applications regarding alleged violations of election law have been submitted to courts, and the Supreme Court has already established judicature on these cases.

### 1.1. The subject-matter of appeal

The *Saeima* Election Law transfers into the competence of the Senate's Department of Administrative Cases three types of applications relating to the *Saeima* election for review:

Firstly, reviewing the legality of the decision by which the Central Election Commission has dismissed an applicant's claim regarding the vote-counting minutes (Section 35<sup>1</sup>(2));

Secondly, an application contesting the CEC's decision to approve the election results (Section 51 (1));

Thirdly, an application contesting CEC's decision on whether, in connection with a convicting sentence in a criminal case on violations of election law, reallocation of mandates is required (Section 52<sup>1</sup>(2)).

Hereafter, due to the limited scope of the article, only the judicial review, based on Section 52 (2) of the *Saeima* Election Law, will be examined, i.e., cases, in which the CEC's decision to approve the election results is contested. Pursuant to Section 51 (1) of this law, the person who has submitted a list of candidates and the announced candidate may turn to court. This provision indicates that the applicant has to submit an application not regarding the correctness of election results as such but has to request repealing of CEC's decision, by which the election result has been approved, as an administrative act. Regulatory enactments do not provide a concrete answer regarding the exact jurisdiction of the Supreme Court in election cases, and the Supreme Court, in the course of examining applications, has had to interpret legal norms with respect to the scope of its mandate on issues of election control. For example, in its first judgement in the area of election control, i.e., the judgement of 2006 in Case SA-5/2006, the Department of Administrative Cases of the Supreme Court's Senate has recognised that the Senate's jurisdiction included not only examining the correctness of CEC's decision formally (e.g., errors in vote-counting, in drafting the decision, etc.) but also reviewing the legality of the election process, i.e., its compliance with the election principles, included in Art. 6 of the *Satversme* and documents of international law.<sup>22</sup>

Considering the incomplete regulation of Section 51 (1) of the *Saeima* Election Law, the Department of Administrative Cases recognises that "in establishing its jurisdiction, in examining applications regarding CEC's decision

<sup>22</sup> Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 3 November 2006 in Case No. SA-5/2006, para. 8.4. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.]; Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 23 May 2017 in Case No. SA-3/2017, para. 8.1.; Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 31 October 2014 in Case No. SA-5/2014, para. 8. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

on approving election results, the said legal provision shall be interpreted within the scope of Article 1 of the *Satversme*”, which means that the Court’s jurisdiction includes reviewing the legality of CEC’s decision on approving the election results, ensuring that human rights, including a person’s electoral rights, are exercised.<sup>23</sup> In a democratic state order, stakeholders should be ensured the possibility to turn to a court to examine in legal procedure the legality of the election process. Judicial review of the legality of the election process is a necessity for a democratic state order. Judicial review of the legality of CEC’s decision on approving the election results is the only one, in the framework of which a court is able to examine the legality of the election process, and, in accordance with the standards of a democratic state, the institution, which examines complaints about election, should have the right to review, *inter alia*, also the legality of the election process.<sup>24</sup> Just as the administrative court does it in other cases, which are examined in administrative procedure, also in this case, the Supreme Court has the right to decide on the appealed decision on its merits.<sup>25</sup> Similarly, it has been noted also in the German legal science that the entire procedure of elections is considered to be the subject-matter of election review, starting with preparation for elections and the process of elections, until establishing the election results and allocation of mandates or seats. This encompasses the actions of both election bodies and third persons, insofar these persons perform certain obligations related to organisation of elections, in compliance with law. Hence, violations of the general principles of election law and other imperative legal provisions, committed by election bodies or third persons, are considered to be election errors or violations, irrespectively of whether the respective violation pertains to preparation, process of elections or establishing the election results.<sup>26</sup>

Several cases are possible, where an applicant could turn to a court in the context of the *Saeima* elections. For example, these can be applications regarding violations committed in the process of elections, which have affected the election results, and, hence, elections had been contrary to the election principles, enshrined in the *Satversme*, and the statutory requirements. Likewise, errors may be made in the process of vote-counting or an error has been made in drafting the CEC’s decision on approving the election results. In its case law thus far, the Supreme Court, in reviewing election disputes, has examined, for example,

<sup>23</sup> Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 3 November 2006 in Case No. SA-5/2006, para. 8.3.

<sup>24</sup> European Commission for Democracy through Law (Venice Commission). Code of good practice in electoral matters. Adopted guidelines and draft explanatory report, pp. 29.–30. Available: <https://rm.coe.int/090000168092af01> [viewed 30.08.2021.]; Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 23 May 017 in Case No. SA-3/2017, para. 8.1. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

<sup>25</sup> Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 31 October 2014 in Case No. SA-5/2014, para. 12. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

<sup>26</sup> Brocker L. In: Epping V., Hillgruber C. (Hrsg.). Beck’scher Online-Kommentar. Grundgesetz. 48<sup>th</sup> edition, München: C. H. Beck, 2021, GG. Art. 41, Rn. 2–3.

the issue whether different duration of airtime allocates to large and small political parties during TV pre-election debates should be regarded as unlawful, as well as whether violation of regulation on financing of political parties and advertising has affected the election results and whether there would be grounds for revoking the CES's decision on approving the election results.

## 1.2. Particularities of legal proceedings in matters of election control

On the whole, in the course of legal proceedings, the general rules of administrative procedure on reviewing cases in court are applicable to cases, where a court reviews the legality of the *Saeima* elections; however, the reviewing of election issues also differs significantly from general administrative proceedings. These special proceedings sometimes have been criticised (mainly by persons submitting the lists of candidates) because, in these cases, the application to a court must be prepared quite promptly, which, of course, may be cumbersome. As noted in legal doctrine, this approach, which differs from the regular approach in administrative proceedings can be justified by the special nature of elections, which, as noted above, is both an institution of constitutional law and also citizens' fundamental rights.<sup>27</sup>

First of all, in cases of election control, the term, in which a person may submit an application to court, is shortened; i.e., Section 51 of the *Saeima* Election Law provides that the person who has submitted the list of candidates and the announced candidate may appeal the CEC's decision to approve the election results within three weekdays. Although the short terms for submitting complaints may cause certain concerns as to whether it is at all possible to prepare, within this term, appropriate reasoning for the complaint, obtain the evidence required for effective examination of the case, although setting of such shortened term in election cases may be justified because long terms for submitting applications could be the grounds for uncertainty regarding the correctness and legality of election results, as well as hinder the functioning of democracy. It follows also from international standards that complaints regarding the legality of election process must be submitted to a court within short terms to avoid prolonged uncertainty regarding election results, and also making the decision regarding election results should not take too long.<sup>28</sup>

Secondly, usually in general administrative proceedings, submission of an application to a court suspends the operation of an administrative act<sup>29</sup>, however,

<sup>27</sup> Levits E. Nozīmīgs spriedums par vēlēšanām [An important judgement on the election]. Jurista Vārds, 2006, No. 50 (453).

<sup>28</sup> European Commission for Democracy through Law (Venice Commission). Code of good practice in electoral matters. Adopted guidelines and draft explanatory report, p. 28. Available: <https://rm.coe.int/090000168092af01> [viewed 30.08.2021.].

<sup>29</sup> See. Art. 185 of Administrative Procedure Law. Available: <https://likumi.lv/ta/en/en/id/55567-administrative-procedure-law> [viewed 03.11.2021.].

Section 51 (2) of the *Saeima* Election Law sets out clearly that the filing of an appeal in court does not nullify the CEC's decision to approve the election results.

Thirdly, traditionally, administrative proceedings in court comply with the principle of objective investigation, pursuant to which the court, within the limits of the claim, in order to establish actual circumstances of the case and achieve legal and fair examination of the case, gives instructions and recommendations to the participants of administrative proceedings and also collects evidence on its own initiative. However, Section 54 (4) of the *Saeima* Election Law sets out clearly that in a case of election control the applicant provides the justification for the appeal and that the applicant carries the burden of proof. This means that, if cases belong to these categories, the applicant is obliged to present to the court credible arguments that might prove the unlawfulness of elections and also submit evidence at the applicant's disposal that justifies their reasoning, and also must indicate in the application what evidence the court should collect.<sup>30</sup> The Supreme Court's Senate has noted – "this means that the submission of an application should be based, on part of the applicant, on sufficiently serious and justified circumstances that cause objective doubts regarding the respective decision made by the election commission. If the applicant does not have in their disposal sufficient justification and evidence or indications regarding such, which must be immediately verified, the applicant will not stand the chance of having such an application reviewed in depth and of having an outcome favourable to them. Neither does the right to submit an application envisage an automatic need to recount the votes nor an obligation to do so."<sup>31</sup>

Fourthly, the court must adopt the decision on approving the election results in an urgent procedure. Pursuant to Section 54 (3) of the *Saeima* Election Law, in the case referred to in its Section 51 (1), the court examines and adopts the ruling within seven days after the receipt of the application. The Department of Administrative Cases of the Supreme Court is of the opinion that the court's obligation to establish the circumstances of the case and obtain evidence should be assessed in conjunction with the limited term for reviewing the case and, thus, the court's objectively limited possibilities to collect evidence on its own initiative.<sup>32</sup> In this regard, the Venice Commission also has noted that excessively long terms for examining the cases in court could subject the court to political and public pressure, as well as hinder the legislative process and exercise of the executive

<sup>30</sup> Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 3 November 2006 in Case No. SA-5/2006, para. 9. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.]; Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 31 October 2014 in Case No. SA-5/2014, para. 27. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

<sup>31</sup> Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 31 October 2018 in Case No. SA-3/2018, para. 26. Available in Latvian: <http://at.gov.lv> [viewed 02.11.2021.].

<sup>32</sup> Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 3 November 2006 in Case No. SA-5/2006, para. 9. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

power.<sup>33</sup> The International Institute for Democracy and Electoral Assistance also has noted in its election standards (*International Electoral Standards*), which are intended as guidelines for reviewing legal regulation, that appropriate terms for examining complaints should be defined in legal norms. Depending on the nature of the complaint, it may be reviewed immediately, within a couple of hours or a couple of days. Fast examination of a complaint often prevents a minor complaint turning into a major problem.<sup>34</sup> Thus, it can be concluded that the shortened term for reviewing election cases, set in the *Saeima* Election Law, complies with the international standards of election law.

Fifthly, pursuant to Section 54 (2) of the *Saeima* Election Law, the Department of Administrative Cases of the Supreme Court's Senate examines a case regarding a CEC's decision on approving the election results as a court of first instance composed of three Judges, and, pursuant to Section 54 (6), the court's ruling, as well as other decisions, which are taken while conducting the procedural activities related to examining an application or an initiated case, are not subject to appeal. The fact that these decisions are unappealable complies with the internationally recognised practice and also the principle of legal certainty.<sup>35</sup> The State needs a parliament that is capable of functioning, and litigations in several instances would considerably prolong the process of forming the parliament. Granting the right to a person to repeatedly initiate full review of the legality of the election process in a court would also increase the risk that a person would not exercise their procedural rights and obligations during the first legal proceedings in good faith and in full.<sup>36</sup> Moreover, that would be contrary to the principle of *res judicata*, which aims to ensure stability of legal relations and, pursuant to which, nobody has the right to re-examine a final and valid judgement with the aim of achieving repeated adjudication in the case.<sup>37</sup> Likewise, from the perspective of the right to a fair trial, the fact that election violations are examined by the Supreme Court as the first and the final instance does not mean that a person's right to a fair trial

<sup>33</sup> Report on the cancellation of election results, adopted by the Council for Democratic Elections at its 31<sup>st</sup> meeting (Venice, 10 December 2009) and by the Venice Commission at its 81<sup>st</sup> plenary session (Venice, 11–12 December 2009), paras 56 and 60. Available: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2009\)054-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)054-e) [viewed 30.08.2021.].

<sup>34</sup> Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 23 May 2017 in Case No. A-3/2017, para. 8.4. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.]; *International Electoral Standards*, p. 94. Available: <https://www.idea.int/sites/default/files/publications/international-electoral-standards-guidelines-for-reviewing-the-legal-framework-of-elections.pdf> [viewed 30.08.2021.].

<sup>35</sup> Judgement of the Constitutional Court of the Republic of Latvia of 29 April 2016 in Case No. 2015-19-01, para. 12.2. Available: [https://www.satv.tiesa.gov.lv/cases/?search\[number\]=2015-19-01](https://www.satv.tiesa.gov.lv/cases/?search[number]=2015-19-01) [viewed 29.08.2021.].

<sup>36</sup> Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 23 May 2017 in Case No. SA-3/2017, para. 8.3. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

<sup>37</sup> Judgement of the Constitutional Court of the Republic of Latvia of 29 April 2016 in Case No. 2015-19-01, para. 12.2. Available: [https://www.satv.tiesa.gov.lv/cases/?search\[number\]=2015-19-01](https://www.satv.tiesa.gov.lv/cases/?search[number]=2015-19-01) [viewed 29.08.2021.].



would be infringed upon – the legislator has the right to determine, in how many instances cases of certain categories are to be reviewed,<sup>38</sup> and the arguments presented above regarding prompt examination of election violations and formation of a parliament capable of functioning justify examination of the matter of election control on its merits only in one judicial instance.

The procedural aspects of election control, referred to above, allow concluding that the procedural regulation on contesting elections is quite complicated since the burden of proof is imposed on the applicant, the shortened terms for appeal and the condition that the operation of the appealed decision is not suspended make cancelling of elections into a quite complicated mechanism to be applied in genuine emergency situations.

### 1.3. Findings in the case law on the significance of election violations

Neither the *Satversme*, nor the *Saeima* Election Law provides clear regulation on the kind of rulings that a court may adopt in a case of election control. Furthermore, in foreign legal science it is often debated how substantial election violations should be in order for courts to declare elections as being void, to announce new elections, etc.

The Supreme Court's Senate, commenting on the legal grounds for contesting the results of the *Saeima* elections, has noted that "a violation of legal provisions *per se* is neither the decisive nor the sufficient pre-condition for considering the election results to be affected to the extent that it would be the grounds for recognising the entire process of elections as being unlawful. In reviewing the legality of the election process, it is not enough to identify a violation, the substance and consequences of the particular violation need to be examined".<sup>39</sup>

In the course of discussing and adopting the draft *Satversme* at the Constitutional Assembly, in deciding on the possible wording of Art. 18, it was pointed out that, in general, that elections might be regarded as being unlawful if due to the violations committed the election results would be different.

Analysis of the Supreme Court's rulings in election cases allows concluding that several findings in these cases have been taken from the practice of the German constitutional law; i.e., the Department of Administrative Cases, referring to a judgement by the German Federal Constitutional Court,<sup>40</sup> notes that "only a serious, significant, repeated, large-scale, generally known violation in election fight is sufficient to recognise it as affecting the elections. Only in those

<sup>38</sup> Neimanis J. *Satversmes* 82. panta komentārs [Commentary on Article 82 of the *Satversme*]. Latvijas Republikas *Satversmes* komentāri. VI nodaļa. Tiesa. VII nodaļa. Valsts kontrole. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2013, p. 47.

<sup>39</sup> Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 3 November 2006 in Case No. SA-5/2006, para. 12. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

<sup>40</sup> Judgment of the German Federal Constitutional Court in BVerfGE, 103.111, paras 89 and 91.

cases, where the designation “election terror”, i.e., coercing all or the largest part of electors to vote for a particular political organisation without the possibility of turning against it, one can speak about substantive impact on the election result, i.e., distortion of the voter’s political will”.<sup>41</sup> The Department of Administrative Cases, referring to the findings expressed in the German legal doctrine, has noted also that “it cannot be recognised that the principle of free elections has been violated of any if the organisations involved in political fight has committed violations but these are publicly discussed during the pre-election period. Thus, for the elector to make their choice, the violations are known and are identifiable”.<sup>42</sup>

The Constitutional Court has noted in several of its judgements that “a violation should be recognised as being such that affects the election results if it significantly influences the outcome of elections, i.e., if it is established that the election results do not reflect the genuine (free) will of electors”. One could speak of unlawfulness of elections as a whole if the election results would be different due to the violations committed. Otherwise, unhindered and effective functioning of the parliament as well as the general stability of the political system in the state would be made impossible.<sup>43</sup> It has been noted also in the German doctrine that it is not enough to identify an election error or a violation to arrive at any conclusion on the validity of the *Bundestag* election. Alongside the principle of reflecting the electors’ will correctly, the principle of providing utmost protection to the existence of the parliament must also be complied with. Both these principles, which may collide, are equally closely linked to the democratic principle of the Basic Law, and in each particular case they need to be duly balanced.<sup>44</sup>

Since the *Saeima* Election Law provides that the entire territory of the state is divided into constituencies, whereas voting takes place in polling stations, this division must be taken into consideration also in reviewing cases of election violations. If it can be established that the election results have been affected in a certain polling station, the legality of the election results in the particular polling stations must be decided on. If the unlawfulness of election results can be recognised in a constituency, there are grounds for deciding on the constituency. If it is concluded that the election results have been affected in the entire territory of the state, there are grounds for deciding on the entire election results approved

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<sup>41</sup> Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 3 November 2006 in Case No. SA-5/2006, para. 13.1. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

<sup>42</sup> *Ibid.*, para. 13.3.

<sup>43</sup> *Ibid.*, para. 12; Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 29 November 2005 in Case No. SKA-468/2005, para 14.; Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 31 October 2014.in Case No. SA-5/2014, para. 24. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

<sup>44</sup> Brocker L. In: Epping V., Hillgruber C. (Hrsg.). Beck’scher Online-Kommentar. Grundgesetz. 48<sup>th</sup> edition. München: C. H. Beck, 2021, GG. Art.41, Rn. 4.

by the Central Election Commission.<sup>45</sup> Member States of the Council of Europe have reached consensus on the fact that cancelling the election results in the entire territory of state is not the only option, partial cancellation is also possible.<sup>46</sup> This allows avoiding two extremes – cancelling election results as a whole, although errors can be found in a small territory, and refusing to cancel the results as a whole because the affected territory is too small.<sup>47</sup>

Although aspects of election control have been rather extensively analysed in the German doctrine, it must be noted that, in this state, just as in Latvia, the results of parliamentary (*Bundestag*) elections have never been declared void,<sup>48</sup> although the land of Schleswig-Holstein had this experience with the 17<sup>th</sup> *Landtag*, the election results of which the Constitutional Court of this land has recognised as being void (alongside it, recognising the respective provision in the Election Law of Schleswig-Holstein as being incompatible with several articles of the Constitution of this federal land).<sup>49</sup>

One can uphold the finding expressed in legal science that in elections, in which the majority of citizens participate and in the organisation of which thousands of persons are involved, “some violations of law will always be found – violations made by private persons or (much more dangerous) also by officials. This cannot be totally excluded. If every violation would lead to the cancellation of election results, normal functioning of the parliament would be impossible”, and one could speak of a constitutional crisis in the state.<sup>50</sup> Currently, when the Constitutional Court has not revoked a single decision by CEC on approving the election results, discussions in legal science on the consequences of such decisions have been rather minimal; however, if such a decision was at some point adopted, it can be expected that the current laconic regulation on this matter and the provisions of the *Saeima* Election Law in the context of the provisions of the *Saeima* Rules of Procedure and of the *Satversme* could cause extensive polemics.

<sup>45</sup> Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 31 October 2014 in Case No. SA-5/2014, para. 21. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

<sup>46</sup> Electoral Law, Report on electoral law and electoral administration in Europe – Synthesis study on recurrent challenges and problematic issues, 234. punkts. Available: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)023-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)023-e) [viewed 30.08.2021.].

<sup>47</sup> Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 31 October 2014 in Case No. SA-5/2014, para. 21. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

<sup>48</sup> Winkelmann H. Wahlprüfungsgesetz [Election Examination Act]. NomosKommentar. 1. Auflage. Baden-Baden: Nomos, 2012, § 11, Rn. 4.

<sup>49</sup> Judgment of the Constitutional Court of Schleswig-Holstein of 30 August 2010 in Case No. LverfG 1/10 (ECLI:DE:LVGSH:2010:0830.LVERFG1.10.0A), para. 1.

<sup>50</sup> Levits E. Nozīmīgs spriedums par vēlēšanām [Important judgement on the election]. Jurista Vārds, 2006, No. 50 (453).

## 2. Constitutional Court as a legal remedy for solving election disputes

Although, as the experience of various countries shows, the so-called election disputes predominantly are resolved both before election commissions and courts of general jurisdiction, as well as before special (*ad hoc*) election courts<sup>51</sup>, states grant the right to become involved in resolution of such disputes also to constitutional courts.

Various studies prove that a single correct mechanism for resolving election disputes does not exist. It is neither right nor wrong that the constitutional court engages in the resolution of these disputes. Each state chooses a model that is most suitable for its legal system (e.g., taking into account the institution which approves the election results) and the system for the protection of rights (e.g., respecting the jurisdiction of courts). One of these may be granting this jurisdiction for the national constitutional court.

At the same time, the involvement of constitutional courts in the resolution of election disputes cannot be examined narrowly. The Constitutional Court of the Republic of Latvia can review, *inter alia*, an issue relating to the constitutionality of a legal norm, which directly defines and affects exercising the right to vote. Hence, the involvement of constitutional courts of the world in the resolution of election disputes is twofold: both by directly resolving and reviewing issues related to violations committed in elections and also by creating election environment that is compatible with the constitution.

### 2.1. Involvement of the constitutional court in resolving election disputes: Experience of other countries and potential for enlarging the competence of the Constitutional Court of Latvia

Involvement of constitutional courts in resolving election disputes is included among the functions that have the aim of ensuring the integrity of political office and related process.<sup>52</sup> Information collected by the Venice Commission shows that in 31 countries the Constitutional Court or a special election court (e.g., in the United Kingdom) have the right to review the so-called election disputes.<sup>53</sup>

<sup>51</sup> European Commission Democracy through Law. Report on electoral law and electoral administration in Europe. Synthesis study on recurrent challenges and problematic issues. Study No. 965/2019, CDL-AD(2020)023-e, p. 39. Available: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)023-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)023-e) [viewed 15.07.2021.].

<sup>52</sup> De Visser M. Constitutional Review in Europe. A Comparative Analysis. Oxford and Portland, Oregon: Hart Publishing, 2014, p. 168.

<sup>53</sup> European Commission Democracy through Law. Report on election dispute resolution. Opinion No. 913/2018, CDL-AD(2020)025-e, p. 13. Available: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)025-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)025-e) [viewed 15.07.2021.].

Constitutional courts have been entrusted with the resolution of election disputes in, for example, Albania, Austria, Bulgaria, Germany, Malta, Slovakia, etc.

For example, the Constitutional Court of Lithuania makes conclusions on whether there have been violations of election laws during the elections of the members of the *Seimas*, as well as elections of the President of the Republic.<sup>54</sup> In such cases, an application, not later than within three days of the official publication of the final election results in the constituency concerned or the official publication of the decision of the Central Electoral Commission on the availability or filling of a vacant seat of a member of the *Seimas*<sup>55</sup>, may be submitted only by the *Seimas*, as well as the President of the State. The Constitutional Court of Lithuania examines also the decisions of the Central Electoral Commission or its refusals to examine complaints concerning the violation of election laws in cases where such decisions are adopted or other actions are carried out by the said commission after the voting closes in the election.<sup>56</sup> Moreover, the Constitutional Court must examine such inquiry within 120 hours of its filing with the Court.<sup>57</sup> It is important that the final regulation, following the opinion by the Constitutional Court, is adopted by the *Seimas* itself.<sup>58</sup>

The Federal Constitutional Court of Germany, in turn, has the mandate to review disputes related to the *Bundestag* elections – both regarding the validity of elections and violation of rights during elections or their preparation.<sup>59</sup> The law provides that “application in such a situation may be lodged within two months of the *Bundestag*’s decision by the Member of the *Bundestag* whose seat is disputed, by an individual or group of individuals who are entitled to vote and whose objections were rejected by the *Bundestag*, by a parliamentary group or by a minority in the *Bundestag* comprising at least one tenth of the statutory number

<sup>54</sup> The Law on the Constitutional Court of the Republic of Lithuania. Article 73. Available: <https://www.lrkt.lt/en/about-the-court/legal-information/the-law-on-the-constitutional-court/1475> [viewed 15.07.2021.].

<sup>55</sup> The Law on the Constitutional Court of the Republic of Lithuania. Article 74. Available: <https://www.lrkt.lt/en/about-the-court/legal-information/the-law-on-the-constitutional-court/1475> [viewed 15.07.2021.].

<sup>56</sup> The Law on the Constitutional Court of the Republic of Lithuania. Article 77, para. 2. Available: <https://www.lrkt.lt/en/about-the-court/legal-information/the-law-on-the-constitutional-court/1475m> [viewed 15.07.2021.].

<sup>57</sup> The Law on the Constitutional Court of the Republic of Lithuania. Article 77, para. 3. Available: <https://www.lrkt.lt/en/about-the-court/legal-information/the-law-on-the-constitutional-court/1475> [viewed 15.07.2021.].

<sup>58</sup> The Constitution of the Republic of Lithuania. Article 107, part 4. Available: <https://www.lrs.lt/home/Konstitucija/Constitution.htm> [viewed 15.07.2021.]; See more Birmontiene T. Konstitucionālā vēlēšanu doktrīna [Constitutional election doctrine]. In: Rinkimų teisės ir kitos konstitucinės jurisprudencijos problemos. Vilnius: Lietuvos Respublikos Konstitucinis Teismas, 2011, pp. 127–161.

<sup>59</sup> Basic Law for the Federal Republic of Germany. Article 41. Available: [http://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0204](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0204) [viewed 15.07.2021.].

of Members.”<sup>60</sup> In a case like this, as can be seen, the Constitutional Court will assess the constitutionality of the *Bundestag*’s decision.

The example of France needs to be highlighted in particular. Art. 59 of the Constitution of France provides: “The Constitutional Council shall rule on the proper conduct of the election of Members of the National Assembly and Senators in disputed cases.”<sup>61</sup> To put it differently, in France, the disputes of parliamentary elections are examined only by *Conseil Constitutionnel*.<sup>62</sup> In France, neither the election commissions nor the parliament has this jurisdiction. That is why J. Bell calls *Conseil Constitutionnel* “election court”.<sup>63</sup> Moreover, the rights to contest election results are vested in all persons registered on the electoral roll for the constituency in which the election was held and by all persons having declared their candidacy.<sup>64</sup> In France, the results of electing both the Members and the Senators can be contested within ten days after the election results have been announced. Moreover, *Conseil* may examine also issues related to the election process itself if any violations are detected before or during elections (e.g., violations of campaigning rules).<sup>65</sup> The Constitutional Council of France has the mandate to both annul the election that is contested or rescind the decision of the census commission and itself declare the proper candidate elected.<sup>66</sup>

Although the common element for these three states is the involvement of the constitutional court (in France – *Conseil Constitutionnel*) in the resolution of election disputes, the jurisdiction granted to the institution highlights some differences. Both the legal act to be reviewed and the circle of persons having the right to submit applications differ, as well as the matters that are decided on at the constitutional review institution. This, in turn, indicates that the legal regulation in each state is unique, based on its individual legal situation. And this means that the comparative method can be used as “an experienced friend”<sup>67</sup>, but

<sup>60</sup> Act on the Federal Constitutional Court. Section 48. Available: [http://www.gesetze-im-internet.de/englisch\\_bverfgg/englisch\\_bverfgg.html#p0238](http://www.gesetze-im-internet.de/englisch_bverfgg/englisch_bverfgg.html#p0238) [viewed 16.07.2021.].

<sup>61</sup> Constitution of October 4, 1958. Article 59. Available: <https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958> [viewed 16.07.2021.].

<sup>62</sup> Daugeron B. Le contrôle des élections parlementaires avant le Conseil constitutionnel: la “vérification des pouvoirs”, histoire et théorie. Available: <https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/le-controle-des-elections-parlementaires-avant-le-conseil-constitutionnel-la-verification-des> [viewed 16.07.2021.].

<sup>63</sup> Bell J. French Constitutional Law. Oxford: Clarendon Press, 2005, p. 30.

<sup>64</sup> Institutional Act on the Constitutional Council, Section 33. Available: [https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank\\_mm/anglais/texts.pdf](https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/texts.pdf) [viewed 16.07.2021.].

<sup>65</sup> Bell J. French Constitutional Law. Oxford: Clarendon Press, 2005, p. 30.

<sup>66</sup> Institutional Act on the Constitutional Council. Section 41. Available: [https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank\\_mm/anglais/texts.pdf](https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/texts.pdf) [viewed 16.07.2021.].

<sup>67</sup> Barak A. Response to The Judge as Comparatist. Comparison in Public Law. *Tulane Law Review*, 2005, Vol. 80, p. 196.

in this situation comparative law should be used very carefully, as in the analysis of comparative rights one has to take into account the functional context.<sup>68</sup>

The jurisdiction of the Constitutional Court of Latvia is defined by Art. 85 of the *Satversme* and Section 16 of the Constitutional Court Law, which do not envisage the possibility of reviewing the so-called election disputes, i.e., the possibility to examine violations committed in the election process.<sup>69</sup> Likewise, the Constitutional Court does not review the constitutionality of individual legal acts. Although, purely theoretically, the possibility of granting this jurisdiction to the Constitutional Court could be considered. Some considerations in particular could suggest reflecting on this possibility. First of all, it would be relatively more simply to broaden the Constitutional Court's jurisdiction – by amending the Constitutional Court Law rather than the *Satversme* because Art. 85 of the *Satversme* provides for the so-called “open” constitutional regulation on jurisdiction. Secondly, the Constitutional Court's jurisdiction has been often assessed as being narrow, which provides the possibility to consider broadening of its jurisdiction. Thirdly, the theory of constitutional review, which must be always respected in considering the possibilities for expanding jurisdiction, theoretically does not exclude the possibility of involving also the constitutional court in the resolution of these disputes.<sup>70</sup>

Nevertheless, the constitutional court's jurisdiction cannot be expanded mechanically. When thinking about it, other arguments also should be considered. For example, the normative regulation of the proceedings, the number of judges in the court's composition. However, the most important aspect that should always be assessed is expedience or whether these changes are truly necessary. Taking into account Latvia's legal system and the fact that a well-established system for resolving election disputes exists, as well as the fact that administrative courts deal with their tasks effectively, there is no need to consider the possibility of transferring the resolution of such disputes to the Constitutional Court. No arguments can be found that would prove that the existing system does not function or has deficiencies. Thus, at this point, any considerations regarding changes to the jurisdiction would only be a theoretical assessment of this possibility without a practical and understandable need.

<sup>68</sup> Judgement of the Constitutional Court of the Republic of Latvia on 8 June 2007 in Case No. 2007-01-01, para. 24.1. Available: [http://www.satv.tiesa.gov.lv/wp-content/uploads/2007/01/2007-01-01\\_Spriedums\\_ENG.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/2007/01/2007-01-01_Spriedums_ENG.pdf) [viewed 17.07.2021.].

<sup>69</sup> Constitutional Court Law. Available: <http://www.satv.tiesa.gov.lv/?lang=2&mid=9> [viewed 17.07.2021.].

<sup>70</sup> See more Rodiņa A. The Jurisdiction of the Constitutional Court. Theoretical Assessment. Possibilities of Expansion. In: Konstitucionālās tiesas kompetence: robežas un paplašināšanas iespējas. Rīga: Latvijas Republikas Satversmes tiesa, 2014, pp. 125–139.

## 2.2. Involvement of Constitutional Court in building of legal environment for elections

Pursuant to the theory of constitutional review, constitutional courts not only resolve a particular dispute by providing their assessment of the constitutionality of the contested legal provision but their rulings are of great importance for subsequent or the so-called future disputes, which means that, in creating legal relations, the court's rulings are respected in accordance with *erga omnes* nature of the judgement. The Constitutional Court of Latvia, similarly to other constitutional courts, in examining cases, constantly defines the content of the norms of the *Satversme*, explaining what has been encoded in them. In other words, the judgements of the Constitutional Court have become a reflection of the concise text of the *Satversme*.

As noted above, elections in general are broader processes. They do not affect solely those fundamental human rights, which can be read into the constitutional principles of elections (Art. 6 of the *Satversme* in the context of Art. 1 of the *Satversme*) – they are linked to and their process depends upon other fundamental human rights, e.g., the right to association, the right to assembly, the freedom of speech<sup>71</sup>. Respecting all these rights is essential to legitimate *Saeima* elections.<sup>72</sup> Therefore, it is important that the normative regulation of elections complies with the *Satversme*.

In its 25 years of existence, the Constitutional Court has contributed significantly to determining the content of the constitutional election principles, included in the *Satversme*. For example, the Constitutional Court of Latvia, similarly to the Federal Constitutional Court of Germany, the Constitutional Court of Czechia<sup>73</sup>, has assessed the system of proportional representation in elections, providing its opinion on the compliance of 5% election barrier with Art. 6 of the *Satversme*.<sup>74</sup>

Those judgements have revealed the principle of general elections, i.e., examined the content of the passive and active electoral rights.

<sup>71</sup> Judgement of the Constitutional Court of the Republic of Latvia of 22 February 2010 in Case No. 2009-45-01. Available: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/07/2009-45-01\\_Spriedums\\_ENG.pdf#search=2009-45-01](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/07/2009-45-01_Spriedums_ENG.pdf#search=2009-45-01) [viewed 19.07.2021.].

<sup>72</sup> Joint report of the Venice Commission and of the Directorate of information society and action against crime of the Directorate General of Human Rights and Rule of Law (DGI) on the Use of digital technologies and elections, Opinion No. 925/2018, CDLAD(2019)016, para. 142. Available: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)016-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)016-e) [viewed 17.07.2021.].

<sup>73</sup> Pildes R. H. Elections. In: The Oxford Handbook of Comparative Constitutional Law, Rosenfeld M. and Sajó A. (eds.). Oxford: Oxford University Press, 2012, p. 538.

<sup>74</sup> Judgement of the Constitutional Court of the Republic of Latvia of 23 September 2002 in Case No. 2002-08-01. Available: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2002/06/2002-08-01\\_Spriedums\\_ENG.pdf#search=2002-08-01](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2002/06/2002-08-01_Spriedums_ENG.pdf#search=2002-08-01) [viewed 19.07.2021.].



The right to vote is an essential aspect of all democracies.<sup>75</sup> In this context, one might even say that the Constitutional Court has played an important role in decreasing the restrictions on active electoral rights in particular.<sup>76</sup> Tracing the development of the Constitutional Court's case law in assessing the restrictions included in Section 2 of the *Saeima* Election Law allows drawing this conclusion. The first case, in which the Constitutional Court reviewed a restriction on the active electoral rights, dates back to 2003. The Constitutional Court had to review the compliance of para. 2 of Section 2 of the *Saeima* Election Law, i.e., a provision which prohibited from voting the suspect, the accused or the defendant if the security measure detention had been applied to them, with Arts 6, 8 and 91 of the *Satversme*.<sup>77</sup> The Constitutional Court recognised this restriction as being anti-constitutional and it became void *ex nunc*.

Following that, in 2009, the *Saeima*, taking into account, *inter alia*, findings expressed in the Constitutional Court's judgement in case No. 2002-18-01, as well as the case law of the European Court of Human Rights, deleted from the *Saeima* Election Law a provision (para. 1 of Section 2 of this Law), which prohibited from voting persons who were serving their sentences in institutions for deprivation of liberty.<sup>78</sup> Taking into account these amendments to the *Saeima Election Law*, the Constitutional Court terminated legal proceedings in a case that was initiated exactly regarding the compliance of this para. 1 of Section 2 of the *Saeima* Election Law with the provisions of the *Satversme*.<sup>79</sup> Thus, (after these amendments of 2009) the law set out prohibition to vote only for persons, who had been recognised as being incapable in a procedure prescribed in law. Later, in 2014, the *Saeima* amended the *Saeima* Election Law, excluding from it Section 2, which defined

<sup>75</sup> Singh M. P. Elections and electoral systems in constitutional regimes. In: Tushnet M., Fleiner T., Saunders C. (eds.). *Routledge Handbook of Constitutional Law*. London: Taylor & Francis Group; 2012, p. 135.

<sup>76</sup> Alongside the cases analysed here, a case regarding the restriction that prohibited a judge from standing for elections, included in the *Saeima* election law, was initiated at the Constitutional Court. The contested norm of the law provided that, upon announcing a judge as candidate, they had to leave the judge's office. The *Saeima* amended the contested norm, and legal proceedings in this case were terminated. See: Decision of the Constitutional Court of the Republic of Latvia of 29 March 2011 to terminate a Case No. 2010-68-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2010-68-01\\_Lemums\\_izbeigsana.pdf#search=2010-68-01](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2010-68-01_Lemums_izbeigsana.pdf#search=2010-68-01) [viewed 17.07.2021.].

<sup>77</sup> Judgement of the Constitutional Court of the Republic of Latvia of 5 March 2003 in Case No. 2002-18-01. Available: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2002/10/2002-18-01\\_Spriedums\\_ENG.pdf#search=2002-18-01](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2002/10/2002-18-01_Spriedums_ENG.pdf#search=2002-18-01) [viewed 19.07.2021.].

<sup>78</sup> Grozījumi Saeimas vēlēšanu likumā [Amendments to the *Saeima* Election Law]. *Latvijas Vēstnesis*, No. 43, 18.03.2009.

<sup>79</sup> Decision of the Constitutional Court of the Republic of Latvia of 9 April 2009 to terminate a Case No. 2008-41-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2008-41-01\\_Lemums\\_izbeigsana\\_dala.pdf#search=2008-41-01](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2008-41-01_Lemums_izbeigsana_dala.pdf#search=2008-41-01) [viewed 19.07.2021.].

the restrictions on passive electoral rights. Hence, only restrictions on the active electoral rights are in force, defined in Art. 8 of the *Satversme*.<sup>80</sup>

As regards constitutionality review pertaining to the passive electoral rights, the matter of restrictions, included in para. 5 and para. 6 of the *Saeima* Election Law, has become relevant before the Constitutional Court, these provisions define the prohibition to stand for the *Saeima* elections for persons who belong or have belonged to the salaried staff of the state security, intelligence or counterintelligence services of the USSR, the Latvian SSR or another country (para. 5) or, after 13 January 1991, have been active in the Communist Party of the Soviet Union (the Communist Party of Latvia), the International Front of the Working People of the Latvian SSR, the United Board of Working Bodies, the Organisation of War and Labour Veterans, the All-Latvia Salvation Committee or its regional committees (para. 6).

In total, these restrictions on the passive electoral rights, whose aim, substantially, is to protect the democratic state order, national security and also the territorial unity of Latvia<sup>81</sup>, have been examined by the Constitutional Court three times, which reveals the sensitivity of this issue and always has raised the question whether it is necessary to retain such restrictions in Latvia now, more than 25 years after independence was regained.

On the first occasion, an application to the Constitutional Court (in 2000, when persons did not yet have the right to submit a constitutional complaint) was submitted by members of the *Saeima*. Although the Constitutional Court recognised the restrictions (both para. 5 and para. 6) as being compatible with provisions of the *Satversme* (Art. 89 and Art. 101 of the *Satversme*), the Court already mentioned that “the legislator, periodically evaluating the political situation in the state as well as the necessity and validity of the restrictions should decide on determining the term of the restrictions in the disputable norms, as such restrictions to the passive election rights may last only for a certain period of time.”<sup>82</sup> The Constitutional Court returned to examination of this issue in reviewing a case<sup>83</sup> in 2006. Also, this time, the Constitutional Court recognised the restrictions as being compatible with the provisions of the *Satversme*, at the same time making other considerations with respect to the submitter of the constitutional complaint J. Bojārs, in particular, taking into account his merits

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<sup>80</sup> Grozījumi Saeimas vēlēšanu likumā [Amendments to the *Saeima* election law]. Latvijas Vēstnesis, No. 38, 21.02.2014.

<sup>81</sup> Judgement of the Constitutional Court of the Republic of Latvia of 30 August 2000 in Case No. 2000-03-01, para. 6. Available: [http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2000/03/2000-03-01\\_Spriedums\\_ENG.pdf#search=2000-03-01](http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2000/03/2000-03-01_Spriedums_ENG.pdf#search=2000-03-01) [viewed 17.07.2021.].

<sup>82</sup> Judgement of the Constitutional Court of the Republic of Latvia of 30 August 2000 in Case No. 2000-03-01, para. 7. Available: [http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2000/03/2000-03-01\\_Spriedums\\_ENG.pdf#search=2000-03-01](http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2000/03/2000-03-01_Spriedums_ENG.pdf#search=2000-03-01) [viewed 17.07.2021.].

<sup>83</sup> Case No. 2005-13-0106, which was initiated on the basis of an application by Members of the *Saeima*, which was later joined with the case (No. 2006-06-01), which had been initiated on the basis of J. Bojārs' constitutional complaint.

in restoring independence.<sup>84</sup> The same matter was examined for the third time in 2018, with regard to the application by T. Ždanoka. Previously, Ms T. Ždanoka had submitted an application to the European Court of Human Rights, which, *inter alia*, had emphasised the necessity to “keep the statutory restriction under constant review”.<sup>85</sup> In the case decided on in 2018, the Constitutional Court recognised the restriction, set out in para. 6 of Section 5 of the *Saeima* Election Law, as being an instrument of self-defensive (militant) democracy<sup>86</sup>, by which a democratic state governed by the rule of law defends its constitutional bodies and national security institutions against persons who, by their actions, endanger independence of the State of Latvia and the principles of a democratic state governed by the rule of law.<sup>87</sup> It was concluded that the state, in protecting its democratic order, has the right to constantly assess the degree of threats and decide on retaining the restriction. The Court very carefully evaluated consequences of the occupation, the concept of militant democracy, situation in Europe, objective meaning of the norm and concluded that the public benefit from the restriction included in the contested norm continued to outweigh the adverse consequences caused to persons, who by their actions endanger the independence of the state and the principles of a democratic state governed by the rule of law, as the result of restricting their fundamental rights.<sup>88</sup> The Court also has recognised that the legislator, upon establishing that the political situation in the state is changing and the foreign policy threats are diminishing, at any point has the duty to review the restriction included in the contested norm and decide on amendments to the *Saeima* Election Law.

<sup>84</sup> Judgement of the Constitutional Court of the Republic of Latvia of 15 June 2006 in case No. 2005-13-0106. Available: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2005/06/2005-13-0106\\_Spriedums\\_ENG.pdf#search=2005-13-0106](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2005/06/2005-13-0106_Spriedums_ENG.pdf#search=2005-13-0106) [viewed 17.07.2021.].

<sup>85</sup> ECHR judgement of 16 March 2006 in case *Zdanoka v. Latvia* (Application No. 58278/00); see commentaries for example, in Hoogers, H. *Zdanoka v. Latvia – European Court of Human Rights: The boundaries of the right to be elected under Article 3 of the first Protocol to the European Convention on Human Rights*. Judgment of 16 March 2006, *Zdanoka v. Latvia*, Application No. 58278/00. *European Constitutional Law Review*, 2007, 3(2), pp. 307–323.; Mits M. *Consolidating democratic changes in Latvia: The various roles of the European Convention on Human Rights In: The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives*, I. Motoc & I. Ziemele (eds.). Cambridge: Cambridge University Press, 2016, pp. 222–223.

<sup>86</sup> See more Malkopoulou A., Norman L. *Three Models of Democratic Self-Defence: Militant Democracy and Its Alternatives*. *Political Studies*, 2018, pp. 442–458.; Accetti C. I., Zuckerman I. *What’s Wrong with Militant Democracy?* *Political Studies*, 2017, Vol. 65 (1S), pp. 182–199.

<sup>87</sup> Judgement of the Constitutional Court of the Republic of Latvia of 29 June 2018 in Case No. 2017-25-01, para. 13.3. Available: [http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/10/2017-25-01\\_Judgment\\_ENG.pdf#search=2017-25-01](http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/10/2017-25-01_Judgment_ENG.pdf#search=2017-25-01) [viewed 17.07.2021.].

<sup>88</sup> Judgement of the Constitutional Court of the Republic of Latvia of 29 June 2018 in Case No. 2017-25-01, para. 24.4. Available: [http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/10/2017-25-01\\_Judgment\\_ENG.pdf#search=2017-25-01](http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/10/2017-25-01_Judgment_ENG.pdf#search=2017-25-01) [viewed 17.07.2021.].

## Conclusion

1. The choice of legal remedies for resolution of election disputes is under the discretion of the state itself. A single correct mechanism for resolving election disputes does not exist – each state chooses a model that is most suitable for its legal system (e.g., taking into account the institution which approves the election results) and the system for the protection of rights (e.g., respecting the jurisdiction of courts). At the same time, the state's choice in defining legal remedies must be compatible with its international commitments.
2. In Latvia, after the restoration of independence, the control of the *Saeima* elections was initially entrusted to the courts of general jurisdiction, but since the amendments to the *Saeima* Election Law in 2006, the election control has been performed by the Department of Administrative Cases of the Senate of the Supreme Court. The Constitutional Court of the Republic of Latvia has acknowledged – despite the fact that electoral issues are matters of constitutional law and not of administrative proceedings, the legislator has the right to transfer to the competence of an administrative court also the examination of cases the nature of which is not strictly administratively legal.
3. Although the control of the *Saeima* elections is exercised by the administrative court, i.e., the Department of Administrative Cases of the Supreme Court, there are significant differences in the examination of election issues from the general administrative process. This approach is justified by the special nature of the elections. There are several differences from the general administrative process in the court: in election control cases, there is a shortened period within which a person can apply to the court; the submission of an application to the court does not suspend the decision of the CEC to approve the election results; the burden of proof in election cases lies with the applicant; the court must hear the case under an expedited procedure; and – the Department of Administrative Cases of the Supreme Court hears the case regarding the decision of the CEC on the approval of the election results as a court of first instance consisting of three judges, and these decisions of the Court cannot be appealed.
4. The involvement of constitutional courts in the resolution of election disputes is twofold: both by directly resolving and reviewing issues related to violations committed in elections and also by creating election environment that is compatible with the constitution.
5. The experience of various states in involving the constitutional review institution in resolving election disputes outlines differences: both the legal act to be reviewed and the circle of persons having the right to submit applications differ, as well as the matters that are decided on at the institution. This, in turn, indicates that the legal regulation of each state is unique, based on its individual legal situation, which prohibits automatic use of the comparative method.
6. Taking into account Latvia's legal system and the fact that a well-established system for resolving election disputes exists, as well as the fact that administrative courts deal with their tasks effectively, there is no need to consider the possibility

of transferring the resolution of such disputes to the Constitutional Court. No arguments can be found that would prove that the existing system does not function or has deficiencies. Thus, at this point, any considerations regarding changes to the jurisdiction would only be a theoretical assessment of this possibility without a practical and understandable need.

7. Elections, as a broader totality of processes, affect not only those fundamental human rights, which can be read into the constitutional principles of elections (Art. 6 of the *Satversme* in the context of Art. 1 of the *Satversme*). They are linked to and their process depends upon other fundamental human rights, e.g., the right to association, the right to assembly, the freedom of speech. It is important that the normative regulation of elections complies with the *Satversme*.
8. In its 25 years of existence, the Constitutional Court of the Republic of Latvia has contributed significantly to determining the content of the constitutional election principles, developing, in genera; election environment and procedure compatible with the *Satversme*.

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## **THE LEGAL IMPLICATIONS OF COVID-19 VACCINATION CERTIFICATES: IMPLEMENTATION EXPERIENCES FROM NORDIC AND BALTIC REGION**

**Keywords:** COVID-19 technologies, fundamental rights, necessity, non-discrimination, proportionality, vaccination certificates

### **Summary**

EU Digital green certificates were initially envisaged as a joint EU initiative to facilitate free movement during the pandemic. However, many countries rapidly extended their use in different contexts at the national level, raising serious ethical and legal concerns and questions, in particular, on how to strike a right balance between the interests of the individual and the interests of society. The paper aims to explore the legal implications of using vaccination certificates at the national level, in particular by exploring and comparing practices in selected Nordic and Baltic countries. The article emphasises that, despite COVID-19 crises, the governments should protect fundamental rights and values and when deciding on new restrictions carefully assess their necessity and proportionality. National responses call for a new regulatory framework to ensure responsible use of digital technologies in public interests.

### **Introduction**

Since March 2020, the COVID-19 pandemic has posed unprecedented challenges for healthcare systems as well as dramatic social and economic impacts

in Europe and around the world. Governments all around the world have developed different policy responses to the pandemic, put in place emergency regulations and continue to introduce different measures to fight the pandemic and save lives.

The COVID-19 pandemic has also become a catalyst for digital transformation. Alongside such well known public health measures as vaccination, testing, social distancing, governments have introduced various new digital solutions to tackle the spread of COVID-19, e.g., mobile apps, thermal scans, facial recognition, biometric wearables and drones.<sup>1</sup> European Union (EU) Member States have also introduced a number of coordinated responses to COVID-19. Different new digital solutions have been experimented by public authorities intervening in people's daily life, i.e., contact tracing apps, use of mobility data<sup>2</sup> and EU digital green certificates. However, the last one has raised the most intense debates.

On 14 June, the European Commission adopted the Regulation on framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital Green Certificate) to facilitate free movement during the COVID-19 pandemic (hereafter – the Regulation).<sup>3</sup> EU Digital COVID Certificate means interoperable certificates containing information about the vaccination, test result or recovery of the holder issued in the context of the COVID-19 pandemic (Article 2(2)). COVID-19 digital certificates, also referred to as “vaccination certificates”, “digital health passports”, or “immunity passports”, are digital credentials that, combined with identity verification, allow individuals to prove their health status (such as the results of antigen and antibody tests, and eventually, digital vaccination records).<sup>4</sup>

Although these certificates have been initially introduced to facilitate free movement across the EU and to fulfil international requirements, many countries rapidly extended their use to govern access to socio-economic life.<sup>5</sup> They are currently used for this purpose within the EU and also third countries.

<sup>1</sup> Vargo D., Zhu L., Benwell B., Yan Z. Digital Technology Use during COVID-19 Pandemic: A Rapid Review. *Human Behavior and Emerging Technologies*, 2020, 3 (1), pp. 13–24, <https://doi.org/10.1002/hbe2.242>.

<sup>2</sup> Commission Recommendation (EU) 2020/518 of 8 April 2020 on a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data, C/2020/3300, OJ L 114, 14.4.2020.

<sup>3</sup> Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic. OJ L 211, 15.06.2021.

<sup>4</sup> Beduschi A. Digital Health Passports for COVID-19: Data Privacy and Human Rights Law, 2020, Exeter: University of Exeter. Available: [https://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/lawimages/research/Policy\\_brief\\_-\\_Digital\\_Health\\_Passports\\_COVID-19\\_-\\_Beduschi.pdf](https://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/lawimages/research/Policy_brief_-_Digital_Health_Passports_COVID-19_-_Beduschi.pdf) [viewed 08.11.2021.].

<sup>5</sup> See, e.g., Susi M., Pajuste T. (eds.). Covid-19 “Vaccine Passports”: An Exploratory Study of 23 Countries, Tallinn: Tallinn University, 2021; Chiusi F. Analysis: Digital vaccine certificates – global patchwork, little transparency, 29.03.2021. Available: <https://algorithmwatch.org/en/digital-vaccine-certificates-analysis-march-2021/> [viewed 08.11.2021.].

Paradoxically, the manner they have been applied and expanded in Member States may actually limit travel. The differences in the adoption and use of vaccine certificates in the countries is emblematic of the limited coordination of COVID-19 measures among Member States.

Vaccination certificates may contribute to the management of the COVID-19 pandemic and may play an essential role in reopening societies and restoring civil freedoms. However, their introduction, in particular at the national level, have raised serious ethical and legal concerns, that have been addressed also by the international and European organisations. They have created broad discourse on dilemmas and trade-offs between different rights, i.e. how to ensure compliance with fundamental rights, e.g. privacy, non-discrimination, equality, freedom of movement, while protecting public interests, such as public health.<sup>6</sup> They have raised new questions about protection of fundamental rights and democratic values, e.g. social justice, non-discrimination, solidarity, the relations between state and citizens, the limits of state power and the rise of digital surveillance.<sup>7</sup>

The article aims to explore legal implications of the use of COVID-19 vaccination certificates at the national level, in particular by examining practices in Denmark, Estonia, Latvia, and Sweden. First of all, it will reveal the main ethical and legal concerns vaccination certificates raise that have been indicated by international and EU institutions. Then, it will examine the implementation of vaccination certificates in different Nordic and Baltic countries – Denmark, Estonia, Latvia and Sweden, as of October 2021. Finally, the article will analyse the conditions for restrictions and limitations of fundamental rights and emphasise that the governments need to ensure compliance with fundamental rights that required carefully assessment of the necessity and proportionality of these restrictive measures.

## **1. Ethical and legal concerns of vaccination certificates at the national level**

Vaccination certificates have been rapidly introduced across Europe, first and foremost, as an obligation arising under EU law. By establishing a common system of interoperable certifications that can be used in all Member States, the Regulation introduces a common system that prevents national authorities from putting in place restrictions on the right of movement in an inconsistent and uneven fashion. This form of COVID-19 passports appears to be justified by the exceptional nature of the current pandemic scenario and fully legitimate

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<sup>6</sup> Beduschi A., 2020.

<sup>7</sup> Gstrein O. J., Kochenov D., & Zwitter A. A Terrible Great Idea? COVID-19 “Vaccination Passports” in the Spotlight. WP-21-153. 2021. Available: <https://research.rug.nl/en/publications/a-terrible-great-idea-covid-19-vaccination-passports-in-the-spotl> [viewed 08.11.2021.].

to foster free movement, without disproportionately constraining such a right for the sake of health protection.<sup>8</sup>

However, many countries have introduced them nationally to create epidemiologically safer environment and also to serve as an incentive for vaccination. There has been a broad agreement within the global scientific community that the most effective available way to deal with the pandemic is through vaccination.<sup>9</sup> Vaccination against COVID-19 is essential in order to contain the pandemic, protect healthcare systems, save lives and help restore the global economy.

The countries have used different strategies and measures to persuade people to get vaccinated. One of such strategies is to provide different privileges allowing to get back to normal life those people who have been vaccinated. Thus, vaccination certificates serve the objective to protect public epidemiological security and to prevent the spread of infection as well as to increase the vaccination rates. Although these objectives should be strongly supported, the ethical and legal concerns of different implementation practices should also be addressed.

In June, the UNESCO World Commission for the Ethics of Science and Technology (COMEST) and the International Bioethics Committee (IBC) issued a “Joined statement on the ethics of COVID-19 certificates and vaccine passports”<sup>10</sup> (hereafter – the Statement), that urges governments to take into account a number of ethical considerations.

Firstly, the statement emphasizes the need to respect civil rights and freedoms. While acknowledging that COVID-19 certificates can

*contribute to restoring civil rights and freedoms, by making it possible to end or mitigate some of the restrictions on people’s freedom of movement,*

at the same time also stressing that

*their societal introduction should not infringe other civil rights and freedoms, such as people’s right to refuse vaccination, for instance for reasons of personal, moral and religious beliefs, age restrictions, medical circumstances, or worries about the reliability and safety of vaccines.*<sup>11</sup>

<sup>8</sup> Vergallo G. M., Zaami S., Negro F., Brunetti P., Del Rio A., & Marinelli E. Does the EU COVID Digital Certificate Strike a Reasonable Balance between Mobility Needs and Public Health? *Medicina* (Kaunas, Lithuania), 2021, 57(10), 1077. <https://doi.org/10.3390/medicina57101077>.

<sup>9</sup> OECD. Enhancing public trust in COVID-19 vaccination. The role of governments. 2021. Available: <https://www.oecd.org/coronavirus/policy-responses/enhancing-public-trust-in-covid-19-vaccination-the-role-of-governments-eae0ec5a/> [viewed 08.11.2021.].

<sup>10</sup> UNESCO. Joint statement of UNESCO’s ethics commissions on ensuring equal access for all to vaccines and therapeutics developed to confront COVID-19: joint statement of the UNESCO International Bioethics Committee (IBC) and UNESCO World Commission for the Ethics of Science and Technology (COMEST). 2021. Available: <https://unesdoc.unesco.org/ark:/48223/pf0000379042> [viewed 08.11.2021.].

<sup>11</sup> *Ibid.*; see also Parliamentary Assembly of the Council of Europe. Resolution 2361 (2021). COVID-19 vaccines: Ethical, legal and practical considerations. 2021. Available: <https://pace.coe.int/en/files/29004/html> [viewed 08.11.2021.].

The Statement indicates that, while vaccination should be actively encouraged and despite its importance for ending the pandemic, it is essential to respect the principle of moral and bodily integrity and vaccination against COVID-19 should never be an unconditional obligation.<sup>12</sup>

The Statement also indicates that, in order to respect people's rights, the proof of vaccination should be equalized with the proof of not being infected or the proof of recent recovery from infection. This can be realized by moving away from ‘vaccination passports’ to broader ‘COVID-19 certificates’ that also register recent infections and/or recent negative test results.<sup>13</sup> The possibility to use test or recovery certificate instead of proof of vaccination is important in order not to exclude and thus not discriminate against those who cannot get vaccinated, for instance, due to a medical condition. Conversely, it can be also asked whether a negative test is equally effective to vaccination, especially if a test taken several days before the event requiring proof of health status is acceptable. Yet, it has become clear that despite vaccination, breakthrough cases are possible, meaning that vaccination is not a guarantee of safety. In this regard, the Statement also emphasises that certificates need to deal responsibly with the uncertainties regarding the degree of protection provided by specific vaccines and past infections.<sup>14</sup>

One of the main concerns is the risk of discrimination arising from the use of vaccination certificates.<sup>15</sup> The Statement stresses that these certificates can bring unjust forms of discrimination and exclusion that should be avoided, they can cause stigmatization and societal divides.<sup>16</sup> If vaccination certificates are required across peoples’ daily lives, they may impact upon the right to equality and non-discrimination as well as many other fundamental rights, including freedom of peaceful assembly, access to employment, access to education.<sup>17</sup>

Vaccination certificates should also respect people’s privacy and be safe, secure, and reliable. The EDPB and the EDPS has emphasized the need to ensure consistency of the Regulation with the General Data Protection

<sup>12</sup> Ibid.; see also Parliamentary Assembly of the Council of Europe. Resolution 2361 (2021). COVID-19 vaccines: Ethical, legal and practical considerations. 2021. Available: <https://pace.coe.int/en/files/29004/html> [viewed 08.11.2021.].

<sup>13</sup> UNESCO, 2021; See also EDPB-EDPS Joint Opinion 04/2021 on the Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (Digital Green Certificate). 2021. Available: [https://edpb.europa.eu/our-work-tools/our-documents/edpb-edps-joint-opinion/edpb-edps-joint-opinion-042021-proposal\\_en](https://edpb.europa.eu/our-work-tools/our-documents/edpb-edps-joint-opinion/edpb-edps-joint-opinion-042021-proposal_en) [viewed 08.11.2021.].

<sup>14</sup> UNESCO, 2021.

<sup>15</sup> See Susi M., Pajuste T., 2021; Beduschi A. Rethinking digital identity for post-COVID-19 societies: Data privacy and human rights considerations. *Data & Policy*, 2021, 3, E15. doi:10.1017/dap.2021.15.

<sup>16</sup> UNESCO, 2021; see also EDPB-EDPS, 2021.

<sup>17</sup> COVID-19 vaccination certificates: WHO sets minimum demands, governments must do even better. 09.08.2021. Available: <https://privacyinternational.org/advocacy/4607/covid-19-vaccination-certificates-who-sets-minimum-demands-governments-must-do-even> [viewed 08.11.2021.].

Regulation (hereafter – the GDPR).<sup>18</sup> The use of Certificate and personal data related to it at Member States' level must respect the rights to privacy and data protection (Articles 7 and 8 of the EU Charter of Fundamental rights (hereafter – the Charter)<sup>19</sup>), and must be in compliance with the GDPR. This implies the need for a proper legal basis in Member State law, complying with the principles of effectiveness, necessity, proportionality and including strong and specific safeguards implemented following a proper impact assessment, in particular, to avoid any risk of discrimination and to prohibit any retention of data in the context of the verification process. The regulation should limit the processing of personal data to the necessary minimum, by only including a limited set of personal data on the certificates to be issued, by setting out that the data obtained when verifying the certificates should not be retained; and by establishing a framework that does not require the setting up and maintenance of a central database.<sup>20</sup> These requirements are relevant and should also be complied with within the use of the certificates at national level.

Every state has an obligation to protect public health and public order to ensure compliance with human rights law as well as facilitate its economic survival. These obligations have to be balanced against the potential negative consequences of the introduction of a vaccination certificate. When implementing vaccination certificates at the national level, it is important to carefully assess the impact of certificates on society and public health as well as the risks they bring, in particular to human rights and democratic values.<sup>21</sup> The practices of Member States call for developing a regulatory framework that would establish monitoring and oversight mechanisms to ensure accountable and transparent use of digital technologies for public interests, such as public health.<sup>22</sup> The next chapter will demonstrate such a necessity by exploring the different practices of the use of vaccination certificates in selected Baltic and Nordic countries.

## 2. Implementation experiences in Nordic and Baltic countries

Each country both in Europe and across the world has implemented vaccination certificates differently. With the increase of COVID-19 infection

<sup>18</sup> European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 04.05.2016.

<sup>19</sup> Charter of Fundamental Rights of the European Union. OJ C 326, 26.10.2012.

<sup>20</sup> EDPB-EDPS, 2021; see also WHO. Digital documentation of COVID-19 certificates: vaccination status: technical specifications and implementation guidance, 2021. Available: <https://apps.who.int/iris/handle/10665/343361> [viewed 08.11.2021.].

<sup>21</sup> Emmie H., Morley J., Taddeo M., Luciano F., Saving Human Lives and Rights: Recommendations for Protecting Human Rights when Adopting COVID-19 Vaccine Passports. 2021. Available: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3885252](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3885252) [viewed 08.11.2021.].

<sup>22</sup> WHO, 2021.

rates, there is a temptation to extend their use in different national contexts, such as education and employment, calling for a more coordinated approach. It is also apparent when comparing practices among Baltic and Nordic countries.

Denmark was one of the first European countries to deploy vaccination certificates on 21 April 2021. Thus, Denmark introduced the use of vaccine passports domestically prior to the entry into force of the Regulation. In Denmark, such passports were seen as a short-term solution to reopen sectors that had been closed since December 2020.<sup>23</sup> They were required to access services involving close contact, like massages, hairdresser services. From May 2021, a new *Coronapas* app using a QR code was introduced to increase security and privacy. It was available to people over 15 years of age, which follows the Health Act, where under individuals can give consent to treatment from 15 years of age.<sup>24</sup> A vaccination certificate was required to enter indoor restaurants or bars, theatres, cinemas, museums, sports games, etc. and further education. A negative test could always be used as an alternative to vaccination (from the first dose) and so could a recovery certificate. *Coronapas* was discontinued on 10 September 2021, when the dangerousness of COVID-19 was downgraded. As more than 75% of the Danish population had been vaccinated, the low infection rate led the government to lift almost all restrictions from September. As the infection rate increased in late autumn, the government reintroduced vaccination certificates on 12 November.<sup>25</sup>

In contrast to Denmark as well as many other European countries, Sweden has not introduced any requirements for using the vaccination certificates internally as of October 2021. Sweden was one of the few countries not to place their citizens under severe lockdowns, in the hope of reaching herd immunity.<sup>26</sup> It removed most of the remaining pandemic restrictions in September 2021.<sup>27</sup> Sweden as a part of its EU legal obligations, in order to facilitate free movement of persons, introduced EU Digital COVID Certificates in July. The certificates are available already after receiving the 1<sup>st</sup> dose of vaccine and can be issued upon the request of the individual. In September, however, a possibility to use the vaccination certificates as infection disease control measure was put on the lawmaker’s agenda.

<sup>23</sup> Rammaeftale om plan for genåbning af Danmark [Framework agreement on plan for reopening of Denmark]. 22.03.2021. Available: <https://www.stm.dk/media/10258/rammeaftale-om-plan-for-genaabning-af-danmark.pdf> [viewed 08.11.2021.].

<sup>24</sup> Sundhedsloven [the Health Act]. Consolidated Act 903, 26.08.2019, Section 17 (1).

<sup>25</sup> Corona passport in Denmark – where and when? 12.11.2021. Available: [https://en.coronasmitte.dk/corona-passport?\\_\\_cf\\_chl\\_rt\\_tk=0ajhFPXJNbvIhPknM7a2AKkn\\_ZW1ev0DaXi3AILKA1Y-1637007453-0-gaNycGzNBmU](https://en.coronasmitte.dk/corona-passport?__cf_chl_rt_tk=0ajhFPXJNbvIhPknM7a2AKkn_ZW1ev0DaXi3AILKA1Y-1637007453-0-gaNycGzNBmU) [viewed 08.11.2021.].

<sup>26</sup> Wenander H. Sweden: Non-binding Rules against the Pandemic – Formalism, Pragmatism and Some Legal Realism. *European Journal of Risk Regulation*, 2021, 12(1), 127–142. doi:10.1017/err.2021.2

<sup>27</sup> Lifting of the restrictions is envisaged in 5 steps. On Sept. 29, 2021 the country lifted restrictions of the 4<sup>th</sup> step. Regeringens plan för avveckling av restriktioner [The Government’s plan for the abolition of restrictions], 27.05.2021. Available: <https://www.regeringen.se/49bcff/content/assets/986d9a7d3d5348b98a0e0fdd0fd9fdf1/promemoriam.-plan-for-avveckling-av-restriktioner-tillganglighetsanpassad.pdf> [viewed 08.11.2021.].



Sweden did not introduce them internally until the end of 2021, and when the use of certificates was introduced, they had limited application.<sup>28</sup>

Estonia, which has generally reacted to the pandemic with short and relatively mild restrictions, adopted COVID-19 vaccination certificates in April 2021. It did so with the same rationale as Sweden – to facilitate the free movement of persons – but also to set up a management system for handling the population vaccination programme. The technology developed for this, *VaccineGuard*, uses KSI blockchain signatures for attesting vaccine creation, handling, and vaccination.<sup>29</sup> While this can, indeed, be used to create vaccination certificates, it is possibly even more valuable because of its ability to help manage a country's vaccination program. Thanks to integration with the Estonian health information system, individuals can generate their digital COVID certificates for themselves via the Patient Portal.<sup>30</sup> The digital COVID certificate works alongside the EU's Digital Green Passport and conveys a proof of vaccination (with 1, 2, or 3 doses), recovery from COVID-19, or a negative test result.

As Estonia's epidemiological situation deteriorated in 2021, the government mandated the use of the certificates not only for travel but also for granting access to various venues, e.g., leisure facilities. In August 2021, the Estonian government adopted a regulation which made it easier for employers to ask their employees for a proof of recovery from the COVID-19 illness, proof of a negative test result, or proof of vaccination against COVID-19, if this was a necessary measure considering the risk of the spread of SARS-CoV-2 at the workplace, the employer could not mitigate the risk otherwise, and it was justified based on the nature of work as well as the employer's annual risk analysis.<sup>31</sup> On 19 October (extended on 28 October), the government introduced temporary restrictions for managing the COVID-19 crisis, particularly with the aim of supporting hospitals and the medical system, and to effectively curb the new wave of COVID-19. The new restrictions concerned also the use of COVID certificates and deemed a negative test result no longer sufficient to gain admission to venues for those 18 and older.

<sup>28</sup> See Förordning om ändring i förordningen (2021:8) om särskilda begränsningar för att förhindra spridning av sjukdomen Covid-19 [Ordinance amending the ordinance (2021: 8) on special restrictions to prevent the spread of covid-19 disease]. 17.01.2022. Available: <https://svenskfattningssamling.se/sites/default/files/sfs/2022-01/SFS2022-22.pdf> [viewed 11.03.2021.]. For the norms in force as of March 2021 regarding vaccination certificate, see Chapter 8 in Förordning (2021:8) om särskilda begränsningar för att förhindra spridning av sjukdomen covid-19 [Ordinance (2021: 8) on special restrictions to prevent the spread of covid-19 disease]. 08.01.2021. Available: [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-20218-om-sarskilda-begransningar\\_sfs-2021-8](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-20218-om-sarskilda-begransningar_sfs-2021-8) [viewed 11.03.2021.].

<sup>29</sup> Vaccineguard end to end visibility for the pharmaceutical value chain. Available: <https://guardtime.com/vaccineguard> [viewed 08.11.2021.].

<sup>30</sup> Digital COVID certificate. Available: <https://www.terviseamet.ee/en/digital-covid-certificate> [viewed 08.11.2021.].

<sup>31</sup> Bioloogilistest ohuteguritest mõjutatud töökaskonna töötervishoiu ja tööohutuse nõuded [Occupational health and safety requirements for the working environment affected by biological hazards]. 17.08.2021. Available: <https://www.riigiteataja.ee/akt/114082021010?dbNotReadOnly=true%20> [viewed 08.11.2021.].

In Latvia, vaccination certificates were also introduced in June 2021. Like in Estonia, certificates were available to people from the age of 12, as from this age COVID-19 vaccination was approved at this time. The vaccination certificates were used both to facilitate the free movement of persons and grant access to various venues. In Summer 2021, they were required in restaurants and cafes, except outside venues, for attending entertainment and cultural events, such as cinemas, theatre performances, concerts etc. Starting from 11 October, the state of emergency was declared in Latvia for three months, and from 21 October a four-week lockdown was introduced because the healthcare system was on the brink of collapse, as hospitals were overwhelmed. The new rules required verification of certificates to participate in interest education and in the on-site study process at higher education institutions. Vaccination or recovery certificates were required for employees working in public institutions, education institutions, in sectors of critical importance to the public, such as health care.<sup>32</sup> On 4 November 2021, the Parliament adopted Amendments of the Law on the Management of the Spread of COVID-19 Infection, which allowed employers to terminate the employment relationship in case when the employee did not have a vaccination or recovery certificate.<sup>33</sup> These new rules were challenged before the court. On 13 November, the Administrative District Court rejected the application of private person challenging the rules requiring that employees and officials of state and local government institutions may perform their duties only if they have a vaccination or recovery certificate finding that the benefit to society of imposing a vaccination obligation outweighs the violation of individual rights.<sup>34</sup>

Countries should strive to adopt a long-term strategy for the management of the COVID-19 pandemic that does not rely on the continued limitation or restriction of fundamental rights. The governments fail to consider the impact of the imposed restrictions on fundamental rights and the need to carefully assess their necessity and proportionality. The use of vaccination certificates should ensure respect of human rights, as well as protection of values such as public trust.<sup>35</sup> The OECD has emphasized that the success of vaccination campaigns is largely influenced by the extent to which people trust the effectiveness and safety of the vaccines, the institutions responsible for vaccination and government, their decisions and actions.<sup>36</sup> Governments should implement effective measures to promote public trust in vaccines and vaccination, i.e. through intense information

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<sup>32</sup> Cabinet of Ministers. Order No. 720 Regarding Declaration of the Emergency Situation. Adopted 09.10.2021. *Latvijas Vēstnesis*, 195A, 09.101.2021.

<sup>33</sup> Amendments of the Law on the Management of the Spread of COVID-19 Infection. Adopted 04.11.2021. *Latvijas Vēstnesis*, 215A, 05.11.2021.

<sup>34</sup> Administratīvā rajona tiesa. Tiesa noraida pieteikumu pirmajā izskatītajā lietā par obligāto vakcināciju [Administrative District Court. The court rejects the application in the first case concerning compulsory vaccination]. 13.11.2021. Available: <https://www.tiesas.lv/aktualitates/tiesa-noraida-pieteikumu-pirmaja-izskatitaja-lieta-par-obligato-vakcinaciju-10842> [viewed 08.11.2021.].

<sup>35</sup> WHO, 2021.

<sup>36</sup> OECD, 2021.

campaigns, in particular targeting prioritized population groups, counter misinformation and disinformation regarding COVID-19 vaccines, not only impose restrictions and limitations of rights. COVID-19 responses raise new questions about the limitations of fundamental rights that will be analysed in the next section.

### 3. Overarching principles of necessity and proportionality

The measures required to combat the virus will unavoidably restrict fundamental rights. The first section revealed that vaccination certificates may restrict wide range of fundamental rights, including the right to non-discrimination, the right to privacy and data protection, the freedom of assembly and association.

There are absolute rights which cannot be justifiably infringed under any circumstances, such as the right to life that is threatened by the COVID-19 pandemic. However, most human rights, including the right to liberty, the right to privacy, the right to data protection, can be restricted under certain conditions. Such interests as the protection of health and public safety are recognized as grounds for the justification of interference with these rights, yet such limitations are allowed if they are “in accordance with the law” or “prescribed by law” and are “necessary” and “proportionate” to achieve the particular aim. These requirements for the limitations of rights are used in all human rights instruments, including the European Convention of Human Rights<sup>37</sup>.

States may impose restrictions based on the usual provisions for limitations in the interest for the protection of public interests, such as public health. However, during the times of emergency, states may also adopt measures of exceptional nature that would require derogation from their obligation to respect certain rights under international human rights instruments.<sup>38</sup> The Council of Europe has indicated that even such derogations may never justify any action that goes against the paramount requirements of lawfulness and proportionality.<sup>39</sup> The principle of legality prescribed that states action must be in accordance with law. The principle of necessity requires that measures must be capable of achieving their purpose with minimal alteration of normal rules. Moreover, any legislation enacted during the times of emergency should also include clear time limits on the duration of these measures.

<sup>37</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, Adopted 4 November 1950, ETS 5.

<sup>38</sup> Article 15 (1) of the ECHR. See more: Nesterova I. The Global Flood of COVID-19 Contact Tracing Apps: Sailing with Human Rights and Data Protection Standards against the Wind of Mass Surveillance. SHS Web of Conferences 92. 2021.

<sup>39</sup> Council of Europe. Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, 2020. Available: <https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40> [viewed 08.11.2021.].

Governments should examine the necessity, proportionality and effectiveness of the use of vaccination certificates before their implementation.<sup>40</sup> The main question is about the necessity and proportionality and how to strike a right balance between the interests of the individual and the interests of society. Although states have an obligation to respect the rights of each individual, they also have a duty to protect society and everyone's life.

The World Health Organisation has also stressed that COVID-19 certificates can be used for a number of purposes, and each Member State that introduces one should be clear about which uses are proposed and that they should not be used for other purposes. The use of COVID-19 certificates to restrict the right to freedom of movement and other human rights is only justified when it supports the pursuit of a legitimate aim during a public health emergency and is provided for by law, proportionate, of limited duration, based on scientific evidence, and is not imposed in an arbitrary, unreasonable or discriminatory manner.<sup>41</sup>

In evaluating the proportionality of the restrictions enabled by the use of vaccination certificates, it is important to refer to the case-law of the European Court of Human Rights (hereafter – the ECtHR) in relation to *de facto* mandatory vaccinations.<sup>42</sup> The ECtHR has recognized the broad freedom of policy in the field of health issues. In April 2021, the ECtHR adopted the judgment in the *Vavříčka and other v the Czech Republic* which ruled that compulsory vaccination, i.e. the imposition of fine on parent and exclusion of children from preschool for refusal to comply with statutory child vaccination, does not violate Article 8 (the right to private life) of the ECHR.<sup>43</sup> The ECtHR found the Czech authorities did not exceed the wide discretion (“margin of appreciation”) that they enjoy in this area and that the measures assessed in the context of the national system, were in a reasonable relationship of proportionality to the legitimate aims pursued by the Czech State through the vaccination duty (para. 203).

When assessing the necessity and proportionality of the measures, the ECtHR took into account a number of important aspects:

- there was a pressing social need to protect individual and public health against the diseases well-known to medical science (para. 284);
- necessary precautions were taken, including the monitoring of the safety of the vaccines in use and the checking for possible contraindications in each individual case (para. 301);
- the fine was not excessive and there were no repercussions for the education of school-age children (para. 304, 305);
- effects on child applicants were limited in time, admission to primary school was not affected by vaccine status (para. 307) etc.

<sup>40</sup> EDPB-EDPS, 2021.

<sup>41</sup> WHO, 2021.

<sup>42</sup> See Susi M., Pajuste T., 2021.

<sup>43</sup> Judgement of the European Court of Human Rights in Case No. 47621/13 and 5 others, *Vavříčka and others v. the Czech Republic*.

The ECtHR also indicated that the compliance with vaccination duty cannot be directly imposed (para. 293).

It is expected that many new cases will be brought both before national and European courts challenging national COVID-19 restrictions, including on the use of vaccination certificates. When deciding on the use of vaccination certificates, the governments need to carefully weigh and balance individual and public interests, and carry out assessment by considering important aspects in each case, for example, the persons to whom the restrictions are imposed (e.g., vulnerable groups such as children), as well as the consequences of these measures to individuals on the one hand, and the public interests at stake on the other hand. The questions to be asked always when new restrictive measures are planned to be introduced are whether they are necessary to achieve the aim, such as protection of public health, and whether there are any other, less rights-infringing ways through which the same aim can be achieved.

## Conclusion

1. Vaccination certificates have raised serious concerns about the protection of fundamental rights. While acknowledging that COVID-19 certificates can contribute to restoring civil rights and freedoms, international and European organisations have indicated the need to protect the freedom of choice regarding vaccination and to avoid unjust forms of discrimination. Vaccination certificates should respect the right to privacy and data protection and comply with the GDPR and security standards. When implementing vaccination certificates at the national level, it is important to carefully assess their impacts on society and public health as well as the risks they create, in particular to human rights. There is a need for a regulatory framework that would establish monitoring and oversight mechanisms to ensure responsible and transparent use of digital technologies in public interests.
2. Vaccination certificates were initially introduced as a joint EU initiative to facilitate free movement during the pandemic. However, countries rapidly extended their use in national contexts. Vaccination certificates have also been introduced in selected Nordic and Baltic countries to govern access to socio-economic life. The surveyed Baltic countries have used them in different national contexts, including employment and education, not only for creating an environment that is safer epidemiologically, but also to serve as an incentive for vaccination, in many cases lacking explanation on their justification and careful assessment of compliance with fundamental rights.
3. Although states have an obligation to respect the rights of each individual, they also have the obligation to protect public health and safety. Measures which involve restrictions of fundamental rights must be legitimate, necessary and proportional to the threat posed by COVID-19 pandemic and be limited in time. The governments should carefully assess the necessity, proportionality

and effectiveness of each particular use of vaccination certificates before the implementation thereof, and weigh public interests against individual rights.

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## FOUNDATION ATROCITIES AND PUBLIC HISTORY: THE ROLE OF LAWYERS IN FINDING TRUTH

**Keywords:** genocide, law and public history, law and post colonialism, law and empire

### Summary

History provides the basis for nations' existence. Yet, history is capable of telling different stories in relation to the same events. It is also open to manipulation and distortion. More so than ever, this is the case with the easy availability and cross border reach of many forms of media. In addition, the concept of public history recognises that representations of history are not made solely by professional historians. The conclusion that must be reached from this is that history is open to contesting and it is not necessarily a fair contest favouring accuracy. This paper argues that law and legal scholars can play a role in settling significant historical disputes by applying the rigour of legal dispute settlement institutions. Consideration of evidence and narrowing arguments to relevant issues are of significant worth. These possibilities are illustrated through the debates surrounding two significant atrocities of history, the Great Irish Famine and the Ukrainian Holodomor. Both events have a critical place in the nation-building of the Irish and the Ukrainians, yet the debate rages on as to whether they may or may not be genocide. We review the historical issues and the genocide issue and suggest that legal scholars rather than historians may assist in settling rather than perpetuating the disputes.

### 1. History and national identity

The aim of this paper is to demonstrate that historical perceptions are important to a variety of geo-political stakeholders in modern states and actively contested. It aims to argue that legal process can assist in finding the truth and settling disputes about history for the benefit of people and states. History is important to identity. In some parts of the world, it is crucial. It plays a core role in shaping national mindsets and nationalism. The very existence of a nation,

as opposed to a state, depends on history. This is of critical importance in post-imperial situations and in the face of continued or renewed imperialism. The ways how groups of people have been distinguished from one another historically, form identity.<sup>1</sup> Oppressive, discriminatory or simply negative treatment of a group by another, usually dominant, group can be the very action that consolidates a nation.<sup>2</sup> It can be at the heart of outcomes such as the historical Norman inhabitants of modern France now regarding themselves as French, while Bulgarians, Serbs,<sup>3</sup> Latvians,<sup>4</sup> the Irish<sup>5</sup> and Slovaks<sup>6</sup> strongly retained their sense of difference after hundreds of years of integration. Of course, oppression can initially be designed to eliminate a separate identity. Nonetheless, if oppression fails in achieving this elimination, it can consolidate the separation instead. The worst form of oppression is genocide.

## 2. History contests

The idea that a certain group of people constitute a separate nation from another group is not therefore a scientific or genetic determination as much as a perception held on the basis of a wide range of factors, some of the most decisive being historical actions. History is not, however, as transparent as many people maintain. It may be highly contestable. What people believe is a historical fact can be quite different from the events that actually occurred. In addition, what actually occurred can be presented in different ways to create different impressions or stories.<sup>7</sup> People's understanding of their history is the product of school learning, sharing of community views, independent learning, as well as the presentation of history in a variety of media, exhibitions and similar phenomena. These can be in the forms of purportedly factual documentaries and the like, and, likewise, how history is presented in movies, serials, novels, and other sources.<sup>8</sup> For example, in Britain, public perception of the history of Scotland is shaped by schools and academic histories, as well as shows such as the BBC's documentary series "The History of Scotland" and movies such as "Braveheart". In Ukraine, Vasyl

<sup>1</sup> Anderson B. *Imagined communities*. United Kingdom: Verso, 2006.

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<sup>7</sup> Jenkins K. *On 'What is History?': From Carr and Elton to Rorty and White*. United Kingdom: Routledge, 1995.

<sup>8</sup> Kelley R. *Public History: Its Origins, Nature, and Prospects*. *The Public Historian* 1, No. 1, 1978, p. 16.

Barka's book "Yellow Prince" and the films "Hunger-33" (1991) and "Mr. Jones" (2019) are notable with their impact upon perception of historic events.

These non-academic forms of history belong to domain of public history. Public history can be understood as history, since it is represented and understood by the non-historian public. In this, it may be distinct from history as understood by academic historians and, indeed, historical fact.<sup>9</sup> Representations of public history are more common than previously with the prevalence of new media. In many ways, it easier than ever for someone to 'publish' their representation of history. The popularity of history documentaries has also meant that commercial investment has been contributed to their production. At the same time, governments see value in supporting local history and heritage projects. Academic history, on the other hand, is largely dependent on government grants for funding research.<sup>10</sup>

Another phenomenon is that through the internet, representations of history become globalised. The public in one country does not necessarily obtain their history from the producers in their own country. This means that their outlook may be globalised and they may be more aware of the history of major countries than their own history. In addition, they can be more exposed to how major countries view their history than previously.

### 3. Public history and truth

All these issues raise some difficult questions about public history in the context of identity formation. The most common issue that arises regarding public history is whether it is reliable, given that producers are not necessarily trained historians or subject to any form of review. They may simply get things wrong. In terms of history as entertainment, it may be deliberately misshaped to make it more sensational and entertaining. In terms of government funding, there is the issue of independence and full representation. If the UK, government is sponsoring historians and the public to develop projects to show how England has always been an open and multicultural place, they are not likely to be delivered history that focuses on intolerance and discrimination.<sup>11</sup> Beyond this, government has long known the value of creating history to build nations and shape the public view. This also extends to political movements. Certain governments can be particularly prone to creating history that supports an outlook or sponsoring those

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<sup>9</sup> Grele R J. Whose Public? Whose History? What Is the Goal of a Public Historian? *The Public Historian*, 3, No. 1, 1981, p. 40.

<sup>10</sup> Liddington J. and Ditchfield S. *Public History: A Critical Bibliography*. *Oral History*, Vol. 33(1), Oral History Society, 2005, p. 40.

<sup>11</sup> Dresser M. Politics, Populism, and Professionalism: Reflections on the Role of the Academic Historian in the Production of Public History. *The Public Historian*, Vol. 32(3), 2010, p. 39.

that do. This is always the case with imperial government.<sup>12</sup> This can be done more or less ethically. It can mean placing a particular angle on certain facts or departing from the facts entirely.

The manner in which facts can be used in different ways can also create a more extreme idea that truth is relative or that there are many truths. This idea is valid but open to gross misuse as a justification for the spreading of entirely false ideas as occurs with, say, holocaust denial.<sup>13</sup> However, history has been swayed by post-modernism and this is problematic. The statement that it does not matter if a certain popular movie completely misrepresents history as it is only entertainment is highly debatable.<sup>14</sup> Being produced for entertainment does not stop a movie influencing the audience's perception of history. The attitude also facilitates those with an agenda to perpetuate certain ideas for political purposes through media, entertainment, public history and even, purportedly, academic history.

Unsurprisingly, public history is riven with disputes. The past is in a very real sense up for grabs and those with significant resources can take control of public history.<sup>15</sup> What people believe of the past can be quite different from what academic historians believe. In addition, even academic historians may not be immune to the socio-cultural (or even legal) hierarchical framework in which they work.

Finally, it must be noted that in creating history in this competitive environment, those with more resources to invest and those with a more driven agenda are at a major advantage. The global nature of the media means that the created content easily traverses borders. The contest for the public's mind between a single historian on the one hand, and state with an agenda and few scruples, on the other, is not a fair one. Nor is it easy for a person who wishes to tell the truth about the misdeeds of a particular group to that same group.

#### 4. Manipulation of truth

Thus, in the contemporary world, history is important. At the same time, history is manipulable and the 'truth' is contestable in a competition that may favour resources devoted to creation of the narrative over accuracy and public palpability, and popularity over the unpleasant. Furthermore, it can favour stasis over change, especially when the *status quo* is popular or serves political interests. This competition is then globalised in the sense that people outside a country can

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<sup>12</sup> Plokhy S. *Lost Kingdom: A History of Russian Nationalism from Ivan the Great to Vladimir Putin*. United Kingdom: Penguin Books Limited, 2017.

<sup>13</sup> Lipstadt D. E. *Denying the Holocaust: The Growing Assault on Truth and Memory*. United Kingdom: Free Press, 2012.

<sup>14</sup> Erickson M. J. *Truth or Consequences: The Promise & Perils of Postmodernism*. InterVarsity Press, 2009.

<sup>15</sup> Marcellino W. *Russian Social Media Influence: Understanding Russian Propaganda in Eastern Europe*. United States: RAND Corporation, 2018.

enter the fray if they have something at stake. All these dynamics can, of course, work in different directions. Those outside the country may favour the truth over those inside it. They may also do the opposite.<sup>16</sup>

History relevant to nation-building and political positions is thus full of dispute and it appears to be on the increase.<sup>17</sup> On the basis of a 'no authenticity' mindset and through the great array of public history vehicles, a party can put forward a counter-argument or a simple dismissal. Group A says that 150 years ago there was a large massacre of their people by Group B, and Group B denies that it happened. Group A shows an article in a journal documenting it, Group B creates a website, show or alternative article. It need not be as extreme as this; it can be a case of two honestly different beliefs. However, it can also be the case of those who simply ignore historical fact.

## 5. Law and dispute resolution

The courts of law have long functioned as the institution of ultimate dispute settlement. This is the case both in civil disputes and criminal procedures. Law contains a raft of rules and procedures to settle disputes practically and as fairly as possible. Facts are determined in accordance with rules of evidence to ensure that those that are relied upon are relevant and reliable.<sup>18</sup> Arguments are narrowed to ensure that the dispute is focussed and resolved rather than allowed to evolve and change to perpetuate uncertainty and dispute. Each party makes their case and is subject to procedural rules.<sup>19</sup> While legal procedures and the courts are far from free of criticism in terms of favouring those with more resources, they are significantly more contained and constrained than the court of public opinion, where parties can declare anything that they can afford to present in a history debate.<sup>20</sup>

In addition, many of the factual matters that are disputed in history will have a connection to some criminal area. A massacre, for example, can be considered as the crime of murder. In this, it is distinguished naturally from involuntary manslaughter. Some issues are actually the product of law to start with. Despite some of the debate about genocide that is seen in the public concerning a genocide

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<sup>16</sup> Consider the dynamics in this book: Birtles B. *The Truth About China: Propaganda, Patriotism and the Search for Answers*. Australia, Allen & Unwin, 2021.

<sup>17</sup> Plokhy S. *Ukraine and Russia: Representations of the Past*. University of Toronto Press, 2008.

<sup>18</sup> Hemming A. and Layton R A. *Evidence Law in QLD, SA and WA*. Australia, Thomson Reuters Australia Limited, 2016.

<sup>19</sup> King A. S. *Global Civil Procedure*. *Harvard International Law Journal*, Vol. 62(1), 2021, p. 223.

<sup>20</sup> De Saulles D. *Reforming Civil Procedure: The Hardest Path*. United Kingdom: Bloomsbury Publishing, 2019.

as a concept is largely the creation of law.<sup>21</sup> It was explicitly considered in view of the holocaust and, as a result, defined in international law. Thus, while genocide has had a long-standing deplorable history, it was only named as such as part of creating the international law concerning the crime of genocide.<sup>22</sup>

## 6. Legal process compared to public historical debate

The issue of naming in law is important to the focus of the dispute. If a court considers whether a genocide has occurred, it considers the legal definition of genocide and the facts established in the court. It then determines whether the established facts meet the definition of genocide. If they do, genocide is considered to have occurred. It is worth considering what the procedure excludes in comparison to a public history debate. It excludes discussion about whether it is good or bad to find that something amounts to genocide. It excludes discussion of what various parties have to say on whether it is genocide – for example, particular governments, experts and historians. Finally, it excludes discussion of whether the definition of genocide employed in the law is an appropriate definition of genocide, or whether it meets some other definition of genocide that differs from the legal one. All these exclusions, as well as the rules around evidence and procedure mean that an outcome can be delivered, and it is one that can be much more impartial – freer of influence and distortions – than a public debate.

Clearly, it is not possible for every significant historical dispute to go to a court. There are issues of standing and courts do not have the resources to deal with all these matters. However, as with all issues in law, this does not exclude the application of legal methods by those who are trained and qualified to apply them. That is, lawyers. Consequently, the current essay suggests that lawyers, in particular, legal academics, engage in a new form of research and publishing that involves the application of their legal skills to the determination of public history disputes of great consequence. This may or may not be done in cross-disciplinary collaboration with academic historians. Such research and publications will be highly valuable to the debate in that they will provide objective evidence in relation to whether a genocide has occurred. While some may call their results into question, the status of established academic lawyers and journals is such that their outcomes should be considered reliable. It is worth noting that there is nothing new about academic lawyers and practising lawyers giving their learned opinions on a dispute that is yet to go before a Court. This is the nature of legal practice. Thus, the law and legal scholars can and should assume a more significant position in settling the disputes around public history. In this, they can play a practical

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<sup>21</sup> Kebranian N. Genocide, History, and the Law: Legal Performativity and Recognition of the Armenian Genocide in France and Germany. *Holocaust and Genocide Studies*, Vol. 34(2), 2020, p. 253.

<sup>22</sup> Art. 2, Convention on the Prevention and Punishment of the Crime of Genocide.

role in the service of the truth, countering imperialism and misinformation and enhancing nation-building and the improvement of lives.

## 7. Example of the famines

The paper will now turn to two introductory cases to demonstrate its argument. It will not apply the method and resolve these disputes, as this task would be beyond the scope of this introductory paper. Rather, it will show how the disputes exist and how the history is debated. Both considered cases involve famine and deliberation as to whether it amounts to genocide. Both famines are traumatic events that have had a major destructive impact on a population. Both occurred when the people were part of a larger political entity and not directly in charge of their own government. Both have shaped and will continue to shape the population's view of their national identity and their need to be independent. The issue of whether the famines were genocide is fundamental to these people. If they were, it represents the complete delegitimization of the dominant 'imperial' government's rule of the population and this has major implications towards any continued or future involvement of that group in the affairs of the impacted population.

The two famines to be considered here are the Great Famine of Ireland in the nineteenth century and the Holodomor of Ukraine in the twentieth century. In brief, the Irish famine occurred when Ireland was part of the United Kingdom and ruled from London. The Holodomor occurred when Ukraine was part of the Soviet Union which was an extension of rule from Moscow/ St Petersburg that had long been established under the Russian empire. While Ireland is now well-established as an independent state, there remains a contest over the legacy of British rule not least in relation to Northern Ireland that remains part of the United Kingdom. Ukraine is now an independent state however, at the stage of nation building and subject to significant internal and external pressure that attempts to delegitimise the state in favour of Russian rule.<sup>23</sup> Russia is significantly involved in this, and public views on Russian rule and the Ukrainian experience are a major focus in both Ukraine and Russia. The issue of whether the population of the state of Ukraine would be better off under Moscow rule is the core of the issue and has major political importance. Thus, whether this population suffered genocide under rule from Moscow less than a century ago is of a paramount significance. It strikes at the heart of Moscow's legitimacy as a government, as well as undermines the legitimacy of the idea that Russians and Ukrainians are really the same people. If they were, genocide would be unthinkable.

The Irish famine occurred from 1845 to 1852, and resulted in the loss of between a fifth and a quarter of the population through death or emigration. Its

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<sup>23</sup> Pisciotta B. Russian revisionism in the Putin era: An overview of post-communist military interventions in Georgia, Ukraine, and Syria. *Italian Political Science Review*, 50(1), 2020.

impact on the overall society and culture was immense. The Irish language, for example, suffered one of its greatest declines due to the impact of the famine in rural areas.<sup>24</sup> No one ever attempted to deny that the famine occurred. What has happened over time – the questions about British complicity in the famine and its outcomes have become increasingly distinct. In the immediate aftermath of the famine, the presentation of it as an unfortunate disaster or even further evidence attesting to inability of the Irish to rule themselves was more common. Overreliance of the Irish on potatoes can be portrayed as an indication of their stupidity rather than the result of the institutional situation they had been forced into.<sup>25</sup> Of course, at the time the British press and press in Ireland would have been dominated by English interests or Anglo-Irish interests.

Historians have been working on the issue of British complicity in the famine over the years. It is only in recent decades that public opinion in England has softened towards Ireland and opened up to considering such questions. The issue of whether the famine amounted to genocide has only recently entered the public consciousness strongly. The debate is interesting to review in light of the discussion above. Tim Pat Coogan, a well-known Irish writer who has played a role in nationalist and republican development published a book called “The Famine Plot”.<sup>26</sup> In this popular book, he asserts that the famine was genocide. He does this by reference to the legal definition. Coogan’s work of public history has been significantly criticised by academic historians.<sup>27</sup> They have expressly focussed on his journalistic as opposed to historical credentials. In addition to attacking his credentials, these historians rely on referring to other historians’ opinions on the matter, public opinion regarding this, and they question Coogan’s citation of the UN definition of genocide. Rather, they assert that genocide is something else, something not captured in this definition. Notably, these positions, unlike Coogan’s, sidestepped the UN definition of genocide, simultaneously proposing that whether the famine was genocide depended on factors like whether such a finding was what the people needed or wanted. In this, their responses are not appropriate. Hence, the issue remains open and should be settled.<sup>28</sup> It is true that Coogan’s methods in terms of evidence and application are open to criticism. However, the response has not focussed on the issue in question – it has resorted to attacks on method and questions of principle. It is suggested that the issue can be resolved by applying Coogan’s reference to the UN definition, but to do so required supplementing it with proper evidence. Such work would be valuable to

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<sup>24</sup> Ó Murchadha C. *The Great Famine: Ireland’s Agony 1845–1852*. United Kingdom: Bloomsbury Academic, 2011.

<sup>25</sup> Nie, M de. *The Eternal Paddy: Irish Identity and the British Press, 1798–1882*. University of Wisconsin Press, 2004.

<sup>26</sup> Coogan T. P. *The Famine Plot: England’s Role in Ireland’s Greatest Tragedy*. United States: St. Martin’s Publishing Group, 2012.

<sup>27</sup> Kennedy, L. 2015.

<sup>28</sup> McGowan M. G. *The Famine Plot Revisited: A Reassessment of the Great Irish Famine as Genocide*. *Genocide Studies International*, Vol. 11(1), 2017, p. 87.



the Irish idea of history and contemporary politics. Historians are not sufficiently constrained in how they have to present their case, while journalists and members of the public are not constrained at all.

The Holodomor contrasts significantly with the Irish famine. It is a more recent historic event, which occurred in 1932 and 1933. The death toll is from 3.5 to 7 million, and therefore much higher than that of Ireland. However, despite these two acute differences, it is far less known about and less controversial in terms of international attention it has received. The reasons for this lie in the fact that it occurred in the completely closed and censored environment of the Soviet Union and the issues of Ukrainian identity and persecution are far less known in the world due to a general lack of western focus and a long-term control of public history and perception of the region by Moscow and St Petersburg. The Holodomor was completely covered up by the Soviet government and international information about it was systematically countered by propaganda. An ostensible Western academic study about it published in 1987 called it a myth created by Ukrainian nationalists.<sup>29</sup> This book has now been revealed to be a work of Soviet propaganda. The Russian public still remains under its misinformation through school history books and an official line that generally constructs a different history of Ukraine.<sup>30</sup> The idea that Ukrainian nationalists are a group of delusional people who cannot see that Ukrainians are Russians is widely held in Russia. There is a wide array of sources that have been sponsored and created to perpetuate the idea. People in Ukraine, as well as overseas are susceptible to this information.

Thus, Russia does not recognise the Holodomor as anything more than a natural disaster and historically the Soviet Union even hid that. However, the information that has arisen, particularly since Ukrainian independence is harrowing to read<sup>31</sup> and paints a far worse picture of government than anything in the Irish case.<sup>32</sup> There can be little doubt that Stalin deliberately took steps that resulted in the deaths of huge numbers of Ukrainians and that he took them with this goal in mind.<sup>33</sup> Hence, it is surprising how the simple facts of the Holodomor can still be contested. There are a number of historians who have documented the horrors.<sup>34</sup> The difficulty in gaining recognition and systematic assessment of the Holodomor as the atrocity was is intimately related to the difficulty that Ukrainians still face in having their identity recognised internationally, in Russia

<sup>29</sup> Tottle D. *Fraud, Famine and Fascism: The Ukrainian Genocide Myth from Hitler to Harvard*. Toronto: Progress Books, 1987, p. 3.

<sup>30</sup> Motyl A. J. *Deleting the Holodomor: Ukraine Unmakes Itself*, World Affairs, 2010, pp. 25–34.

<sup>31</sup> Kul'chyts'kyy S. *Ukrayins'kyy Holodomor v konteksti polityky Kremlya pochatku 1930*. Instytut istoriyi Ukrainy, 2014, p. 208.

<sup>32</sup> Klid B. and Motyl A. J. (eds.). *The Holodomor Reader. A Sourcebook on the Famine of 1932–1933 in Ukraine*. Canadian Institute of Ukrainian Studies, 2012.

<sup>33</sup> Graziosi A., Hajda L. and Hryn H. (eds.). *After the Holodomor: The Enduring Impact of the Great Famine on Ukraine*. Harvard Ukrainian Studies, Vol. 30 (1–4), 2008.

<sup>34</sup> Hrynevych L. *Khronika kolektyvizatsiyi ta Holodomoru v Ukraini 1927–1933*. HREC Press, 2016, p. 693.

and even within their own country. This is related to Russian identity and the role that Ukrainian identity plays in that concept. Consequently, it is more important than ever that the Holodomor's status as genocide be properly established from a solid legal perspective. This outcome is important in setting the national identity issues that hold up the success of the Ukrainian state.

## Conclusion

This paper has concluded that legal process and academic approach can resolve historical disputes for the benefit of people and states. It has looked at the role of history in national success and how this relates to the problem of truth in history. It argues that history can be manipulated and contested in a way that favours powerful interests. It shows that this problem is even more significant now than in the past. It illustrated the issue through the great famines of Ireland and Ukraine. These two examples amply reflect the problems discussed in terms of the constant contestability and manipulability of public history, at the same time noting that it is essential for the settlement of disputes, the establishing of identity and reconciliation with the past.<sup>35</sup> They also show how scholarship on the disputes shies away from legal method in favour of various historical approaches. The argument is that a strict legal method applied by lawyers can significantly improve the situation by providing an outcome that has been subject to due process and is more objective and freer of significant manipulation. Such scholarly output would be of high value and clearly innovative. It would also contribute to international fairness and stability.

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<sup>35</sup> Noack C., Janssen L and Comerford V.(eds.). *Holodomor and Gorta Mór: Histories, Memories and Representations of Famine in Ukraine and Ireland*. London: Anthem Press, 2012, p. 278.

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## PERMISSIBILITY OF PREGNANCY TERMINATION – THE LEGAL REALITY IN POLAND AFTER THE RULING OF CONSTITUTIONAL TRIBUNAL K 1/20

**Keywords:** permissibility of pregnancy termination in Poland, constitutional guarantees of the legal protection of human life, abortion, ruling of Constitutional Tribunal K 1/20

### Summary

The article presents selected issues related to constitutional guarantees for the legal protection of a child's life in the prenatal period in the event of a collision of rights. The author analyses the problem concerning the legal status of a child in the prenatal phase of life, as well as acceptability and bounds of terminating pregnancy. The author examines the ruling of the Constitutional Tribunal in Poland of 22 October 2020 held that prenatal examinations or other medical data indicate a high probability of serious and irreversible disability of the foetus or an incurable life-threatening disease, was contrary to the Constitution of the Republic of Poland.

### Introduction

Roots of the right to life in its contemporary form can be sought in Magna Carta, issued in 1215, which forbade arbitrary deprivation of life. The right to life composed a triad of three principal natural rights formulated by the 17<sup>th</sup> and 18<sup>th</sup> century thinkers. However, the right to life as an instrument guaranteeing the basic socio-ethical value was considered to be so obvious that it was merely mentioned, if referred to at all. Among the 18<sup>th</sup> century declarations of human rights, the right to life was only confirmed in America, where it was explicitly worded in the American Declaration of Independence. French and other European declarations concerned other natural rights. The World War

Two crimes and experiences of that time led to the right of life being strongly reaffirmed in proclamations of people's rights<sup>1</sup>.

As regards its fundamental meaning, the right to life first and foremost entails the protection of a person's biological life, and, secondly, it means that a person must not be deprived of life in consequence of any action by the state authorities. It is the fundamental right of every person to exercise the inviolable right to life, which is the pillar of all the other human rights. The course of a human life is biologically conditioned, meaning that it begins from the moment of conception. Some legal regulations are required to protect life since its conception, subject to certain specific cases when women have a right to make an ultimate decision if they wish to carry a pregnancy to term.

## **1. Constitutional guarantees of the legal protection of human life**

Constitutional guarantees of the legal protection of human life are regulated in Art. 38 of the Constitution of the Republic of Poland, which states that the Republic of Poland ensures the legal protection of life of every person<sup>2</sup>. In the light of Polish law, human life is a constitutional value. The Constitution names the principle of protecting the life of every person as the first one among the regulations pertaining to rights and liberty. Rather than focusing on a guarantee of the right to life, the Constitution views human existence as a value deserving special protection. It should be underlined that the provision contained in Art. 38 of the Constitution does not state unambiguously that human life must be obligatorily protected from conception to death.

The entry into force of the provision by Art. 38 of the Constitution should be equated with the decision of the Constitutional Tribunal declaring that the presence of certain rights of an individual, such as the right to life, is an essential component of a democratic state, governed by the rule of law<sup>3</sup>. Art. 38 of the Constitution of the Republic of Poland guarantees protection of life to every individual, that is a person who has already been born. A question arises whether it entails 'the protection of man' and 'the protection of life'? If so, what is the difference between the two in terms of protection? Art. 38 of the Constitution does not suffice in itself to make such a distinction. The norm arising from the Constitution is very general and needs to be expressed more specifically in ordinary legislation. The legislator permits abortion in certain specific cases, and thus allows the deprivation of life of a conceived child. The Supreme Court stated that "it needs to be emphasised that

<sup>1</sup> Kędzia Z. *Prawo do Życia. Prawa człowieka. Model Prawny* [Right to Life. Human Rights. Legal Model]. Wrocław-Warszawa-Kraków: National Institute Ossolińskich, 1991, p. 169.

<sup>2</sup> Constitution of the Republic of Poland, of 2 April 1997, Dz. U. of 1997, No. 78, item 483 with subsequent amendments, hereinafter referred to as the Constitution or the Constitution of the RP.

<sup>3</sup> Constitutional Tribunal judgement of 25 November 1997, Ref. No. K. 26/97.

irrespective of the opinion approved of by the legislator regarding the temporal borderlines of human life, the criminal law norms can determine differentiated protection of human life, depending on the phase of its development. This holds true both when the termination of pregnancy is considered as more leniently punishable homicide and when – as it is in Polish law – it is a separate type of crime<sup>4</sup>.

A much broader scope of protection is guaranteed to someone already born as an individual person, whereas a narrower one is ensured to a conceived child. This gives rise to another important question: when does a human cease to be a conceived child and becomes a person? The Supreme Court in the judgement cited above concluded that this moment occurs when the delivery of a baby begins, more specifically when “the uterine contractions start, implicating that delivery is in progress;” or when a Caesarean section is performed, this is the moment “procedures for a C-section are started”<sup>5</sup>. Although these borderlines apply to a regulation contained in Crime law, they rest on the foundations laid out by the Constitution and, through the systematic interpretation, are applicable in other branches of law.

In Polish law, the norm of legal protection of life was largely defined in the judgement of the Constitutional Tribunal of 28 May 1997<sup>6</sup>. The Constitutional Tribunal ruled out on the compliance of the provisions of the Act of 30 August 1996 amending the so-called anti-abortion law and some minor acts with the Constitution<sup>7</sup>. The aforementioned act liberalized the permissibility of abortion and weakened the position of an unborn child. The Constitutional Tribunal derived the assumption that protection of the right to life is the state’s responsibility arising from the principles of a democratic state under the rule of law, acknowledging that it was one of the standards of democracy. The Tribunal also pointed out that a democratic state under the rule of law is constituted solely as a certain community of people, where every person and all goods significant for the person are placed in the central position. Protection of life in such a state should therefore be granted to every person from the moment of conception. The constitutional value that life unquestionably is cannot be differentiated according to the phase in one’s life because there are no criteria that would allow one to make such a distinction.

## 2. Dignity of the person

Notably, human dignity and spirituality are fundamental to human life. How is then dignity perceived in the Polish legal system? Art. 30 of the Constitution of the Polish Republic affirms that the dignity of the person is inherent, inalienable

<sup>4</sup> Resolution of the Supreme Court of 26 October 2006, Ref. No. I KZP 18/06, OSNKW 2006, No. 11, item 97.

<sup>5</sup> Ibid.

<sup>6</sup> Constitutional Tribunal judgement of 28 May 1997, Ref. No. K. 26/96, OTK 1997/2/19.

<sup>7</sup> Dz. U. of 1996, No. 139, item 646.

and inviolable, and it is the source of freedoms and rights of the person and citizen. Therefore, the public authorities are obliged to respect and protect human dignity. The position of the Supreme Court appears helpful in this regard. The court has stated that dignity is the sphere of personality which attains its specific form in the person's self-esteem and expectation of respect from others. This feeling, which is an essential element of the human psyche, is determined by many external circumstances. Being a product of the development of human nature, human dignity depends on history and culture. Its form or dimension also significantly depends upon other characteristics of an individual's psyche and on his or her overall personality. Thus, there can be different measures of a person's self-esteem and what constitutes an act violation of dignity<sup>8</sup>.

The ascertainment whether one's dignity has been violated is based on objective criteria rather than on subjective feelings of the person seeking legal protection. A measure that will allow passing a judgment should be sought in the so-called public opinion, which is the emanation of views broadly held and accepted by the society at a given time and place. The models which should be the targeted point of reference for the assessment being made "are provided by opinions of reasonably and honestly minded persons, and further on by moral teachings given by persons competent in this scope and enjoying unquestionable authority". It follows that non-legal norms will be decisive in the process of passing a judgement on the violation of a person's dignity. They will be the norms related to customs in the society, – moral, social, occupational and, to a certain degree, religious norms. They are not fully encompassed in the content of legal acts by the legislator, although to some extent they are referred to in written law, as can be seen in the constitutional, civil and criminal laws. In all these branches of law, there are notions that refer to social norms or customs. Thus, identification of the values (premises) required to ascertain whether some action or behaviour is dignified relies on the views held by the public opinion and on the attitude of the public opinion to the behaviour of a given person. The court of law must explore the type and character of the rights that a person has been deprived of, and the attitude of other people to this person deprived certain rights. Thus, an act of the violation of dignity will be identified not when a person feels they have been deprived of a certain value but when a value identified by most of the society in which that person lives has been violated. The Supreme Court asserts that, "although human dignity is expressed in the capacity of defending some acknowledged values, the defence of which is connected with the person's sense of self-esteem and expectation of respect from others, this does not entail that deprivation of some rights in the circumstances of the contemporary social life means the violation of personal dignity<sup>9</sup>". In the court's opinion, if only a few individuals (or one, two or a few persons out of hundreds or several thousands) believe that their dignity has been violated while the overwhelming majority that has been exposed to the same

<sup>8</sup> Judgement of the Supreme Court of 25 April 1989, Ref. No. I CR 143/89, OSP 1990/9, item 330.

<sup>9</sup> Ibid.



action or behaviour claim the reverse, then it cannot be concluded that was a case of the violation of the person's dignity. A decisive role here is played by the view of the majority. Hence, objectivization is always required. Any sign of subjectivism must be excluded. Otherwise, it would be necessary to take into consideration frequently exaggerated and inappropriate behaviours, which might be turned into typical ones by the adjudicating court.

### 3. Abortion in Poland

Since the dawn of human history, abortion has been one of the most fervently contentious ethical and philosophical issues. The fundamental problems stem from definitions of the beginnings of human existence and different stages in the development of a human being. This is where the dilemma of the moral and legal status of man has its rooted<sup>10</sup>. The Latin term *abortio* stands for miscarriage, which leads to the termination of pregnancy, removal of an embryo from the mother's organism, causing its death. Abortion can be divided into spontaneous one, where a pregnancy is terminated due to natural causes, and artificial (induced) abortion, which is brought about by intentional manipulation. In common language, the term "abortion" is associated with the latter, an abortion induced with the woman's consent. It is the only type of abortion that can be submitted to moral and legal evaluation. Other categories of abortion are also distinguished, such as therapeutic abortion, where the foetus is removed because of the risk to the mother's life, eugenic abortion, where there is high risk or certainty that the child will have a permanent health damage, humanitarian abortion, when the conception has been caused by a criminal act, or social abortion, when the baby is not desired due to poor economic and social conditions.

The origin of the debate on abortion and its legal regulations in Poland dates back to the interwar years, when the penal code was being developed. The Penal Code of 1932<sup>11</sup> legalized abortion by a doctor if there was a serious risk to the mother's health or life, if the pregnancy resulted from such crimes as a sexual intercourse with a minor or mentally retarded, or by abuse of the relationship of dependence, through rape or incest.

In the 1950s, work commenced on new regulations pertaining to the issues of abortion. It was a consequence of the fact that abortion was legalized in the Soviet Union in 1955. In Poland, it resulted in the Act on Conditions for Permissibility of Abortion<sup>12</sup>. The purpose of this act was to protect women's health from adverse consequence of abortions performed in unsanitary conditions or by persons who

<sup>10</sup> Breczko A. Podmiotowość prawna człowieka w warunkach postępu biotechnomedycznego [Legal subjectivity of the human being under biotechnomedical progress]. Białystok: Publishing House Temida 2, 2011, p. 191.

<sup>11</sup> Art.231, Art. 232 and Art. 233, Penal Code of 11 July 1932, Dz. U. of 1932, No. 60, item 571.

<sup>12</sup> Art. 1 and Art. 2, Act on Conditions for Permissibility of Abortion, of 27 April 1956, Dz. U. of 1956, No. 12, item 61.

were not doctors. The new law stated that a woman undergoing abortion could not be penalized. Abortion was permitted due to legal, medical but also social indications, the latter meaning inadequate living standards. The two principal conditions were: to have an abortion performed by a doctor, and to ensure that the procedure would not pose a risk to the pregnant woman's health or life.

In 1956, the Ministry of Health issued a regulation on the termination of pregnancy<sup>13</sup>, to make it as easy as possible for women to obtain a decision permitting abortion, making it sufficient for a woman to testify verbally about her difficult situation and then the procedure was allowed.

In 1980, pressure from Catholic movements contributed to passing a legal limitation on the permissibility of abortion. The ministry now ordered to limit the number of abortions carried out on the basis of medical and social indications. Consultations with doctors, who would try to dissuade women from terminating pregnancy, became mandatory. It became illegal to perform an abortion after 12 weeks from conception. Another restriction imposed on the legal permissibility of pregnancy termination was the Regulation of the Minister of Health of 30 April 1990<sup>14</sup>, which granted the right to doctors to decline performing an abortion except in cases where there was an immediate risk to the woman's life. The Polish Commissioner for Protection of Civil Rights questioned this regulation, which was nevertheless upheld by a ruling of the Constitutional Tribunal.

In March 1992, two drafts of acts were tabled, both derived from completely different doctrinal grounds. The first one, a draft of Act on Legal Protection of a Conceived Child, was signed by members of parliament who advocated a restrictive approach to the question of the termination of pregnancy. The proponents of the extremely opposite position submitted a draft on the Act on Parenthood, Protection of Conceived Human Life and Conditions of the Permissibility of Abortion. Meanwhile, it was proposed to have a nationwide referendum concerning abortion<sup>15</sup>. This proposal was criticised by the authorities of the Catholic Church in Poland. On 7 January 1993, the Act on the Family Planning, Human Embryo Protection and Conditions for Legal Pregnancy Termination,<sup>16</sup> which was rather restrictive, was passed. The principle of penalisation of causing death of a child, excluding penalisation of the child's mother, was adopted. This effectively discouraged doctors from performing abortion procedures. In the light of this act, indications in favour of abortion are a risk to the mother's life, a pregnancy resulting from a criminal act, and an irreversible damage to the foetus.

<sup>13</sup> Regulation of the Minister of Health of 19 December 1959 on termination of pregnancy, Dz. U. of 1960, No. 2, item 15.

<sup>14</sup> Regulation of the Minister of Health and Social Care, of 30 April 1990, on the professional qualifications to be possessed by doctors performing abortion, and on the procedure for issuing medical opinions on the permissibility of abortion, Dz. U. z 1990, No. 29, item 178.

<sup>15</sup> More on this in: A. Breczko, 2011, p. 206.

<sup>16</sup> Act on Family Planning, Human Embryo Protection and Legal Pregnancy Termination, of 7 January 1993, Dz. U. of 1993, No. 17, item 78, with amendments.

In 1995, the act was amended, which obligated the Council of Ministers to submit an annual report to the Lower Chamber of the Parliament on the execution of this act and consequences of its implementation. In August 1996, other amendments were made, accepted by the Parliament and signed by the then President of the Republic of Poland, Mr Aleksander Kwaśniewski.

This law has been in force in Poland to date. The circumstances, when pregnancy is allowed to be terminated are expressed in Art. 4a, which states that abortion can be performed only by a doctor in cases, when the pregnancy is a threat to the woman's health or life. The presence of such circumstances must be determined by a doctor other than the one who will carry out abortion. In such a situation, it is allowed to terminate a pregnancy at any stage. Another indication for abortion is the results of prenatal tests or other medical findings, which indicate a very high probability of "a severe and irreversible foetal defect or incurable illness that threatens the foetus's life." Likewise, in such cases these conditions are diagnosed by a doctor other than the one who will carry out the procedure. The termination of a pregnancy in these cases is allowed up to the moment when the foetus is able to live outside the mother's womb. The last legal provision enabling abortion is a situation when there are reasonable grounds to suspect that a pregnancy is a consequence of a prohibited act, e.g., rape. This must be verified and confirmed by a prosecutor. Under this provision, abortion is allowed until the 12<sup>th</sup> week of pregnancy.

Abortion cannot be performed without the woman's written consent. If a pregnant woman is a minor or a completely incapacitated person, a written consent is given by the person with a power of attorney acting in the name of this woman. If this is a woman over 13 years of age, then her written consent is also required. If a pregnant underage girl is less than 13 years of age, than the consent must be given by the Court of Protection, although the minor also has a right to express her opinion. When a woman is entirely incapacitated, her written consent is also required except in a situation when her current mental health state does not enable her to express consent. When there is no consent expressed by the legal representative, then it needs to be issued by the Court of Protection.

In the original version, the act comprised another indication for abortion, which was similar to the one included in the Act of 1956. Namely, it referred to constrained living conditions or a difficult personal situation of a pregnant women at the given time. In the ruling of 28 May 1997,<sup>17</sup> the Constitutional Tribunal stated that the regulations which permit abortion in such circumstances were not compliant with the then binding constitutional regulations. The lack of compliance consisted of the fact that the mentioned provisions of the Act legalised abortion without a sufficient justification of the need to protect any other constitutional right, value or liberty. They also referred to some unspecified legalisation criteria in these cases, thereby violating the constitutional guarantee of the right to life

<sup>17</sup> Judgment of the Constitutional Tribunal of 28 May 1997, Ref. No. K 26/96, OTK 1997, No. 2, item 19.

of human beings. The Constitutional Tribunal also validated the statement that human life in any stage of its development and in any circumstances is a constitutional value. Legal protection and its type are not a simple consequence of the value of a protected good. The intensity and type of protection are influenced by several factors, beside the value of the protected good, and these factors need to be taken into consideration by the legislator when specifying the intensity and type of protection. Considering the perspective of the good to be protected, this protection should be adequate to every situation<sup>18</sup>.

#### **4. Ruling of the Constitutional Tribunal of 22 October 2020**<sup>19</sup>

In its judgement passed on 22 October 2020, the Constitutional Tribunal questioned the permissibility of the so-called eugenic abortion (due to embryonic pathology). In the Act on Family Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination, of 7 January 1993, the legislator permitted abortion, as noted above, if prenatal tests or other medical indications suggested a high probability of “a severe and irreversible foetal defect or incurable illness that threatens the foetus’s life”<sup>20</sup>. A eugenic (embryo pathological) abortion under the provision questioned by the Tribunal was allowed until the foetus was able to sustain life outside the women’s womb<sup>21</sup>. The legal problem in respect of eugenic abortion arises from the indissoluble duality of contradictory interests, namely the public interest such as the protection of conceived life, and the woman’s interest, who – by virtue of her inherent dignity – cannot be subjected to any degrading and inhumane treatment.

The constitutional problem pending before the Tribunal touches one of the most difficult questions. Firstly, the problem concerns the legal status of a child in the prenatal stage of life, and the child’s subjectivity. Secondly, it pertains to the permissibility and limits of pregnancy termination, that is an action in a situation of the conflict of values and balancing the values. Significantly, the way the first question is solved has a fundamental influence on the other issue.

The Tribunal emphasised that the role of a constitutional court is to issue binding statements in cases which concern the compliance of created law with the Constitution, and these statements must be based on the law in force, that is the system of norms created in compliance with the formal, established procedure by an authorised public authority. The Tribunal indicated that the mentioned

<sup>18</sup> Announcement of the President of the Constitutional Tribunal of 18 December 1997, Dz. U. No. 157, item 1040.

<sup>19</sup> Judgement of the Constitutional Tribunal of 22 October 2020, Ref. No. K 1/20, OTK ZU A/2021, item 4.

<sup>20</sup> Act on Family Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination, of 7 January 1993, Dz. U. of 1995, No. 17, item 78 with amendments, hereinafter Act on Family Planning, Human Embryo Protection.

<sup>21</sup> Art. 4a section 2 of the Act on Family Planning, Human Embryo Protection.

system should be understood as a system of axiologically and teleologically related norms, which – as pointed out by the Court in its judgement of 30 September 2008 – are the product of culture, rooted in the historical experiences of the community and built according to the system of values shared by the given community<sup>22</sup>.

According to Art. 4a, section 1 point 2 of the Act on Family Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination, termination of pregnancy can only be performed by a doctor in a case when “prenatal tests or other medical indications suggest a high probability of severe and irreversible foetal defect or incurable illness that threatens the foetus’s life”. This provision employs certain evaluative criteria referred to by every doctor *ad casum* when making a decision. However, the decision is not an unrestricted one, dictated by the formal conditions, but calls for weighing the good of the mother and the good of the child, which in such cases collide. According to the doctrine, the legislator concluded that due to severe illness or impairment, the life of a child can be too expensive for the child’s nearest family to be sustained, and may create excessive burden; on the other hand, due to the foetal defect the child is directly refused the right to life<sup>23</sup>. However, the way the aforementioned indications were formulated, it appears that for a doctor to make a decision about abortion, it is not necessary to be certain that the foetus suffers from a severe and irreversible defect or from a life-threatening illness, as the provision allows a doctor to make such a decision when there is a high probability thereof. This approach can raise problems when interpreting this provision both by a doctor making a decision and the court which might have to judge whether a given decision was justified<sup>24</sup>.

The Tribunal emphasised that the doctrine demonstrated – the notion of “high probability” included in Art. 4a section 1 point 2 of the Act on Family Planning was no longer valid in the light of the current medical knowledge. It is now possible to successfully perform medical treatments on a foetus in the mother’s womb, or implement intensive procedures sometimes without making a diagnosis, not just indicating probability but providing evidence beyond any doubt that the foetus suffers from a severe and irreversible defect or a life-threatening illness.

The Tribunal emphasised that the term “a severe and irreversible foetal defect” is not accurate enough and may be understood as a severe, considerable limitation of one’s physical or mental performance. In the court practice, however, it is assumed that the defect must be serious enough to threaten the child’s life – and

<sup>22</sup> Judgement of the Constitutional Tribunal of 30 September 2008, Ref. No. 44/07, OTK ZU No. 7/A/2008, item 126.

<sup>23</sup> Cf. Królikowski M. Problem interpretacji tzw. przesłanki eugenicznej stanowiącej o dopuszczalności zabiegu przerwania ciąży. In: Współczesne wyzwania bioetyczne, [The problem of interpretation of the so-called eugenic premise constituting the admissibility of pregnancy termination. In: Contemporary bioethical challenges.] Bosek L., Królikowski M. (eds.). Warszawa: Publishing House C. H. Beck, 2010, p. 175 and on.

<sup>24</sup> Cf. e.g., judgement of the Supreme Court of 6 May 2010, Ref. No. II CSK 580/09.

this condition applies only to an incurable illness<sup>25</sup>. Irreversibility in the context of this indication refers to a situation when the impairment of a foetus will be permanent and no improvement will be possible.

## Conclusion

By passing the ruling K 1/20, the Constitutional Tribunal sustained the opinion that human life in any stage of its development is a value, and that by being a value arising from the constitutional regulations, it should be protected by the legislator, not only in the form of laws to guarantee the survival of a person as a purely biological creature, but also as a human being in its entirety, an individual who needs adequate social, living and cultural conditions to exist. The Tribunal's opinion is that an unborn child as a human being and a person who is entitled to inherent and inalienable dignity is a subject who has the right to life, and the legal system – in compliance with Art. 38 of the Constitution – must guarantee adequate protection of this principal good, without which the mentioned subjectivity of a person would be negated. The Tribunal underlined that human life is legally protected, also during the prenatal phase, and the child's legal subjectivity is inextricably connected with the dignity that the child is entitled to. Therefore, it is possible to envisage a situation when one of the constitutional goods being in a state of collision pertains to a child in the period of the child's life before birth. Thus, one of the indications for legally allowed abortion contained in the legal regulations binding until this judgement – a high probability of a severe and irreversible foetal defect or life-threatening illness – has now been dismissed.

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<sup>25</sup> Cf. judgement of the Supreme Court Ref. No. II CSK 580/09.

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# SECTION 5

## CURRENT ISSUES OF CRIMINAL LAW: CHALLENGES AND SOLUTIONS TO THEM



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## CRIMINAL PROCEEDINGS IN TIMES OF PANDEMIC

**Keywords:** distribution, legislation powers, Federal Republic of Germany, pandemic, impact of administrative containment measures, criminal proceedings, exhausting time lines, mandatory presence, hearings and protection of health, public hearings under containment conditions, detention, accelerated proceedings, aggravated conditions

### Summary

COVID-19 caught humanity off guard at the turn of 2019/2020. Even when the Chinese government sealed off Wuhan, a city of millions, for weeks to contain the epidemic, no one in other parts of the world had any idea of what specifically was heading for the countries. The ignorant and belittling public statements and tweets of the former US president are still fresh in everyone's memory. Only when the Italian army carried the coffins with the COVID-19 victims in northern Italy, the gravesites spread in the Bergamo region, as well as the intensive care beds filled in the overcrowded hospitals, the countries of the European Union and other parts of the world realised how serious the situation threatened to become. Together with the World Health Organisation (WHO), the terms changed to pandemic. Much of the pandemic evoked reminiscences originating in the Black Death raging between 1346 and 1353 or in the Spanish flu after the First World War.

Meanwhile, life went on. The administration of justice in criminal cases could not and should not come to a standstill. Emergency measures, such as those that began to emerge in February 2020, are always the hour of the executive. In their efforts to stop the spread of the virus, in Germany, governments particularly reflected on criminal proceedings. Neither criminal procedural law nor the courts and court administrations applying this procedural law were adequately prepared for the challenges. Deadlines threatened to expire, access to court buildings and halls had to be restricted to reduce the risk of infection, public hearings represented a potential source of infection for both the parties to the proceedings and the public, virtual criminal hearings via conference calls had not yet been tested in civil proceedings, but were legally possible, but not so in criminal cases. The taking of evidence in criminal cases in Germany is governed by the rules of strict evidence and is largely not at the disposal of the parties to the proceedings. Especially in criminal cases, fundamental and human rights guarantees serve to protect the accused, but also

the victims and witnesses. Executive measures of pandemic containment might impact these guarantees.

Here, an attempt will be made to discuss at some neuralgic points how Germany has attempted to balance the resulting contradictory interests in the conflict between pandemic control and constitutional requirements for criminal court proceedings.

## **Introduction: How it came about**

When news spread from the People's Republic of China at the end of 2019, and the beginning of 2020, that a new “flu virus” had appeared in the province of Wuhan<sup>1</sup>, the ordinary citizen wondered at best whether this was another new type of bird flu. No one was seriously concerned at the turn of the year – neither the governments in Europe (and elsewhere) nor the individual citizens. Flu viruses have been part of winter seasons, and colds caused by them have (mostly) been under control. It was only when the Chinese government quarantined the megacity of Wuhan, as well as the surrounding province and curbed travel within the People's Republic of China that the first questions arose about what would happen if the viruses detected in Wuhan spread further, perhaps even appearing in Europe (or elsewhere on this globe). It should be recalled in this context that at the beginning of 2020 there was still no vaccine. At the same time, based on the experience gained in China, it had to be noted that the vaccines previously used for common flu infections were not effective<sup>2</sup>. Subsequently, when there was a widespread outbreak of COVID-19 in the Bergamo region of Lombardy, and news showed the Italian army using military vehicles to drive through the night transporting the coffins which contained the first COVID-19 victims there, the gravity of the situation in Europe was recognized. However, people were not really prepared for what the future held.

The COVID-19 pandemic has not only raised questions of medical law and ethics, such as how to select critically ill patients under shortage of the available intensive care beds and ventilators. COVID-19 has given rise to movements, not only in Germany, but also beyond, that have led to violent protests in denial of the pandemic. The coalescence of COVID-19 sceptics and conspiracy theorists is a consequence that raises questions for criminal law when this symbiosis joins forces with violent extremists. The undertaken containment measures have deeply interfered with our economic and social coexistence; of necessity, they have also restricted individual freedoms. Fundamental questions about parliamentary democracy in Western countries were raised when it became clear that all the employed measures created a gubernative power overhang that frequently

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<sup>1</sup> Lutz H.-J. Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (Infektionsschutzgesetz – IfSG). Kommentar [Prevention and control of infectious diseases in humans (Infection Protection Act – IfSG). Commentary]. 2<sup>nd</sup> ed., München, 2020, Vorbemerkung margin 1.

<sup>2</sup> One head of state however was of different opinion. His initial press statements on COVID-19 made true internet history due to their surrealistic content.

left parliaments speechless. Financial aid to a pandemic-restricted or even stalled economy, in turn, has created opportunities for individual enrichment, implying criminal relevance. As is so often the case with urgent procurement of medical supplies, the shadow of corruption hangs over the actions of the public sector. Although the issues raised have criminal relevance, due to the scope of this article they cannot be discussed here, and must await scientific investigation in post-COVID-19 times. This article will focus on essential questions that concern dealing with the consequences of the pandemic in terms of criminal procedure. However, whether these can be applied to other countries or be relevant in other pandemics or natural disasters is a question that remains open.

## 1. Distribution of powers in disaster situations: Some German particularities

### 1.1. Managing the disaster by administrative measures

Germany is a federal state<sup>3</sup>. Legislative and governmental functions are divided between the central state of the Federal Republic and her *Länder* or Member States<sup>4</sup>. The Constitution does not provide for central government functions of federal bodies even in the event of national disasters, with the exception of the case of defense<sup>5</sup>. The management of disaster situations, which may include the COVID-19-pandemic at issue here, is primarily the responsibility of the 16 *Länder*<sup>6</sup>. However, under Art. 74 para. 1 No. 19 of the Basic Law, the central Federal Republic has (concurrent) legislative competence, *inter alia*, in respect of measures against dangerous or communicable diseases in humans and animals. The Federal Republic has made use of this legislative competence through the Act on the Prevention and Control of Infectious Diseases in Humans of 20 July 2000<sup>7</sup> (IfSG). Within the Federal Government, the Federal Ministry of Health (BMG) is the lead agency in the area of health policy and is thus responsible for drafting the relevant bills, ordinances and administrative regulations. As far as the Federal Government has not established its own federal health authorities<sup>8</sup>, the *Länder* however are responsible for implementing the IfSG-regulations in accordance with

<sup>3</sup> Art. 20 para. 1 of the Basic Law of 23 May 1949 (BGBl. 1949 p. 1) last amended by Act of 29 September 2020 (BGBl. 2020 I, p. 2048).

<sup>4</sup> Arts 30, 70 and 83 of the Basic Law in particular.

<sup>5</sup> Arts 65a, 115a–115l of the Basic Law.

<sup>6</sup> Lutz H.-J., 2020, Vorbemerkung, margin 1.

<sup>7</sup> BGBl. 2000 I, p. 1045, in the latest version of Art. 98 der Jurisdiction Adjustment Ordinance of 19 June 2020 (BGBl. 2020 I, p. 1328) and Art. 5 of the COVID-19 Tax Aid Act of 19 June 2020 (BGBl. 2020 I, p. 1385).

<sup>8</sup> See section 4, para. 1, 1<sup>st</sup> sentence of IfSG as far as the Robert-Koch-Institute is declared leading coordination agency within Germany but also internationally (para. 3 of Art. 4). Section 5 of IfSG, amended by laws for the Protection of the Population in the Event of an Epidemic Situation of National

Section 54 of the IfSG. Additionally, they may issue their own *Länder* regulations in the field of public health, which must not contradict the IfSG. When it comes to COVID-19 containment measures, an interim summary conclusion is that the 16 State or *Länder* Governments are primarily responsible. They enact the necessary legislation and ensure that it is implemented by their subordinate state authorities. The role of the Federal Government, and in particular of the Federal Minister of Health and the Federal Chancellor, on the other hand, is a coordinating one; the Federal Government also performs the necessary tasks of coordination with the European Union<sup>9</sup> and with the other Member States of the Union in the case of the pandemic that crosses national borders<sup>10</sup>. The forum for national containment coordination is a conference held at regular intervals between the Federal Chancellor and the Heads of Government of the *Länder*, which ensures that measures taken or to be taken are uniform throughout Germany. The Chancellor, even if she wanted to, cannot “govern through” to the last city and its health departments. This observation seems important for an understanding by observers who are not familiar with the constitutional situation in Germany. Rather, the State Governments or the health ministries of the *Länder* implement the resolutions of the Conference of Prime Ministers (which the Federal Chancellor chairs) and the requirements of the Infection Protection Act through legal ordinances and other administrative degrees<sup>11</sup>. The parliaments of the *Länder* are informed about this, but have no expressive constitutionally secured powers of participation. For example, in spring 2021, the Twelfth Bavarian Infection Protection Measures Ordinance of 5 March 2021, has come into force in Bavaria on the basis of section 32 sentence 1 in conjunction with section 28 para. 1, section 28a of the Infection Protection Act (IfSG)<sup>12</sup>, and should lead Bavaria<sup>13</sup> out of the second lockdown since COVID-19 had broken out.

As far as civil protection is concerned, the legislature of the States, such as of Bavaria, has enacted its own civil protection laws, which allows for increased coordination measures by the *Länder* authorities, but can also encroach on the legal sphere of third parties. In the context of the pandemic crisis, Bavaria has twice

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Significance of 27 March 2020 (BGBl. 2020 I 587) and of 19 May 2020 (BGBl. 2020 I 1018) now allows the Federal Parliament to declare the National Emergency Infection Status. However, the federal authority is still limited and only comprises international border-crossing and travelling people across international borders as well as securing medical equipment and personnel nationally (Lutz H.-J., 2020, § 5 margins 1–2b).

<sup>9</sup> See Arts 23 and 32 of the Basic Law.

<sup>10</sup> As far as the financial and economic consequences from the combat against COVID-19 are concerned, the budgets of all public entities from central government to municipalities are affected. The main burden, however, also in relation to the European Union and the aid programs initiated by it, is borne by the federal budget, which also receives most of the public levies and taxes.

<sup>11</sup> See section 54 of the IfSG.

<sup>12</sup> The 12<sup>th</sup> Bavarian Infection Protection Measures Ordinance (BayIfSMV) (BayMBL, 2021, pp. 1–15).

<sup>13</sup> The other State Governments have enacted similar ordinances.

declared a disaster situation<sup>14</sup> under Art. 4 para. 1 of the Civil Protection Act, on 16 March 2020, and 9 December 2020. In addition to the Disaster Protection Act, on 25 March 2020, the Bavarian State Parliament (Landtag) passed a Bavarian Infection Protection Act<sup>15</sup>, which was limited in time until 31 December 2020<sup>16</sup>. This allowed the State Government to more easily access medical supplies such as respirators or protective suits during the COVID-19 crisis. The new law was also intended to make it easier for the State Government to access personnel such as doctors and nurses or firefighters, but not employees of the Bavarian Red Cross and other aid organizations. In an acute emergency situation, this should make it possible to meet additional personnel requirements. In addition, in an extreme emergency, the authorities could even “require any suitable person to provide services, materials or works”. Before all these measures could be taken, the State Government had to declare a so-called “health emergency”, which the State Parliament (Landtag) could demand be lifted at any time. The law has become obsolete; the status of “health emergency” never was declared<sup>17</sup>.

## 1.2. Pandemic and court legislation

The situation with view on the constitutional distribution of legislative powers between central State of Germany and her *Länder* is not significantly different when it comes to other effects of the COVID-19 pandemic, in particular to courts. Under Art. 74 para. 1 No. 1 of the Basic Law, the German Central Government has legislative competence over matters of civil law, criminal law, the judiciary’s organization, judicial procedure (excluding the law governing pre-trial detention), the legal profession, the notary’s office and legal advice services. This (concurrent) legislative competence has a constitutional tradition in Germany and can be traced back to the Constitution of the German Empire

<sup>14</sup> Disaster is defined by article 1 para. 2 of the Civil Protection Act of 24 July 1996 (GVBl. 1996, p. 282) in the latest version of the Act of 10 April 2018 on amending the Civil Protection Act (GVBl. 2018, p. 194): A disaster within the meaning of this Act is an event in which the life or health of a large number of people or the natural basis of life or significant material assets are endangered or damaged to an unusual extent and the danger can only be averted or the disturbance can only be prevented and eliminated if, under the direction of the disaster control authority, the authorities, departments, organizations and the forces deployed cooperate in disaster control.

<sup>15</sup> GVBl. 2020, p. 174

<sup>16</sup> Other *Länder* did not follow the Bavarian example so that the Act remained unique.

<sup>17</sup> The constitutionality of this Bavarian state law to combat COVID-19 consequences was highly questionable. The federal legislature had made extensive use of its (concurrent) legislation through the IfSG. Under the regime of Art. 72 para.1, 1<sup>st</sup> sentence of the Basic Law, even supplementary *Länder* laws are not constitutionally permitted in such cases. Indeed, Art. 72 para. 1 of the Basic Law stipulates: “On matters within the concurrent legislative power, the *Länder* shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law.” Due to the passage of time, the question of the constitutionality of the Bavarian law has been overcome.

of 16 April 1871<sup>18</sup>. It is explained by the need at the time to establish legal unity in the newly founded German nation state consisting out of 25 Federal States from the Kingdom of Prussia to the Free and Hanseatic City of Hamburg – all of them having different legislation on major issues of common national interest. The Reich legislature enacted a uniform Code of Civil Procedure (ZPO)<sup>19</sup>, a uniform Code of Criminal Procedure (StPO)<sup>20</sup> and a uniform Court Constitution Act (GVG)<sup>21</sup> in the form of the then so-called Reich Justice Acts, which entered into force on 1 October 1879<sup>22</sup>, the basic structures of which are still in force today. A uniform Criminal Code (StGB)<sup>23</sup> was already in force at the time under the North-German Federation and was then adopted as a Reich Act, the Commercial Code (HGB)<sup>24</sup> and the Civil Code (BGB)<sup>25</sup> followed the Reich Justice Acts; they too continue to shape legal life in Germany<sup>26</sup> up to now. In contrast to quoted legislation, the administration of justice remained and still is a matter for the courts of the Federal States, nowadays the *Länder*<sup>27</sup>. The central state has only those courts whose establishment is ordered or permitted by the Basic Law. These are the highest courts with ultimate jurisdiction. In the case of civil and criminal law, it is the Federal (Supreme) Court of Justice in Karlsruhe<sup>28</sup>.

The laws of interest in the context of COVID-19 pandemic and criminal proceedings (in the first place, Code of Criminal Procedure [CPC] and secondly, the Court Constitution Act [CCA]) do not consider national (and international) emergency situations arising from pandemics. Only section 206 of the Civil Code (CC) recognizes a legally relevant circumstance as *force majeure* when a creditor is restricted and hindered in his legal litigation if and to the extent that this creditor has been prevented from any enforcement measures in the last six months. In this

<sup>18</sup> BGBl. des Norddeutschen Bundes 1871, No. 16, pp. 63–85. The broad scope of centralized legislation goes even back to the Constitution of the North-German Federation of 1 July 1867 (Stern K. Das Staatsrecht der Bundesrepublik Deutschland. Vol. V: Die geschichtlichen Grundlagen des deutschen Staatsrechts [The constitutional law of the Federal Republic of Germany. Vol. V: The historical foundations of German constitutional law]. München 2000, p. 305 et seq.).

<sup>19</sup> of 30 January 1877 (RGBl, p. 83).

<sup>20</sup> of 1 February 1877 (RGBl, p. 253).

<sup>21</sup> of 27 January 1877 (RGBl, p. 1077).

<sup>22</sup> Stern K. 2000, p. 417 et seq.

<sup>23</sup> of 15 May 1871 (RGBl, p. 127).

<sup>24</sup> of 10 May 1897 (RGBl, p. 219).

<sup>25</sup> of 8 April 1896 (RGBl, p. 195) (Stern K. 2000, p. 448 et seq.; Grüneberg C. In: Palandt, Bürgerliches Gesetzbuch mit Nebengesetzen [Civil Code with Ancillary Laws]. 79<sup>th</sup> ed., München, 2020, Einleitung margin 4 and 5).

<sup>26</sup> In contrast to other Federal States, cf. United States of America or Switzerland, the German *Länder* courts only apply national law, not rules that respective State Parliaments have enacted.

<sup>27</sup> Art. 92 of the Basic Law: The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law and by the courts of the *Länder*.

<sup>28</sup> Art. 95 para. 1 of the Basic Law; sections 123 et seqq. of the Court Constitutional Act.

case, section 206 of the CC orders that limitation of claims is suspended<sup>29</sup>. This substantive regulation on the suspension of lapse of time rules is paralleled by section 245 of the Civil Procedure Code, which reads: “If, as a result of war or any other event, the activities of the court cease, the proceedings shall be suspended for the duration of that state of affairs.”<sup>30</sup> However, litigation is different from criminal prosecution. It is therefore inadmissible to draw conclusions by analogy from the civil law regulations for the situation under criminal law. Executive COVID-19 containment measures, meanwhile, create multiple tensions with legal positions of others involved in the criminal process and even with judicial independence, as executive measures tend to disrespect the scope of sole judicial decision making when it comes to emergency measures. Executive measures find their end and limits where judicial responsibility has to be implemented, in particular in courtrooms when proceedings are formally carried out there. These tensions and their resolution shall now be examined in more details, after it has been discussed in general terms how the competences are distributed in the German constitutional structure.

## 2. Situations of tension

### 2.1. Justice has to be carried out – time lines

Justice has to be carried out. This demand is nothing less than a human right, its violation – a breach of international law. German criminal procedural law is also based on this principle, which is, however, not expressly laid down in German law. It follows from the general Principle of the Rule of Law contained in Art. 20 para. 3 of the Basic Law<sup>31</sup>, that it is one of the most important duties of a state to grant legal protection to those seeking justice. This idea also underlies the guarantee

<sup>29</sup> Ellenberger J. In: Palandt, Bürgerliches Gesetzbuch mit Nebengesetzen [Civil code with subsidiary laws]. 79<sup>th</sup> ed., München, 2020, § 206 margin 4.

<sup>30</sup> That includes epidemics. The interruption sequence occurs automatically as soon as the organisation of a court is paralysed for a longer period of time. A formal decision is not required. The effects end as soon as the court is functional again (Greger R. In: Zöller R. Zivilprozessordnung. Kommentar [Convention for the Protection of Human Rights and Fundamental Freedoms. Commentary]. Code of Civil Procedure. Commentary]. 33<sup>rd</sup> ed., Köln 2020, § 245 margins 1 and 2, see also RGZ 128, 47; 167, 215).

<sup>31</sup> In conjunction with the fundamental rights of individuals as set forth by Art. 1 et seqq. of the Basic Law, in particular from Art. 2 para. 1 of the Basic Law (see BVerfGE 107, 395 [401]; Breuer M. In: Karpenstein U., Mayer F. C. (eds.). Konvention zum Schutz der Menschenrechte und Grundfreiheiten. Kommentar [Convention for the Protection of Human Rights and Fundamental Freedoms. Commentary]. 2<sup>nd</sup> ed., München, 2015, Art. 13, margin 3; Eser R. In: Löwe-Rosenberg, Die Strafprozessordnung und das Gerichtsverfassungsgesetz. Großkommentar [The Code of Criminal Procedure and the Law on the Constitution of the Judiciary. Extensive commentary]. Erb V., Eser R., Franke U., Graalman-Scheerer K., Hilger H., Ignor A. (eds.). Vol. 11, 26<sup>th</sup> ed., Berlin/Boston 2012, EMRK Art. 6, margin 13.

of Art. 19 para. 4 sentence 1 of the Basic Law, according to which legal recourse must be open to anyone whose rights have been violated by public authorities. Moreover, at the level of international law, the denial of judicial protection constitutes a violation of human rights<sup>32</sup>, which German authorities including criminal courts are obliged to avoid under Art. 25, first and second sentences, of the Basic Law. For according to this, the general rules of international customary law are part of federal law, precede all laws of the land and generate immediate rights and obligations for all inhabitants of the federal territory<sup>33</sup>. An even clearer statement is contained by Art. 6 para. 1 sentence 1 of the European Convention of Human Rights of 4 November 1950 (ECHR) – that everybody under indictment has the right to trial within adequate time<sup>34</sup>. Additionally, Art. 13 of the Convention rules that everybody whose conventional rights have been violated shall have the right to seek effective legal protection by internal remedies of the States<sup>35</sup>.

In theory, any pandemic leaves the court system untouched. Courts and judges are legally not permitted to cease, suspend or interrupt proceedings, unless the law expressly does make an exception. Since the entry into force in 1879, Germany, under the rule of the same CPC, experienced two wars. The First World War spared by direct impacts and battles did not affect any part of the German territory. However, the Second World War brought direct misery and horror to the German population and unprecedented physical damage to the country's infrastructure including the country's courts. Nevertheless, the court system kept on functioning – more or less, until the Allies intercepted the court structure on 8 May 1945<sup>36</sup>. The Reichsgericht, the former German Supreme Court in Leipzig,

<sup>32</sup> Doehring K. *Völkerrecht. Ein Lehrbuch* [International law. A textbook]. 2<sup>nd</sup> ed., Heidelberg 2004, p. 388; Verosta S. Denial of Justice. In: Bernhardt R. (ed.). *The Max Planck Encyclopedia of Public International Law*, Vol. 1, 1992, p. 1007 et seqq.; Paulsson J. Denial of Justice in International Law. *American Journal of International Law*, 2005, Cambridge University Press, p. 279 et seqq.; Eagleton C. Denial of Justice in International Law. *American Journal of International Law*, 1928, Cambridge University Press, p. 538 et seqq.; Berber F. *Lehrbuch des Völkerrechts*, Vol. 3: Streiterledigung, Kriegsverhütung, Integration [Textbook of International Law, Vol. 3: Settlement of Disputes, Prevention of War, Integration]. 2<sup>nd</sup> ed., München 1977, p. 12; Verdross A., Simma B. *Universelles Völkerrecht. Theorie und Praxis* [Universal international law. Theory and practice]. 3<sup>rd</sup> ed., Berlin, 1984, p. 857;

<sup>33</sup> Doehring K. 2004, p. 315; Sauer H. *Staatsrecht III. Auswärtige Gewalt, Bezüge des Grundgesetzes zu Völker- und Europarecht* [Constitutional Law III. External threat, references of the Basic Law to international and European law]. 5<sup>th</sup> ed., München, 2018, p. 94, et seqq.; Geiger R. *Staatsrecht III. Bezüge des Grundgesetzes zum Völker- und Europarecht* [Constitutional Law III. References of the Basic Law to international and European law]. 7<sup>th</sup> ed., München, 2018, p. 147 et seqq.; Verdross A., Simma B. 1984, p. 542 et seqq.; Schorkopf F. *Staatsrecht der internationalen Beziehungen* [Constitutional law of international relations]. München, 2017, p. 147 et seqq.

<sup>34</sup> Eser R. 2012, EMRK Art. 6, margin 307 et seqq.

<sup>35</sup> The guarantees set down in Art. 6 para. 1 and Art. 13 of the ECHR are concurring (see Breuer M. 2015, Art. 13, margin 5).

<sup>36</sup> Proclamation No. 1, promulgated by the Allied Commander-in-Chief Dwight D. Eisenhower on 18 April 1944, closed the German courts.



ceased to exist on 19 April 1945<sup>37</sup>. However, few weeks after the surrender of German militaries, Military Governments in all four occupation zones including Berlin reopened courts, and they restarted their functions<sup>38</sup>.

Despite the experience of war, the German legislature has so far seen no reason to make provisions in criminal procedure law for the event of an emergency situation affecting the entire country. COVID-19 has created a situation that Germany (and other countries) have never experienced in modern times<sup>39</sup>. A complete or temporary closure of the courts by the executive in its effort to contain the epidemic has however not been contemplated in Germany (or, recognizably, elsewhere in Europe). There is no legal basis for this in Germany. Moreover, in view of the constitutional and human rights guarantees on the access of individuals to judicial protection, such a statutory authorization of the government to close courts is hardly conceivable<sup>40</sup> or even unconstitutional.

The core of German criminal procedure are those regulations that deal with the main criminal proceedings in which the court has to establish the guilt of the defendant. For reasons of procedural concentration, but also to accelerate the process, which is stressful for all parties involved, especially the accused, section 229 of the CPC establishes a strict temporal regime. The court is not free to decide how long it can interrupt, postpone or adjourn a main hearing that has already begun. The law makes mandatory statutory provisions therefore. If these are not adhered to, the main hearing must begin anew. In individual cases, such restarted trial may contradict the requirements of Art. 6 para. 1 of the ECHR on the expedited treatment of charges before the courts, especially in matters

<sup>37</sup> Fischer D. Zur Geschichte der höchstrichterlichen Rechtsprechung in Deutschland [On the history of supreme court decisions in Germany]. JZ 2010, pp. 1077–1086. Attempts to re-establish the *Reichsgericht* in Leipzig immediately after the collapse of the Third Reich failed, among other things, because as a result of the Allied decisions of the Potsdam Conference, the US troops withdrew from Saxony and Central Germany came under Soviet military administration, which had no interest in re-establishing the *Reichsgericht*. Instead, the Soviets arrested those judges of the former *Reichsgericht* whom they could get hold of and took them to the Mühlberg concentration camp on the Elbe, where most of them died (Fischer D. 2010, pp. 1077–1086).

<sup>38</sup> Herbst G. Von der Wiedererrichtung bis zur Gegenwart [From restoration to the present]. In: Herbst G. (ed.). Das Bayerische Oberste Landesgericht. Geschichte und Gegenwart [The Bavarian Supreme Court. History and present]. München, 1993, p. 59; Biebl W., Helgerth R. Die Staatsanwaltschaft bei dem Bayerischen Obersten Landesgericht [The public prosecutor's office at the Bavarian Supreme Court]. 4<sup>th</sup> ed., München, 2004, p. 191.

<sup>39</sup> In the context of time limits under criminal procedure law, only section 26 (4) EGGVG takes extraordinary circumstances into account through the concept of *force majeure* (Böttcher R. In: Löwe-Rosenberg. Die Strafprozeßordnung und das Gerichtsverfassungsgesetz. Großkommentar [The Code of Criminal Procedure and the Law on the Constitution of the Court. Extensive commentary]. Erb V., Eser R., Franke U., Graalman-Scheerer K., Hilger H., Ignor A. (eds.). Vol. X, 26<sup>th</sup> ed., Berlin/New York 2010, EGGVG § 26, margin 11; Kissel O. R., Mayer H. Gerichtsverfassungsgesetz. Kommentar [Jurisdiction Act. Commentary]. 7<sup>th</sup> ed., München 2013, § 26 EGGVG margin 18). However, the provision is not susceptible to analogy.

<sup>40</sup> Different opinion: Wagner M. Die Strafjustiz in Zeiten der Pandemie – Überlegungen zu § 10 EGStPO [Criminal justice in times of the pandemic - considerations on § 10 EGStPO]. Zeitschrift für Internationale Strafrechtsdogmatik, 2020, pp. 223, 231. Available: [www.zis-online.com](http://www.zis-online.com). [viewed 11.03.2021.].

of detention<sup>41</sup>. In any case, a new start of a main trial is anything but desirable, especially in large-scale proceedings with many defendants and many defense lawyers and an extensive taking of evidence that has already begun. These types of proceedings characterize everyday life in Germany before the white-collar criminal divisions of the regional courts, before the jury divisions of the regional courts and before the state protection senates of the higher regional courts, especially when these proceedings have already used up a large number of trial days. The effort of restarting the main hearing in such constellations is also always an expensive undertaking. According to section 229 of the CPC, a main hearing that has begun can be interrupted for up to three weeks. If more than 10 trial days have taken place, the interruption may last up to one month. Only in exceptional cases of illness of a party to the proceedings or of one of the recognizing judges can the interruption last longer. The legal idea behind this strict binding of the trial judge is that the trial events should be before his or her eyes before the deliberation and pronouncement of the judgement<sup>42</sup>. The longer the interruptions and adjournments last, the less this seems to be guaranteed<sup>43</sup>. The fact that this concentration of proceedings is accompanied by an acceleration of the process is a desirable side effect.

Justice has to be carried out, but not at any price. If court proceedings have to take place regardless of an emergency situation<sup>44</sup>, simultaneously care must be taken to ensure that the health risk for all parties involved is kept as low as possible<sup>45</sup>. This is required by the constitutional protection of physical integrity according to Art. 2 para. 2 of the Basic Law and the protection of life through Art. 2 para. 1 ECHR<sup>46</sup>. When the first major wave of infections hit in the spring 2020, this conflict between granting justice and protecting health was put on the agenda of all courts, they were not prepared. Moreover, at that time it was not entirely clear from the point of view of epidemiology which concrete protective measures were at all capable of guaranteeing health protection in a courtroom. It quickly became apparent in March 2020 that the stringent deadlines of section 229 of the CPC could not be met and that major proceedings that had already begun were in danger of having to be suspended and to be then started anew.

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<sup>41</sup> Eser R. In: Löwe-Rosenberg. Die Strafprozessordnung und das Gerichtsverfassungsgesetz. Großkommentar [The Code of Criminal Procedure and the Law on the Constitution of the Judiciary. Extensive commentary]. Erb V., Eser R., Franke U., Graalman-Scheerer K., Hilger H., Ignor A. (eds.). Vol. 11, 26<sup>th</sup> ed., Berlin/Boston 2012, EMRK Art. 6 margin 313 et seqq.

<sup>42</sup> Wagner M. 2020, pp. 223, 226.

<sup>43</sup> The statement of the Federal Bar Association No. 71/2020 of November 2020.

<sup>44</sup> For various measures taken, see: Wagner M. 2020, pp. 223, 224 and 225.

<sup>45</sup> BVerfG, Einstweilige Anordnung of 1 April 2020 – file No. 2 BvR 571/20 = BeckRS 2020, 4898; VerfGH Sachsen, Beschluss of 20 March 2020 – file No. Vf. 39-IV-20 = BeckRS 2020, 4039; BVerfG, Einstweilige Anordnung of 16 November 2020 (file No: 2 BvQ 87/20); Usebach J. Angeklagter muss trotz Corona im Strafverfahren erscheinen [Despite Corona, the accused must appear in criminal proceedings]. Available: <https://www.jura.cc/rechtstipps/angeklagter-muss-trotz-corona-im-strafverfahren-erscheinen/> [viewed 11.03.2021.].

<sup>46</sup> Eser R. 2012, EMRK Art. 2, margin 23 et seqq.; Satzger H. International and European Criminal Law, 2<sup>nd</sup> ed., München, 2018, p. 180 et seqq.

Switching to audiovisual hearings was not permissible under German criminal procedure law. Since other areas of law, such as insolvency law with the COVID-19 crisis, also faced unsolvable deadline problems, the federal government decided on a comprehensive solution, which with section 10 Introductory Act to the CPC (IACPC) (EGStPO)<sup>47</sup> also brought a solution for commenced main hearings in criminal cases. The time limit of two months and then days granted to the courts for interrupting or postponing a main hearing that had already begun enabled them to take the protective measures required for health protection in the hearing rooms in the meantime<sup>48</sup>. How many cases pending at trial in spring 2020 have been “saved” by the new regulation of section 10 IACPC is not known yet<sup>49</sup>.

Section 10 IACPC was unavoidable<sup>50</sup>. The German Code of Criminal Procedure does not allow to switch (in crisis situations) to a virtual main hearing.

<sup>47</sup> Act to Mitigate the Consequences of the COVID-19 Pandemic in Civil, Insolvency and Criminal Procedure Law of 27 March 2020 (BGBl. 2020 I p. 569), entered into force 28 March 2020. Section 10 IACPC was timely limited until 27 March 2021, and should then be repealed or become obsolete. Against the background that further containment measures might be necessary after 27 March 2021, because the lawmaker at the time expected the pandemic to be over after one year. However, in our experience, it is not. With a view toward the 2021 general elections to the 20<sup>th</sup> Bundestag, the German national parliament, that will take place in fall 2021 it is already clear that the life of the current Parliament will then come to its end. Forming a new Government and a supporting majority within Parliament might take considerable time. Therefore, consideration have already started to extend the validity of section 10 IACPC for one year more until 27 March 2022. Critical of this with regard to the principle of acceleration and the concentration maxim is the statement of the Federal Bar Association No. 71/2020 of November 2020.

<sup>48</sup> Section 10 of IACPC has the following wording:

‘Suspension of interruption periods due to infection control measures:

(1) Irrespective of the duration of the main hearing, the running of the periods of interruption referred to in section 229, paras 1 and 2, of the Code of Criminal Procedure shall be suspended for as long as the main hearing cannot be held due to protective measures to prevent the spread of infections with the SARS-CoV-2 virus (COVID-19 pandemic), but for no longer than two months; these periods shall end at the earliest ten days after the expiry of the suspension. The court shall determine the beginning and end of the suspension by an unappealable order.

(2) Subsection (1) shall apply mutatis mutandis to the time limit for pronouncing a judgment specified in section 268 paragraph 3 sentence 2 of the Code of Criminal Procedure” (see the official explanation to the draft law of 24 March 2020 [BT-Drs. 19/18110, p. 32 et seqq.]).

<sup>49</sup> At least the Case No. 7 St 1/16 pending in main trial at the Munich Higher Regional Court could be terminated by guilty verdict of 27 July 2020, due to section 10 IACPC. When COVID-19-pandemic hit this trial was on for almost three years and nine months. It started on 17 June 2016 when in total 10 defendant were charged of terrorism allegations. The trial included not only those 10 defendants but also their 20 defense counsels, 10 supporting interpreters and five court interpreters. In spring, the Higher Regional Court had already spent more than 200 court days, had closed the evidentiary proceeding and the final statements of the parties of the trial had already started. Millions of Euros had been spent already when the short time lines of Section 229 threatened to turn the trial in a restart from the beginning. – The unknown number of “saved” trials is another critical point of statement of the Federal Bar Association No. 71/2020 of November 2020.

<sup>50</sup> In this context with views on France and the efforts there, see Mechtcherine A. M. Pandemiebedingte Neuerungen im französischen Strafverfahrensrecht [Pandemic-related innovations in French criminal procedure law]. Available: [https://jura.uni.koeln/efferuhd/user\\_upload/Homepage\\_Aufsatz\\_Mechtcherine.pdf](https://jura.uni.koeln/efferuhd/user_upload/Homepage_Aufsatz_Mechtcherine.pdf) [viewed 10.03.2021.]; with view on Austria see Göilly S. Strafverfahren “in der Krise” [Criminal proceedings “in crisis”]. Universität Graz, We work for tomorrow – Interview

In contrast, this is possible before the civil courts<sup>51</sup>, and the civil courts made good use of this possibility in the times of the current pandemic. Civil and criminal proceedings in Germany differ considerably in their legal structure<sup>52</sup>, which makes it questionable whether virtual main hearings in criminal courts can be made possible at all in the future without deep intervention by the legislature in the structures of criminal proceedings. For future nationwide and long-lasting disasters, virtual main hearings are not a solution to be endorsed<sup>53</sup>.

## 2.2. Containment measures and participation in the main trial

The CPC makes it crystal clear: the main trials can legally be held only in presence of the judges, including lay judges, the prosecutor, the court clerk and the defendant and his counsel<sup>54</sup>. It is a matter of course that the professional judges

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of 19 May 2020; for critical views see Wagner M. 2020, p. 223/227 et seqq.; Fromm I. E. Strafprozess und Corona-Krise [Criminal proceedings and the Corona crisis]. Available: [https://www.caspers-mock.de/publikationen/corona\\_strafprozess.htm](https://www.caspers-mock.de/publikationen/corona_strafprozess.htm) [viewed 11.03.2021.]; Isfen O. Interview. Available: <https://www.fernuni-hagen.de/universitaet/aktuelles/2020/04/am-corona-im-strafrecht.shtml> [viewed 11.03.2021.];

- <sup>51</sup> Section 128a of the Civil Procedure Code. The court may order an audio-visual hearing without any motion or consent of the parties (Greger R. 2020, § 128a margin. 3). Interrogation of witnesses, experts and parties is also permitted. Only taking evidence by documents is inadmissible (Greger R. 2020, § 128a margin. 7), as section 420 of the Civil Procedure Code requires the physical handover of the document to the court (Feskorn C. In: Zöllner R. Zivilprozessordnung. Kommentar [Code of Civil Procedure. Comment]. 33<sup>rd</sup> ed., Köln 2020, § 420 margin 2).
- <sup>52</sup> Civil proceedings are conducted to a greater extent in writing, they can even be performed in writing without any oral hearing at all (section 128 para. 2 CPC). Criminal proceedings, on the other hand, are strictly oral (with a significant exception in the case of evidence by documents, which the criminal court may refer to the so-called self-reading procedure under section 249 para. 2 CPC, whose introduction met with considerable resistance from the bar associations and other legal professionals at the time, because they feared that it would result in a considerable loss of their opportunities to attack the formation of convictions by the judge in open court and that the criminal process would be faced with secret proceedings without public scrutiny). In civil proceedings, the parties also have a much stronger influence on the scope of an evidentiary hearing. What is not disputed is deemed admitted and does not require proof. In criminal proceedings, on the other hand, these procedural concessions do not exist. Whatever appears to the criminal court to be in need of proof requires proof. Such evidence is to be taken *ex officio*. The scope of the criminal court's taking of evidence is simply inconceivable in German civil proceedings, and may not even be feasible. Only evidence that has been formally collected before the criminal court according to the rules of criminal procedure can be used by the criminal judge in his judgement. This is not the case in civil proceedings in this strictness. It is hardly conceivable that the criminal proceedings would be written down to a greater extent without interfering with the right of the accused and his defence lawyers to request evidence. The legal profession will not allow itself to be deprived of this main means of struggle without resistance in future reforms of criminal procedure law. A virtualisation of criminal proceedings would also require far greater discipline on the part of those involved in the proceedings, which can hardly be reconciled with the procedural drama of the request for evidence.
- <sup>53</sup> On the legal review of an inhibition according to section 10 of the Code of Criminal Procedure (EGStPO) by the Federal Supreme Court of Justice see BGH decision of 11 November 2021 – file No. 4 StR 431/20 – StraFo 2021, p. 77 et seq.
- <sup>54</sup> If a verdict is rendered in the absence of a person whose presence at the main hearing is required by law, this constitutes an absolute ground for appeal under section 338 No. 5 of the CPC, which, without further statutory circumstances, leads to the nullification of the verdict by the appellate court.

are obliged to participate in the hearings on the days determined by the presiding judge<sup>55</sup>. This applies in the same way to the representatives of the public prosecutor's office. The law provides<sup>56</sup> for the participation of lay judges in criminal proceedings – with the exception of the single judge at the district court and the criminal senates of the higher regional courts with jurisdiction at first instance. The lay judges are obliged to serve and must appear at the hearings, in which they have to participate according to the general list of lay judges established by the court administration<sup>57</sup> after the election of lay judges<sup>58</sup>. If they fail to comply with this duty, they may be charged with the costs of the proceedings caused by their absence<sup>59</sup>.

The presence of the defendant at main trial is mandatory<sup>60</sup>. Under exceptional circumstances, exclusively as defined by law, the defendant may take leave from his obligation to show up in court and to be present during the main trial<sup>61</sup>. The (abstract) risk of infection by COVID-19 virus does not match such exemptions. If the accused fails to appear at the main hearing despite being duly summoned, he or she must expect to be forcibly brought before court by police on the next day of the hearing or to be taken into trial custody. Such a trial custody arrest warrant does not require any further grounds for arrest<sup>62</sup>. In the case of defense counsels, their attendance is a professional duty, which, however, cannot be enforced. In addition, the absence of an appointed defense counsel will regularly cause the criminal court to assign a mandatory defender to the accused, who is subject to the same professional duties as the appointed defense counsel<sup>63</sup>. Witnesses, as well as expert witnesses are also obliged to appear in court when duly summoned<sup>64</sup>. The background to these duties is the principle of personal interrogation in the main hearing contained in section 250 of the CPC. Failure to appear despite being summoned can lead to witnesses and experts being ordered to pay a fine, or alternatively to serve a detention order, and to

<sup>55</sup> The issue might be seen differently when it comes to work at home and not in the court office room. This is a common recommendation across Europe. Nevertheless, it should not be overlooked that this requires a secure infrastructure and optimal IT equipment, which is not guaranteed at all courts in Germany (Wagner M. 2020, p. 223).

<sup>56</sup> Sections 28 and 29 of the CCA for the District Courts (1 professional judge and two lay judges); section 76 para. 1 of the CCA for the Regional Courts (1 professional judge and two lay judges in the “small” criminal chamber (appeals only) and three professional judges and two lay judges in the “grand” first instance chambers).

<sup>57</sup> Section 44 of the CCA.

<sup>58</sup> Sections 36–45 of the CCA

<sup>59</sup> Section 56 of the CCA.

<sup>60</sup> Sections 230 and 231 of the CPC.

<sup>61</sup> Sections 231a; 231c and 233 of the CPC.

<sup>62</sup> Section 230 para. 2 of the CPC.

<sup>63</sup> In the event of the absence of the duly summoned mandatory defence counsel or in the event of his refusal to defend, this conduct may result in his being ordered to pay the costs caused by the suspension if the court is thereby compelled to suspend the proceedings and start anew (section 145 para. 4 of the CPC).

<sup>64</sup> Section 48 para. 1 of the CPC (witnesses); Section 72 of the CPC (experts).

pay the costs of the proceedings incurred by their absence<sup>65</sup>. The court may also order witnesses (although not the experts) to be coercively brought to the next scheduled hearing (by the police)<sup>66</sup>. Neither witnesses nor experts may use the general risk of infection by COVID-19 as sufficient excuse to stay away from a hearing they are summoned to.

All these listed duties are subject to the constitutional reservation of proportionality. In the case of witnesses, experts and lay judges, the Code of Procedure and the Courts Constitution Act leave their non-appearance without consequences if their absence is sufficiently excused<sup>67</sup>. In the context of COVID-19, this can only ever be for medical reasons, which the witness, expert or lay judge must give evidence for. The court's assessment of submitted medical certificates – as is so often the case – is a question that the court can only answer after expert advice from epidemiologists or virologists. The measures that the court itself has taken to protect the health of persons in the hearing room have to be included in such assessments. Indeed, these measures are a part of the considerations that courts must make under the proportionality test before they may impose negative measures on individuals. These measures will be commented on in the following discussion.

In the case of witnesses and experts, the question always arises within the framework of proportionality whether procedural law provides possibilities to avoid their direct hearing in the courtroom and to replace them with other means of taking evidence. First and foremost, audiovisual examination of witnesses is to be considered, which is admissible if direct examination in the courtroom causes the risk of serious detriment to the witness<sup>68</sup>. Infection risks might represent such risks. Under such circumstances, the court may order the audio-visual hearing. The consent thereto by the parties is not needed, and the respective witness may even be interviewed in his home – from pandemic perspective, a safe place. Again, without consent of the parties, the court may order the hearing of an expert. A risk of detriment, as it is pre-required by section 247a para. 1 CPC when it comes to hearing witnesses is not required in this constellation of hearing experts<sup>69</sup>.

Section 256 para. 1 of the CPC allows the reading of expert opinions, medical certificates and investigation reports of police witnesses. Orders under section 256 para. 1 CPC to read out these items of evidence do not require the consent of the parties to the proceedings. Under narrow conditions, according to section 251 para. 1, para. 2 of the CPC, the court may also order the reading of earlier records of interrogation of witnesses, experts and former co-defendants, for example, if the interrogated persons have died in the meantime or are otherwise unreachable,

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<sup>65</sup> Section 51 of the CPC (witnesses); section 77 of the CPC (experts).

<sup>66</sup> Section 51 para. 1, 3<sup>rd</sup> sentence of the CPC.

<sup>67</sup> Section 51 para. 2 CPC (witnesses); section 72 CPC (experts); section 56 para. 1 of the CCA.

<sup>68</sup> Section 247 para. 1 CPC. On those methods see Mechtcherine A. M.

<sup>69</sup> Section 247 para. 2, 1<sup>st</sup> sentence CPC.

but especially if the prosecutor, the accused and the defense agree to such a reading. Forensic experience teaches that consents under section 251 para. 1 of the CPC are granted if such protocols only marginally concern the events of the crime and of guilt. If they are of significance regarding guilt, the parties to the proceedings do not waive the personal hearing of the persons giving evidence, because only in this way do they have the possibility of direct confrontation.

Likewise, the courts are well advised not to turn to the possibilities of a substitution without further ado. If, for example, the credibility of a witness is questionable or the scientific performance of an expert is of importance, it would be unwise to “only” read out earlier hearing transcripts or the written expert opinion. Pursuant to section 261 of the CPC, the court must draw its conviction to be recorded in the judgement from the entirety of the main hearing and, in doing so, pursuant to section 244 para. 2 of the CPC, extend its findings *ex officio* to all facts and evidence that are of importance for establishing the truth. In the case of critical evidence, a hasty evasion of a substitute taking of evidence may run counter to these duties and render the subsequent judgement erroneous<sup>70</sup>. Furthermore, documentary evidence that depends on the authenticity of the document or that involves circumstances that require a visual inspection can only be taken in a main hearing. This is another reason why audiovisual criminal hearing are ruled out, because the parties to the proceedings must be given the opportunity to participate in the judicial inspection in person and directly.

In order to cope with COVID-19-related consequences, the German Code of Criminal Procedure does open up possibilities to a limited extent to reduce human encounters in courtrooms in accordance with epidemic advice. The main hearings, which sometimes involve many people in a confined space, are nevertheless to be accepted under the given legal conditions.

At the height of the first pandemic wave in spring 2020, the obligation to appear in court was often hard up against the limit of its enforceability. At the beginning of the pandemic, when its dimensions gradually became apparent and even nowadays, judges and court administrations had to develop abilities beyond the legal demands, which they never thought to be forced into in order to cope with constitutional requirements to protect health and bodily integrity of persons who have to appear before court and in courtrooms. A few examples may give evidence for the management skills that had to be developed at that time.

The participants in the proceedings who were not in custody<sup>71</sup> but also did not live at the court location and did not have their own motor vehicle, were confronted with the situation that long-distance and local public transport was suspended for weeks. Planes were grounded, trains at the station, long-distance buses no longer ran. In order to continue with important main hearings, especially those that had already begun, the courts resorted to costly means of transport

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<sup>70</sup> Raising that topic, see Mechtcherine A. M.

<sup>71</sup> The issue of custody in pandemics as a different aspect to be discussed here later.

at the expense of public budgets. The judiciary could not help but pay for taxi fares and hotel accommodation when hotels were still open and running their business<sup>72</sup>. In extreme cases, the only option was for the police upon official requests of the courts to provide transport. The logistical effort to overcome the distance between the place of residence/office and the place of the court was enormous in individual constellations. Reliable figures so far are not available, yet. At the very end of the road, in a certain number of cases, main hearings had to be adjourned. Again, reliable figures of such cases are not yet available. However, the problems did not stop with people to be transported. Another problem in the first wave was the provision of food for the participants in the proceedings, when restaurants, cafés and canteens had to close. Not every court location with longer trial durations had and still has “food to go” facilities. In the end, catering might have been the only remaining option, again at the expense of public funds. After all, the protection of life and physical integrity also covers the obligation to provide food options when an entire infrastructure has been eliminated due to official disease containment measures.

This obligation to appear in court if duly summoned correlates with the court’s obligation to install and secure a safe environment in courtrooms, their surroundings, in the court house and the immediate areas surrounding the courthouse. The obligation to protect health by the adjudicating courts can be traced back to the fundamental right guarantee of the protection of health and physical integrity under Art. 2 para. 2 of the Basic Law. As far as the hearing room and its immediate surroundings are concerned, section 176 para. 1 of the CCA declares the presiding judge of the adjudicating court responsible<sup>73</sup>. He implements his authority through so-called session security orders, which are issued prior to the hearing’s beginning (and then altered if needed) and then enforced during the proceedings by the court administration, the police or court guards who are present.

These security orders of the presiding judge cover the seating arrangement in the courtroom, the distances between the individual parties to the proceedings, the erection of dividing screens between them, their disinfection, the equipment of the individual seats with microphones and their regular disinfection, the frequency of interruption of a main hearing on the day of the hearing for its ventilation with fresh air. In addition, the security orders may also limit the number of spectator seats in the auditorium. The presiding judge may, of course, order the wearing of certain facial masks, which is also recommended or obligatory outside the court,

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<sup>72</sup> In the first weeks of the pandemic, completely unorthodox types of cooperation between courts and the private sector could occur. Defence lawyers complained that it was impossible to find open hotels in Munich when they travelled from their law firm or residence to the court in Munich for several days. In this situation, the Hotel and Restaurant Association offered its help and even set up a hot-line for such defence counsels.

<sup>73</sup> Mechtcherine A. M.



for the court and participants in the proceedings<sup>74</sup>. However, it should also be noted in this context that the implementation of some of these measures cannot be enforced. It makes little sense to put masks on defendants by direct coercion. Against the defense lawyers, such measures fail completely. Direct coercion against them is inadmissible. If the parties to the proceedings do not cooperate, the criminal court only has the option of adjourning the main hearing and ordering the defense lawyers who are unwilling to cooperate to pay the costs incurred on the day of the hearing in question if the law provides for. The imposition of costs proves to be a rather blunt sword in the concrete conflict-like trial situation between a court carrying out its legal duties and unwilling lawyers<sup>75</sup>.

The court building and its immediate surroundings are not accessible to such security orders issued by the presiding judge of the trial. This is where the respective court president comes into play as the representative of the building owner and as the holder of domiciliary rights. While respecting the right of the public and the media to participate in court hearings (section 169 para. 1, 1<sup>st</sup> sentence of the CCA) and giving priority to individual security decisions of the presiding judges in specific proceedings, all court presidents in Germany have regulated access to and stay in court buildings by so-called in-house-rules. This includes, for example, security checks at the entrances of the courts, bans on dangerous objects and the exclusion of drunk persons from entering court buildings. After COVID-19, these rules had to be adapted and continuously altered, for example, with regard to distance requirements, masking, disinfection and the obligation to self-disclose any infections. Certain areas of the buildings that were accessible to everyone before COVID-19 were now closed in order to reduce the risk of infection. Basically, it has been and still remains the duty of the Police and the Court Guards to enforce those rules. However, it should be noticed that those rules are a matter of private law; enforcing private regulations by Police and Court Guards is legally complicated. In case of visitors not complying with those rules the conflict between administration (including Police) and obstructing individuals might end

<sup>74</sup> The obligation to wear a mask during an ongoing trial is not unproblematic. Against a completely different background (in particular the veiling of [female] defendants and witnesses by face veils), the legislature introduced section 176 para. 2 of the CCA on 13 December 2019 (Act of 10 December 2019 [BGBl, 2019 I, p. 2121]), according to which persons participating in the hearing may not veil their faces, either in whole or in part. The presiding judge may allow exceptions to this rule if and to the extent that making the face visible is not necessary to establish identity or to assess evidence. If, in order to reduce the risk of infection, the presiding judge compulsorily orders the wearing of masks, the extent to which this may affect the assessment of evidence of individual witnesses must be weighed up in accordance with section 176 para. 2, 2<sup>nd</sup> sentence of the CCA (see Heuser M., Bockemühl J. “Der Rechtsstaat braucht den freien Blick ins Gesicht” – Maskerade in der Hauptverhandlung [“The rule of law needs a clear look in the face” – masquerade in the main hearing?]. *KriPoZ*, 2020, p. 342 et seq.; Wagner M. 2020, pp. 223, 224).

<sup>75</sup> Lack or refusal of cooperation by defence lawyers can constitute a violation of their professional duties, which may be prosecuted in the (state) lawyers' courts. However, this sword is also a rather blunt one; the sanctioning of professional duties by the lawyers' courts does not help in the conflict situation. It does not follow the refusal to cooperate on its heels, but hits the lawyer unwilling to cooperate only after a period of investigation and indictment – if at all. Obstructive lawyers are aware of this situation and might make an illegitimate benefit out of it.

by the court president banning them from the court house. Ignoring such bans is a criminal offence pursuant to section 123 of the German CC (trespass) and may therefore provoke the Police to act and to remove the person concerned or to arrest him/her. Is that person however a participant to a trial, defendant, defense counsel, witness or expert such removal or arrest proves contra-productive. With view on enforcing the president's house rules on persons who claim to have the right to be in court or to have access to the court the house rules require the enforcement officers to inform the presiding judges of respective trials before imposing further measures so that the presiding judge being responsible for the main trial may take a decision in terms of safeguarding his/her trial and letting the house rules being enforced – often an exercise between Scylla and Charybdis.

### **2.3. Public hearings under containment measures**

The hearing before the adjudicating court, including the pronouncement of judgments and orders, shall be public (section 169 para. 1, 1<sup>st</sup> sentence of the CCA). This principle, whose roots in Germany can be traced to the Napoleonic reforms at the beginning of the 19<sup>th</sup> century, put an end to the inquisition proceedings, which had been held in secret and which had been the rule for centuries all over Europe. Even then with the implementation of the Napoleonic reforms, public hearings meant the duty of the third power to show transparency. With the democratic upheavals in the 19<sup>th</sup> and especially in the 20<sup>th</sup> century, another element of the principle of publicity was added, namely the control of the courts by the public, especially the media. This means democracy within courts and court proceedings. Media and courts are therefore a very sensitive issue. Their interests are often not congruent, for example when courts protect the personal rights of those involved in proceedings, but in whom the media have a heightened interest. In the context of the pandemic, however, it is not primarily a question of this highly interesting and highly controversial area of conflict, but simply of the obligation of the courts to organize the access and stay of persons in court buildings and courtrooms in such a way that no (increased) risk of infection emanates from them.

However, the principle of public court hearings must not be misunderstood. The principle of public court hearings does not give rise to an individual right (not even of the media representatives) to come to the court and to the proceedings pending there under all conceivable circumstances. Other events can prevent this in individual cases. It does not play a decisive role whether the obstacles are those with natural causes or those caused by people. Snowstorms in winter, floods in spring and fall can easily prevent the journey to the court and the proceedings just as much as strikes or terrorist attacks elsewhere. Such constraints do not affect the publicity of a court hearing. As long as a court does not hinder the access through its own decisions, publicity of court hearings appear to be guaranteed.

In spring and early winter 2020, *Länder* governments agreed on reducing social contacts. They limited social contacts to a few people of not more than two households. With these containment restrictions personal movement was reduced.

Only those, who had valid reasons were permitted to leave their homes temporarily. Those who went to work had such valid reason and were permitted to leave their homes so that respective administrative restrictions did not cause problems to representatives of media. It took however a while and routine in practice to make enforcement authorities to understand that those who justified their absence from home with their wish to attend a court hearing as an observer had either valid reason to be on the move. In this context, publicity of court hearings was not affected.

The same applies insofar as the house rules of the court presidents, in implementation of the government rules to reduce social contacts, entailed restriction measures to protect visitor circulation and court personnel, such as the mask requirement in the buildings, the distance rules (also in the immediate area in front of the buildings) and the disinfection requirement. Although this made the work of the media representatives on reporting from hearings more difficult, it did not make it impossible and was reasonable from a proportionality point of view, because general as well as individual health protection could claim priority. In this context, no legal disputes have become known that would have prompted media houses. Nothing else applies to general visitor traffic.

However, based on section 176 para. 1 of CCA, presiding judges were also obliged to take restriction measures within a courtroom and in the immediate area in front of it. Their orders limited the number of seats available to spectators in order to implement the administrative spacing rules. In doing so, consideration was and is given to the special interests of the media<sup>76</sup>. Nevertheless, measures taken by the presiding judge's security orders also lead to a reduction in the number of seats available to members of the press in a session room. At the first glance, such restrictions seem to entail limitations on the publicity of court hearings. The principle of public hearing does not apply without limitation, however. Family matters and non-contentious matters, as well as matters of mandatory placement in medical or psychiatric treatment are not heard in public pursuant to sections 170 and 171a of CCA. Whenever the interests of third parties (including victims) or of the state require it, the court may exclude the public entirely or for certain parts of the proceedings<sup>77</sup>. Persons who appear in a manner contrary to the dignity of the court may also be denied admission to hearings<sup>78</sup>. A further point for consideration in this context is the simple observation that, when it comes to criminal proceedings that attract media and public attention, no courtroom can meet the demands placed on the presiding judge. Only in exceptional cases may a court resort to temporarily renting suitable hearing rooms in this kind of

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<sup>76</sup> Section 169 of the CCA opens the possibility that under the legally given conditions public hearings may be transmitted from the courtroom to a different media room. Under pandemic conditions this legal option could not be implemented factually. Firstly, too many proceedings are concerned. Secondly, courts in Germany are not equipped with media rooms, as section 169 – new CCA was enacted in 2017 and the time was too short to let all courts realize the requirements and to install necessary equipment.

<sup>77</sup> Sections 171b; 172 of the CCA.

<sup>78</sup> Section 175 para. 1 of the CCA.

“sensational trials”. Such facilities are not designed for the special (security) needs of criminal proceedings and require elaborate preparation, which often cannot be done in the short time until the trial begins. In addition, frequently it cannot be forecasted that a particular trial will arouse exceptional media and public interest. These findings are particularly true for public hearings under pandemic conditions, where even ordinary criminal proceedings encounter a shortage of space resources. At the end of all considerations regarding the publicity of court hearings, the admissibility of restriction measures depends on a judicial weighing of proportionality: How much publicity in a courtroom is still conducive to the protection of health vis-à-vis judges and all other participants in the proceedings? In a case pending at the Munich Higher Regional Court with an average of 60 people present in a 250 m<sup>2</sup> courtroom, the court sought virological and forensic medical advice. The experts developed a courtroom and trial concept, which the presiding judge then implemented by issuing orders according to section 176 para. 1 of the CCA – much against the initial resistance of the defense counsels who preferred the proceeding be interrupted and be restarted anew. This was the only way to bring the proceedings, which had lasted four years, to a conclusion by way of a verdict. None of the persons present at trial contracted infection.

#### **2.4. Acceleration requirement in detention cases under aggravated pandemic conditions**

Finally, one last momentum of tension should be addressed, namely, pre-trial detention under COVID-19 conditions. Since pre-trial detention and execution of criminal sanctions in a pandemic such as COVID-19 have much broader references, which therefore cannot be discussed in the context of this description, the presentation focuses on the tension between pre-trial detention and delayed or slowed down criminal proceedings.

Art. 6 para. 1, 1<sup>st</sup> sentence of the ECHR requires speedy treatment of detention cases<sup>79</sup>. Section 121 of the German CPC transposes this international obligation into national law. Section 121 of the CPC rules by its first paragraph that pretrial detention may not last longer than six months. Pre-trial detention may only be maintained beyond six months if the particular difficulty or the particular scope of the investigation or another important reason prevents the proceedings from being concluded by judgment. In such cases, the Higher Regional Court decides every three months whether these conditions are still met and the custody might then be extended.

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<sup>79</sup> Meyer F. In: Karpenstein U., Mayer F. C. Konvention zum Schutz der Menschenrechte und Grundfreiheiten. Kommentar [Convention for the Protection of Human Rights and Fundamental Freedoms. Commentary]. 2<sup>nd</sup> ed., München, 2015, Art. 6 margin 72 et seqq.; Satzger H. 2018, p. 195 et seqq.

The wording of Art. 6 para. 1 of the ECHR and section 121 of the CPC suggests that a schematic consideration of the circumstances that lead to a long pre-trial detention does not have to take place in the assessment<sup>80</sup>. A pandemic has not yet been the subject of such considerations. It has always been circumstances such as lengthy investigations abroad, difficult questions of fact that can only be answered by experts, or simply the multitude of offences and the victims harmed by them who must be heard before the start of a main hearing. As long as and to the extent that the public prosecutor's office and the courts cannot be reproached for delaying the handling of the proceedings, but rather have done everything in their power to promote the proceedings towards a verdict, the competent higher court, if the proportionality of the detention is still maintained, is in a position to pronounce the three-month extension of custody. Only circumstances that lie within the sphere of the public prosecutor's office and the court can justify the release of a pre-trial detainee from detention. First and foremost, the overloading of the courts, especially with other detention cases, should be mentioned in this context<sup>81</sup>, which in the past has led higher courts to cancel arrest warrants. Although their focus is primarily on the adjudicating body, a higher court also takes the situation of a court as a whole into consideration when making the necessary overall assessment. If the competent body of the court, in Germany the presidium of the court, which is entrusted with self-administrative tasks and is staffed with democratically elected judges, fails to provide necessary relief for a criminal division that is overloaded with detention cases, this omission falls back on the judiciary. The pandemic-related obstacles cannot be compared to all this.

The outbreak of the COVID-19 pandemic is a circumstance for which neither the courts nor the public prosecutors are responsible. This applies equally to the containment measures ordered by governments, over which the courts have no control and which they cannot disregard if they are not to be accused of disregarding health protection.

COVID-19 would be clearly misunderstood if courts did not start trials or interrupted trials with this in mind. The extended interruption periods granted by section 10 of the IACPC are therefore to be understood as obligations to act. A court concerned must do everything within the interruption period – if necessary, in cooperation with the court administration – to ensure that the interrupted main hearing can be resumed as soon as possible under the conditions of guaranteed health protection for all parties to the proceedings and can then be continued. If this goal has been achieved and, if necessary, confirmed by an expert, there is no reason to wait until the end of the legally granted interruption period. *Mutatis mutandis*, this also applies to those proceedings that have yet to begin and to which section 10 IACPC does not apply. With a view to the review of the promotion acts by the higher courts, it is urgently advisable for the recognizing courts to document

<sup>80</sup> See for the criteria that the European Court of Human Rights as applied by Meyer F. 2015, Art. 6 margins 79–82; Eser R. 2012, EMRK Art. 6 margin 313 et seqq.

<sup>81</sup> Also see Meyer F. 2015, Art. 6 margin 82.

their efforts, if necessary, their failure and the reasons for this<sup>82</sup>. However, the focus must always remain on the proportionality of detention, which must be examined independently of all other circumstances at every stage of the proceedings and without regard to the time limits granted<sup>83</sup>. Proportionality has an objective element of assessment, which the courts cannot influence, even though their own best efforts. If at a certain point in time the expected sentence is disproportionate to the imprisonment served so far, or if further execution is no longer reasonable for other reasons, the only option is release. This, however, is independent of any pandemics and their effects.

Pandemic and acceleration requirement are admittedly a new process constellation that has not occurred before. However, they are being managed under conditions that were already tested before COVID-19.

## Conclusion

The current article attempted to give an insight into some, by no means all, aspects of criminal proceedings under pandemic conditions in Germany. The discussion may suggest that German criminal procedure law does not always have adequate solutions at hand, however, in my opinion, they are necessary. The legislator has so far been hesitant and procrastinating in coming up with temporary solutions only. However, it does not take Cassandra to say that with today's globalization and the international mobility that comes with it, the next pandemic is looming around the corner. Should the wheel that was half-invented at COVID-19 then be completed? Under the impression of the existing pandemic, there would be an opportunity to take precautions when nature again shows its face in all its harshness, for example, whether it is conceivable or even desirable to facilitate the taking of evidence in the main trial under pandemic conditions<sup>84</sup>. Germany was not alone in being affected; COVID-19 hit other countries much harder. The European Union recognises the goal of a harmonized Union-wide criminal procedure law. Here, indeed, would be a real project<sup>85</sup>. If this presentation has provided food for thought on this, it has already halfway achieved its goal.

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<sup>82</sup> So expressively, OLG Karlsruhe, Decision of 30 March 2020 (file No. HEs 1 Ws 84/20).

<sup>83</sup> OLG Naumburg, Decision of 30 March 2020 (file no: 1 Ws HE 4/20); OLG Karlsruhe, Decision of 30 March 2020 (file No. HEs 1 Ws 84/20); OLG Braunschweig, Decision of 25 March 2020 (file No. 1 Ws 47/20).

<sup>84</sup> See also: Wagner M.2020, pp. 223, 232.

<sup>85</sup> Art. 82 para. 2 sub-para. 2 lit. d of the Treaty on the Functioning of the European Union (Eser R. 2012, EMRK Einf., margin 152 et seqq.; Satzger H. 2018, p. 84 et seqq.).

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## ALTERNATIVE SANCTIONS IN THE REPUBLIC OF SERBIA, CONTEMPORARY CHALLENGES AND RECOMMENDATIONS FOR IMPROVEMENT

**Keywords:** alternative sanctions, efficiency, positive effects, prevention, recidivism

### Summary

The application of alternative sanctions has positive effects both on the re-socialization of perpetrators of criminal acts, and on the reduction of pressure on institutions for the enforcement of prison sanctions. The use of alternative sanctions enables the offender to continue working, educating, keeping family connections, and other activities that may have preventive effect on the crime re-commission and prevent stigmatisation that person might have after the prison sanction.

The subject of this paper is the analysis of the effectiveness of the application of alternative sanctions in the Republic of Serbia and impact of the implementation of National development strategy for the system of enforcement of criminal sanctions for period 2013–2020. In line with the Strategy, the key national legislative acts were amended to align with international and European standards on alternative sanctions, specifically with the CoE European Probation Rules.

Bearing in mind previous experiences, the authors start from the assumption that there are still certain challenges in their application, which can be caused by various factors. In order to give recommendations for reducing the challenges, the authors analyse the compliance of national regulation with international standards, as well as available data on volume and structure of imposed alternative sanctions in period 2015–2020, with the special focus on community work and conditional sanction with oversight.

## Introduction

The policy of proliferation of alternatives to imprisonment has been endorsed by the Council of Europe over the last 50 years through adoption of several recommendations and resolutions that provide for a supranational normative framework.<sup>1</sup> International and European rules on alternative sanctions are clear that measures should prioritise the person's rehabilitation, social inclusion and reintegration, comply with human rights and not discriminate or stigmatise in their application.<sup>2</sup>

The application of alternative sanctions has positive effects on the re-socialization of perpetrators of criminal acts and the decrease of overburden of institutions for the execution of institutional sanctions. The use of alternative sanctions enables the perpetrator to continue working, acquiring education, maintaining family ties and other activities that may have a preventive effect on the re-commission of crimes. In addition, it prevents the stigmatization of convicts after a prison sentence.

Although the terms "alternative prison sentences" and "alternative criminal sanctions" are very often confused, these are two different terms. The first term is broader and, in addition to alternative criminal sanctions, includes other measures and procedures that lead to the non-application of imprisonment. The notion of alternative sanctions is narrower. It covers only substitutes for imprisonment which are provided for in criminal law as criminal sanctions.<sup>3</sup>

In the Republic of Serbia, the Criminal Code prescribes the following alternative criminal sanctions: suspended sentence with and without protective supervision, house arrest with and without electronic supervision, work in the public interest (community sanction) and conditional release.<sup>4</sup> Bearing in mind that it includes supervision, which is a characteristic of alternative sanctions, a suspended sentence with protective supervision also represents an alternative criminal sanction.

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<sup>1</sup> Junger-Tas J. *Alternatives to Prison Sentences Experiences and Developments*. Amsterdam: Kugler Publications, 1994, p. 10.

<sup>2</sup> See: Mrvić-Petrović N. and Đorđević, Đ. *Moć i nemoć kazne [The Power and Powerlessness of Punishment]*. Belgrade: Vojnoizdavački zavod, 1998.

<sup>3</sup> Tešović O. *Priručnik za primenu alternativnih sankcija [Manual for the application of alternative sanctions]*. Belgrade: Forum of judges of Serbia, 2020. p. 3. Macanović N. *Alternativne krivične sankcije – za i protiv [Alternative criminal sanctions – for and against]*. In: Jovanović G. and Petrović J. (eds.). "Probacija i alternativne krivične sankcije – mogućnosti i perspektive [Probation and alternative criminal sanctions – possibilities and perspectives]". Banja Luka: Center of Modern Knowledge, 2016, p. 24.

<sup>4</sup> Kolarić D. *Uslovna osuda sa zaštitnim nadzorom i druge alternativne krivične sankcije u Krivičnom zakoniku Srbije [Probation with protective supervision and other alternative criminal sanctions in the Criminal Code of Serbia]*. In: Bejatović S. and Jovanović I. (eds.). *Alternativne krivične sankcije [Alternative criminal sanctions]*. Belgrade: OEBS, 2018, pp. 73–93. *Criminal Code of the Republic of Serbia, The Official Gazette of the Republic of Serbia*, No. 85/2005...35/2019. Available: <https://www.paragraf.rs/propisi/krivicni-zakonik-2019.html> [viewed 22.10.2021.].

Alternative sanctions in the legislation of the Republic of Serbia are not directly prescribed for certain criminal offenses but are related to the duration of the envisaged sanction for the specific crime. However, for some offenses application of alternative sanctions is excluded (e.g., house arrest as alternative sanction cannot be imposed in connection with the criminal offense of domestic violence). For some crimes, short-term prison sentences are prescribed for the basic form of the crime, so alternative sanctions can only be imposed for that form.<sup>5</sup> Despite reforms and efforts available statistical data highlighted that there is room for increase of application of alternative sanctions. The reasons for the still modest number of alternative sanctions are twofold. One of the assumptions from which we start in this paper is shortcomings in the legislative framework and lack of incentives for judges to impose alternative sanctions. The second reason relates to the capacities of probation services, which are reflected in the insufficient number of employees until 2021, as well as technical shortcomings for supervision. Examples of comparative good practices could be used for strengthening of legislative framework, organization of work and judicial practice.

In the first part of the paper, we analysed the international standards in the field of alternative sanctions, followed by the assessment of compliance of Serbian national legislation with them. After that, we provided an overview of the good practices from comparative legislation, which could have a positive impact on the legislation and practice in Serbia, in order to increase the number of court judgements in which perpetrators were sentenced to alternative sanctions instead of short prison sentences. After that, we analysed the reports of various institutions on the number of imposed alternatives in the period of 2015–2020. Based on the application of legal-dogmatic, comparative legal method and content analysis, we try to provide recommendations for improvement of national legislation and practice in relation to the imposition and application of alternative sanctions.

## 1. International and EU standards

According to the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners (Rule No. 58) and revised rules from 2015 known as the Nelson Mandela Rules (Rule No. 41), custodial sentences should be applied only when their application is justified to protect society from crime.<sup>6</sup> In the area

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<sup>5</sup> For example, criminal offenses: unauthorized possession of narcotics, endangering the safety of public transport and theft, which, according to relevant reports, are the most common criminal offenses committed in the territory of the Republic of Serbia.

<sup>6</sup> Standard Minimum Rules for the Treatment of Prisoners Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Available: [https://www.unodc.org/pdf/criminal\\_justice/UN\\_Standard\\_Minimum\\_Rules\\_for\\_the\\_Treatment\\_of\\_Prisoners.pdf](https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf) [viewed 22.10.2021.].

of alternative sanctions, the most relevant international soft-law instrument is the United Nations Standard Minimum Rules for Non-Custodial Measures from 1990 (Tokyo Rules) that are not legally binding, but is of a great importance for the imposition of extrajudicial measures.<sup>7</sup> The aim of their adoption was to promote the imposition of alternative sanctions in order to strengthen special prevention in criminal law and limit the application of imprisonment by applying alternative sanctions. According to paragraph 2.3. of Tokyo rules, the criminal justice system should provide a wide range of measures that are alternatives to institutional sanctions. Paragraph 3.4. of Tokyo rules emphasize that measures imposing an obligation on an offender can be applied only after the consent of the offender. The same requirement of consent is envisaged by Recommendation R(92)16 of the Committee of Ministers to Member States on the European Rules on Community Sanctions and Measures (Rule 35).<sup>8</sup>

However, such an obligation is not prescribed by the Criminal Code of the Republic of Serbia. According to Art. 65, para. 2 of the Criminal Code, in addition to the imposition of a suspended sentence, the perpetrator of a criminal offense may also be obliged to return the proceeds of crime, the obligation to compensate the damage caused by the criminal offense, and other obligations. However, the obligation to give consent by a convicted person in accordance with European standards is not prescribed.<sup>9</sup> The same inconsistency is present when it comes to accepting obligations that are imposed with a suspended sentence with protective supervision.<sup>10</sup>

National legislation is harmonized with European standards in terms of considering the purpose of the sanction imposed, the perpetrator's personality, his previous life, behaviour after the crime, the degree of guilt and other responsibilities under which the crime was committed. Thus, Art. 72, para. 1 of the Criminal Code of the Republic of Serbia prescribes the obligation for a court when deciding on a suspended sentence with protective supervision to take into account the perpetrator's personality, previous life, posture, and especially his/her relationship with the victim of the crime and circumstances of the commission

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<sup>7</sup> United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), adopted by General Assembly resolution 45/110 of 14 December 1990. Available: <https://www.ohchr.org/documents/professionalinterest/tokyorules.pdf> [viewed 22.10.2021.].

<sup>8</sup> Recommendation No. R (92) 16 of the Committee of Ministers to Member States on the European Rules on Community sanctions and measures, adopted by the Committee of Ministers on 19 October 1992 at the 482nd meeting of the Ministers' Deputies. Available: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804d5ec6> [viewed 22.10.2021.].

<sup>9</sup> See: Snacken S. and McNeill F. Scientific recommendations. In: Flore D., Bosly S., Honhon A. and Maggio J. (eds.). Probation Measures and Alternative Sanctions in the European Union. Cambridge: Intersentia, 2021, pp. 561–571.

<sup>10</sup> However, the Criminal Procedure Code requires consent of the suspect for the application of measures envisaged within the deferred prosecution (Art. 283 of the Criminal Procedure Code).

of the offense.<sup>11</sup> However, there is no provision that requires the explicit consent of the perpetrator before or during the imposition of measures. To ensure full harmonisation with European standards, the Serbian legislation should include requirement of the explicit consent of the convicted person to the fulfilment of the obligations that can be imposed under protective supervision.

When it comes to alternative sanctions according to the provisions of national legislation, the obligatory consent of the perpetrator is required only in connection with the imposition of a sentence of community work, because forced labour is prohibited (Art. 52, para. 4 of the Criminal Code).

According to the Recommendation Rec (2000)22 on improving the implementation of the European rules on community sanctions and measures, an alternative sanction or measure must be of limited duration.<sup>12</sup> However, there is an exception, e.g. if the seriousness of the previous or committed criminal offense in combination with the personal characteristics of the perpetrator requires an unlimited duration, as well as due to the constant and immediate danger to human life and health and the safety of the community. According to the recommendations, sanctions and measures implemented at the national level should be prescribed, imposed and enforced only on the basis of the law, and the legal provisions should be clear, as well as prescribe the consequences of non-compliance with the established restrictions.

In addition to the listed recommendations, relevant soft-law instruments for application of alternative sanctions at the national level are Recommendation R(2010) 1 on probation rules adopted by the Committee of Ministers, as well as Recommendation R(2014) 4 on electronic surveillance.<sup>13</sup>

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<sup>11</sup> These measures may consist of reporting to the body responsible for protective supervision within the deadlines set by that body, training the perpetrator for a certain profession, accepting employment appropriate to the perpetrator's abilities, fulfilling the obligations of family support (alimony), care of children and other family obligations, refraining from visiting certain places, bars or events if it may be an opportunity or incentive to commit crimes again, timely notification of change of residence, address or workplace, restraint of use of drugs or alcoholic beverages, treatment in an appropriate health institution, visiting certain professional and other counselling centers or institutions and acting in accordance with their instructions and eliminating or mitigating the damage caused by the crime, and especially reconciling with the victim of the crime.

<sup>12</sup> Recommendation Rec(2000)22 of the Committee of Ministers to Member States on improving the implementation of the European rules on community sanctions and measures (adopted by the Committee of Ministers on 29 November 2000 at the 731<sup>st</sup> meeting of the Minister's Deputies. Published in Gazette Committee of Ministres, November 2000, No. X/2000. Appendix 1 to the Recommendation Rec (2000)22. Available: <https://www.legislationline.org/documents/id/8023> [viewed 21.10.2021.].

<sup>13</sup> The Recommendation CM/Rec(2010)1 of the Committee of Ministers to Member States on the Council of Europe Probation Rules, adopted by the Committee of Ministers on 20 January 2010. at the 1075<sup>th</sup> meeting of the Ministers' Deputies. Available: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cfbc7](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cfbc7) [viewed 22.10.2021.]. Recommendation CM/Rec(2014)4 of the Committee of Ministers to Member States on electronic monitoring, adopted by the Committee of Ministers on 19 February 2014, at the 1192<sup>nd</sup> meeting of the Ministers' Deputies. Available: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805c64a7](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c64a7) [viewed 22.10.2021.].

According to Recommendation R(92) 17 of the Committee of Ministers to Member States considering consistency in sentencing, imprisonment sanctions should be considered as a sanction of last resort and should be imposed only in a situation where the imposition of another sentence would be inadequate to the gravity of the offense, justified, and it should not be longer than what is considered necessary for that crime.<sup>14</sup> In addition, criteria for excluding imprisonment should be developed, especially in cases of minor pecuniary damage, consideration should be given to introducing legal restrictions on imprisonment, especially for short-term imprisonment, and national laws should prescribe non-custodial sanctions or measures instead of imprisonment for certain crimes. However, the challenge for implementation of that recommendation in the Republic of Serbia is the fact that a significant number of criminal offenses are prescribed by different laws,<sup>15</sup> which provide for penalties that are disproportionate to the gravity of the criminal offense, i.e., the degree of their social danger and consequences. Therefore, it is necessary to reassess the need of regulation of so many crimes in the national legislation, which in practice causes challenges for application.

## **2. Good practice on alternative sanctions in comparative legislation**

To improve the national legislation of the Republic of Serbia on alternative sanctions, we analysed the provisions of the Penal or Criminal Codes of the Republic of Croatia, Slovenia and Germany to identify solutions that could be applicable to Serbian legal framework. The first two countries were members of the Socialist Federal Republic of Yugoslavia, so they share the same legal tradition with the Republic of Serbia, while its criminal legislation developed under the influence of the German legal tradition. In addition, these countries are members of the European Union, so their solutions could be applied in the process of harmonising the criminal legislation of the Republic of Serbia with the EU *acquis*.

Croatian Code contains a provision aimed at encouraging more frequent application of alternative sanctions. Namely, Art. 45 of the Penal Code stipulates that a court may impose a prison sentence of six months only if it can be expected that a fine or a community sanction cannot be carried out or if a fine, community sanction or probation could not achieve the purpose of punishment.<sup>16</sup> This

<sup>14</sup> The Recommendation R(92) 17 of the Committee of Ministers to Member States considering consistency in sentencing, adopted by the Committee of Ministers on 19 October 1992 at the 482nd meeting of the Ministers' Deputies. Available: <https://rm.coe.int/16804d6ac8> [viewed 21.10.2021.].

<sup>15</sup> For example, the Law on Tax Procedure and Tax Administration of the Republic of Serbia, which prescribes a larger number of criminal offenses in addition to tax payment and non-payment of withholding tax, which are prescribed by the basic criminal legislation. Many of these crimes could be prescribed as a misdemeanour or fall under the legal description of already existing crimes.

<sup>16</sup> Penal Code of the Republic of Croatia, Narodne novine Republike Hrvatske [The Official Gazette of the Republic of Croatia], No. 125/2011...84/2021. Available: <https://www.zakon.hr/z/98/Kazneni-zakon> [viewed 22.10.2021.].

means that even in these cases, the judge would be obliged to provide reasoning for imposition of short-term prison sanction, instead of alternative sanction. The solution from Croatian legislation is revealing the burden from judges in case they apply for alternative sanctions, while legislation in Serbia is having opposite approach and judges have to provide reasoning for imposing alternative sanction instead of a prison sanction.

Furthermore, the Penal Code of Croatia prescribes that in addition to the community sanction, the perpetrator may be imposed one or more obligations envisaged for the application of the institute of conditional release or protective supervision. Such an approach of the legislator is largely in line with the Recommendations of the Committee of Ministers.

In the Republic of Slovenia, community sanction is an alternative to the imprisonment prescribed by Art. 86, paras 7 to 10 of the Penal Code as a substitute for imprisonment for up to two years.<sup>17</sup> According to that provision, a convicted person may, instead of imprisonment for up to two years (this possibility is excluded if the perpetrator of a criminal offense against sexual freedom is in question, because there would be a possibility to repeat the commission of a criminal offense) perform community sanction for two years. To impose a community, the consent of the convicted person is necessary. The body responsible for the sanction enforcement, when determining the type of community work, shall take into account the expertise and ability of the convict to work. The court may order measures of protective supervision, and towards the person who has been imposed sanction of community work.

German law recognizes two sanctions that are an alternative to imprisonment. These are a suspended sentence and a suspended sentence with protective supervision. They are prescribed by Arts 56 to 56d of the Criminal Code of the Federal Republic of Germany.<sup>18</sup>

In addition, the court may issue certain orders to the convicted person with the aim to prevent reoffending. However, since the success of the measure depends on the readiness of the perpetrator to perform the imposed obligation, his consent is required for its imposition, which is in line with European standards on the imposition of alternative sanctions. Work in the public interest may be imposed in German law as part of a suspended sentence with protective supervision as one of the obligations provided for by it or as a substitute for an unpaid fine. It cannot be imposed as an independent sanction.

The Criminal Code of the Federal Republic of Germany includes same provision as the Croatian legislation, and which incentivise the application of alternative sanctions. Art. 47 stipulates that short-term imprisonment is an

<sup>17</sup> Criminal Code of the Republic of Slovenia, Uradni list Republike Slovenije [The Official Gazette of the Republic of Slovenia], No. 50/2012...95/2021. Available: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKOS050> [viewed 22.10.2021.].

<sup>18</sup> Strafgesetzbuch (StGB). Adopted on 15 May 1871, with last amendments from 19 June 2019. Available: [https://www.legislationline.org/download/id/8253/file/Germany\\_CC%20am2019\\_de.pdf](https://www.legislationline.org/download/id/8253/file/Germany_CC%20am2019_de.pdf) [viewed 21.10.2021.].

exception. Therefore, the courts must explain in the verdict in which they impose a short-term prison sentence why they decided to impose such a sentence, and not an alternative sanction.

### **3. Challenges in the application of alternative sanctions in the Republic of Serbia**

The draft Strategy for the Development of Alternative Sanctions in the Republic of Serbia for the period 2021–2027<sup>19</sup> was recently published for public consultations. The new policy document is a continuation of the strategic planning of reforms of the system of execution of criminal sanctions in the Republic of Serbia. It began with the adoption of the 2005 Strategy for the Reform System of the Criminal Sanctions Enforcement.<sup>20</sup> In the same year, the Criminal Code<sup>21</sup> was amended to introduce alternative sanctions as prescribed by Arts 43–52. Based on it, the Law on Execution of Criminal Sanctions was passed, after which a Strategy for Reducing the Overcrowding of Accommodation Capacities in Institutions for Execution of Criminal Sanctions in the Republic of Serbia in the period from 2010 to 2015 was drafted.<sup>22</sup> With the aim to improve legislative framework and ensure alignment with the EU *acquis*, in 2014 the new Law on Execution of Criminal Sanctions was adopted,<sup>23</sup> while alternative sanctions were regulated by a separate law.<sup>24</sup>

Despite the improvement of the normative framework, in the period from 2001 to 2010, an increase in the prison population was recorded, which meant an overload of accommodation capacities in prisons. During 2010, the number of persons deprived of liberty was 11 000, but in the following period that number remained stable, primarily due to normative interventions.<sup>25</sup> Strategy for Reducing the Overcrowding of Accommodation capacities in Institutions for Execution of Criminal Sanctions recognized alternative sanctions and measures, parole and the probation service as institutes that should contribute to reducing prison overcrowding. The strategy yielded results, so overcrowding was reduced to an

<sup>19</sup> Available: <https://www.mpravde.gov.rs/sr/tekst/33173/strategija-razvoja-sistema-izvršenja-krivicnih-sankcija-u-republici-srbiji-za-period-2021-2027-godina.php> [viewed 21.10.2021.].

<sup>20</sup> Text is available at: [https://arhiva.mpravde.gov.rs/images/Strategija%20reforme%20sistema%20izvršenja%20zavodskih%20sankcija\\_03312.pdf](https://arhiva.mpravde.gov.rs/images/Strategija%20reforme%20sistema%20izvršenja%20zavodskih%20sankcija_03312.pdf) [viewed 21.10.2021.].

<sup>21</sup> The Criminal Code of the Republic of Serbia was adopted in September 2005 and entered into force on 1 January 2006, The Official Gazette of the Republic of Serbia, No. 85/2005.

<sup>22</sup> The Law on Execution of Criminal Sanctions, The Official Gazette of the Republic of Serbia, No. 85/05, 72/09 i 31/11. Strategy for Reducing the Overcrowding of Accommodation Capacities in Institutions for Execution of Criminal Sanctions in the Republic of Serbia in the period from 2010 to 2015. Official Gazette of the Republic of Serbia, No. 53/2010. Available: [https://www.cins.rs/uploads/useruploads/Documents/Strategija-za-smanjenje-preopterećenosti-smestajnih-kapaciteta-u-zavodima-za-izvršenje-krivic\\_03312.pdf](https://www.cins.rs/uploads/useruploads/Documents/Strategija-za-smanjenje-preopterećenosti-smestajnih-kapaciteta-u-zavodima-za-izvršenje-krivic_03312.pdf) [viewed 22.10.2021.].

<sup>23</sup> The Law on Execution of Criminal Sanctions. Official Gazette, No. 55/2014, 35/2019.

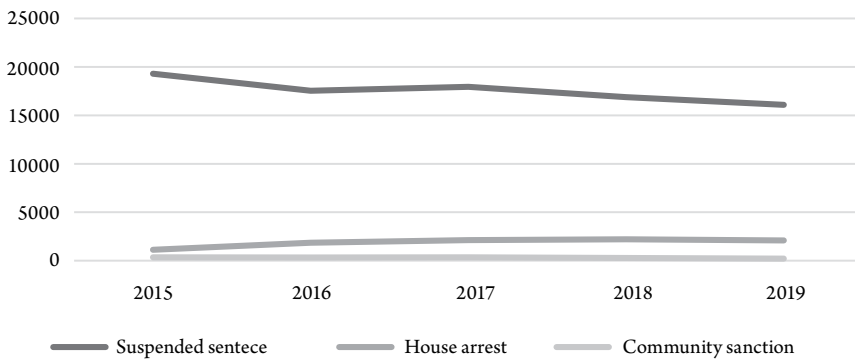
<sup>24</sup> Criminal Code of the Republic of Serbia.

<sup>25</sup> Official Statistics of the Directorate for the Execution of Criminal Sanctions, Annual Work Reports.



acceptable level. Thus, the population density in prisons decreased from 172.3 in 2010 to 110.1 in 2015.<sup>26</sup> To continue with the trend of reducing overcrowding the new Strategy for Reducing the Overcrowding of Accommodation Capacities in Institutions for Execution of Criminal Sanctions in the Republic of Serbia until 2020 was adopted. Part of the strategic approach was to improve infrastructure and accommodation capacities increased to accommodate 11 451 persons.<sup>27</sup>

Strategy for Development of System of Execution of Criminal Sanctions until 2020 and new legislative framework had an impact on reduction of short-term prison sanctions from 8 000 in 2015 to 6 000 in 2019, and increase of some alternative sanctions, specifically a house arrest.<sup>28</sup> However, judges are still reluctant to impose community sanctions to the higher extent and suspended sentence with protected supervision. According to the SPACE I, in 2020 Serbia still remained among countries with very high prison population rate per 100 000 inhabitants.<sup>29</sup>



### Alternative sanctions 2015–2020

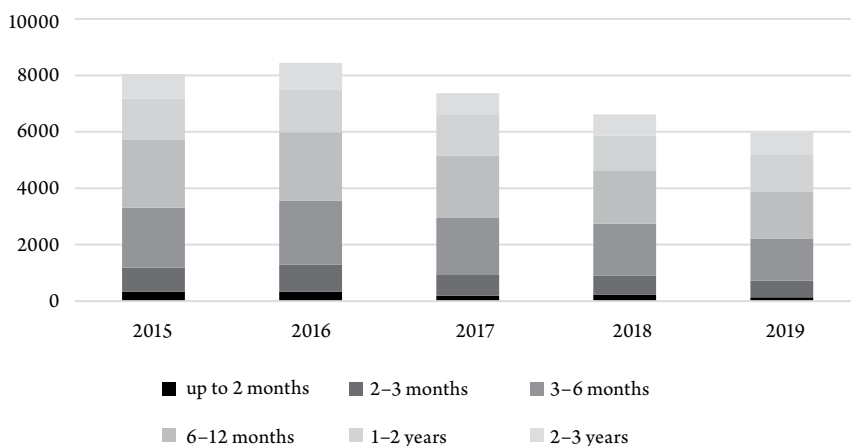
Source: Bulletin of the Republic Statistical Office

<sup>26</sup> Strategy for Reducing the Overload of Accommodation Capacities in Institutions for Execution of Criminal Sanctions in the Republic of Serbia until 2020. Official Gazette of the Republic of Serbia, No. 43/2017. Available: <https://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/vlada/strategija/2017/43/1/reg> [viewed 22.10.2021.].

<sup>27</sup> *Ex-post* impact assessment of implementation of Strategy for Development of System of Execution of Criminal Sanction until 2020. Ministry of Justice, p. 8. Available: <https://www.mpravde.gov.rs/sr/tekst/33173/strategija-razvoja-sistema-izvršenja-krivicnih-sankcija-u-republici-srbiji-za-period-2021-2027-godina.php> [viewed 22.10.2021.].

<sup>28</sup> More about house arrest see in: Matić Bošković M. and Kostić J. Kućni zatvor i iskustva u primeni [House arrest and experience in application]. In: Bejatović S. (ed.). *Izmene u krivičnom zakonodavstvu i statusu nosilaca pravosudnih funkcija i adekvatnosti državne reakcije na kriminalitet (međunarodni pravni standardi i stanje u Srbiji), krivičnopravni aspekti* [Changes in criminal legislation and the status of holders of judicial functions and the adequacy of the state response to crime (international legal standards and the situation in Serbia), aspects of criminal law]. Belgrade: Udruženje za krivičnopravnu teoriju i praksu [Association for Criminal Theory and Practice], Intermex, 2019, pp. 216–229.

<sup>29</sup> Prison Population – SPACE I, Council of Europe, 2020. Available: [https://wp.unil.ch/space/files/2021/04/210330\\_FinalReport\\_SPACE\\_I\\_2020.pdf](https://wp.unil.ch/space/files/2021/04/210330_FinalReport_SPACE_I_2020.pdf) [viewed 22.10.2021.].



### Short-term imprisonment 2015–2019

Source: Bulletin of the Republic Statistical Office

The administrative capacity of the Commissioner's Office in the previous period was modest. Only 27 full-time commissioners and 36 educators were employed in 25 probation offices, who work half of their working time in penal constitutions, and half in the Probation service.<sup>30</sup> In addition, Serbia was among the countries with the lowest number of probation officers per 100 000 inhabitants. According to the data of the Annual Criminal Statistics of the Council of Europe SPACE II from 2016, the average number of probation officers per 100 000 inhabitants in European countries was 5.8, and in the Republic of Serbia 1.5. However, in late 2020 the new organisational structure of the probation service was adopted, and the number of probation officers were significantly increased, according to the 2020 SPACE II report there were 53 staff members in direct contact with the probationers. The strengthening of human resources was necessary for many reasons, especially having in mind the number of cases in progress and the number of cases pending from previous years.<sup>31</sup> It is too early to assess the impact of the increased human resource capacities, and results will be available in the future.

According to the existing data, the execution of alternative sanctions and measures does not include treatment or programs prepared to improve the social functioning of the convicted persons and prevent the convicted from reoffending.<sup>32</sup>

<sup>30</sup> Persons under the supervision of probation agencies – SPACE II, Council of Europe, 2020. Available: [https://wp.unil.ch/space/files/2021/09/SPACE-II\\_Final\\_report\\_210919.pdf](https://wp.unil.ch/space/files/2021/09/SPACE-II_Final_report_210919.pdf) [viewed 22.10.2021.].

<sup>31</sup> In 2018, the Commissioner's Office had 5,001 cases in progress, of which 2,260 were completed.

<sup>32</sup> Spasojević A. and Arsenijević S. Efekti alternativnih sankcija i mera iz ugla Povereničke službe [Effects of alternative sanctions and measures from the point of view of the Commissioner's Service]. Valjevo: Odbor za ljudska prava, 2017, p. 35.

Existence of programs and treatment is of exceptional importance, especially for house arrest, both with and without electronic supervision. The goal of execution of the sanction in the premises where the convicted person lives is to reduce the pressure on the prisons, prevent “criminal contamination” and stigmatization of the convicted.

In accordance to Council of Europe standards, alternative sanctions should be used in combination with interventions aimed at rehabilitating, reintegrating and re-socializing offenders. Given the fact that the reoffending rate in Serbia is around 70 percent,<sup>33</sup> it is necessary to take adequate measures such as treatment programs and post-penal admission that would have a positive effect on reducing returns and re-socialising convicts.<sup>34</sup> Therefore, the Republic of Serbia is among the countries with the highest rate of return.<sup>35</sup>

According to the legislation of the Republic of Serbia, there is no possibility for probation officers (commissioners) to be involved in criminal proceedings before imposition of a criminal sanction. There are comparative experiences in active involvement of probation service through preparation of a report on personal circumstances, which would help the judge in deciding on the sanction.<sup>36</sup> Although introduction of this type of report is not in line with the current constitutional and legislative framework, it could be valuable to open public discussion on its relevance for success of resocialisation and prevention of reoffending. There are opinions that this would prejudicated the court decision, but according to some authors, the court as an independent body has the right to decide what data it will collect and what circumstances it will take into account when making a decision.<sup>37</sup> Collection of data and information from other state authorities already exists in the legislation and practice in the Republic of Serbia in the family disputes, in which the court often requests the opinion of the Center for Social Work.

<sup>33</sup> Stevanović I., Međedović J., Petrović B. and Vujičić N. Ekspertska istraživanje i analiza povrata [Expert research and analysis of returns]. Belgrade: Institute for Criminological and Sociological Research, 2018.

<sup>34</sup> About that: Mrvić-Petrović N. Alternativne krivične sankcije i postupci [Alternative Criminal Sanctions and Procedures]. Belgrade: Vojnoizdavački zavod, 2010, pp.147–148.

<sup>35</sup> Butorovac K., Gracin D. and Stanić N. The Challenges in reducing criminal recidivism, public security and public order. 2017 (18), pp. 115–131. See: Nikolić N. and Nikolić N. Vreme je za drugu šansu: Mogućnost za zapošljavanje bivših osuđenika-analiza i preporuke [It's time for a second chance: Opportunity for employment of former convicts-analysis and recommendations]. Belgrade: OSCE, Belgrade Center for Human Rights, 2016.

<sup>36</sup> According to Tokyo rules 7.1. The report should contain social data on the offender that are relevant to the previous offenses and the offenses that are being prosecuted. Also, the report should contain information relevant to the decision in the judgment, it should be fact-based, objective, impartial, with clearly identified views, if any.

<sup>37</sup> Spasojević A. Janković D. and Kovačević N. Podrška primeni alternativnih sankcija i mera u Srbiji, Izveštaj i preporuke [Support to the implementation of alternative sanctions and measures in Serbia, Report and recommendations]. Niš: Network of the Committees for Human Rights in Serbia, CHRIS, 2018, p. 109.

## Conclusion

Area of execution of criminal sanctions is complex and to conduct reforms and measure their impact requires time. Over the last decade, Serbia is putting efforts to modernize system of execution of criminal sanctions and to develop capacities for alternative sanctions. However, in addition to time, the establishment of the probation service requires resources, both financial and human. Establishment of probation service in Serbia happened in time of budget restrictions and ban on employment, which presented additional challenge for the success.

Analysed data confirms that reforms for introduction of alternative sanctions gave positive results since Serbia decreased number of short-term sentences and increase number of alternative sanctions. However, the structure of alternative sanctions is not adequate. Most of the alternative sanctions are home arrest, where treatment is not available. The community sanctions and suspended sentence with supervision should be used more often as these e sanctions should enable resocialization and prevent reoffending.

To change structure of the alternative sanctions there is a need to increase awareness of judges on their relevance and positive impact. To ensure that trainings, workshops and other awareness raising event should be organized. In addition, the legislative amendments should include incentives for judges to use alternative sanctions instead of short-term imprisonment. Comparative examples from Germany and Croatia might be used as good practice in the future amendments of legislation. Specifically, the duty of the judge to reason decision on short-term imprisonment.

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## CLARITY OF A CRIMINAL LAW PROVISION IN THE CASE LAW OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

**Keywords:** criminal law, clarity of provisions, the Constitutional Court of the Republic of Latvia, *nullum crimen, nulla poena sine lege*

### Summary

The quality criteria for the provisions of criminal law follow from Art. 90 and the second sentence of Art. 92 of the *Satversme* [Constitution] of the Republic of Latvia. A person may be recognised as being guilty and punished only for such actions that have been recognised as being criminal in accordance with law. A person's fundamental right to know his or her rights defines the framework for the legislator's actions because only such a provision that complies with all the quality criteria of a legal provision may be recognised as being a law, i.e., as having been granted legal force. These fundamental rights require the legislator to take special care in drafting legal norms that envisage criminal liability, which is the most severe form of legal liability. The Constitutional Court of the Republic of Latvia has repeatedly engaged in assessing the quality of criminal law provisions. This study provides an insight into the Constitutional Court's approach to reviewing the clarity of criminal law provisions and summarizes the most important findings made by the Constitutional Court regarding this issue.

### Introduction

In the area of substantive criminal law, the requirement regarding the foreseeability and clarity of provisions follows from the principle *nullum crimen, nulla poena sine lege* (no crime, no penalty without law). Currently, this principle is validly recognised as being the cornerstone of European criminal law systems, which has been enshrined in Art. 7 of the European Convention for the Protection



of Human Rights and Fundamental Freedoms<sup>1</sup>, as well as in national constitutions and criminal laws.<sup>2</sup> The significance of this principle has been highlighted in the case law of the European Court of Human Rights, which has noted that “The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection [...] It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment”<sup>3</sup>. Within the case law of the European Court of Human Rights, the significance of this principle is determined also by another aspect, i.e., clarity of provisions and foreseeability of their application allow persons to adjust their actions to the requirements of these provisions.<sup>4</sup> A direct correlation exists between the foreseeability of norms and the offender’s personal liability. Art. 7 of the Convention provides for a mental element of guilt in the perpetrator’s conduct to establish that penalty is to be imposed for such actions.<sup>5</sup>

The *Satversme* of the Republic of Latvia<sup>6</sup> does not refer *expressis verbis* to the principle *nullum crimen, nulla poena sine lege*; however, the words “in accordance with law” in the second sentence of Art. 92 of the *Satversme* encompass also the principle of *nullum crimen, nulla poena sine lege*, i.e., that a person may be recognised as being guilty and penalty can be imposed only for such conduct (actions or failure to act), which has been recognised as being criminal in accordance with law<sup>7</sup>. The respective principle has been given a more detailed legal regulation in

<sup>1</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms. Signed in Rome on 04.11.1950. [in the wording of 01.08.2021.].

<sup>2</sup> Peristeridou Ch. The Principle of Legality in European Criminal Law. Cambridge, Interesentia, 2015, p. 3.

<sup>3</sup> ECHR judgement of 12 February 2008 in Case Kafkaris v. Cyprus (application No. 21906/04), para. 137. Murphy C. C. The Principle of Legality in Criminal Law under the ECHR. European Human Rights Law Review, Vol. 2, 2010. Available: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1513623](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1513623) [viewed 10.10.2021.].

<sup>4</sup> ECHR judgement of 16 February 2015 in Case Plechov v. Romania (application No. 1660/03), para. 71. ECHR case law research report – Art. 7 The “quality of law” requirements and the principle of (non-)retrospectiveness of the criminal law under Article 7 of the Convention, 2019, p. 9. Available: [https://www.echr.coe.int/Documents/Research\\_report\\_quality\\_law\\_requirements\\_criminal\\_law\\_Art\\_7\\_ENG.PDF](https://www.echr.coe.int/Documents/Research_report_quality_law_requirements_criminal_law_Art_7_ENG.PDF). [viewed 10.10.2021.].

<sup>5</sup> ECHR Grand Chamber judgement of 28 June 2018 in Case V.I.E.M. S.R.L. and others v. Italy (application No. 1828/06), para. 242, 246. Guide on Article 7 of the European Convention on Human Rights, 2021, p. 13. Available: [https://www.echr.coe.int/Documents/Guide\\_Art\\_7\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf) [viewed 10.10.2021.].

<sup>6</sup> The Constitution of the Republic of Latvia. Available: <https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia> [viewed 10.10.2021.].

<sup>7</sup> Judgment of the Constitutional Court of the Republic of Latvia of 16 December 2008 in Case No. 2008–09–0106, para. 4.2. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2008-09-0106\\_Spriedums.pdf#search=2008–09–0106](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2008-09-0106_Spriedums.pdf#search=2008–09–0106) [viewed 10.10.2021.].

the Criminal Law<sup>8</sup>, i.e., the first<sup>9</sup> and the fourth<sup>10</sup> part of Section 1 “Basis of Criminal Liability”, as well as in Section 5 “Time when the Criminal Law is in Force”<sup>11</sup>.

The requirement regarding the clarity of provisions follows both from Art. 90<sup>12</sup> and the second sentence of Art. 92<sup>13</sup> of the *Satversme* and the first part of Art. 7<sup>14</sup> of the European Human Rights Convention. The European Court of Human Rights has pointed out that a person should be informed about the actions for the taking of which they should be made criminally liable and punished. A person may obtain this information:

- by studying the text of the legal provision;
- by studying case law (or the court’s interpretation of the provisions);
- by taking appropriate legal assistance.<sup>15</sup>

If a person, having studied the practice of applying the legal provision and having used legal assistance to clarify the content of the provision, nevertheless, is “taken by surprise” by being made criminally liable, the clarity and foreseeability of the legal provision is contestable. In such a case, in a democratic state governed by the rule of law, doubts arise as to whether the legal provisions that define the constituent elements of the particular criminal offence comply with the principle that everyone knows their rights and obligations.<sup>16</sup>

Although changes in the scope of legal provisions through interpretation are unavoidable, irrespectively of how clearly and unambiguously they are worded

<sup>8</sup> Criminal Law. Available: <https://likumi.lv/ta/en/en/id/88966-criminal-law> [viewed 10.10.2021.].

<sup>9</sup> Only a person who is guilty of committing a criminal offence, that is, one who deliberately (intentionally) or through negligence has committed an offence which is set out in this Law and which has all the constituent elements of a criminal offence, may be held criminally liable and punished.

<sup>10</sup> An offence may not be considered criminal by applying the law by analogy.

<sup>11</sup> (1) The criminality and punishability of an offence (act or failure to act) are determined by the law which was in force at the time of committing the offence. (2) A law which recognises an offence as not punishable, reduces the punishment or is otherwise beneficial to a person, unless otherwise provided for in the applicable law, has retrospective effect, that is, it applies to offences which have been committed prior to the applicable law coming into force, as well as to a person who is serving a punishment or has served a punishment but regarding whom conviction remains in effect. (3) A law which recognises an offence as punishable, increases the punishment, or is otherwise not beneficial to a person, does not have retrospective effect. (4) A person who has committed a crime against humanity, a crime against peace, a war crime or has participated in genocide, shall be punishable irrespective of the time when such offence was committed.

<sup>12</sup> Everyone has the right to know about his or her rights.

<sup>13</sup> Everyone shall be presumed innocent until his or her guilt has been established in accordance with law.

<sup>14</sup> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

<sup>15</sup> ECHR judgement of 21 October 2013 in Case *Del Río Prada v. Spain* (application No. 42750/09), para. 79.

<sup>16</sup> Separate Thoughts of the Judges of the Constitutional Court Ineta Ziemele and Sanita Osipova in the Case No. 2018-10-0103, para. 3.3. Available in Latvian: [https://www.satv.ties.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/06/2018-10-0103\\_Atseviskas\\_domas.pdf#search=2018-10-0103](https://www.satv.ties.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/06/2018-10-0103_Atseviskas_domas.pdf#search=2018-10-0103) [viewed 10.10.2021.].

in a legal act, such further development of law, in broader understanding, should be reasonably foreseeable.<sup>17</sup> Namely, at the time when the respective actions were taken, a person should have had a valid possibility to foresee, if necessary, by availing of appropriate legal assistance, that the understanding (scope of the provision) of the criminal offence develops and that criminal liability might be set for such actions.<sup>18</sup> This can happen if changes in the content of a legal provision have occurred as the result of the gradual development of case law.<sup>19</sup>

Research of the database of judgements delivered by the Constitutional Court of the Republic of Latvia<sup>20</sup> reveals that, in the period from 2008 to 2021, the Constitutional Court has focused on reviewing the clarity of criminal law provisions in four cases. In all these cases, these matters had been submitted for the Constitutional Court's review in connection with constitutional complaints submitted by private persons. And in all these cases the Constitutional Court has established compliance of the contested norms with the *Satversme* of the Republic of Latvia. Judging by the information available in the Constitutional Court's database of rulings, neither courts of general jurisdiction nor the Ombudsman, nor any other subject who, in accordance with Section 17 of the Constitutional Court Law<sup>21</sup> has the right to submit an application regarding initiation of the case, have ever turned to the Constitutional Court to request examination of criminal law provisions from this perspective.

This research summarises the findings of the Constitutional Court regarding the requirements that Art. 90 and the second sentence of Art. 92 of the *Satversme* of the Republic of Latvia advance regarding the clarity of criminal law provisions. The authors will also present their opinion regarding these findings by the Constitutional Court.

## 1. Criminal law provisions submitted for the Constitutional Court's review

### 1.1. In Case No. 2008-09-0106

By the judgement of the Constitutional Court of the Republic of Latvia on 16.12.2008 in case No. 2008-09-0106 "On Compliance of Section 230<sup>1</sup> (1) of Criminal Law with the First Sentence of the First Part of Article 7 of the European

<sup>17</sup> ECHR judgement of 11 February 2016 in Case Dallas v. United Kingdom (application No. 38395/12), para. 74.

<sup>18</sup> ECHR judgement of 12 July 2007 in Case Jorgic v. Germany (application No. 74613/01), paras 109–113.

<sup>19</sup> ECHR judgement of 22 November 1995 in Case S. W. v. United Kingdom (application No. 20166/92), para. 36.

<sup>20</sup> Database of rulings of the Constitutional Court of the Republic of Latvia. Available: <https://www.satv.tiesa.gov.lv/en/cases/?case-filter-years=&case-filter-status=&case-filter-types=&case-filter-result=&searchtext=Criminal+law> [viewed 10.10.2021.].

<sup>21</sup> Constitutional Court Law. Available: <https://likumi.lv/ta/id/63354-satversmes-tiesas-likums> [viewed 10.10.2021.].

Convention on Human Rights and Fundamental Freedoms and Article 64 and 65 and the Second Sentence of Article 92 of the *Satversme* of the Republic of Latvia<sup>22</sup>, the contested norm was recognised as being compatible with Art. 64, Art. 65 and the second sentence of Art. 92 of the *Satversme* of the Republic of Latvia, as well as with the first sentence of the first part of Art. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The contested criminal law provision is constructed as a blanket norm, it provides for criminal liability for violating regulations on keeping animals if it has caused bodily injury to the victim or caused the victim's death. The submitter of the constitutional complaints had several objections regarding the compliance of this provision with the *Satversme* of the Republic of Latvia, one of which focused also on the clarity of the provision. The applicant had noted that the contested provision provided for liability for violating regulations on keeping animals; however, at the time when the criminal offence had been committed (on 30 April 2005), no Cabinet Regulations that regulated the procedure of keeping animals or the rights of obligations of owners or holders of animals had been in force. The only valid law had been the Animal Protection Law, where the rights and obligations of animal owners had been defined in a very general way. Moreover, this law had delegated the Cabinet to draft several regulations in the area of keeping animals. Since such Cabinet Regulations had not been in force, the applicant expressed the opinion that he had been sentenced on the basis of an unlawful provision of the Criminal Law because it did provide a clear understanding of what kind of actions a person should refrain from in order not to violate other persons' rights and interests.

The Constitutional Court found that the wording used in the contested norm "the keeping of animals regulation" should be understood as a certain rule of conduct (precept), which pertains to the keeping of animals and is included in a regulatory enactment. The guilty person should be made criminally liable in accordance with the contested norm for failure to abide by this precept or for not doing it properly, as the result of which harm has been inflicted upon a person's health. It follows from the system of the Criminal Law that "the concept of "violating regulations" should be understood as cases, where a person violates a rule on conduct (precept) or prohibition included in an external regulatory enactment. Such precepts and prohibitions can be included both in laws and Cabinet Regulations, and in the respective period the Animal Protection Law<sup>23</sup> was in force, para. 3 of Section 5 (2) of which defined animal owners' obligation to ensure that animals do not disturb or threaten human beings. At the time when the offence, with which the applicant is charged, was committed, the practice of applying the contested norm also had evolved. The Department of Criminal

<sup>22</sup> Judgment of the Constitutional Court of the Republic of Latvia of 16 December 2008 in Case No. 2008-09-0106. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2008-09-0106\\_Spriedums.pdf#search=2008-09-0106](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2008-09-0106_Spriedums.pdf#search=2008-09-0106) [viewed 10.10.2021.].

<sup>23</sup> Animal Protection Law. Available: <https://likumi.lv/ta/en/en/id/14940-animal-protection-law> [viewed 10.10.2021.].

Cases of the Supreme Court Senate has noted that the concept “the keeping of animals regulations,” referred to in Section 230<sup>1</sup> of the Criminal Law is broader than the concept of “Cabinet Regulation”, and the Senate holds that the word “regulation” also encompasses the concept of “law”<sup>24</sup>.

## 1.2. In Case No. 2018-10-0103

By the judgement of the Constitutional Court of the Republic of Latvia on 21.02.2019 in case No. 2018-10-0103 “On Compliance of Section 237<sup>1</sup> (2) of the Criminal Law, in the Wording that was in Force from 1 April 2013 to 1 December 2015, with Article 90 and the Second Sentence of Article 92 of the *Satversme* of the Republic of Latvia and of Sub-para. “e” of Annex 10A905 to the Cabinet Regulation No. 645 of 25 September 2007 “Regulation on the National List of Goods and Services of Strategic Significance”, in the Wording that was in Force from 28 November 2009 to 23 January 2014, with the Second Sentence of Article 92 of the *Satversme* of the Republic of Latvia”<sup>25</sup>, the contested norm was recognised as being compatible with Art. 90 and the second sentence of Art. 92 of the *Satversme* of the Republic of Latvia.

This contested criminal law provision is also constructed as a blanket norm, it provides for criminal liability for the violation of the prohibition on the circulation of the equipment, devices or instruments and their components specially designed or adapted for the operational activity measures to be performed by specific methods. Accordingly, the content of this norm had to be clarified by interpreting it in conjunction with the law “On the Circulation of Goods of Strategic Significance”<sup>26</sup> and the Cabinet Regulation of 25.09.2007 No. 645 “Regulation on the National List of Goods and Services of Strategic Significance”<sup>27</sup>, the annex of which comprises the National List of Goods and Services of Strategic Significance of the Republic of Latvia. The submitter of the Constitutional Complaint noted that the grammatical wording of the contested Criminal Law provision led to the conclusion that it provided for criminal liability only for the violation of the prohibition on the circulation only of such devices that were intended for taking operational activity measures to be performed by specific methods.

<sup>24</sup> Judgement of Senate of Supreme Court, Department of Criminal Cases of 4 January 2005 in Case SKK-j-2(679). Available in Latvian: <https://at.gov.lv/downloadlawfile/4222> [viewed 10.10.2021.].

<sup>25</sup> Judgment of the Constitutional Court of the Republic of Latvia of 21 February 2019 in Case No. 2018-10-0103. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/06/2018-10-0103\\_Spriedums.pdf#search=2018-10-0103](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/06/2018-10-0103_Spriedums.pdf#search=2018-10-0103) [viewed 10.10.2021.].

<sup>26</sup> Law on the Circulation of Goods of Strategic Significance. Available: <https://likumi.lv/ta/en/en/id/159963-law-on-the-circulation-of-goods-of-strategic-significance> [viewed 10.10.2021.].

<sup>27</sup> Regulations on the National List of Goods and Services of Strategic Significance. Available in Latvian: <https://likumi.lv/ta/id/163892-noteikumi-par-nacionalo-strategiskas-nozimes-precu-un-pakalpojumu-sarakstu> [viewed 10.10.2021.].

Allegedly, it follows from the provisions of the Operational Activities Law<sup>28</sup> that all the measures of operational activities to be performed by specific methods are aimed only at obtaining information, therefore it can be clearly concluded that the contested Criminal Law provision does not include such devices, by which information cannot be obtained and that are intended only for hindering operational measures. It is contended that it cannot be reasonably foreseen that a person would be made criminally liable in accordance with the contested Criminal Law provision for keeping such equipment or device, the intended use of which, i.e., hindering operational measures, is diametrically opposite to the aims of operational measures to be performed by special measures. Also, the legislator had not considered that the contested Criminal Law provision had envisaged criminal liability for violating the prohibition on circulation of devices intended for hindering measures of operational activities. It is said that such understanding by the legislator is proven by the fact that, on 12 November 2015, the law “Amendments to the Criminal Law”<sup>29</sup> was adopted, adding to the constituent elements of crime in the contested norm a direct reference to devices intended for hindering measures of operational activities. Later, similar amendments were introduced also to the law “On the Circulation of Goods of Strategic Significance”<sup>30</sup>, including in its Section 5<sup>1</sup> a direct reference to devices intended for hindering measures of operational activities. Moreover, for a person to understand that in order to clarify the content of the contested Criminal Law provision the Cabinet Regulation and the Annex to it should be taken into account, they have to study several other regulatory enactments. An overly complicated structure of a blanket norm like this is said to be incompatible with the quality requirements set for a criminal law provision. The applicant holds that, even with the assistance of a qualified lawyer, it is impossible to conclude that the contested Criminal Law provision provides for criminal liability for violating the prohibition on the circulation of devices intended for hindering measures of operational activities.

In this case, the Constitutional Court found that a person could have ascertained for what kind of activity they could be made criminally liable in accordance with the contested norms, either by interpreting these provisions independently or, if necessary, by receiving appropriate legal assistance. Thus, the contested provisions are sufficiently clear and foreseeable to serve as the grounds for making a person criminally liable. However, it is worth noting that, apparently, such a conclusion by the Constitutional Court was not unanimous since two of

<sup>28</sup> Operational Activities Law. Available: <https://likumi.lv/ta/en/en/id/57573-operational-activities-law> [viewed 10.10.2021.].

<sup>29</sup> 12.11.2015. Amendments to Criminal Law. Available in Latvian: <https://likumi.lv/ta/id/278151-grozijumi-kriminallikuma> [viewed 10.10.2021.].

<sup>30</sup> 31.03.2016. Amendments to Law on the Circulation of Goods of Strategic Significance. Available in Latvian: <https://likumi.lv/ta/id/281494-grozijumi-strategiskas-nozimes-precu-aprites-likuma> [viewed 10.10.2021.].

the Justices chose to add their dissenting opinion<sup>31</sup> to it, criticising this judgement. A closer examination of this difference in opinions will be provided in the next section of this study.

### 1.3. In Case No. 2019-22-01

By the judgement of the Constitutional Court of the Republic of Latvia on 24.07.2020 in case No. 2019-22-01 “On Compliance of Section 316 (1) of the Criminal Law, in the Wording that was in Force from 2 January 2004 to 31 March 2013, with the Second Sentence of Article 92 of the *Satversme* of the Republic of Latvia”<sup>32</sup> the contested norm was recognised as being compatible with the second sentence of Art. 92 of the *Satversme* of the Republic of Latvia.

The contested criminal law provision introduces Chapter XXIV of the Special Part of the Criminal Law “Criminal Offences Committed in the State Authority Service” and defines the concept of a public official in the meaning of criminal law. In the wording that was in force from 2 January 2004 until 31 March 2013, this norm provided that representatives of State authority, as well as every person who permanently or temporarily performed their duties in the State or local government service and who had the right to make decisions binding upon other persons, or who had the right to perform any functions regarding supervision, control, investigation, or punishment or to deal with the property of financial resources of the state or local government, were to be considered to be public officials. The amendments to the Criminal Law of 15 May 2014<sup>33</sup> added a reference to the norm that also persons, who permanently or temporarily performed their duties in the State or local government service, including the state or local government capital company, also were to be regarded as public officials.

Persons, who submitted the constitutional complaint were leading officials at a capital company owned by the State and who, as public officials, had been sentenced for bribery, considered that before the aforementioned amendments had been introduced to it, the contested norm had not been sufficiently clear and, therefore, they could not foresee that they could be recognised as public officials in the meaning of the contested norm because of their leading position at the state capital company. Moreover, the lack of clarity of the contested norm is said to be confirmed by the amendments of 15 May 2014, which supplemented this norm, including in the range of public officials also officials of state and local government

<sup>31</sup> Separate Thoughts of the Judges of the Constitutional Court Ineta Ziemele and Sanita Osipova in Case No. 2018-10-0103. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/06/2018-10-0103\\_Atseviskas\\_domas.pdf#search=2018-10-0103](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/06/2018-10-0103_Atseviskas_domas.pdf#search=2018-10-0103) [viewed 10.10.2021.].

<sup>32</sup> Judgment of the Constitutional Court of the Republic of Latvia of 24 July 2020 in Case No. 2019-22-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2019/10/2019-22-01\\_Spriedums-1.pdf#search=2019-22-01](https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2019/10/2019-22-01_Spriedums-1.pdf#search=2019-22-01) [viewed 10.10.2021.].

<sup>33</sup> 15.05.2014. Amendments to Criminal Law. Available in Latvian: <https://likumi.lv/ta/id/266590-grozijumi-kriminallikuma> [viewed 10.10.2021.].

enterprises, hence, before the introduction of these amendments the status of a public official, in the meaning of the Criminal Law, was not applicable to them.

The Constitutional Court found that legal regulation was constantly evolving, *inter alia*, by the legislator improving the wording of regulatory enactments to reflect its will more accurately. Allegedly, just because the legislator later decides to amend the respective norms *per se* does not mean that they had not been sufficiently clear before. By amendments of 15 May 2014, the legislator amended Section 316 (1) of the Criminal Law to make it even clearer, however, this *per se* does not mean that it had not been sufficiently clear before to make persons criminally liable in accordance with Section 320 (3). Respectively, the applicants could have foreseen that the contested norm could be applied to them.

#### 1.4. In Case No. 2020-23-01

By the judgement of the Constitutional Court of the Republic of Latvia of 19.02.2021 in case No. 2020-23-01 “On compliance of Section 236 (1) of the Criminal Law (in the Wording that was in Force until 31 March 2013) with Article 90 and Article 92 of the *Satversme* of the Republic of Latvia and of the Transitional Provision of the Law of 29 October 2015 “Amendments to the Criminal Law” with Article 1 and Article 92 of the *Satversme* of the Republic of Latvia”<sup>34</sup>, the contested norm was recognised as being compatible with Art. 90 and the second sentence of Art. 92 of the *Satversme* of the Republic of Latvia. As regards the Transitional Provisions of the Amendments to the Criminal Law, contested in this case, the Constitutional Court identified incompatibility with the *Satversme*; however, in this part of the judgement the reasoning was not linked to the requirements regarding the clarity of criminal law provisions, therefore the Constitutional Court’s judgement in this part will not be examined in the research.

The contested Criminal Law provision provided for criminal liability for negligent storage, carrying, transportation or forwarding of a firearm or firearm ammunition or for negligent storage, transportation or forwarding of high-powered pneumatic weapons, explosives and explosive devices, in violation of the regulations that regulate the circulation of weapons, if by this offence another person has been given the possibility to acquire this firearm, firearm ammunition, high-powered pneumatic weapons, explosives and explosive devices. The submitter of the constitutional complaint held that the contested Criminal Law provision established criminal liability for a person’s activity envisaged in another regulatory enactment and that constituted elements of the criminal offence were substantive. Thus, to recognise a person guilty of committing the criminal offence envisaged in the contested Criminal Law provision, not only a violation of legal norms that

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<sup>34</sup> Judgment of the Constitutional Court of the Republic of Latvia of 19 February 2021 in Case No. 2020-23-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/04/2020-23-01\\_Spriedums.pdf#search=2020-23-01](https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/04/2020-23-01_Spriedums.pdf#search=2020-23-01) [viewed 10.10.2021.].



regulate storage of weapons and ammunition but also certain consequences should be established, i.e., the possibility created for another person to acquire this firearm or ammunition. The occurrence of such consequences is considered to be a feature of the respective criminal offence; the contested Criminal Law provision, however, is said to provide for only an abstract possibility that such consequences could set it. The applicant holds that the consequences envisaged in the contested Criminal Law provision, i.e., the possibility for another person to acquire the firearm or ammunition, are very vague.

The Constitutional Court found that the regulatory enactments that regulate the circulation of firearms set the requirement that a qualification test had to be passed before acquiring a firearm for the first time. Passing of this test proves, *inter alia*, that a person is familiar with the procedure of circulation of firearms and ammunition. The applicant is a police officer who had the permit to use a service firearm. Such right is claimed to be inseparably linked to the obligation, while in service, to act with special caution. Hence, it can be validly expected that a person, who has the right to use a firearm, while performing their official duties, will have better knowledge than other persons not only of the regulations that regulate the circulation of firearms and ammunition but also of the criminal law risks related to violation of these regulations. The Constitutional Court found that a person could have ascertained for what kind of action they could be made criminally liable in accordance with the contested Criminal Law provision; hence, the contested Criminal Law provision is to be considered as being sufficiently clear and foreseeable to make a person criminally liable.

## 2. Interpretation of Art. 90 and Art. 92 of the *Satversme*

In all the cases examined above, the Constitutional Court's legal reasoning and interpretation of Art. 90 and the second sentence of Art. 92 of the *Satversme* have been very similar.

Pursuant to Art. 90 of the *Satversme*, everyone has the right to know one's rights. This provision of the *Satversme* falls within the principle of the rule of law, pursuant to which only generally binding legal norms can establish persons' rights and obligations. Art. 90 of the *Satversme* encompasses the State's obligation to create a mechanism for ensuring that persons are informed about legal regulation and its content.<sup>35</sup> At the moment when an offence is committed, for which later criminal liability sets it, a clear and foreseeable legal norm must be in force, providing that the particular conduct of a person – actions or failure to act – is to be recognised as being criminal.<sup>36</sup> A norm is to be recognised as being unclear if it

<sup>35</sup> Judgement in Case No. 2020-23-01 para. 11, Judgement in Case No. 2018-10-0103, para. 13.1.

<sup>36</sup> Judgement in Case No. 2020-23-01 para. 9, Judgement in Case No. 2019-22-01, para. 14.

is impossible to establish its genuine meaning by using interpretation.<sup>37</sup> No matter how precisely and clearly legal norms are formulated, it will always be necessary to clarify their content through interpretation.<sup>38</sup> The European Court of Human Rights also has noted: no matter how precisely and clearly legal norms are worded, it will always be necessary, also in criminal law, to clarify their content through interpretation. It will always be necessary to clarify doubtful issues and to adapt legal provisions to changing circumstances. Although certainty is very desirable, it may lead to excessive rigidity but law must be able to follow the changing circumstances. Hence, inevitably, laws are formulated by using words with several possible meanings and the interpretation and application of which is the matter of practice.<sup>39</sup> Laws and legal norms that restrict a person's fundamental rights must be appropriately understandable and foreseeable. I.e., a norm must be formulated with sufficient precision so that an individual, in case of necessity seeking appropriate advice, would be able to regulate their actions.<sup>40</sup>

Pursuant to the second sentence of Art. 92 of the *Satversme*, the legislator must formulate criminal law provisions so as to ensure safeguards to a person against arbitrary charges, sentencing, and punishing.<sup>41</sup> Criminal liability is the most severe possible form of legal liability, and its consequences can have a significant impact upon a person's life also after the criminal sentence has been served. Therefore, the norms that provide for criminal liability must have a greater certainty contentwise compared to the provisions in other areas of law.<sup>42</sup> However, the duty to adopt norms that are sufficiently clear may not be exaggerated.<sup>43</sup> If a legal norm allows its addressee to understand and foresee the obligation imposed upon them and the parties applying legal norms – to establish all actual and legal circumstances to examine the occurrence and decide on making a person criminally liable then this norm can be considered to be sufficiently clear.<sup>44</sup> The concept of “a legal act”, used in the second sentence of Art. 92 of the *Satversme*, falls within the concept of “law”, included in Art. 90 of the *Satversme*.<sup>45</sup> Hence, norms that provide for criminal liability may be recognised as being law in the meaning of the second sentence of Art. 92 of the *Satversme* only if they meet the same quality criteria of legal norms that are included in Art. 90 of the *Satversme*.<sup>46</sup> The degree of clarity

<sup>37</sup> Judgement in Case No. 2020-23-01 para. 9, Judgement in Case No. 2019-22-01, para. 13., Judgement in Case No. 2018-10-0103, para. 13.1.

<sup>38</sup> Judgement in Case No. 2020-23-01 para. 11, Judgement in Case No. 2018-10-0103 para. 18.1.

<sup>39</sup> Judgement in Case No. 2019-22-01 para. 19, ECHR judgement of 25 June 2009 in Case *Liivik v. Estonia* (application No 12157/05), para. 94.

<sup>40</sup> Judgement in Case No. 2020-23-01 para. 11.

<sup>41</sup> Judgement in Case No. 2020-23-01 para. 11, Judgement in Case No. 2019-22-01 para. 14.

<sup>42</sup> Judgement in Case No. 2019-22-01 para. 14, Judgement in Case No. 2018-10-0103 para. 13.2.

<sup>43</sup> Judgement in Case No. 2019-22-01 para. 14, Judgement in Case No. 2008-09-0106 para. 7.2.

<sup>44</sup> Judgement in Case No. 2020-23-01 para. 11, Judgement in Case No. 2019-22-01 para. 14, Judgement in Case No. 2008-09-0106 para. 8.

<sup>45</sup> Judgement in Case No. 2020-23-01 para. 11, Judgement in Case No. 2019-22-01 para. 14.

<sup>46</sup> Judgement in Case No. 2020-23-01 para. 11, Judgement in Case No. 2018-10-0103 para. 13.2.

that a legal norm should attain when a criminal penalty is applied to a person, in turn, should be examined by taking into account the specific requirements set out in the second sentence of Art. 92 of the *Satversme*.<sup>47</sup>

The second sentence of Art. 92 of the *Satversme* encompasses also the fundamental rights defined in para. 1 of Art. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>48</sup> The European Court of Human Rights has recognised that a person should know, judging by the wording of the respective legal norm and, if necessary, after studying the way courts have interpreted this wording, for what kind of actions or failure to act criminal liability could set in and what kind penalty could be applied for such actions or failure to act. Moreover, a legal norm may comply with the foreseeability requirements also if the person needs to receive qualified legal assistance in order to assess to a reasonable degree the potential consequences of certain actions in the particular circumstances. If a legal provision, on the basis of which a person has been convicted, is incompatible with these requirements, the European Court of Human Rights recognises that a violation of para. 1 of Art. 7 of the Convention has occurred.<sup>49</sup>

In several judgements by the Constitutional Court, examined above, the compliance of blanket criminal law norms with the requirements regarding the clarity of these norms was reviewed. In this respect, the Constitutional Court has noted that the inclusion of such legal norms, which define criminal liability for a person's actions, which are envisaged in another regulatory enactment, in the Criminal Law is seen as one of the measures for formulating criminal law precepts and such norms that provide for such criminal liability cannot be recognised as being unclear only because their content must be clarified on the basis of other regulatory enactments.<sup>50</sup> It has been recognised also in the case law of the European Court of Human Rights that constructing blanket criminal law norms *per se* is not contrary to the requirements set down in Art. 7 of the Convention.<sup>51</sup> Taking into account that, in the case of blanket criminal law norms, their content must be clarified in conjunction with regulatory enactments that regulate another, special area, the Constitutional Court also has noted that the required degree of foreseeability of the criminal law provision depends also on the content of the related regulatory enactment, the area that it has to regulate,

<sup>47</sup> Judgement in Case No. 2020-23-01 para. 11.

<sup>48</sup> Judgement in Case No. 2020-23-01 para. 11, Judgement in Case No. 2018-10-0103 para. 13.2.

<sup>49</sup> Judgement in Case No. 2020-23-01 para. 11, ECHR judgement of 25 June 2009 in Case *Liivik v. Estonia* (application No. 12157/05), para. 93, ECHR judgement of 12 February 2008 in Case *Kafkaris v. Cyprus* (application No. 21906/04), para. 150, 152.

<sup>50</sup> Judgement in Case No. 2020-23-01 para. 15, Judgement in Case No. 2018-10-0103 para. 15, Judgement in Case No. 2008-09-0106 para. 7.2.

<sup>51</sup> Guide on Article 7 of the European Convention on Human Rights, 2021, p. 14. Available: [https://www.echr.coe.int/Documents/Guide\\_Art\\_7\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf) [viewed 10.10.2021.].

the number and status of its subjects.<sup>52</sup> Those persons, who, in their professional activities, are used to acting with special caution, can validly be expected to very meticulously assess the risks related to such activities and to be able to accordingly foresee the criminal law risks pertaining to their professional activities better than other persons.<sup>53</sup> Similarly, the European Court of Human Rights has likewise noted that the foreseeability of a norm is examined from the perspective of the convicted person<sup>54</sup>.

In several of the examined judgements by the Constitutional Court, the clarity of criminal law provisions was reviewed in situations, where later the norm had been amended by the legislator. In such instances, actually, the dispute regarding the clarity of norm can be reduced to the question whether the legislator had only specified these norms, making them clearer, without changing the scope of the norm, or did the legislator introduce additions, broadening or narrowing the scope of the norm accordingly. As regards these issues, the Constitutional Court has only concluded that the legal regulation is in constant development, *inter alia*, by the legislator improving the wording of normative acts so that they would reflect its will more precisely. The fact that the issuer of regulatory enactments later decides to amend the respective norms *per se* does not mean that previously they had not been sufficiently clear.<sup>55</sup> Thus, the fact that the legislator has amended the contested norm of the Criminal Law later, *inter alia*, by specifying the offence for which henceforth criminal liability is envisaged, as such is not the grounds for recognising such a Criminal Law provision as being unclear or unforeseeable.

Generally upholding these findings of the Constitutional Court, the authors of this research, nevertheless, advance the opinion that, at least in one of the Constitutional Court's judgements examined, this conclusion, while generally correct, has been attributed to the issue under review without grounds. Namely, it pertains to the judgement by the Constitutional Court of 21.02.2019 in case No. 2018-10-0103, where it was found that the legislator, by adding to the contested Section 237<sup>1</sup> of the Criminal Law a note that liability was envisaged not only for unlawful circulation of devices intended for taking measures of operational activities but also for the circulation of devices intended for hindering operational activities, had not broadened the scope of this norm but had only worded this criminal law provision with greater clarity and precision, without changing its scope. Thus, in the authors' opinion, an erroneous conclusion was made that prior to introducing these amendments to this Criminal Law provision unlawful

<sup>52</sup> Judgement in Case No. 2020-23-01 para. 18, Judgement in Case No. 2019-22-01 para. 18, Judgement in Case No. 2018-10-0103 para. 13.2.

<sup>53</sup> Judgement in Case No. 2020-23-01 para. 18, Judgement in Case No. 2019-22-01 para. 24, ECHR judgement of 11 November 1996 in Case *Cantoni v. France* (application No. 178622/91), para. 33.

<sup>54</sup> ECHR judgement of 21 October 2013 in Case *Del Río Prada v. Spain* (application No. 42750/09), para. 112.

<sup>55</sup> Judgement in Case No. 2020-23-01 para. 17, Judgement in Case No. 2019-22-01 para. 22.2, Judgement in Case No. 2018-10-0103 para. 18.2.

circulation, including storing, of devices that could be used for hindering measures of operational activities had been criminalised.

In attempting to clarify the legislator's will in this matter, it is worth looking at the process of drafting these amendments to the Criminal Law<sup>56</sup> and the available preparatory materials. This proposal was submitted for the second reading by deputy A. Judins.<sup>57</sup> The transcript of the *Saeima's* sitting on 22.10.2015<sup>58</sup> shows that prior to voting on introducing additions to Section 237<sup>1</sup> (2) of the Criminal Law, deputy A. Judins provided the following explanation to the *Saeima* members from the podium: "Proposal to specify Section 237<sup>1</sup>, which defines liability for violating the regulations on the circulation of goods of strategic importance. Currently, the second part of the Section provides for liability for violation of the prohibition on the circulation of the equipment, devices or instruments and their components specially designed or adapted for the operational activity measures to be performed by specific methods, but it is not clearly stated that liability sets in also for handling devices intended for hindering. However, it follows from the Cabinet Regulation that liability should set in. Hence, there is a certain discrepancy between the provisions of the Cabinet Regulation, the special law and the Criminal Law. By adopting these amendments, henceforth liability would be envisaged not only for handling the devices that have been created for performing the said activities but also for handling devices intended for hindering them." The transcript shows that by 50 votes "in favour", 9 votes "against" and 13 votes "abstaining" this proposal by A. Judins was supported. Consequently, at the *Saeima's* sitting on 12.11.2015<sup>59</sup>, without any debates and further explanations, this draft law was adopted by 89 votes in the third, final, reading. In the legislator's opinion, handling devices intended for hindering measures of operational activities was not criminally punishable, and the amendments to the Criminal Law, referred to above, were adopted exactly for criminalising such activities. In such circumstances, particularly taking into account the justification of politicians for introducing amendments in the respective Criminal Law provision, it is rather contestable that the addressees of the criminal law provision, by way of interpretation or by receiving appropriate legal advice, had the possibility to foresee with certainty and to understand that the acquisition and storage of devices intended for hindering measures of operational activities was a criminally punishable action before these amendments to the law were adopted.

<sup>56</sup> 12.11.2015. Amendments to Criminal Law.

<sup>57</sup> Andrejs Judins, Member of the 12<sup>th</sup> Parliament of the Republic of Latvia, 01.10.2014. Proposals for the draft law "Amendments to the Criminal Law" (344/Lp12). Available in Latvian: [https://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/c9483bcc4191ec0fc2257ed10045bcbf/\\$FILE/Kriminallikums\\_uz%20otro%20lasijumu\\_A.Judins%20\(1\).docx](https://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/c9483bcc4191ec0fc2257ed10045bcbf/$FILE/Kriminallikums_uz%20otro%20lasijumu_A.Judins%20(1).docx) [viewed 10.10.2021.].

<sup>58</sup> Transcript of the sitting of the 12<sup>th</sup> convocation of the *Saeima* of the Republic of Latvia on 22.10.2015. Available in Latvian: <http://titania.saeima.lv/LIVS12/saeimalivs12.nsf/0/B5F885A21BD010AEC2257EEB004F3883?OpenDocument> [viewed 10.10.2021.].

<sup>59</sup> Transcript of the sitting of the 12<sup>th</sup> convocation of the *Saeima* of the Republic of Latvia on 12.11.2015. Available in Latvian: [http://titania.saeima.lv/LIVS12/SaeimaLIVS2\\_DK.nsf/DK?ReadForm&nr=Sef628af-9571-43af-b3b2-1a9d3697a7f3](http://titania.saeima.lv/LIVS12/SaeimaLIVS2_DK.nsf/DK?ReadForm&nr=Sef628af-9571-43af-b3b2-1a9d3697a7f3) [viewed 10.10.2021.].

Two Justices of the Constitutional Court also have pointed out in their dissenting opinion on this judgement<sup>60</sup> that, in their opinion, by the law of 12 November 2015 “Amendments to the Criminal Law” the norm was not made clearer but a new regulation was included in this norm, pursuant to which criminal liability sets in for the violation of the prohibition on the circulation of devices or equipment intended for hindering measures of operational activities.

At this point, the authors of the study would also like to take a critical look at the Constitutional Court’s findings in several of the judgements examined above, i.e., that specifying (without changing the scope of provision) of criminal law norms *per se* is not the grounds for recognising such a norm as being unclear or unforeseeable in its wording before it was specified. If a criminal law provision had been sufficiently qualitative with understandable and clearly defined limits of its application, then the legislator should not be engaged in specifying such qualitative norms, all the more so if, as the result of amending the norm, its scope is not changed. Such actions by the legislator, in specifying some criminal law provisions, in the authors’ opinion, is a sign *per se* that there had been some complications in the practice of applying this norm and that there had been objective grounds for making the limits of applying the law more comprehensible. This, in turn, leads to the conclusion that prior to introducing such amendments, the norm, also in the legislator’s opinion, had not been of sufficient quality and its applicability had not been foreseeable. Hence, in such cases, the parties applying the criminal law provisions, who are considering how to qualify a person’s actions by the constitutive elements of this norm, should act with exceptional caution, in each particular case, looking at the foreseeability of the scope of such a norm, which has later undergone “cosmetic” specifications, from the offender’s perspective.

In conclusion, the authors of the research can only call upon the legislator and the parties applying legal provisions to keep in mind that the members of society are far from being sterling lawyers who are able to interpret criminal law provisions and understand the scope of a norm in conjunction with other regulatory enactments. Moreover, there are not always grounds to assume that, in disputable cases, addressees of criminal law provisions might even suspect that one or another criminal law provision might apply to them and that it would be advisable to seek the advice of qualified lawyers regarding the content of this norm to make an intentional choice of actions that are either compatible or incompatible with the Criminal Law. It is not contested that the persons without legal education in the absolute majority of cases are also able “to tell the right from wrong” and understand, which actions could be criminally punishable, and which – not, on the basis of common sense and the system of values prevailing in society. However, development of society and criminal law has resulted in increasingly

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<sup>60</sup> Separate Thoughts of the Judges of the Constitutional Court Ineta Ziemele and Sanita Osipova in the Case No. 2018-10-0103, para. 3.3. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/06/2018-10-0103\\_Atseviskas\\_domas.pdf#search=2018-10-0103](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/06/2018-10-0103_Atseviskas_domas.pdf#search=2018-10-0103) [viewed 10.10.2021.].

greater complexity of the construction of the constituent elements of criminal law provisions, sometimes criminalising actions, which, in accordance with ethical standards comprehensible to the majority, might seem not to be punishable. Therefore, in such cases, it is of particular importance that those who are drafting legal norms should “step into the shoes of an average person” to try to understand, whether the message sent by the Criminal Law regarding the prohibition of certain actions will reach its addressees in due time and, consequently, will be able to deter them from an intentional violation of such a prohibition.

## Conclusion

1. The Constitutional Court of the Republic of Latvia has examined the quality and clarity of criminal law provisions in four disposed cases. It can be found that the criteria used to review the compatibility of these norms with the *Satversme* are stable and uniform in the Constitutional Court’s judicature, and are also compatible with the findings of the European Court of Human Rights.
2. Requirements regarding foreseeability and clarity of criminal law provisions follow from Art. 90 and the second sentence of Art. 92 of the *Satversme*.
3. At the moment when an offence, for which later criminal liability sets in, is committed, a clear and foreseeable legal norm must be in force, providing that the particular conduct of a person – action or failure to act – is to be recognised as being criminal.
4. Criminal liability is the most severe possible form of legal liability, and its consequences can have a significant impact upon a person’s life also after the criminal sentence has been served. Therefore, the norms that provide for criminal liability must have greater certainty contentwise compared to the provisions in other areas of law. At the same time, it does not mean that criminal law provisions should be strictly casuistic or that wordings cannot be used therein that require interpretation to clarify their content. A norm is to be recognised as being unclear, if its true meaning cannot be clarified through interpretation. Likewise, a criminal law provision will comply with the quality and clarity requirements, if its scope can be established by receiving qualified legal assistance. In all cases, the clarity of norms must be assessed from the perspective of the norm’s addressee.
5. In those cases, where the legislator has amended the criminal law provision, special care must be taken in assessing, whether, as the result of amendments, the legislator specifies these norms without changing their scope or also adds to them, broadening or narrowing their scope accordingly. However, in cases where the content of the norm has been specified without changing its scope, special care is needed in assessing, whether such specification of a criminal law provision is not a sign of some deficiencies relating to the quality of the previous wording of the norm, and whether such a norm in its previous wording also could be considered as being clear and having foreseeable limits of application.

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## APPLICATION OF COERCIVE MEASURES TO A LEGAL PERSON: LAW, THEORY, PRACTICE

**Keywords:** legal person, “in the interests of a legal person”, “for the benefit of a legal person”, “as a result of inadequate supervision or control”

### Summary

The application of coercive measures to a legal person in Latvian criminal law is a relatively new institute of law, which is becoming increasingly relevant. Although some issues of the application of coercive measures have already been addressed in legal doctrine, there still remains a great deal of uncertainty regarding this institute. The purpose of this article is to address the regulation contained in Section 70<sup>1</sup> of the Criminal Law, clarifying the content of such features as “in the interests of a legal person”, “for the benefit of a legal person” and “as a result of inadequate supervision or control”, providing an understanding of these features.

### 1. Relationship of a legal person with a criminal offense and the natural person who committed it

Section 12 of the Criminal Law<sup>1</sup> (hereinafter also the CL) stipulates that a criminal offense committed by a natural person acting in the interests of a public legal entity, for the benefit of that person or as a result of improper supervision or control thereof shall be held criminally liable, whereas coercive measures provided for by law could be applied to a legal person. It follows from the content of Section 12 of the Criminal Law that legal persons cannot be the subjects of criminal liability; natural persons who are guilty of criminal offenses in connection with

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<sup>1</sup> Krimināllikums [The Criminal Law]: LV likums. Latvijas Vēstnesis, 08/07/1998, Nr. 199/200.).

the activities of legal persons shall be held criminally liable.<sup>2</sup> A legal person, having established its legal connection with a criminal offense and a natural person, who has committed a criminal offense, may be subject to coercive measures provided for in the Criminal Law, the application of which requires a legal basis established in Section 70<sup>1</sup> of the CL.

Section 70<sup>1</sup> of the CL provides for three types in which a legal person may be involved in a criminal offense, namely:

- 1) the offense is committed in the interests of a legal person;
- 2) the offense is committed for the benefit of a legal person;
- 3) the offense is committed as a result of improper supervision or control of a legal person.

Then again, in order to establish a legal connection between a natural person who has committed a criminal offense and a legal person against whom coercive measures may be applied, the provisions of Section 70<sup>1</sup> of the CL should be taken into account regarding an individual or viewing him/her as a member of a collegial institution:

- 1) on the basis of the right to represent a legal person or to act on its behalf;
- 2) on the basis of the right to take decisions on behalf of the legal person;
- 3) in implementing control within the scope of the legal person.

According to Professor Uldis Krastiņš, the content of the authorization given by a legal entity to the natural person provided by law is quite extensive. The exercise of such an authorization constitutes a *de facto* link between the conduct of the natural person and the legal person. This connection is not criminal in itself if the natural person fulfils the obligations imposed in good faith. Crime occurs when a natural person commits a criminal offense while performing his or her duties.<sup>3</sup>

The doctrine of criminal law emphasizes that an illegal activity of a legal person, which manifests itself in the practical realization of a certain interest, may occur in cases when the interest of the legal person is illegal or when the interest of the legal person is legal but implemented by illegal means. A natural person is to blame for the fact that the unlawful or legal interest of his or her legal person is realized in an unlawful manner for which criminal liability has been established in one of the articles of the Special Part of the Criminal Law. Thus, there is a link between the two activities, it has to be stated and proven. If such a link does not exist, the natural person is liable for a specific offense, but the legal person has no grounds to apply the coercive measures provided for by law.<sup>4</sup> Reference to this

<sup>2</sup> Krastiņš U. Juridiskās personas atbildības krimināltiesiskie aspekti [Criminal Aspects of the Liability of a Legal Person]. In: Krastiņš U. Theory and Practice of Criminal Law. Opinions, Problems, Solutions 2009–2014. Rīga: Latvijas Vēstnesis, 2015, p. 216.

<sup>3</sup> Krastiņš U. Juridiskajām personām piemērojamo piespiedu ietekmēšanas līdzekļu reglamentācijas aktualitātes [Topicalities of Regulation of Coercive Measures Applicable to Legal Persons]. Administratīvā un Kriminālā Justīcija, Nr. 1 (62), 2013, p. 3.

<sup>4</sup> Krastiņš U. Juridiskās personas atbildības krimināltiesiskie aspekti [Criminal Aspects of the Liability of a Legal Person]. In: Krastiņš U. Theory and Practice of Criminal Law. Opinions, Problems, Solutions 2009–2014 Latvijas Vēstnesis, Rīga, 2015, p. 216.

thesis can also be found in case law.<sup>5</sup> In the absence of a connection between a legal person and a criminal offense, or in the absence of a connection between a legal person and a person who has committed a criminal offense, there are no grounds for imposing any coercive measure on the legal person.<sup>6</sup>

## 2. Criminal offense committed “in the interests” or “for the benefit” of the legal person

Chapter VIII<sup>1</sup> “Coercive Measures Applicable to Legal Persons” was included in the Criminal Law by the Law of 5 May 2005 “Amendments to the Criminal Law”.<sup>7</sup> In the original version of Section 70<sup>1</sup> of the CL, there was a reference to only one feature, namely, the criminal offense was committed “in the interests of a legal person” (as well as the feature “as a result of inadequate supervision or control”), while the feature – “a criminal offense committed for the benefit of a legal person” was included in the Law of 14 March 2013 “Amendments to the Criminal Law”<sup>8</sup>, which entered into force on 1 April 2013.

It should be noted that, for example, under the first part of § 14 of the Estonian Criminal Code<sup>9</sup>, a legal person is liable in statutory cases for an act committed on behalf of a legal person by its body, its member or senior official or competent representative. Thus, unlike the Criminal Law, the Estonian Criminal Code has only one feature.

Looking at the international framework, it can be concluded that Art. 18 of the Council of Europe Criminal Law Convention on Corruption requires each Party to take such legislative and other measures as may be necessary to ensure that legal persons are held liable for bribery, trading in influence and money laundering under this Convention and performed for their benefit by any natural person [...].<sup>10</sup>

<sup>5</sup> Decision of Supreme Court of 27 January 2021 in Case No. SKK-90/2021 (11816000520); Decision of the Supreme Court of 14 June 2016 in Case No. SKK-6/2016 (15830604408). Available: [www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/kriminallietu-departaments/hronologiska-seciba?lawfilter=0&year](http://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/kriminallietu-departaments/hronologiska-seciba?lawfilter=0&year) [viewed 20.07.2021.].

<sup>6</sup> Rozenbergs J. Piespiedu ietekmēšanas līdzekļu juridiskajām personām krimināltiesiskais raksturojums [Criminal Law Description of Coercive Measures for Legal Persons]. In: The 73<sup>rd</sup> Scientific Conference of the University of Latvia “The Effectiveness of Law in a Postmodern Society”. Rīga: LU Akadēmiskais apgāds, 2015, p. 148.

<sup>7</sup> Grozījumi Krimināllikumā [Amendments to the Criminal Law]: LV likums. Latvijas Vēstnesis, 25.05.2005., Nr. 82..

<sup>8</sup> Grozījumi Krimināllikumā [Amendments to the Criminal Law]: LV likums. Latvijas Vēstnesis, 27.03.2013., Nr. 61.).

<sup>9</sup> Criminal Code of the Republic of Estonia. Available: [https://www.legislationline.org/download/id/8244/file/Estonia\\_CC\\_am2019\\_en.pdf](https://www.legislationline.org/download/id/8244/file/Estonia_CC_am2019_en.pdf) [viewed 05.07.2021.].

<sup>10</sup> Par Eiropas Padomes Krimināltiesību pretkorupcijas konvenciju [On the Council of Europe Criminal Law Convention against Corruption]: LV likums. Latvijas Vēstnesis, 20.02.2000., Nr. 460/464.

It follows from the given regulation that the Convention, as regards the legal connection of a legal person with a criminal offense, provides for the feature – a criminal offense is committed for the benefit of a legal person.

Although the theory of criminal law is of the opinion that the content of these two features, respectively, a criminal offense is committed in the interests of or for the benefit of a legal person, as if no question arises, it is rightly emphasized that what really differentiates an offense it is not really clear from an offense committed in someone's interest. The question is also raised whether it is possible to commit a criminal offense for the benefit of a legal person if it is not in the interests of that legal person, and *vice versa* – what would be the situation when the offense is committed in the interests of the legal person but not for its benefit.<sup>11</sup>

Despite the apparent similarity of the aforementioned features, the fact that “in the interests” and “for the benefit” are distinguished in the Criminal Law as two alternative features, obviously presuming that the legislator is characterized by their autonomous content, cannot be ignored.

As alternative features, these concepts are also singled out in Section 1, para. 5 of the Law on the Prevention of Money Laundering and Terrorist and Proliferation Financing<sup>12</sup>, indicating to the legislator that the real beneficiary is a natural person who is the owner of the customer – legal person – or controls the customer, or in whose name, for whose benefit, a business relationship is established or an occasional transaction is executed, [...].

When trying to establish the content of these two features – “in the interests” and “for the benefit”, which could serve as the delimiting criterion of these features, it should be noted that nowadays in Latvian criminal law the term “interests” is primarily related to the object of a criminal offense. In its turn, at the end of the 20<sup>th</sup> century the term “benefit” was used to define the object of a criminal offense, the criticism of which is related to the object of a criminal offense. The term “interests” is interpreted as needs<sup>13</sup>, values<sup>14</sup>; its content is determined by the needs of society or individuals, various benefits, expediency<sup>15</sup>.

<sup>11</sup> Rozenbergs J., Strada-Rozenberga K. Krimināltiesiskie piespiedu ietekmēšanas līdzekļi juridiskajām personām, to piemērošanas process un tā aktuālās problēmas Latvijas kriminālprocesā [Criminal Law Coercive Measures for Legal Persons, the Process of their Application and its Current Problems in Latvian Criminal Proceedings]. In: Public Legal Liability of Legal Persons: topical issues, problems, possible Solutions. The team of authors. Rīga: LU Akadēmiskais apgāds, 2018, p. 181.

<sup>12</sup> Noziedzīgi iegūtu līdzekļu legalizācijas un terorisma un proliferācijas finansēšanas novēršanas likums [Law on the Prevention of Money Laundering and Terrorism and Proliferation Financing]: LV likums. Latvijas Vēstnesis, 30.07.2008., Nr. 116.

<sup>13</sup> Latviešu valodas vārdnīca [Latvian language dictionary]. Rīga: Avots, 1987, p. 296.

<sup>14</sup> Baumanis J. Jēdziena “intereses” interpretācija krimināltiesību normās [Interpretation of the Term “Interests” in Criminal Law]. Administratīvā un Kriminālā justīcija, 2015., Nr. 3 (72), p. 3.

<sup>15</sup> Krastiņš U. Noziedzīga nodarījuma sastāvs un nodarījuma kvalifikācija. Teorētiskie aspekti [Composition of the Criminal Offense and Qualification of the Offense. Theoretical Aspects]. Rīga: Tiesu namu aģentūra, 2014, p. 54.

Professor Uldis Krastiņš has pointed out that, in connection with the definition of the object of a criminal offense, “interests” include such a concept as “benefit”<sup>16</sup>.

A similar view is expressed in the legal doctrine relating to the application of coercive measures to a legal person: a natural person has committed a criminal offense in the interests of a legal person if that legal person directly or indirectly obtains or may receive an undue benefit or advantage.<sup>17</sup>

Thus, the term ‘interests’ is broader in content than the term ‘benefit’. It should be noted that a review of case law allows concluding that it is basically established that a criminal offense is committed in the interests of a legal person and not in its favour.

The actions of a natural person in the interests of a legal person have been reasonably established in criminal proceedings, in which it is stated that A, being the Chairman of the Board of JSC “Latvijas tilti”, on 4 February 2016 gave a bribe in the value of 5175 euros to the acting director B for the fact that as a representative of the contracting authority – state enterprise “Klaipeda State Seaport Authority” (SE KSSA), within the scope of his authority, will make decisions favourable to the performance of works by JSC “Latvijas tilti” in accordance with the contracts concluded with SE KSSA construction company.<sup>18</sup>

The Chamber of the Criminal Court of Latgale Regional Court has found the following considerations indicated in the judgment of Rēzekne court regarding the fact that the offense was committed in the interests of a legal person to be justified: “Pursuant to the provisions of Section 70<sup>8</sup>, para. 1 of the Criminal Law, the court shall take into account the nature of the criminal offense committed in the interests of this legal person and the damage caused. It can be established from the evidence obtained in the criminal case that the serious crime provided for in Section 218, para. 2 of the Criminal Law was committed in the interests of SIA / name/, because unjustified overpaid VAT overpayments were diverted to other taxes of this company [...]”<sup>19</sup>

In another criminal case, it is clear from the protocol of agreement with the representative D of SIA “Alīna U” that the agreement was reached with the representative of the legal entity that the prosecutor will ask the court to impose a legal sanction on SIA “Alīna U” – deprivation of the right to perform activities with

<sup>16</sup> Krastiņš U. *Noziedzīga nodarījuma sastāvs un nodarījuma kvalifikācija. Teorētiskie aspekti* [Composition of the Criminal Offense and Qualification of the Offense. Theoretical Aspects]. Rīga: Tiesu namu aģentūra, 2014, p. 54.

<sup>17</sup> Rozenbergs J. *Juridiskajām personām piemērojamo krimināltiesisko piespiedu ietekmēšanas līdzekļu juridiskā daba* [Legal Nature of Coercive Measures Applicable to Legal Persons]. *Juridiskā zinātne*, Nr. 4, 2013, 217. lpp.; Sk. arī Danovskis E. *Administratīvā pārkāpuma subjekta noteikšanas problēmas* [Problems of Identifying the Subject of an Administrative Violation]. In: *The 73<sup>rd</sup> Scientific Conference of the University of Latvia “The Effectiveness of Law in a Postmodern Society”*. Rīga: LU Akadēmiskais apgāds, 2015, p. 58.

<sup>18</sup> Judgment of Riga City Vidzeme Suburb Court of 30 November 2020 in Case No. 16870001619. Available: [manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/433476.pdf](https://manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/433476.pdf) [viewed 23.08.2021.].

<sup>19</sup> Judgment of Latgale Regional Court of 4 October 2019 in Case No. 15830001815. Available: [manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/396964.pdf](https://manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/396964.pdf) [viewed 15.08.2021.].

wood chips production. It follows from the protocol of the agreement that the State Prosecutor, when choosing the type of coercive measure for the legal person, has taken into account the nature of the criminal offenses committed in the interests of SIA “Alina U” and the damage caused – the accused committed two serious crimes and one less serious crime in the interests of the legal person. The State suffered a large loss of 223 547.41 euros as a result of tax evasion in connection with the movement and production of wood chips. In selecting the coercive measures against the legal person, the prosecuting authority has taken into account the actual actions, nature and consequences of the legal person, measures taken by the legal person to prevent the commission of a criminal offense, size, type of activity and financial situation, measures taken for compensation of damages – the implementation of the legal protection process of SIA “Alina U” was announced by the court judgment of October 26, 2019, approving the plan of process measures, which the company successfully implemented, the company's declared activities  $\frac{3}{4}$  forestry service activities, road freight transport, other transport service activities. According to the annual report of SIA “Alina U” for 2018, the company owns fixed assets in the amount of 419 078.00 euros, current assets in the amount of 108 272 euros. In 2018, the company had 8 employees, owned two real estates, seven registered transport units and eight technical units.<sup>20</sup>

Court rulings indicate, for example, the desire to use the money obtained and laundered from the sale of illegally purchased diesel to supplement the company's financial resources as a justification for the accused committing a criminal offense in the interests of a legal person;<sup>21</sup> large-scale use of trademarks for the purpose of offering and placing on the market counterfeit goods with trademarks, the use of which is not authorized, in the interests of the company;<sup>22</sup> illegal storage of alcoholic beverages for sale in order to obtain fiscal advantages for the company in the form of unpaid taxes;<sup>23</sup> tax evasion and avoidance of taxes and similar charges in the interests of a legal person which has thus benefited from other taxpayers.<sup>24</sup>

In the proceedings regarding the application of coercive measures to a legal person – SIA [X], it was clarified that during the activity of B, who was an official of SIA with the rights to represent the company separately, the mandatory tax and fee payments declared by SIA to the state budget were not made, causing material damage to the state in the amount of 41 085.43 euros. The court noted that in the criminal proceedings it had not been established that SIA had taken measures

<sup>20</sup> Judgment of Daugavpils Court of 15 September 2020 in Case No. 15840026219. Available: [manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/433744.pdf](https://manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/433744.pdf) [viewed 20.08.2021.].

<sup>21</sup> Judgment of Kurzeme District Court of 4 March 2021 in Case No. 11151029319. Available: [manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/442925.pdf](https://manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/442925.pdf) [viewed 21.08.2021.].

<sup>22</sup> Judgment of Riga City Vidzeme Suburb Court of 2 March 2021 in Case No. 1181600520. Available: [manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/442667.pdf](https://manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/442667.pdf) [viewed 23.08.2021.].

<sup>23</sup> Judgement of Riga City Vidzeme Suburb Court of 9 December 2020 in Case No. 11816005218. Available: [manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/435276.pdf](https://manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/435276.pdf) [viewed 23.08.2021.].

<sup>24</sup> Judgment of Kurzeme District Court of 3 January 2020 in Case No. 15840013619. Available: [manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/401252.pdf](https://manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/401252.pdf) [viewed 22.08.2021.].

to prevent the commission of a criminal offense, and found that the interest of a legal person in committing a criminal offense provided for in Section 218, para. 2 as a result of the activities, avoiding the payment of taxes and similar payments, unjustified financial advantages were created for SIA, as financial resources were unreasonably left at its disposal, while large losses were incurred to the state.<sup>25</sup>

Examining the case law of the Republic of Estonia, it can be pointed out that the Estonian Supreme Court, recognizing the fact of copyright infringement (music was played in the store without the author's permission), stated that since the music playback was inextricably linked to the main activities of the store, there was a reason to believe that the activity has been committed in the interests of the legal person.<sup>26</sup>

In another criminal proceeding, the Supreme Court of Estonia, in analysing whether a senior official or a body of a legal person has acted in the interests of a legal person, has ruled that not only acts offering a financial benefit to a legal person can be considered the acts committed on behalf of that legal person. In order for an offense to be considered to have been committed in the interests of a legal person, it must be linked to a legal person. The offense should be committed in the sphere of activity of a legal person or in a related sphere. Of course, not all activities of senior officials or units of a legal entity are performed in the interests of the legal entity. Activities of senior officials committed solely in their personal interest may not be attributed to a legal person. However, the interests of a legal person go beyond mere financial gain and may cover areas that are far from the main activities of the legal person (e.g., registration in a trade register). Therefore, the question whether an act is committed in the interests of a legal person must be decided in each case according to the circumstances of the case.<sup>27</sup>

As already emphasized, the notion of “benefit” is, in fact, a part of the content of the term “interests”, which means that it has probably not been necessary to distinguish between such two alternative features. At the same time, it is possible that the attribute “for the benefit of the legal person” is more related to the material benefit. Thus, in cases where a legal person obtains a benefit consisting of property as a result of a natural person's offense, it is presumed that the question of whether the offense was committed “for the benefit of a legal person” is decisive, as this criterion could be primarily related to a material benefit. On the other hand, if we talk about “interests of a legal person”, then, in our opinion, they could be broader (related to any advantages, intangible benefits, etc.). For example, if a natural person is arbitrarily cutting down trees, a legal person could acquire a larger construction site, which could be considered a criminal offense committed in the interests of the legal person.

<sup>25</sup> Judgment of Kurzeme District Court of 12 August 2020 in Case No. 15840004118. Available: [manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/425196.pdf](https://manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/425196.pdf) [viewed 22.08.2021].

<sup>26</sup> CLCSCd, 23.03.2005, 3-1-1-9-05. – RT III 2005, 12, 118. Available: <http://www.nc.ee/?id=11&tekst=RK%2F3-1-1-82-04&print=1> (in Estonian). [viewed 05/03/2021]

<sup>27</sup> CLCSCd, 23.03.2005, 3-1-1-9-05. – RT III 2005, 12, 118. Available: <http://www.nc.ee/?id=11&tekst=RK%2F3-1-1-82-04&print=1> (28.07.2009) (in Estonian). [viewed 05.03.2021].



### 3. Necessity and “sufficiency” of establishing interest / benefit

The wording of Section 12 of the CL

*on a criminal offense committed in the interests of a legal person of private law for the benefit of that person [...] by the natural person concerned shall be held criminally liable, but the legal person may be subjected to coercive measures*

presumes that not every criminal offense committed by an employee of a legal person is a ground for imposing a coercive measure on a legal person.

Whether the interest/benefit is sufficient to be able to apply a coercive measure must be assessed in each specific case within the scope of the provisions of the Criminal Law and the Criminal Procedure Law<sup>28</sup> (hereinafter – also the CPL). The purpose of the norm included in Section 12 of the CL is to prevent the application of a coercive measure to a legal person in cases when a natural person commits a criminal offense in his or her personal interests that does not coincide with the interests of the legal person.

Section 439<sup>1</sup>, para. 1, clause 3 of the CPL stipulates that in the decision on commencement of the coercive measure application proceedings the person conducting the proceedings shall indicate the grounds for the presumption that the investigated criminal offense is most likely committed in the interests of a legal person. In its turn, in accordance with Section 548, para. 1, clause 3 of the CPL, when reviewing the materials of the proceedings regarding the application of coercive measures to a legal person, the court shall decide together with other facts specified in the section having acknowledged that the facts referred to in para. 1 of this section have not been proved, namely, a natural person's independent interest and initiative to commit a criminal offense has been established, the court terminates the application of coercive measures to a legal person.

It can be concluded from the regulation included in the Criminal Law and the Criminal Procedure Law that not every criminal offense from which a legal person can theoretically benefit will always be committed in the interests or for the benefit of this person. Legal writers rightly point out that a situation cannot be ruled out where a mid-level employee, in accordance with his understanding of what is and what is not in the interests of a legal person, has committed a criminal activity from which the legal person could theoretically benefit, but the company's board considers that such conduct is in no way in the public interest.<sup>29</sup> In such a situation, although a legal link between the natural person concerned and the legal person will be established, the legal person will lack

<sup>28</sup> Kriminālprocesa likums [The Criminal Procedure Law]: LV likums. Latvijas Vēstnesis, 11.05.2005., Nr. 74.

<sup>29</sup> Sk. Rozenbergs J., Strada-Rozenberga K. Krimināltiesiskie piespiedu ietekmēšanas līdzekļi juridiskajām personām, to piemērošanas process un tā aktuālās problēmas Latvijas kriminālprocesā [Criminal Law Coercive Measures for Legal Persons, the Process of their Application and its Current Problems in Latvian Criminal Proceedings]. In: Public Legal Liability of Legal Persons: Topical Issues, problems, Possible Solutions. The team of authors. Rīga: LU Akadēmiskais apgāds, 2018, pp. 181–182.

a link with the criminal offense, as a result of which there will be no grounds to impose a coercive measure on the legal person. It must be agreed that, in order to apply the coercive measures provided for in the Criminal Law to a legal person, it will not be sufficient to establish that the offense was committed with the tools or means of the legal person or that the offense was committed by an employee of the legal person. In order to establish that a natural person has committed an offense in the interests of a legal person, it must be established that a legal person has also benefitted from such an offense.<sup>30</sup>

The Supreme Court has indicated: if, when applying a coercive measure to a legal person, the court does not decide and substantiate the interest of the legal person in committing each separate criminal offense, then the provisions of Sections 440 and 548 of the Criminal Procedure Law are not observed.<sup>31</sup>

It follows from the provisions of Section 1, para. 2 of the Commercial Law<sup>32</sup> that “commercial activity is an open economic activity which is performed by a merchant in its own name for the purpose of gaining profit”, thus, this norm defines the purpose of economic activity: gaining profit. When assessing the potential “benefit” of a legal entity, several factors need to be considered.

Section 440, clause 1 of the CPL states that in the pre-trial proceedings for the application of coercive measures to a legal person the circumstances of the commission of a criminal offense shall be ascertained, while clause 6 regulates that the size, occupation and financial position of the legal person must also be ascertained. Thus, in the process of applying coercive measures, it is necessary to find out and evaluate the amount of “gain” or “benefit” of a legal person, as well as such indicators as the company's monthly turnover, profit, paid taxes, company size, etc.

European Commission Regulation declaring certain categories of aid compatible with the internal market, in application of Sections 107 and 108 clause 2 of the Treaty clarifies that a small enterprise is one whose annual turnover and/or annual balance sheet total exceeds 2 million euros, but not exceeding 10 million euros. Large company – with an annual turnover exceeding 50 million euros and/or an annual balance sheet total not exceeding 43 million euros. A medium-sized enterprise corresponds to a category between small and medium-sized enterprises (for more details, see Annex 1 of the Regulation).<sup>33</sup> As can be seen, the amount of turnover is a criterion for the gradation of companies according to their size.

<sup>30</sup> Danovskis E. Administratīvā pārkāpuma subjekta noteikšanas problēmas [Problems of Identifying the Subject of an Administrative Violation]. In: The 73<sup>rd</sup> Scientific Conference of the University of Latvia “The Effectiveness of Law in a Postmodern Society”. Rīga: LU Akadēmiskais apgāds, 2015, p. 58.

<sup>31</sup> Decision of Supreme Court of 14 June 2016 in Case SKK-6/2016 (15830604408. Available: [www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/kriminallietu-departaments/hronologiskaseciba?lawfilter=0&year](http://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/kriminallietu-departaments/hronologiskaseciba?lawfilter=0&year) [viewed 20.07.2021].

<sup>32</sup> Komerclikums [The Commercial Law]: LV likums. Latvijas Vēstnesis, 04.05.2000., Nr. 158/160.

<sup>33</sup> Commissions Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance. Official Journal of the European Union, 26.6.2014 L 187/1.

Such financial indicators of a legal person are important in assessing whether a legal person, gaining any property benefit from a criminal offense committed by a natural person, benefits within the meaning of Section 12 of the CL.

In the opinion of the authors of the article, when assessing whether a legal person benefits from a criminal offense committed by a natural person, the property criteria incorporated in the legal norms of the Special Part of the Criminal Law should be taken into account. Thus, for example, the first part of Section 23<sup>1</sup> of the Law “On the Procedures for the Coming into Force and Application of the Criminal Law” provides that liability for a criminal offense under the Criminal Law committed to a significant extent arises if the total value of the criminal offense was not less than the total amount of ten minimum monthly wages established in the Republic of Latvia during the period. Pursuant to Section 218 of the CL, criminal liability for tax evasion and payment of taxes equated to them is provided only in cases where it has caused losses to the state or local government to a large extent, which in accordance with Section 20 of the Law “On the Procedures for the Coming into Force and Application of the Criminal Law”, the total value of the object of the crime at the time of the commission of the offense has not been less than the total amount of fifty minimum monthly salaries established in the Republic of Latvia at that time.

#### 4. Insufficient supervision or control

In Section 12 of the Criminal Law, one of the ways in which a legal person may be associated with a criminal offense is the commission of an offense as a result of insufficient supervision or control of the legal person. The reference in the law to a criminal offense committed by a natural person as a result of insufficient supervision or control creates a need to ascertain whether the natural person who committed the criminal offense has not sufficiently controlled the legal person or the legal person has not sufficiently controlled the actions of the natural person. The doctrine of criminal law emphasizes that this issue is important “because they are two completely different situations and it is necessary to find out which of them may be the basis for the application of coercive measures to a legal person”. Jānis Rozenbergs, applying the method of grammatical interpretation of a legal norm, translating Section 70<sup>1</sup> of the CL “offense committed by a natural person as a result of insufficient supervision or control of a legal person”, concludes that there is no reason to exclude either of these two cases.<sup>34</sup>

Art. 18 of the Council of Europe Criminal Law Convention on Corruption provides that each Party shall take such legislative and other measures as may

<sup>34</sup> See: Rozenbergs J., Strada-Rozenberga K. Krimināltiesiskie piespiedu ietekmēšanas līdzekļi juridiskajām personām, to piemērošanas process un tā aktuālās problēmas Latvijas kriminālprocesā [Criminal Law Coercive Measures for Legal Persons, the Process of their Application and its Current Problems in Latvian Criminal Proceedings]. In: Public Legal Liability of Legal Persons: Topical Issues, problems, Possible Solutions. The team of authors. Rīga: LU Akadēmiskais apgāds, 2018.

be necessary to ensure that legal persons are held liable for bribery, trading in influence and money laundering in accordance with this Convention performed by any natural person, acting either individually or as part of a governing body of that legal person and based on: the right to represent that legal person, or the right to take decisions on behalf of that legal person, or the right to exercise control within that legal person. The second paragraph states that, in addition to the cases already referred to in the first subparagraph, each Party shall take the necessary measures to ensure that legal persons are held liable where a lack of supervision or control by a natural person referred to in the first subparagraph has the offenses referred to in para. 1 for the benefit of a given legal person.<sup>35</sup>

The second paragraph of Art. 10 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime provides that, notwithstanding the cases referred to in subpara. 1, each State Party shall take the necessary measures to ensure that a legal person may be held liable if: the said natural person has not exercised supervision or control and thus the natural person who is subordinated to the said legal person has an opportunity to commit the criminal offenses referred to in subpara. 1 for the benefit of that legal person.<sup>36</sup>

It follows from the given regulation that inappropriate supervision or control can be applied only to such persons who are entitled to exercise control within the given legal person.

Looking at Art. 18 of the Criminal Law Convention against Corruption and Art. 10 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime for Lack of Control, criminal law doctrine states that the liability of legal persons is due to inaction (lack of control), as a result of which another person may commit a criminal offense. Subject to the regulations contained in conventions and national laws and regulations, the doctrine of criminal law states that coercive measures against a legal person for insufficient supervision or control, as a result of which a natural person has committed a criminal offense, may be applied both if it is criminal and punishable insufficient supervision and control (for example, negligence of the responsible official), as well as if insufficient supervision has led to another person (employee) having the opportunity to commit a criminal offense.<sup>37</sup>

In the opinion of the authors of the article, insufficient control or supervision does not apply to such persons who act under the supervision or control of another person, because the obligation of control and supervision applies only to persons entitled to supervise and control. At the same time, this does not

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<sup>35</sup> Council of Europe Criminal Law Convention on Corruption of 27 January 1999. Available: <https://rm.coe.int/168007f315> [viewed 07.08.2021.].

<sup>36</sup> Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990. Available: <https://rm.coe.int/168007bd23> [viewed 07.08.2021.].

<sup>37</sup> Rozenbergs J. Piespiedu ietekmēšanas līdzekļu juridiskajām personām krimināltiesiskais raksturojums [Criminal Law Description of Coercive Measures for Legal Persons]. In: The 73<sup>rd</sup> Scientific Conference of the University of Latvia "The Effectiveness of Law in a Postmodern Society". Rīga : LU Akadēmiskais apgāds, 2015, pp. 149–150.

rule out the possibility that a company with a multi-level management system has a complicated division of responsibilities, as a result of which, for example, the head of a company controlled and supervised by the company's board did not take specific control. In such circumstances, the heads of unit would be subject to insufficient control or supervision.

Section 301 of the Commercial Law<sup>38</sup> explains that the board is the executive body of the company, which manages and represents the company. The board knows and manages the company's affairs. It is responsible for the company's business activities, as well as for lawful accounting. The board manages the company's property and handles its funds in accordance with the laws, the Articles of Association and the decisions of the shareholders' meeting.

Whether insufficient control or supervision applies to a member of the board depends on a number of factors, such as whether there is a division of responsibilities between the members of the board, if there are several, or whether all decisions are taken collegially or by a member of the board, what are the supervisory and work organization responsibilities in the company, whether the responsibilities of the board member include employee control, etc. If such control and supervision responsibilities apply to the board member in question, and it is as a result of the failure or improper performance of this control or supervision measures that a natural person commits a criminal offense, a legal link between the natural person and the legal person will be established.

Assessing the range of persons who could be blamed for insufficient supervision or control, is debatable whether a board member who is empowered to make decisions on behalf of a legal entity will be justified in blaming a lack of control if he commits a criminal offense himself. The Criminal Law Division of Latgale Regional Court has concluded that “/ pers. D / was the only member of the board in the company, only he had the right not only to represent this legal entity, but also to decide on all issues related to the operation of the company. In such circumstances, when SIA /the name/ as a legal person did not have the possibility to control its manager, the appellate court recognizes that the degree of liability of the company is minimal”.<sup>39</sup>

In this context, account should also be taken of the fact that supervision and control are a set of measures that can be taken against persons other than themselves.

The liability of legal persons is determined on the basis of two conditions: the first, whether the legal person was able to ensure compliance with the rules for which criminal liability is envisaged, and the second, whether the legal person took the necessary measures to ensure compliance with those rules.

In accordance with the provisions of Section 440 of the CPL, the person conducting the proceedings must ascertain the following circumstances:

<sup>38</sup> Komerclikums [The Commercial Law]: LV likums. Latvijas Vēstnesis, 04.05.2000, Nr. 158/160.

<sup>39</sup> Judgment of Latgale Regional Court of 4 October 2019 in Case No.15830001817. Available: manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/396964.pdf [viewed 15.08.2021.].

- 1) the circumstances of the commission of a criminal offense;
- 2) the status of the natural person, if known, in the institutions of the legal person;
- 3) the actual actions of the legal person;
- 4) the nature of the activities performed by the legal person and the consequences thereof;
- 5) the measures taken by the legal person to prevent the commission of a criminal offense;
- 6) the size, type of occupation and financial position of the legal person.

Thus, it follows from the regulatory framework that in order to establish “insufficient supervision or control”, the measures taken by a legal person to prevent the commission of a criminal offense, which could be the basis for the establishment of insufficient supervision or control, should be examined. In order to establish insufficient control and supervision, in our opinion, it must be stated that no measures have been implemented within the legal person in the organization of work, division of responsibilities, supervision and observance and enforcement of norms contained in regulatory enactments and the absence of these measures has been the cause to the commission of the crime.

It is necessary to assess whether the supervision and control measures of the legal person have been implemented at all, whether they have been taken, and if they have been taken, then to assess their adequacy. Thus, for example, the Vidzeme Suburb Court of the City of Riga has established that on 27 September 2019, JSC “Latvijas tilti” with the order of the member of the Board /pers. K/ has adopted a company code of ethics, which also defines anti-corruption policy; the company's employees have held a seminar on corruption risks in construction and in 2020 on preventive measures to prevent corruption. Since 20 June 2016 /pers. A/ has been released from the position of the Chairman of the Board and transferred to the position that is not related to decision-making on behalf of the mentioned legal entity.<sup>40</sup>

The construction of “insufficient supervision or control” provided for in Section 12 of the CL is characterized by non-performance or insufficient performance of certain duties, which is comparable to the objective side of the criminal offense provided for in Section 319 of the CL.

The explanation of insufficient control is included in the decision of the Supreme Court of 29 October 2019, which reads that “the accusation indicates what obligations the accused has not fulfilled – has not controlled the legality and reasonableness of the transfers to be made, has not established an internal control procedure to ensure the legality of salary payments. Considering that the charge indicates specific money transfers, as well as indicates a violation of Section 4, para. 2 of the Law “On Prevention of Squandering of the Financial Resources and Property of a Public Person” the court has acknowledged that the description

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<sup>40</sup> Judgement of Riga City Vidzeme Suburb Court of 30 November 2020 in Case No. 16870001619. Available: [manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/433476.pdf](https://manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/433476.pdf) [viewed 23.08.2021.].

of the accused's criminal activities reveals all criminal offenses provided for in Section 319, para. 3 of the Criminal Law constituent elements of the offense".<sup>41</sup>

On the other hand, in a criminal proceeding in which the accusation was brought in accordance with Section 319 of the Criminal Law for insufficient accounting control, the person was acquitted. Jūrmala court justifying person A in the accusation against her regarding the failure to perform control, indicated: "[...] the points mentioned in the job description of the Accounting Officer with reference to Cabinet Regulation No. 585 "Regulation Regarding the Conduct and Organisation of Accounting" of 21 October 2003 paragraph 69.2. "On bookkeeping" and "/Title /" of January 23, 2009 "Accounting description" paragraph 7 – are not specified in the accusation. Control, monitoring and inspection are general concepts and are included into concrete actions. Such specific acts or omissions are not reflected in the prosecution."<sup>42</sup>

Thus, in order for a legal person to be subjected to any of the coercive measures, it is necessary to establish which control measures the person concerned did not take or did not carry out sufficiently, and whether the lack of control or insufficient supervision was the cause of the natural person's criminal activity.

When evaluating the circumstances mentioned in Section 440 of the Criminal Procedure Law, in order to answer the question of what measures are taken by a legal person to prevent the commission of a criminal offense, the organization of the legal person's internal control process and its compliance with the legal person's size, type of activity and financial position should be examined.

The Director of the Treasury's Quality and Risk Management Department explains that internal control is a process implemented by the institution's management and staff and implemented to provide reasonable assurance on the achievement of objectives regarding: the institution's operations (efficiency and effectiveness); accountability (timeliness, completeness, accuracy) and compliance (regulatory enactments and other binding documents). Internal control is an integrated process in the operation of the institution and it covers all areas of the organization.<sup>43</sup>

Thus, whether a criminal offense has been committed as a result of "insufficient supervision or control" is to be determined on the basis of an assessment of the legal person's internal control measures.

<sup>41</sup> Decision of Supreme Court of 29 October 2019 in Case No. SKK-485/2019 (12360000617). Available: [manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/393834/pdf](http://manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/393834/pdf) [viewed 20.07.2021.].

<sup>42</sup> Judgment of Jūrmala Court of 23 February 2017 in Case No. 12502000813. Available: [manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/228546.pdf](http://manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/228546.pdf) [viewed 20.07.2021.].

<sup>43</sup> Galandere-Zīle I. Iekšējās kontroles sistēma kā stratēģiskās vadības instruments [Internal Control System as a Tool of Strategic Management]. Open Lecture for Local Governments Rīga, 2018. Available: [http://old.varam.gov.lv/files/text/Valsts\\_kase\\_2018\\_03\\_IKS.pdf](http://old.varam.gov.lv/files/text/Valsts_kase_2018_03_IKS.pdf) [viewed 21.07.2021.].

## **5. In the interests of the legal person, for its benefit or as a result of its insufficient supervision or control**

In order to apply a coercive measure to a legal person, one of the features provided for in Section 70<sup>1</sup> of the CL must be established, namely, the natural person has committed a criminal offense in the interests of the legal person, for the benefit of that person or as a result of insufficient supervision or control.

Looking at the case law, it can be concluded that the coercive measure is not always applied, indicating the legal connection, motivation as well as the causal link between the criminal offense committed by a natural person and the legal person. Sometimes there is a formal rewriting of legal norms, without any specification and connection with the actual circumstances of the offense. Thus, for example, in the judgment of Liepāja court it reads that “on 29/09/2015 a decision has been made to initiate proceedings for the application of coercive measures to a legal person – SIA “Lora D”, reg. No. / registration number / [...]. Section 70<sup>1</sup> of the Criminal Law provides that a court or a prosecutor may apply a coercive measure to a legal person of private law, including a state or local government company, as well as a partnership, for a criminal offense provided for in a special part of this law if the offense is in the interests of the legal person, committed for the benefit of this person or as a result of its improper supervision or control by a natural person, acting individually or as a member of a collegial institution of the relevant legal person: 1) on the basis of the right to represent the legal person or act on its behalf; 2) based on the right to take decisions on behalf of the legal person; 3) exercising control within a legal person. The legislator has determined that when considering a case, a court shall also make a ruling on the application of a coercive measure to a legal person, upon adoption of which, in accordance with Section 548, para. 1 of the Criminal Procedure Law, it must be decided: 1) whether a criminal offense has occurred; 2) whether the circumstances referred to in Section 440 of this law have been clarified; 3) whether the criminal offense has been committed in the interests of the legal person, for good or as a result of insufficient supervision or control; 4) what coercive measure is applicable. According to Section 70<sup>2</sup> of the Criminal Law, the following coercive measures may be imposed on a legal person: liquidation; restriction of rights; confiscation of property; money recovery. The court considers that the most severe of the coercive measures provided for by law for a legal person in this case is the liquidation of the legal person, as the company has not made any tax payments within three years. At present, the company is not operating and its liquidation will not affect the interests of other persons or employees”<sup>44</sup>. It should be noted that the Court of Appeal upheld the judgment in that regard.<sup>45</sup>

<sup>44</sup> Judgment of Liepāja Court of 24 March 2016 in Case No. 15830015913. Available: [manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/271637.pdf](https://manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/271637.pdf) [viewed 21.08.2021.].

<sup>45</sup> Judgment of Kurzeme Regional Court of 25 May 2016 in Case No. 15830015913.913). Available: [manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/271485.pdf](https://manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/271485.pdf) [viewed 15.08.2021.].



In other criminal proceedings, the establishment of the legal link regulated by the Criminal Law and the Criminal Procedure Law between a criminal offense committed by a natural person and a legal person is not paid attention at all, even without a formal reference to the legal features. Thus, the indictment reads that the duties of a member of the Board of SIA “Three L Technologies” as a director of the company included all activities necessary to ensure the performance of the company's business activities, including the provision of technical support and the provision of necessary computer programs for business activities. B, being aware that computer programs are the object of copyright, because their reproduction and use in the economic activity of SIA “Three L Technologies” requires the acquisition of licenses, deliberately violated the procedure for reproduction and use of computer programs and independently installed counterfeit computer programs obtained at an unspecified time and under conditions not clarified in pre-trial criminal proceedings, thus causing material damage to copyright holders in the amount of 145 896 euros by reproducing computer programs.

The court found that by his actions B had committed a criminal offense provided for in Section 148, para. 3 of the Criminal Law. It was also decided to apply a coercive measure to SIA “Three L Technologies” – recovery of money in the amount of 25 (twenty-five) minimum monthly salaries set in the Republic of Latvia, i.e., in the amount of 10 750 euros.<sup>46</sup> Whether it is in the interests of the legal person, in its favour or as a result of insufficient control or supervision, nothing is said.

In turn, in the criminal case A accused of the crimes provided for in Section 218, para. 2 and Section 195, para. 3 of the CL, the court acknowledged that these criminal offenses were committed in the name of a legal person – SIA [X], in the interests of the company and payments to the state budget, as well as to legalize the financial resources obtained as a result of the commission of the criminal offense, changing their location, concealing and disguising their ownership and true origin, as a result of which A together with B and V acquired these financial resources. A committed the criminal offenses as an official of SIA [X], based on the right to represent the legal entity and make decisions on behalf of the legal entity, as well as exercising control over the company.<sup>47</sup> It should be noted here that it is not clear from the accusation what was the interest of the legal person and why the criminal offenses should be considered as committed in its favour, if the accused actually benefited.

At the end of the article, it should be noted that in some cases, in quite similar circumstances, the issue of liability of a legal person is dealt with differently.

Thus, for example, the court, examining and evaluating the submitted agreement between the prosecutor and the accused A on 30 April 2020 regarding the admission of guilt and punishment, as well as examining the materials of

<sup>46</sup> Judgment of Riga District Court of 11 September 2019 in Case No. 11816911718. Available: [manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/391271.pdf](https://manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/391271.pdf) [viewed 21.08.2021.].

<sup>47</sup> Judgment of Riga City Latgale Suburb Court of 21 July 2020 in Case No. 15840089919. Available: [manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/420085.pdf](https://manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/420085.pdf) [viewed 22.08.2021.].

the criminal case, found that A committed a copyright infringement in the following circumstances: SIA “Smartteh” 10 computer programs were reproduced (stored electronically) in two computer systems without the permission of the copyright holder until 8 January 2019, thus violating copyright and causing large-scale losses to the copyright holder. It follows from the judgment that “/ pers. A /, being a member of the Board of SIA “Smartteh” with the right to represent the company separately, whose responsibilities included ensuring the legality of computer programs used in SIA “Smartteh” economic activities and monitoring employees using computer systems with computer programs, recognizing that computer programs are copyrighted, including temporary or permanent reproduction, requires the permission of the copyright holder in the form of a license agreement or license, in the interests of SIA “Smartteh” assumed that two computer systems of SIA “Smartteh” were installed for the purpose of using them in the performance of the economic activity of SIA “Smartteh” ”.

By reproducing and ensuring the use of computer software of the copyright holder “Dassault Systemes SolidWorks Corporation” in the total value of 64 067 euros in the economic activity of SIA “Smartteh” without the permission of the said copyright holder, without concluding a license agreement and obtaining a license, A violated the Copyright Law The prohibition to use works if permission of the copyright holder has not been received specified in Section 40 first part and thus also exclusive rights of the author in relation to the use of a computer program provided for in Section 15, para. 2 of the Copyright Law, including, temporarily or permanent reproduction, that in accordance with Section 68, para. 1, clause 1 shall be recognized as a copyright infringement committed to a large extent and qualified in accordance with Section 148, para. 3 of the CL.<sup>48</sup>

Although the indictment established the right of a board member to represent the company separately, as well as clarified that his responsibilities included ensuring the legality of computer programs used in SIA “Smartteh” business activities and monitoring employees using computer systems with computer programs. In the interests of SIA “Smartteh”, it was assumed that counterfeit computer programs obtained in time and under conditions not specified in the investigation were installed in two computer systems of SIA “Smartteh” – the issue of application of coercive measures to a legal person was not discussed in the specific criminal proceedings. In another criminal proceeding, in which a person has been charged in accordance with Section 148, para. 3 of the CL, an agreement has been reached with the accused and an agreement has been reached with the legal person that the prosecutor will ask the court to apply a coercive measure to the legal person – money recovery 35 minimum monthly wages established in the Republic of Latvia. The judgment in question states that A, as the company's chief executive officer, was the chairman of the board with the right to represent the company separately, whose responsibilities included ensuring the legality of computer programs used

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<sup>48</sup> Judgment of Riga District Vidzeme Suburb Court of 28 May 2020 in Case No. 11816003519. Available: [manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/416691.pdf](https://manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/416691.pdf) [viewed 21.08.2021.].

in, including temporary or permanent reproduction, requires the permission of the copyright holder in the form of a license agreement or license, in the interests of the company ensured that in pre-trial investigation in unspecified circumstances in 14 (fourteen) computer systems counterfeit computer programs obtained at time and in circumstances not clarified in the investigation were installed. Reproduction and provision of Microsoft Corporation computer software with a total value of 5 208.00 euros, “Autodesk Incorporated” software with a total value of 46 800.00 euros, and “Dassault Systemes SolidWorks Corporations” software with a total value of 88 200.00 euros in the economic activity of SIA “BIC” without the permission of the mentioned copyright subjects, without concluding a license agreement and obtaining a license, A as a member of the SIA Board violated the prohibition to use works specified in Section 40, para. 1 of the Copyright Law if the permission of the copyright holder has not been received and also the author's exclusive right to use a computer program, including temporary or permanent reproduction, provided for in Section 15, para. 2 of the Copyright Law, that according to the Section 68, para. 1, clause 1 of the Copyright Law, is considered to be a copyright infringement committed on a large scale. A coercive measure applied to a legal person – recovery of money in the amount of 35 minimum monthly salaries established in the Republic of Latvia, that is 15 050 euros.<sup>49</sup>

By the judgment of the Court of Appeal D was also found guilty of committing the criminal offense provided for in Section 148, para. 3 of the CL. The appellate court found that the directly accused D, as a member of the board and technical director of SIA [X], deliberately assumed that SIA [X]'s computer systems contained and used for commercial purposes computer programs obtained in violation of the copyright of computer software owners.

The Court of Cassation found that the accusation brought by D and maintained by the prosecutor in the Court of Appeal, as well as the description of the criminal offense recognized as proven by the court did not set out the objective side of the criminal offense provided for in Section 148 of the Criminal Law, namely content of D alleged acts – ensuring reproduction – content. Nor is such a content disclosed in the grounds of the judgment of the Court of Appeal. Additionally, in the prosecution maintained by the prosecutor, D was charged with an act, but in the court judgment – inaction. The Court of Appeal thus found different factual circumstances. D's findings of fact were not known to the court, and counsel therefore rightly stated that D could not defend himself against such an accusation. Acknowledging that the Court of Appeal, by failing to provide the content of the notion – ensuring reproduction – in the specific case has committed a violation of Section 511, para. 2, Section 512, para. 1, Section 20, para. 1 and Section 564, para. 4 of the CPL, which is a material violation of the CPL within the meaning of Section 573, para. 3 of this law and led to an illegal ruling in the case, the Senate of

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<sup>49</sup> Judgment of Riga City Pārdaugava Court of 19 December 2019 in Case No. 11816004817. Available: [manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/405697.pdf](https://manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/405697.pdf) [viewed 21.08.2021.].

the Supreme Court annulled the judgment of the appellate instance court and sent the case for a new hearing in the regional court.

At the same time, assessing the merits of the appellate court's opinion that D as a member of the board and technical director of SIA [X] was responsible for the legality of computer programs in the company, the Senate pointed out that Section 169, para. 1 of the Commercial Law states that a member of the board and council must perform his or her duties as an honest and careful manager. One of the basic duties of a member of the board of a commercial company is to ensure the legality of the company's activities. If a member of the Board, while performing the tasks of managing the company entrusted to him, acts contrary to the requirements of regulatory enactments, then there is no reason to talk about the compliance of such activity with the standards of a serious and careful owner. It was therefore concluded that the objections rose in the cassation appeal in that regard could not be used to call into question the legality and validity of the court decision.

The Senate of the Supreme Court also pointed out that the accusation of committing the criminal offense provided for in Section 148, para. 3 of the CL was brought against D and not to other persons; nor has criminal proceedings been instituted in the case regarding the application of coercive measures to legal persons.<sup>50</sup>

## Conclusion

1. It follows from the regulatory framework, as well as from the findings of legal doctrine and case law that in order to consider that a criminal offense has been committed "in the interests of a legal person", it is necessary to establish a link between the activities of a natural person and a legal person; secondly, the content of the authorization of the natural person given by the legal person, thirdly, the fact that the legal person obtains, directly or indirectly, a benefit or advantage to which they are not entitled as a result of the criminal offense.
2. Despite the *prima facie* appearance of the features "in the interests of the legal person" and "in favour of the legal person", the Criminal Law distinguishes these features as two alternative features, thus the legislator presumes that each of them is characterized by its own autonomous content.
- 2.1. In the opinion of the authors, the feature "in the interest" is broader in terms of content than the feature "benefit" (for the benefit). It should be noted that the review of case law allows concluding that it is basically established that a criminal offense is committed in the interests of a legal person and not for its benefit.
3. Whether the interest/benefit is sufficient to impose a coercive measure on a legal person must be assessed in the context of the individual case, assessing the size, financial position, "size" or "amount" of the benefit, etc. actual circumstances.

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<sup>50</sup> Decision of Supreme Court of 19 July 2019 decision in Case No. SKK-154/2019 (11816006415). Available: [manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/387383.pdf](https://manas.tiesas.lv/eTiesasMyc/nolemumi/pdf/387383.pdf) [viewed 20.07.2021.].

4. When assessing whether a legal person benefits from a criminal offense committed by a natural person, the property criteria incorporated in the legal norms of the Special Part of the Criminal Law should also be taken into account, which in a number of cases serve to separate criminal liability from other types of legal liability.
5. In order to establish “insufficient supervision or control” of a legal person, it must be ascertained: 1) whether the particular person is entitled to exercise control within the given legal person; 2) whether the legal person had the opportunity to ensure compliance with the regulations for the violation of which criminal liability is provided, as well as whether the legal person took the necessary internal control measures to ensure compliance with the relevant regulations; 3) it must be established which direct control measures the legal person has not taken; 4) it is also necessary to establish a causal link, namely, that it is the lack of control or insufficient supervision that has caused the natural person to have committed a criminal offense.

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## **GROUNDS FOR COMPENSATION IN ADMINISTRATIVE PROCEDURE FOR THE DAMAGES CAUSED IN CRIMINAL PROCEEDINGS – SOME RELEVANT ASPECTS OBSERVED IN LATVIA’S LAWS AND CASE LAW**

**Keywords:** damages caused in criminal proceedings, compensation for damages in administrative procedure

### **Summary**

The article is dedicated to the topic of compensation in administrative procedure for such damages that have been inflicted by unlawful or unjustified infringements on a person’s legal interests in the framework of criminal proceedings in Latvia. Acknowledging that this topic comprises numerous relevant and problematic aspects, this article focuses on those infringements in the case of which compensation for damages is due and on the preconditions for claiming it. The article presents the authors’ opinion on whether the regulation on this matter in Latvia is sufficiently clear, what the relevant issues are in the practice of applying law, and the proposals for improving the regulation and practice.

### **1. Damages caused in criminal proceedings and compensation for them – is this matter relevant and why?**

Criminal proceedings as one of the manifestations of the State’s actions are characterised by a high degree of interference into persons’ lives. The existence of criminal proceedings *per se* allows implementation of numerous procedural measures of the kinds that are not envisaged in any other procedural law. Sufficiently striking examples serve as an illustration to this, e.g., detention or prohibition to manage one’s property, lasting for years, applied to persons, with respect to whom only presumption is made that they might have committed criminal offences or



even to persons who have not offended but to whom some adverse consequences could be applied. The existence of various procedural statuses can be restrictive for a person, as well as conductive of certain procedural activities relating to the person, their home, etc. We assume, no one will deny – criminal proceedings as a legally regulated process are nothing pleasant. At the same time, the State needs them, they have existed and will exist always, as long as crime exists. However, the need for them does not justify unlawful and unjustified infringements on persons in the course of criminal proceedings. Damages that have been inflicted upon persons in such a way must be compensated for. Several regulatory enactments set out this provision, *inter alia*, on the level of international and EU law. Thus, for example, para. 5 of Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup> provides: “Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation”; Art. 13 sets down: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”; whereas Art. 41 prescribes: “If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.” Para. 3 of Art. 40 of the Charter of Fundamental Rights of the European Union<sup>2</sup>, in turn, provides: “Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.”, and Art. 47 provides for “Right to an effective remedy and to a fair trial”. Digests of the case law and guidelines on the case law regarding the application of the rights, included in conventions, of the European Court of Human Rights and the Court of Justice of the European Union are available, providing sufficient illustrative information on the way these matters are treated on the EU and international level.<sup>3</sup>

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<sup>1</sup> European Convention on Human Rights. Signed in Rome on 04.11.1950. [in the wording of 15.10.2021.].

<sup>2</sup> Charter of Fundamental Rights of the European Union. Available: [http://data.europa.eu/eli/treaty/char\\_2012/oj](http://data.europa.eu/eli/treaty/char_2012/oj) [in the wording of 15.10.2021.].

<sup>3</sup> See, for example: Guide on Article 5 of the European Convention on Human Rights. Council of Europe/European Court of Human Rights, 2021. Available: [https://www.echr.coe.int/Documents/Guide\\_Art\\_5\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf) [viewed 15.10.2021.]; Guide on Article 13 of the European Convention on Human Rights. Council of Europe/European Court of Human Rights, 2021. Available: [https://www.echr.coe.int/Documents/Guide\\_Art\\_13\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_13_ENG.pdf) [viewed 15.10.2021.]; Guide to good practice in respect of domestic remedies (adopted by the Committee of Ministers on 18 September 2013). Available: [https://www.echr.coe.int/Documents/Pub\\_coe\\_domestics\\_remedies\\_ENG.pdf](https://www.echr.coe.int/Documents/Pub_coe_domestics_remedies_ENG.pdf) [viewed 15.10.2021.]; see also information on the homepage of FRA, e.g.: <https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial?page=1#TabCaseLaw> [viewed 15.10.2021.].

The aim of this article is to dwell on the situation in Latvia. The third sentence of Art. 92 of the Latvian Constitution, the *Satversme*<sup>4</sup> provides: “Everyone, where his or her rights are violated without basis, has a right to commensurate compensation”. Whereas the Constitutional Court has recognised in its rulings that “commensurate compensation has several functions – first of all, indemnity, reconciliation, as well as the function of general and special prevention. The purpose of these functions is to achieve effective restitution of justice and protection of fundamental rights because only such compensation is compatible with the third sentence of Art. 92 of the *Satversme*, which simultaneously is also an effective legal remedy”<sup>5</sup>. Compensation for an infringement may be of different kinds – both material and non-material. As recognised by the Constitutional Court of the Republic of Latvia: “The term “commensurate compensation”, included in the third sentence of Art. 92 of the *Satversme*, may not be interpreted to mean that this is only disbursement in cash. The said term includes any fair satisfaction, which is proportionate to the infringement on a person’s rights in the particular legal situation. Thus, taking into account, for example, the type and nature of the infringement upon rights, the legal interest endangered, the legal subject affected or the severity of damages inflicted, “commensurate compensation” may have also a non-material form.”<sup>6</sup> The issue regarding compensation may be decided on already during the proceedings, where the infringement occurred, as well as in other proceedings.

Response to failure to abide by a reasonable term of legal proceedings can be mentioned as a vivid example of an infringement in criminal proceedings which is compensated for in a non-material form already during the proceedings where this infringement occurred. Pursuant to Section 14 of the Criminal Procedure Law<sup>7</sup> (hereafter – CPL), each person has the right to the completion of criminal proceedings within a reasonable term, and the failure to respect this right may be the grounds for terminating criminal proceedings. Section 58 (5) of the Criminal Law<sup>8</sup> defines the substantive law grounds for terminating legal proceedings. However, these are not the only possible criminal law consequences and are even not the most extensively applicable. In practice, the most frequently encountered ones are defined in Section 49<sup>1</sup> of the Criminal Law, which defines the rights of

<sup>4</sup> The Constitution of the Republic of Latvia (*Satversme*). Available: <https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia> [viewed 06.10.2021.].

<sup>5</sup> Judgment of the Constitutional Court of the Republic of Latvia of 6 June 2012 in Case No. 2011–21–01. Available in Latvian: <https://likumi.lv/ta/id/248796-par-valsts-parvaldes-iestazu-nodarito-zaudejumu-atlidzinasanas-likuma-8panta-otras-dalas-atbilstibu-latvijas-republikas-satversmes-92panta-tresajam-teikumam> <https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia> [viewed 06.10.2021.], para. 11.1.

<sup>6</sup> Judgment of the Constitutional Court of the Republic of Latvia of 6 June 2012 in Case No. 2011–21–01. Available in Latvian: <https://likumi.lv/ta/id/248796-par-valsts-parvaldes-iestazu-nodarito-zaudejumu-atlidzinasanas-likuma-8panta-otras-dalas-atbilstibu-latvijas-republikas-satversmes-92panta-tresajam-teikumam> [viewed 15.10.2021.], para. 11.1.

<sup>7</sup> Criminal Procedure Law. Available: <https://likumi.lv/ta/en/en/id/107820> [viewed 15.10.2021.].

<sup>8</sup> Criminal Law. Available: <https://likumi.lv/ta/en/en/id/88966> [viewed 15.10.2021.].

a court, upon establishing that the right to termination of criminal proceedings within a reasonable term had not been respected, to determine both more lenient type of punishment and sanction. Compensation for infringement of the right to have criminal proceedings terminated within a reasonable term by determining a lesser type of punishment is quite extensively applied in practice in Latvia.<sup>9</sup>

Although the issues related to compensation for the damages inflicted during criminal proceedings in the framework of the same criminal proceedings are sufficiently interesting, this time we are going to focus on another matter – compensation for the damages in administrative procedure, which, in Latvia, has been established by a special law “Compensation for the Damages Caused in Criminal Proceedings and Record-Keeping of Administrative Offences”<sup>10</sup> (hereafter – the Compensation Law). This law was adopted on 30 November 2017, entered into force on 1 March 2018. Until now, the parliament has not amended it; however, the Constitutional Court has recognised one of its provisions as being incompatible with the *Satversme*<sup>11</sup>.

The statistics relating to the application of this law proves that the application of this law is a relevant issue in practice. Unfortunately, aggregated statistics is not publicly available, therefore, in the course of preparing this article, we turned to competent authorities<sup>12</sup> and the data provided by them will be used as an illustration of the situation.

Pursuant to the data provided by the Prosecutor’s General Office, which, on the basis of Section 17 of the Compensation Law, is the authority, if the decision, which is the grounds for compensating for damages, has been adopted in pre-trial criminal proceedings<sup>13</sup>:

- In 2018, 39 applications regarding compensation for damages have been reviewed, of these 29 were dismissed, 8 were partially satisfied, and 2 were satisfied in full.

<sup>9</sup> See, for example: Tiesu prakse par tiesībām uz kriminālprocesa pabeigšanu saprātīgā termiņā un soda noteikšanā, ja nav ievērotas tiesības uz kriminālprocesa pabeigšanu saprātīgā termiņā [Case law with respect to the right to have criminal proceedings terminated within a reasonable term and the setting of punishment if the right to having criminal proceedings completed with a reasonable term has not been respected]. Available: [https://at.gov.lv/files/uploads/files/6\\_Judikatura/Tiesu\\_prakses\\_apkopojumi/sapratigi%20termini.doc](https://at.gov.lv/files/uploads/files/6_Judikatura/Tiesu_prakses_apkopojumi/sapratigi%20termini.doc) [viewed 15.10.2021.].

<sup>10</sup> Kriminālprocesā un administratīvo pārkāpumu lietvedībā nodarītā kaitējuma atlīdzināšanas likums [Compensation for the Damages Caused in Criminal Proceedings and Record-Keeping of Administrative Offences]. Available in Latvian: <https://likumi.lv/ta/id/295926-kriminalprocesa-un-administrativo-parkapumu-lietvediba-nodarita-kaitejuma-atlidzinasanas-likums> [viewed 15.10.2021.].

<sup>11</sup> Judgment of the Constitutional Court of the Republic of Latvia of 5 March 2021 in Case No. 2020–30–01. Available in Latvian: <https://likumi.lv/ta/id/321524-par-kriminalprocesa-un-administrativo-parkapumu-lietvediba-nodarita-kaitejuma-atlidzinasanas-likuma-parejas-noteikumu-2-punkta-...> [viewed 15.10.2021.].

<sup>12</sup> The authors express their sincere gratitude to the Prosecutor’s General Office, the Ministry of Justice, the Court Administration, the Administrative Regional Court and Regional Courts.

<sup>13</sup> Statistical indicators on the applications examined by the Prosecutor’s General Office and decisions on disbursed compensations for damages caused in criminal proceedings. Information prepared by the Prosecutor’s General Office, October 2021, unpublished material.

- In 2019, 33 applications regarding compensation for damages have been reviewed, of these 19 were dismissed, 12 were partially satisfied, and 2 were satisfied in full.
- In 2020, 31 applications regarding compensation for damages have been reviewed, of these 23 were dismissed, 7 were partially satisfied, and 1 was satisfied in full.
- In the first six months of 2021, 19 applications regarding compensation for damages have been reviewed, of these 12 were dismissed, 7 were partially satisfied, and none was satisfied in full.

The rate of appealed decisions made by the Prosecutor's General Office is rather low. Pursuant to the data provided by the Prosecutor General's Office,

In 2018, 9 decisions were appealed against, of these, in the courts, 3 remained valid, 3 repealed in full, and 3 were partially repealed.

- In 2019, only 5 decisions were appealed against, of these 3 remained valid, 1 was repealed in full, and one case is still being reviewed.
- In 2020, only 7 decisions were appealed against, of these 3 remained valid, 3 were repealed partially, none has been was repealed in full, and three cases are still being reviewed.
- In 2021, only 3 decisions have been appealed against, they all are still being reviewed.

The "smallest" compensation that was granted had been an apology, whereas material compensations during this period had varied in the range from EUR 28 to EUR 21212.20. The total amounts to be disbursed as compensation (on the basis of decisions adopted both by the Prosecutor's General Office and courts) had been

- In 2018 – EUR 52207.19
- In 2019 – EUR 8282.86
- In 2020 – EUR 1911.10
- In 2021 – EUR 10037.15

Pursuant to information provided by the Ministry of Justice, which, pursuant to Section 17 of the Compensation Law, is the authority in case where the judgement or decision, which is the grounds for the right to compensation for damages, has been adopted by a court<sup>14</sup>,

- In 2018, 36 applications were reviewed, part recognised as such to which the Compensation Law was not applicable, none of the applications had been satisfied in full, 24 were partially satisfied, one was dismissed.
- In 2019, 42 applications were reviewed, part recognised as such to which the Compensation Law was not applicable, 2 applications were satisfied in full, 24 were partially satisfied, one was dismissed.

<sup>14</sup> Statistical indicators on the applications examined by the Ministry of Justice and decisions on disbursed compensations for damages caused in criminal proceedings. Information prepared by the Ministry of Justice, October 2021, unpublished material.

- In 2020, 27 applications were reviewed, part recognised as such to which the Compensation Law was not applicable, none of the applications had been satisfied in full, 16 were partially satisfied, one was dismissed.
- In the first sixth months of 2021, 13 applications were reviewed, part recognised as such to which the Compensation Law was not applicable, none of the applications had been satisfied in full, 5 were partially satisfied, none were dismissed.

The Ministry of Justice does not collect statistics about the outcomes in cases where its decisions have been appealed against in courts; however, it records the number of decisions that have been appealed against. Also, in this case it can be recognised that the share of decisions that have been appealed against is not large, 9 in 2018, 11 in 2019, 2 in 2020, and 1 in 2021.

We can see that the total number of decisions by the Prosecutor General's Office and the Ministry of Justice that have been appealed against in courts is not high, hence, such cases do not cause excessive workload for administrative courts.

The case law of the Administrative Regional Court as the appellate instance<sup>15</sup> shows that the number of appealed rulings by the first instance court is not high either. In 2019 this number was 12, in 2020 – 28, and 8 in the first six months of 2021. Examination of complaints reveals that, in the majority of cases, the Regional Court has upheld the ruling made by the first instance court. Thus, out of 28 complaints reviewed in 2020, in 18 cases an analogous judgement was passed, in 6 cases the judgement by the first instance court was amended, and in 4 cases an opposite judgement was delivered. In 2021, 5 cases have been reviewed, in 4 cases a judgement analogous to the one by the first instance court was adopted, in one case it was amended. The amounts of compensation granted by the judgements of the Regional Court in 2019–2021 had been in the range from 110 to 44280 EUR.

Insight into the total amounts of compensation to be disbursed is granted by the statistics provided by the Ministry of Justice, pursuant to which, in 2018, it amounted to 192 185.35 EUR; in 2019 – 97 393.97 EUR; in 2020 – 97 646.88 EUR, and in the first six months of 2021 – 40292.46 EUR, whereas the smallest amount had been EUR 27.84, but the largest – 50 000 EUR. In both cases, the decision was made by a court.

As shown above, neither the number of reviewed applications nor the compensations granted are comparatively high. Examination of statistics on acquittals and other cases, where criminal proceedings had been terminated on exonerating grounds, reveals that persons exercise their right to receive some kind of compensation in a very low number of cases (thus, for example, pursuant to the information provided by the Prosecution Office, in 2018, 91 persons were

<sup>15</sup> Statistical indicators on the complaints examined by the Administrative Regional Court and the rulings on disbursed compensations for damages caused in criminal proceedings. Information prepared by the Administrative Regional Court, October 2021, unpublished material.

fully acquitted, but in 2019 – 74 persons<sup>16</sup>. Moreover, the range of cases where it is possible is not limited by only the ones mentioned. This raises the question – why it is so, can it be explained by not knowing one's rights, lack of understanding, unwillingness to exercise them or some kind of deficiencies, *inter alia*, in the normative regulation. Admitting that all these aspects are worth researching, this time we shall focus on the analysis of some aspects in the normative regulation.

## 2. Compensation for the damages inflicted during criminal proceedings in Latvia – a general overview of the legal regulation

As noted above, on the constitutional level, the obligation to compensate for damages, primarily, has been defined in the third sentence of Art. 92 of the *Satversme*, whereas the Compensation Law deals specifically with compensation in administrative procedure for the damages inflicted in criminal proceeding. The Constitutional Court has recognised that “By adopting the Compensation Law, the legislator has created regulation, in which the right, included in the third sentence of Art. 92 of the *Satversme*, to receive compensation for material and non-material damages inflicted upon a person in criminal proceedings or in record-keeping of administrative offences due to unlawful or unjustifiable actions by an institution, a prosecutor's office or a court.”<sup>17</sup> It is essential that “Since 1 March 2018, an application by a person regarding compensation of the damages, caused to them in relation to an infringement of their fundamental rights in criminal proceedings or in record-keeping of administrative offences is not subject to review by a court of general jurisdiction. A private person may demand the State's liability for unjustifiable and unlawful actions of its institutions during criminal proceedings or in record-keeping of administrative offences in accordance with the provisions of the Administrative Procedure Law.”<sup>18</sup>

The following are the most important provisions of the Compensation Law with respect to the issues directly examined in this article:

Section 4. Legal grounds for compensation for the damages inflicted during criminal proceedings

<sup>16</sup> Latvijas Republikas Prokuratūras darba rezultāti 2019. gadā [Results of the work of the Prosecutor's Office of the Republic of Latvia in 2019]. Available in Latvian: [http://www.prokuratūra.gov.lv/media/Statistika\\_2019.pdf](http://www.prokuratūra.gov.lv/media/Statistika_2019.pdf) [viewed 15.10.2021].

<sup>17</sup> Decision by the Constitutional Court of the Republic of Latvia on Terminating Legal Proceedings in Case No. 2019-21-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2019/10/2019-21-01\\_Lemums-par-tiesved%C4%ABbas-izbeig%C5%A1anu.pdf#search=](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2019/10/2019-21-01_Lemums-par-tiesved%C4%ABbas-izbeig%C5%A1anu.pdf#search=) [viewed 15.10.2021.].

<sup>18</sup> Decision by the assignments sitting of the Senate of the Republic of Latvia on 29 July 2020 in Case No. C(-), SKC-988/2020 (ECLI:LV:AT:2020:0729.SKC098820.8.L).

- (1) *A natural person shall have the right to compensation for damages if one of the following conditions occurs:*
- 1) *an acquitting court judgement has entered into force, by which a person has been recognised as being innocent of or acquitted of all charges brought against him or her;*
  - 2) *criminal proceedings have been fully terminated due to exonerating circumstances;*
  - 3) *a court's judgement has entered into force, by which a person has been acquitted of charges of one of the criminal offences, for which the person has been made criminally liable, if during the course of the particular criminal proceedings a procedural coercive measure, involving deprivation of liberty, had been applied to the person and the law does not provide for a punishment of deprivation of liberty for the criminal offence, for the commitment of which a person has been sentenced;*
  - 4) *criminal proceedings have been terminated in a part thereof due to exonerating circumstances if during the course of the particular criminal proceedings a procedural coercive measure involving deprivation of liberty was applied to this person and criminal proceedings are continued in the part thereof concerning a criminal offence, for the commitment of which the law does not provide a punishment of deprivation of liberty;*
  - 5) *the duration of the procedural coercive measure involving deprivation of liberty, applied in the respective criminal proceedings, has exceeded the duration of the punishment of deprivation of liberty applied by the final judgement;*
  - 6) *by the decision of an authorised official in criminal proceedings, a violation has been established in the course of procedural activities, as the result of which property has been destroyed or excessively damaged.*
- (2) *A legal person of private law (hereafter — a legal person) acquires the right to compensation for damages if a decision on terminating proceedings in full or in part thereof regarding the application of coercive measures to this person enters into force, without establishing the grounds, defined in the Criminal Law, for applying the coercive measure to the respective person.*

We see that the range of cases included in this provision is strictly limited and by far does not cover all situations, where damage could be unlawfully inflicted in criminal proceedings. Prior to the third reading of this draft law, this problem was validly foregrounded also by the Ombudsman and Judges of the Supreme Court. The Ombudsman noted in his letter<sup>19</sup> that various interests may be infringed upon in criminal proceedings, not only the ones mentioned in the draft law. The Ombudsman, referring to case law, underscored, that claims, for example, regarding damages caused by imposing arrest, are not accepted by courts for reviewing in civil procedure, as well as other cases. The Ombudsman proposed expanding the scope of the draft law, applying it to any situation, where a person's interests had been unlawfully or unjustifiably infringed upon. The Department

<sup>19</sup> Letter of the Ombudsman of the Republic of Latvia of 20.02.2017 to the Legal Committee of the Saeima No. 1-8/8 "On the Draft Law "Compensation for Damages Caused in Criminal Proceedings and Record-Keeping of Administrative Offences" (No. 578/Lp12)". Available: <http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/2CA0246F5CF5FD94C22580CD004E350D?OpenDocument> [viewed 15.10.2021.].

of Administrative Cases of the Supreme Court, likewise, emphasised the need for clarity and foregrounded the problem that it was not clear what should be done in cases not covered by the law<sup>20</sup>. The Department of Administrative Cases proposed applying to these the civil procedural review.<sup>21</sup> The Department of Civil Cases of the Supreme Court drew attention to the need to establish united procedure applicable to those claims that were not covered by the law, applying to it administrative procedure to ensure a uniform approach<sup>22</sup>. The matter was examined also at the sitting of Chairpersons of the Supreme Court's Departments, recommending to the legislator to choose this model to provide in this law that all cases (referred to directly and not referred to) should be resolved in the procedure set out in this law. Denial of the possibility for persons to receive compensation for damages is seen as being contrary to the *Satversme*, whereas failure to include precise references would increase legal uncertainty, the application of different procedures, in turn, would be incompatible with the principle of legal equality<sup>23</sup>.

The outcome of discussions was an addition to the draft law, as the result of which we now see Section 2 (2) of the Compensation Law: "The provisions of this Law shall be applicable also to cases not referred to directly in this Law, if in criminal proceedings or record-keeping of administrative offences a private person has been inflicted damages due to unlawful actions by an institution, a prosecutor's office or a court", which is recognised and applied in practice, admitting that, thus, Section 4 and Section 5 of the Law cover only the most typical and most important but not all possible legal grounds (cases) for compensation for the damages inflicted in the course of criminal proceedings or record-keeping of administrative offences, and that compensation may be granted also in situations that are not directly referred to in the said legal provisions.<sup>24</sup>

The Compensation Law provides for compensation for damages caused by unlawful or unjustified actions.

#### Section 6. Unlawful and unjustified actions

(1) *In the meaning of this Law, actions by an institution, a prosecutor's office or a court shall be unlawful if legal norms have been violated by such an action and later one of*

<sup>20</sup> Letter of the Department of Administrative Cases of the Supreme Court of 02.2017 No. 10-1/1-375nos On Draft Law No. 578/Lp12. Available: <http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/B8402781228A2281C22580C90029C78E?OpenDocument> [viewed 15.10.2021.].

<sup>21</sup> Letter of the Department of Administrative Cases of the Supreme Court of 13.04.2017 No. 10-1/1-169Inos On Draft Law No. 578/Lp12. Available: <http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/6EC3C6645E1411D8C2258106002478DF?OpenDocument> [viewed 15.10.2021.].

<sup>22</sup> Letter of the Department of Civil Cases of the Supreme Court of 10-1/1-16 On Draft Law No. 578/Lp12 [viewed 15.10.2021.]. Available: <http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/F7F3227BA0249047C22580F100321A32?OpenDocument> [viewed 15.10.2021.].

<sup>23</sup> Letter of the Supreme Court of 26.04.2017 to the Legal Committee of the *Saeima* No. 10-1/1-756 On Draft Law No. 578/Lp12. Available: <http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/233FD1AAF5012164C225810F0040BEAC?OpenDocument> [viewed 15.10.2021.].

<sup>24</sup> See, for example, Decision by the Senate of the Supreme Court of 14 November 2018 in Case SKA-1081/2018 (ECLI:LV:AT:2018:1114.SKA108118.4.L ), paras 12–13 quoted from Decision by the Senate of the Supreme Court of 18 October 2019 in Case SKA-1533/2019 (ECLI:LV:AT:2019:1018.A420255418.13.L).



*the legal grounds for compensating for the damages, referred to in this Law, has set it. Unlawful actions shall be established by a ruling of an authorised person in criminal proceedings or by a court.*

- (2) *In the meaning of this Law, actions by an institution, a prosecutor's office or a court shall be unjustified if, at the moment of making the decision, they had complied with legal norms, but later one of the legal grounds for compensation, referred to in this Law, has set it.*

The respective norms allow concluding that in the cases referred to in Section 4 and Section 2 (2) of the Law the grounds for granting compensation are sometimes unlawful and unjustified actions, sometimes – only unlawful.

The legal regulation quoted above is quite laconic. However, the regulation *per se* and issues identified in practice allow advancing several important matters for examination.

### **3. What are the damages “inflicted in criminal proceedings”?**

We see that for a person to have claim compensation on the basis of the Compensation Law, the damages need to have been inflicted in “criminal proceedings”. *Prima facie* it seems simple, however, it seems to be far from it when delving deeper. Criminal proceedings are a totality of actions made for a definite purpose and which are regulated in CPL. However, their practical implementation is inconceivable also without such actions, the regulation/ appeal/ supervision of which is not subject to criminal procedural regulation. In such situations, it is important to define, what are and what no longer are criminal proceedings, thus, assessment of which actions is and of which is not subject to administrative courts. This matter has been foregrounded in the Supreme Court's case law.

Thus, for example, in its decision of 18 October 2019 in case SKA-1533/2019<sup>25</sup>, the Court recognised that the claim for compensation for such damages or harm, which had been inflicted upon a private person by actions taken in criminal proceedings by the investigative institution, which had the nature of criminal proceedings, fell within the scope of the Compensation Law for Damages Caused in Criminal Proceedings and Record-Keeping of Administrative Offences. In the particular case, it was assessed whether the damage caused during the search could be recognised “as having happened in criminal proceedings”.

Whereas in case SKA-430/2021, the Supreme Court did not recognise the failure to release immediately a person from the pre-trial prison as an action in criminal proceedings. It is noted in the ruling “[...] also the conducting of pre-trial criminal proceedings are actions by public administration because it is an action by the State power, which is neither the action of legislating, administration of justice or government. Exclusion of actions in criminal proceedings from review in

<sup>25</sup> Decision by the Senate of the Supreme Court of 18 October 2019 in Case SKA-1533/2019 (ECLI:LV:AT:2019:1018.A420255418.13.L).

administrative procedure does not follow from the fact that the concepts of actions by public administration and actions in criminal proceedings would be opposites but from the fact that actions in criminal proceedings are reviewed in accordance with another law – the Criminal Procedure Law [...]. Whether the respective action is an action of factual nature in criminal proceedings must be determined by reviewing its connection to the course of the particular criminal proceedings and the aim of this action [...]. The purpose of a pre-trial prison, pursuant to Section 4(1) of the law On Procedures for Holding under Arrest, is to implement the investigative judge's decision on the application, change or revoking of the arrest. Hence, the pre-trial prison does not make the decision on the application of a particular security measure and its term but ensures the performance of an administrative function. [...] In organising a person's release from the place of detention due to release from arrest, the institution does not have to make any considerations relating to criminal proceedings. The procedure of release is a matter of the institution's administrative actions. [...] As the Senate has noted, exclusion of actions in criminal proceedings from review in administrative procedure does not follow from the fact that the concepts of actions by public administration and actions in criminal proceedings would be opposites but from the fact that actions in criminal proceedings are reviewed in accordance with another law – the Criminal Procedure Law. Thus, it is also important that the Criminal Procedure Law does not set out the procedure for reviewing the actions of prison in releasing a person from prison due to revoking of the arrest.<sup>26</sup>

It is also important to keep in mind that, within criminal proceedings, damages can be inflicted upon any person, not only a person who has a certain criminal procedural status. In this respect, the Supreme Court's finding can be entirely upheld, i.e., "An investigative institution, by its actions in criminal proceedings, can inflict damages or harm upon a private person even if no status has been defined for the private person in criminal proceedings, i.e., they cannot be considered as being a person involved in criminal proceedings. The fact that the private person has no status whatsoever in the particular criminal proceedings *per se* does not change the nature of the institution's criminal procedural actions."<sup>27</sup>

#### **4. Should all damages caused in criminal proceedings be compensated for?**

Providing a brief answer to this question, it should be – no. Firstly, only unlawful and unjustified damages should be recognised (see explanation above).

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<sup>26</sup> Decision by the Senate of the Supreme Court of 30 April 2021 in Case SKA-430/2021. Available: <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:AT:2021:0430.A420286718.10.L> [viewed 15.10.2021.], paras 6, 10, 12.

<sup>27</sup> Decision by the Senate of the Supreme Court of 18 October 2019 in Case SKA-1533/2019. Available: <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:AT:2019:1018.A420255418.13.L> [viewed 15.10.2021.].

Secondly, to receive compensation, the infringement should be in causal relation to the unlawful or unjustified action. Thirdly, the unlawfulness of the action should be established in criminal procedure. This has been consistently recognised in case law, *inter alia*, in the Supreme Court's rulings. For example, by drawing the conclusion: "Hence, the legislator has granted to administrative courts, in connection with criminal procedural actions, the competence to decide on compensation for damages but has not granted the competence to review the criminal procedural actions themselves on their merits."<sup>28</sup> In general, not objecting to this position, nevertheless, it has to be recognised that, by applying it without any derogations, the possibilities for a real person to achieve a fair solution to a situation might be endangered. Also, in the ruling quoted above, the Court has not taken into account the applicant's arguments regarding the lack of clarity with respect to appealing against actions made in the pre-trial proceedings, it has only noted: "The applicant had to submit a complaint regarding alleged violations of the provisions of the Criminal Procedure Law committed by the official in charge of the proceedings (Section 231 (1), Section 232 (3), Section 412 (2)). The procedure for submitting a complaint is defined by Section 336 and Section 337 of the Criminal Procedure Law [...]" Admittedly, such action can be partially recognised as being formal because, indeed, there are grounds for considering CPL provisions as unclear and incomplete with respect to establishing unlawfulness of some pre-trial decisions or actions, in particular, if these have taken place during the final stage of the pre-trial proceedings<sup>29</sup>. The main problems are related to the requests and complaints submitted in accordance with Section 413 (6) of CPL, which the prosecutor forwards to the court as soon as the pre-trial proceedings have been completed and the case has been transferred to a court. It is not quite clear what happens to them because the provisions of Chapter 24 of CPL, referred to by the Supreme Court, does not provide that a court might review complaints regarding violations committed during the pre-trial proceedings.

The Supreme Court admits that the prior out-of-court procedure for assessing the unlawfulness of an infringement has not been complied with also in Case No. SKA-992/2021. At the same time, this ruling includes references that, substantially, do not qualify the respective situation as being criminal proceedings. Thus, the Court points out "it is essential that the verification of the correctness of the contested action should be subject to review by the competent authority and it would have the possibility to rectify errors made by the lower institution if such exist. In this matter, another institution, i.e., the prosecutor's office, may not

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<sup>28</sup> Decision by the assignments sitting of the Senate of the Republic of Latvia on 29 June 2021 in Case No. SKA-831/2021. Available: <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:AT:2021:0629.A420231319.9.L> [viewed 15.10.2021.] [2].

<sup>29</sup> Judgement by the Senate of the Republic of Latvia on 28 September 2020 in Case No. SKA-1286/2020. Available: <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:AT:2020:0928.A420142719.22.S> [viewed 15.10.2021.] [5].

replace the Chief of the State Police.”<sup>30</sup> Thus, the procedure for reviewing criminal procedural matters, defined in CPL, has been totally ignored because, pursuant to CPL provisions, complaints regarding an investigator’s actions are not examined by their direct manager but by the supervising prosecutor, likewise, the supervising prosecutor has the right to give binding instructions to an investigator.

At the same time, it does not go unnoticed that the courts take a more lenient attitude towards the cases of administrative offences. A judgement by an administrative regional court is a vivid example of it: “Within the framework of administrative proceedings, the court, substantially, can review neither the institution’s actions nor the decisions adopted in the case of administrative offence because, pursuant to para. 5 of Section 1 (3) of the Administrative Procedure Law, neither such actions nor decisions are subject to the judicial review in the framework of administrative proceedings. Hence, the control over violations made in the framework of reviewing cases of administrative offences has been transferred into the competence of a court of general jurisdiction. Only the matter of granting compensation when harm or damages have been inflicted upon a person in the framework of a case of an administrative offence has been transferred into the administrative court’s competence. And yet, even if the review of the legality of record-keeping of an administrative violence *per se* is not subject to the administrative court, in the context of the matter of compensation, the administrative court must verify whether, in the particular case, a person is entitled to compensation for an institution’s actions in a case of administrative offence. Moreover, in those cases when, in the framework of reviewing a case of an administrative offence, the procedural violations committed by an institution have not been examined, it can be done by the administrative court in the framework of the claim for compensation.”<sup>31</sup>

In connection with the above-stated, it can be recognised that, in the current circumstances, unlawful and unjustified infringements made in criminal proceedings can be left without fair compensation. Why? First of all, the current wording of the Compensation Law causes certain bewilderment, if an answer needs to be found to the question of whether, in case a person is recognised as being guilty in criminal proceedings, they have any hope of achieving compensation for damages if they have been subjected to unlawful actions (for example, unlawful detention, search, etc.). Section 4 of the Compensation Law does not provide for it. It might seem that Section 2(2) of this Law might save the situation. However, we have not found confirmation of this being so in the case law. At least, in studying judgements by the first instance court that have entered into force and are included in the database of redacted court rulings, we could not identify a single case of the kind. Secondly, the strict requirement for establishing the unlawfulness of

<sup>30</sup> Decision by the Senate of the Republic of Latvia on 4 August 2021 in Case No. SKA-992/2021 ECLI:LV:AT:2021:0804.A420146821.10.L [7].

<sup>31</sup> Judgement by the Senate of the Republic of Latvia on 21 June 2021 in Case No. A42-01379- Available: <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:ADRJLTN:2021:0621.A420137021.2.S> [viewed 15.10.2021.] [7].

the infringement in the criminal procedure may cause insurmountable obstacles in a situation where CPL sets out that certain actions or decisions are not subject to appeal or where the regulation on the mechanism of appeal is imperfect.

The next aspect of particular significance is the fact that the unlawfulness or unjustifiability of the infringement *per se* does not create the grounds for compensation for the damages. I.e., it is stipulated in several sections of the Compensation Law, including Section 7 and Section 11, that nonmaterial damage is such that has caused adverse consequences. Hence, it can be concluded that for a person to acquire the right to compensation for non-material damages, it must be established that the unlawful or unjustified action had caused some kind of negative consequences (caused an infringement), and causal relation must be identified. This finding is consistently confirmed by the Supreme Court's case law: "[...] it has to be established that not only a procedural decision had been revoked in the framework of criminal proceedings but also that the adoption of the decision had caused an infringement on a person's rights. The content of the decision referred to by the applicants does not provide the grounds to consider that the adoption of it *per se* had caused damages for the applicant"<sup>32</sup>; "it must be established whether, in the particular case, unlawful or unjustified actions by an institution, a prosecutor's office or a court in criminal proceedings can be identified and whether, in causal relation to these actions, adverse non-material consequences have been caused for the applicant"<sup>33</sup>; "At the same time, for the purpose of initiating a criminal case, establishing whether a person has committed a criminal offence *per se* cannot be regarded as an unjustified infringement upon rights and the necessity to participate in these proceedings, as well as to appeal against the decisions adopted therein cannot be regarded as adverse consequences in the context of the Compensation Law, unless malice or obvious negligence can be identified in the initiation of proceedings"<sup>34</sup>.

A clear illustration of the negative answer to the question, where compensation is granted for any damages caused in criminal proceedings, is the highest threshold of compensation defined in the Compensation Law. The most vivid example – para. 2 and para. 3 of Section 13(3) of the Compensation Law, pursuant to which damages are only partially compensated for if they exceed 145 000 EUR. This issue, as the matter of the amount of compensation in general, is essential; however, it will not be examined here, leaving it for a separate study.

Interesting discussions in the case law have pertained to the compensation for damages when third persons have incurred some costs. The Supreme Court

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<sup>32</sup> Decision by the Senate of the Republic of Latvia on 4 August 2021 in Case No. SKA-992/2021 ECLI:LV:AT:2021:0804.A420146821.10.L [8].

<sup>33</sup> Decision by the Senate of the Republic of Latvia on 15 July 2021 in Case No. AA43-0048-21/12 ECLI:LV:ADAT:2021:0715.A420319418.10.S [11].

<sup>34</sup> Danovskis E. Nemaniskā kaitējuma jēdziens administratīvajās tiesībās [The Concept of Non-pecuniary Damage in Administrative Law]. Jurista vārds, 2018. gada 20. marts, Nr.12 (1018) See also Decision by the Senate of the Republic of Latvia on 15 July 2021 in Case No. AA43-0048-21/12 ECLI:LV:ADAT:2021:0715.A420319418.10.S [13].

has provided a reasoned solution that can be upheld, by noting “The Senate does not agree that in all cases, where the invoice has been paid by another person, the right to receive compensation should be recognised. However, if it follows from the agreement between the person to whom legal assistance was provided and the person who paid for the legal assistance that the paid amount is a loan that would have to be repaid, with high probability, in foreseeable future, then the damages should be considered as such that have been incurred by the person to whom the legal assistance was provided. In this respect, the Senate draws attention to the finding mentioned in the judgement, to which the regional court has referred to: decrease of assets that are part of property is to be considered financial deprivation in the meaning of Section 1770 of the Civil Law. The existing property is diminished not only by decreased value of the property but also when property is encumbered by debt. [...] In view of the above, for a person, who has received assistance, to be entitled to recover costs in circumstances where someone else has paid the invoice for the legal assistance, it is not enough to conclude that someone has paid the invoice issued by the attorney but is essential to establish that the person who claims compensation has incurred costs because they repaid the money or became indebted.”<sup>35</sup>

In concluding this insight into some interesting issues relating to compensation for damages caused in criminal proceedings, one more interesting aspect needs to be mentioned. An infringement on a person’s rights that has occurred in criminal proceedings may be of criminal nature, i.e., it could be qualified as exceeding the authority of a public official, negligence or abuse of office, etc. A question arises – whether the fact that the unlawful infringement is assessed as being criminal “changes the game”? No clear answer can be found to this at this point. We have not succeeded in finding an example from the case law of compensating for criminally inflicted damages in criminal proceedings. However, the Supreme Court has expressed its opinion on a similar situation, i.e., assessing the possibility of applying the law “On Compensation for Damages Caused by Institutions of Public Administration”<sup>36</sup> in such situations. It has recognised: “If non-material harm or damages have been caused to a person by a public official’s failure to act, which has been recognised as being a criminal offence, i.e., the actual actions already have transformed into a criminal offence and it has been recognised by a judgement in a criminal case that has entered into force, then, primarily, the person who has committed the criminal offence is responsible for the harm and damages caused, and this person is liable in the procedure set out in the Criminal Procedure Law and the Civil Procedure Law. Subsidiary liability may set in for a public person as

<sup>35</sup> Decision by the Senate of the Republic of Latvia on 18 June 2021 in Case No. SKA-471/2021. Available: <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:AT:2021:0618.A420160919.12.S> [7] [viewed 15.10.2021.].

<sup>36</sup> Valsts pārvaldes iestāžu nodarīto zaudējumu atlīdzināšanas likums [Law “On Compensation for Damages Caused by Institutions of Public Administration”]. Consolidated text in Latvian. Available: <https://likumi.lv/ta/id/110746-valsts-parvaldes-iestazu-nodarito-zaudejumu-atlidzinanas-likums> [viewed 15.10.2021.].

an employer, on the basis of Section 1782 of the Civil Law. Accordingly, the victim has the right to submit a claim subsidiarily against the official's employer in civil procedure."<sup>37</sup> Assuming that the Court might take a similar position with respect to the Compensation Law, we shall take the liberty to not subscribe to this approach. The Compensation Law, as to its purport, is needed to allow a person, to whom representatives of the State power have inflicted unlawfully or unjustifiably damages to receive, in a relatively simple procedure, compensation from the State. No objective reason can be found why the State would not have this duty if the representatives of the State power in their unlawfulness have already reached the level of criminality. Invoking the possibility of civil law liability in this situation would be contrary to the idea that the State's obligation to compensate for the damages is to be reviewed only in the administrative procedure. And, even more importantly, in our opinion, limiting the State's liability is not commensurate with, for example, the trend to apply more extensively the adverse criminal law consequences of criminal offences to legal persons of private law, on behalf of or in the interests of which or due to insufficient control/supervision by which the criminal offence had been committed. Likewise, it does not promote treatment of the State as a socially responsible formation, whose inalienable force is assuming legal liability for infringements related to the exercise of the State power.

And, finally, – when to seek justice in a court? In order to turn to a court, a person, first of all, has to turn to the competent authority, to the Ministry of Justice or the Prosecutor General's Office, respectively. Most often, failure to abide by this procedure is an obstacle to legal proceedings. However, in some cases, calling for special review, this might not be the case. The Supreme Court has recognised: "At the same time, it should be taken into account that abiding by the procedure for prior out-of-court examination of the case as a pre-condition for reviewing the application in court is not an end in itself. Therefore, in deciding on leaving an application unexamined if this precondition has not been met, the expedience and proportionality of such a decision should be considered in light of the functions performed by the out-of-court procedure. In exceptional cases, due to some special circumstances, an exception could be admissible with the purpose of respecting the principle of respecting a private person's rights, as well as ensuring the principle of procedural economy, it could be admissible to

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<sup>37</sup> Para. 5, para. 6. of the decision by the Sitting of the President of the Supreme Court's Departments on 11 October 2018, also Decision by the Supreme Court of 6 December 2018 in Case No. 670006518 SKA-13102/2018. Available in Latvian: <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:AT:2018:1206.SKA130218.7.L> [viewed 15.10.2021.]. See also Tiesu prakses apkopojumu "Tiesu prakse par administratīvajām tiesām pakļautajiem prasījumiem (2017.-2021.maijs)" [Case Law Digest "Case Law on Claims under the Jurisdiction of Administrative Courts], Rīga, 2021, p. 149. Available: [https://at.gov.lv/files/uploads/files/6\\_Judikatura/Tiesu\\_prakses\\_apkopojumi/2021/Administrativajam%20tiesam%20paklautie%20jautajumi%202017-2021.pdf](https://at.gov.lv/files/uploads/files/6_Judikatura/Tiesu_prakses_apkopojumi/2021/Administrativajam%20tiesam%20paklautie%20jautajumi%202017-2021.pdf) [viewed 15.10.2021.].

derogate from the mandatory requirement to abide by the regular procedure of having the case examined in prior out-of-court procedure.”<sup>38</sup>

## Conclusion

1. In the course of criminal proceedings, a person's different rights and lawful interests can and are significantly affected. It cannot be excluded that this is unlawful or unjustified, which causes a person's right to receive compensation for the unlawful infringement. There are different types of compensation. The State's obligation to compensate for damages caused by unlawful or unjustified actions in criminal proceedings is defined in detail by the Compensation Law for the Damages Caused in Criminal Proceedings and Record-Keeping of Administrative Offences (the Compensation Law).
2. Pursuant to the provisions of the Compensation Law, the damages caused by unlawful or unjustified criminal procedural actions may be compensated for.
3. Criminal procedural actions, whose unlawfulness or unjustifiability may cause grounds for compensating for damages must be differentiated from administrative actions (by public administration) that are not of criminal procedural nature.
4. Pursuant to the current case law, the unlawfulness of a criminal procedural action may be established in criminal procedure. Such a strict approach may cause obstacles to effective exercise of a person's rights, in view of the incomplete mechanism for appealing against officials' decisions and actions, included in the Criminal Law. This, in particular, applies to decisions, which, pursuant to the Criminal Procedure Law, are not subject to appeal at all, as well as to decisions made and actions taken in the final stage of the pre-trial proceedings. The solution to this deficiency should be linked either to improving the provisions of the Criminal Procedure Law, envisaging a clear possibility and a mechanism for appealing against all decisions and actions, or by expanding the possibilities for applying the Compensation Law also with respect to a situation, where its unlawfulness and unjustifiability has not been established in criminal procedure.
5. The “highest threshold” for compensation for damages, set in the Compensation Law, could be viewed as an unjustifiable infringement on a person's rights and an obstacle to fair compensation.
6. There are no grounds for not applying the provisions of the Compensation Law when the unlawful infringement is to be assessed as being criminal. Limiting the State's liability in such a case would not testify to the existence of the State as a socially responsible formation, which, *inter alia*, should assume also legal liability for the infringements inflicted by representatives of power.

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<sup>38</sup> Decision by the Senate of the Supreme Court on 18 October 2019 in Case SKA-1533/2019 (ECLI:LV:AT:2019:1018.A420255418.13.L).



7. In order to turn to a court, a person, first of all, has to turn to the competent authority, to the Ministry of Justice or the Prosecutor General's Office, respectively. However, pursuant to the current case law of the Supreme Court, the failure to abide by this requirement not always is an obstacle to legal proceedings.

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## COMMISSION BY OMISSION

**Keywords:** commission by omission, improper omission, individual liberty, duty to act

### Summary

The concept of state penalising a person for his or her failure to act must be understood and analysed as transcending a criminal responsibility for something that a person has failed to do. The idea that, unless a person complies with the obligations imposed by the state and acts accordingly, he or she will receive a court sentence, is related to the principle of legality in criminal law, individual liberty to act, and the rule of law.

This article will underline the concept of improper omission, and how the criminal liability for improper omission is affecting individual liberty. Should there be a general responsibility to help other persons? Which are the obligations, whose neglect should result in criminal responsibility? Should there be situations, expressly regulated by the law, in which a person, although he or she has omitted to do something, should not be held criminally responsible? These are some of the questions I intend to answer in this article, offering a theoretical presentation of the main theories of responsibility for omissions.

In conclusion, a theoretical study about criminal responsibility for omissions is, in essence, a study about the rule of law and individual liberty.

### Introduction

The concept of state penalising a person for his or her failure to act must be understood and analysed as transcending a criminal responsibility for something that a person has failed to do. Every time we commit an action, we omit infinity of other actions, therefore, it can be said that we commit infinity of omissions. However, the goal of criminal law is or should be to punish only those particular omissions that are dangerous to others. The idea that, unless a person complies with the obligations imposed by the law and acts accordingly, he or she will be held liable, is related to the principle of legality in criminal law, individual liberty to act, and the rule of law.

## 1. Proper and improper omissions

A classic distinction regarding crimes committed by omission lies between proper and improper omissions<sup>1</sup>. This distinction is important because it teaches us a degree of discipline regarding responsibility for omission: at every moment of his or her existence, a human omits to perform an infinity of actions. However, these omissions are criminally relevant only if we are talking about a proper omission (a crime defined by the law as an omissive act), or an improper omission (if the agent was in a guarantor's position, and omitted to fulfil the action).

## 2. Problematic cases

The classic case that regulates characterises commission by omission is the mother that does not feed her newborn baby, thus ultimately provoking its death. This omission of the mother is perceived as equally grave offence as if the mother would have killed the baby directly by using a gun or a knife.

However, not every example is as clear, and many situations stand at the borderline of the principle of legality.

Let us first analyse some controversial examples:

**Case 1:** *A father (A) and his friend of 20 years (B) talk at the edge of a pool, while the son of A is swimming. At one moment, the son of A starts to drown, and none of them, either A or B, do something to help. The son of A dies.*

In this case, the responsibility for the death of the child can be easily imposed upon the father. However, regarding the friend of the family, it seems morally unacceptable that his omission would not be relevant.

**Case 2:** *A babysitter makes a deal with the parents of a two-year-old girl to take care of her every Friday from 7 to 10 p.m., while the parents go out. One Friday, the parents return home at 9:30 and the girl has a heart attack. All the three, the parents and the baby-sitter, remain passive and do nothing, until the baby dies.*

One of the sources of the duty to act can be the contract. However, if the contract is understood from the civil point of view, we can wonder whether in the example above the baby-sitter still had a duty to act.

**Case 3:** *A man convinces his girlfriend to accompany him to a pension in the mountains with some of his friends. There, two of the friends of the man violate his girlfriend, without him reacting in any way.*

<sup>1</sup> Baumann J. Derecho penal. Conceptos fundamentales y sistema [Criminal law. About fundamental concepts and system]. Buenos Aires. Ediciones Depalma, 1973, p. 137, Cadoppi A., Veneziani P., Manuale di diritto penale [Criminal Law Handbook]. Milano: Casa Editrice Dott. Antonio Milani, 2005, p. 230, Sanchez Sodi H. Lineamentos elementales de derecho penal [Elementary Parts of Criminal Law]. Mexico, editorial Porrúa, 2003. p. 140, Orts Berenguer E., González Cussac J., Manual de derecho penal. Parte general [Criminal Law Handbook. General Part]. CAJ/FIU – USAID, 2004. p. 78, Castellanos F., Lineamientos elementales de derecho penal [Elementary Parts of Criminal Law]. Mexico: Editorial Porrúa, 2003, p. 158.

Another source of the duty to act is the previous conduct of the subject that has created that threatens a social value. However, if the previous conduct was licit, is it morally acceptable to base the criminal liability upon it?

*Case 4: A driver hits a person that was walking near the road, and, scared, does not stop to verify the state of the victim's health, but runs away from the place of the accident. The victim dies as a result of the accident.*

In this case, it is clear that the previous conduct of the subject created a threat. However, if the agent did not know the state of the victim, can his omission to act be criminally relevant?

*Case 5: A drivers hits a person that was walking near the road. He stops, checks the victim's state of health and realizes the injuries are pretty serious, so he takes the victim, puts the victim into his garage on the floor, and leaves her there without food or medical attention. The victim dies 5 days later.*

The difference between this case and the previous one is that after the impact, the driver undertakes another action that exacerbates the threat. In this case, it can be even questioned whether this can be considered an omission at all.

### 3. The structure of commission by omission

The improper omission crime has a particular structure that can be analysed when examining criminal responsibility for omission. Besides the result and the causality connection, of the elements that are also found in the commissive crime, for the improper omission crime we must have: the existence of the duty to act, the capacity to act, the omission to act of the agent. We will explore each of these elements in particular.

#### a) The duty to act

The existence of the duty act is the main element, that fundamentes the guarantors position. Traditionally, it is considered that the source of the duty to act can be found in a law, a contract or from the previous conduct of the agent.

Initially, this might seem simple, however, all these sources are extensively debated in the literature. Regarding the law as the source of the duty to act, many authors ask whether law should be understood as a normative act in general<sup>2</sup> or as an act emitted by the legislative authority only. Regarding the contract as the source

<sup>2</sup> Authors who agree with this interpretation: Luzón Peña D.-M. Omisión impropia o comisión por omisión [Improper omission or commission by omission]. *Revista de la Fundación Internacional de Ciencias Penales [Journal of International Foundation of Criminal Science]*, 2017, No. 6, p. 198, Ordeig E. G. La omisión en la dogmática penal alemana [The omission in German criminal literature]. *Anuario de Derecho Penal y Ciencias Penales [Annual Journal of Criminal Law and Criminal Science]*, 1997, p. 13, Aráuz Ulloa M. La omisión, comisión por omisión y la posición de garante [The omission, the commission by omission and the guarantor's position]. *Encuentro [Meeting]*, 2000, No. 54, p. 36.

of the duty to act, should we understand it as a contract in the civil form? Because, in this case, any cause of nullity or invalidation of the contract will affect the duty to act, thus being inexistent. The majority of authors maintain that the answer is negative, and that by “contract” we should understand a voluntary assumption of the duty to act, which should not be affected by the causes that, from a civil point of view, invalidate the contract<sup>3</sup>.

Thirdly, the previous conduct as the source of the duty to act generates numerous discussions. If the conduct is illicit, it can be argued that it could serve as the basis for a duty to act, yet, if the conduct is licit, or justified by a legitimate reason, then some argue, it is not normal to fundament criminal responsibility.

All the discussion above is valid mainly if we analyse the sources of the duty to act from a formal point of view, – a position criticized for its rigidity<sup>4</sup>. However, other authors, beginning with Armin Kaufmann, sustain that, instead of formalizing the duties to act, we should, instead, view them depending on the functions of the agent. Armin Kaufmann identifies three functions: the function to protect the social value, the function to supervise a source of danger, and the function to control the source of danger<sup>5</sup>.

This interpretation avoids the formality problems, but incurs other difficulty. The function of protection arises from a special relationship with the owner of the social value, but could we say that any form of special relationship reinforces a function of protection? Or, to put it in other words, what are the characteristics of a relationship that forms the foundation of this function? Parents to children (however, would it refer to the children of any age?), children to parents (in any case, or only under special conditions?), spouses between themselves, brothers and sisters, long-standing friends, neighbours? The list can be continued. Regarding the function to supervise or to control a source of danger, the things are not clear, either. Should there be an absolute function? What if the victim “provokes” the source of danger (especially when the source of danger is an animal), and thereby the victim himself/herself increases the risk of danger? What about the responsibility to control a person who cannot control his or her actions? Can

<sup>3</sup> Zaffaroni E. R., Slokar A., Alagia A. *Derecho penal: parte general* [Criminal Law: General Part] Buenos Aires: Editar Sociedad Anónima Editora, Comercial, Industrial y Financiera, 2002, p. 578, Mir Puig S. *Derecho penal. Parte general* [Criminal Law: General Part]. Barcelona: Editorial, 2006, p. 323.

<sup>4</sup> Roxin C. *Derecho penal. Parte general. Tomo II. Especiales formas de aparición del delito* [Criminal Law. General Part. Second Volume. Special forms of appearance of crime]. Madrid: Civitas Thomson Reuters, 2014, p. 848, Jescheck H.-H. *Problemas del delito impropio de omisión desde la perspectiva del derecho penal comparado* [Problems regarding improper omission from the perspective of comparative criminal]. *Nuevo Foro Penal* [New Criminal Forum], 1993, No. 59, p. 18, Crespo E. D. *Sobre la posición de garante del empresario por la no evitación de delitos cometidos por sus empleados* [About the guarantor's position of the business man for non evading crimes committed by his employees]. *Derecho Penal Contemporáneo: Revista Internacional* [Contemporary Criminal Law: International Journal], 2009, No. 28, p. 9.

<sup>5</sup> Kaufmann A. *Dogmática de los delitos de omisión* [The dogmatic of omissive crimes]. Madrid: Marcial Pons, 2006, p. 289 et seq.

this responsibility be equalized with the function of control? What about owning certain goods, such as buildings or spaces used by others to commit crimes?

All these questions show that the problem of the sources of the duty to act still remains to be solved.

### **b) The existence of a typical situation**

The duty to act activates only when there is a situation that threatens the social value<sup>6</sup>. Only in this case it might be said that the agent's duty to act was activated and that he or she must act in order to save the social value.

### **c) The capacity to act**

The second element of great importance is the capacity to act, meaning that the agents must be able to perform an action that would prevent the adverse outcome<sup>7</sup>. For example, if the mother did nothing while her child is drowning, she would not be held criminally liable if she did not know how to swim and did not have any chance to call for help.

The literature identifies two facets of the capacity to act: the intellectual element<sup>8</sup>, meaning that the agent must have the representation of the action that can be performed. For instance, in the example above, the mother might have used a lifebuoy to save her son, but she did not notice it. In this case, it is obvious that she would not be held liable for a crime committed with intent, however, negligence might be identified. The second element is the physical possibility to act<sup>9</sup>, meaning that the guarantor must have the physical ability to perform the saving action. For example, if the father is paralyzed and, being in a room alone with his newborn child, notices that the child is suffocating, he would not be held liable for not acting, given that he was physically unable to act.

### **d) The omission to act**

Thirdly, if the agent has a duty to act and has the capacity to perform the action, of course, in order to talk about a relevant omission, he or she must not have acted<sup>10</sup>. If there were an attempt to act and to save the social value, then

<sup>6</sup> Zaffaroni E. R., Slokar A., Alagia A. 2002, p. 573, Kaufmann A. 2006, p. 114, Roxin C. 2014, p. 814.

<sup>7</sup> Pozo Hurtado P. Manual de derecho penal [Criminal Law Handbook]. Lima: Eddili, 1987, p. 175, Gullock V. R. Fundamentos teóricos básicos del delito de omisión y su aplicación en el derecho penal costarricense [Basic theoretical fundaments of omissive crime and their appliance in Costaricás Criminal Law]. Heredia: San Joaquín de Flores: Escuela Judicial, 2008, p. 157.

<sup>8</sup> Kaufmann A. 2006, p. 117.

<sup>9</sup> Bacigalupo E. Delitos improprios de omisión [Improper omission crimes]. Madrid: Dykinson, 2006, p. 151, Zaffaroni E. R., Slokar A., Alagia A. 2002, p. 574.

<sup>10</sup> Bacigalupo E. 2006, p. 128, Zaffaroni E. R., Slokar A., Alagia A. 2002, p. 573.



criminal liability might not be invoked. However, the reasons why the attempt did not succeed should be carefully analysed on the grounds of causality.

## Conclusion

1. The first and general conclusion is that an omission is criminally relevant if it is expressly punished by the law, or the agent had a duty to act and neglected it.
2. When talking about improper omission or commission by omission, it must be kept in mind that it represents a special type of crime, with special elements: there must be a situation of danger that threatens a social value, the subject must have the capacity to act, and there must be a duty to act.
3. Criminal responsibility for omission is strongly connected with the duty to act imposed by the law. Consequently, it affects individual liberty. Numerous duties to act increase the limitations to the liberty of the citizen and represent a step towards a collectivist society in which a person is forced to act.
4. As the first proposal, I suggest that there should be a general clause that regulates improper omission, stipulating the main sources of the duty to act.
5. As the second proposal, when analysing criminal responsibility for an omission, the subject's capacity to act must be carefully assessed. However, it must always be kept in mind that not every duty to act generates a criminally punishable omission. It must be carefully analysed what duties can represent grounds for criminal responsibility for an omission.

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## SECTION 6

# **PUBLIC INTERNATIONAL LAW AND HUMAN RIGHTS: CURRENT CHALLENGES**

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## IS THE R2P NORM A LEGAL NORM?

**Keywords:** responsibility to protect, norm, principle, atrocities

### Summary

The conception of the Responsibility to Protect (R2P) was developed to resolve the practical problem of the inefficiency of the international community to address atrocities. The present contribution aims at the clarification of the theoretical problem on the nature of R2P norm and provision of conceptual tools for its solution. After differentiating R2P objects and contouring their content, the question whether the R2P norm is of a legal kind will be addressed. The contribution claims that application of the proposed legal concepts – theoretical conception related to the law, doctrine, norm, principle and rule – contributes to the clarification of the objects and content of the R2P; and that political responsibility approach to the identification of a legal norm and the specific concept of emerging norm are suitable tools for determining the legal nature of R2P norm.

### Introduction

The practical problem which has motivated writing of this article is the issue of the inefficiency of the international community in addressing atrocities.<sup>1</sup> The conception of the Responsibility to Protect (in the following text: R2P) emerged as an attempt to address the problem<sup>2</sup> and, according to acceptance of

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<sup>1</sup> It is generally accepted that the scope of protection by R2P is limited to atrocity that includes four crimes: genocide, ethnic cleansing, war crimes and crimes against humanity. See: Peters A. The Responsibility to Protect: Spelling Out the Hard Legal Consequences for the UN Security Council and Its Members. In: Fastenrath U. et al. (eds.). *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*. Oxford: Oxford University Press, 2011, p. 299.

<sup>2</sup> Debate about R2P is “about the possible remedies, including military intervention, to avoid or to put an end to massive violations of human rights committed by a state towards its own citizens or in situations where state authorities critically lack effectiveness.” Focarelli C. *The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine*. *Journal of Conflict & Security Law*, 2008, Vol. 13, No. 2, p. 191.

this conception and its practical results, we can detect bright, shadow as well as dark periods of R2P development in recent history.<sup>3</sup>

The research starts from two assumptions: the theoretical conceptions related to the law have an important role in resolving legal problems; and the practical problem of our concern is a legal problem. Consequently, the inefficiency of the international community in addressing atrocities can be affected by the solutions to R2P theoretical problems. The R2P theoretical puzzles still remain unresolved and the nature of the R2P norm is one of them. Two aims of this contribution are: to clarify this specific theoretical problem and to provide the tools for its solution.<sup>4</sup> The present article claims that application of the proposed legal concepts contributes to the clarification of the objects and content of the R2P; and that the political responsibility approach to the identification of a legal norm (hereinafter – PRA), and the specific concept of *emerging norm* are adequate tools for determining the legal nature of R2P norm.

The clarification goal will be attained by differentiating objects comprised under the notion “R2P” and outlining their contents. The concepts of theoretical conception related to law, doctrine, norm, principle and rule will be exposed and applied for differentiation of the R2P objects (Section 1). After that, the content of R2P conception understood as a legal doctrine, and the content of the R2P norm will be briefly outlined (Section 2). It follows the section focused on the finding-solution goal prompted by the question whether the R2P norm is of a legal kind. The identification criteria proposed by different approaches to the identification of legal norm will be clarified (Subsection 3.1), as well as two understandings of the emerging norm (Subsection 3.2). After that, it will be indicated how norm-identification through PRA and the specific concept of the emerging norm can be used for supporting the claim about the legal nature of the R2P norm (Subsection 3.3). In Conclusion, we will summarize the insights and emphasize the importance of the introductory assumptions.

<sup>3</sup> Gareth Evans described the phases of the development of R2P as: (a) [development] of the conception (2001–2005); (b) birth (2005); (c) growth to maturity (2005–2011); (d) mid-life crisis (2011–2014); (e) future [development] (2014–...). Evans G. The evolution of the Responsibility to Protect: From concept and principle to actionable norm. In: Thakur R., Maley W. (eds.). *Theorising the responsibility to protect*. Cambridge: Cambridge University Press, 2015. We could say that first three are bright phases of R2P with regard to its acceptance by states and international institutions, as well as considering its practical implementation, e.g., in Kenya and, at the beginning, in Libya. The shadow phasis has started with the results of Libya intervention and continues nowadays coloured with sceptical attitudes of some states towards R2P. The dark moments can be found in failure of international community to react upon atrocities, e.g., in Syria and recently – in Myanmar. Michael Byres found setbacks of R2P also when it was attempted to use it as a justification of the interventions that it did not cover. Byres M. *International Law and the Responsibility to Protect*. In: Thakur R., Maley W. (eds.). 2015, p. 101.

<sup>4</sup> Ramesh Thakur and William Maley listed three sets of issues, which the theorizing on R2P can address: conceptual clarification, normative justification and the relationship of R2P to social phenomena. Thakur R., Maley W. Introduction: *Theorising global responsibilities*. In: Thakur R., Maley W. (eds.). 2015, pp. 9–10. In this contribution, the first set is addressed in the context of the first goal, and the last two sets of issues in the context of the second goal, as long as these two sets refer to the question of how the R2P norm can be described as a legal norm.

## 1. Responsibility to protect: Conception, doctrine and norm

The discourse about R2P is marked by the disagreement about the content of international law, as well as by conceptual confusion when different concepts and different meanings of the same concept-terms (i.e., norm) are used to discuss the R2P.<sup>5</sup> The last-mentioned characteristic is partially caused by interdisciplinary approach to R2P especially when described from the perspectives of international law and international relations.

The description of a phenomenon from different aspects is more than welcomed when addressing the international problems. Moreover, the study of law in general combines two approaches.<sup>6</sup> The legal sciences focused on posited law (legal dogmatics), e.g., science of international law, aim at answering the question about what are the legal norms in a community governed by law, while sociology in a broad sense (including international relations) aims at describing the social factors influencing the content and effects of law.<sup>7</sup> However, the different linguistic apparatus that various disciplines use for the explanation of a phenomenon cause the problem of mutual understanding. The awareness of different approaches of legal dogmatics and sociology makes some scholars to explicitly declare what approach they follow.<sup>8</sup>

However, the separation of domains whether or not announced to the audience, sometimes turns into an activity of influencing the result in one domain by using the exclusive methodology of the other. For instance, this is the case when the legal answer to the question “what is the law” is being replaced by statements about the factual political relations. When the understanding of atrocity crimes is reduced to “[current] might is right”, the interpretation of legally relevant R2P objects, especially those outside the framework determined by current might, becomes a child’s play on the ground of international relations and peripheral activity in legal sciences. What is more important, the domination of such a one-sided interference into domains, as well as insistence on rigid separations of domains suppresses the theoretical attempts to connect political and legal domains in more co-operative way. For instance, such attempt can be

<sup>5</sup> Melissa Labonte has detected in academic discourse the following understandings of the term R2P mainly in reference to R2P as a norm: a single norm, a collection of different norms, ‘accepted norm’, a ‘new norm’, or a ‘new international norm’, professional, legal, social or practical norm, norms in context of ‘norm advancement’ or ‘normative trajectory’ or ‘norm consolidation’, outcome of ‘positive normative developments’ or ‘normative shifts’, ‘collection of shared expectations that have different qualities’, political concept based on well-established legal principles and norms, ‘contested norm’, between a concept and a principle, ‘emerging’ norm and ‘fading norm’. Labonte M. R2P’s Status as a Norm. In: Bellamy A. J, Dunne T. *The Oxford Handbook of The Responsibility to Protect*. Oxford: Oxford University Press, 2016, pp. 134–135.

<sup>6</sup> Ross A. *On Law and Justice*. Clark, New Jersey: The Lawbook Exchange, 2004, pp. 4, 19, 20 and 23.

<sup>7</sup> Ross 2004, pp. 21 and 23.

<sup>8</sup> See Bellamy A. J. *The Responsibility to Protect Turns Ten*. *Ethics & International Affairs*, 2015, Vol. 29, No. 2, p. 162.

found in the legal theories explaining how social and moral phenomena can be of legal importance.

### 1.1. Conception, doctrine, norms, principle and rule

The first conceptual confusion about R2P refers to the often hidden assumption about what R2P is. The confusion can be resolved by clarification of different concepts of conception, doctrine, norm, principle and rule. As noted below, the R2P is all of that but not all at the same time. It is important to separate different objects of R2P by using different concepts. Even more importantly, it must be explained how these concepts interconnect.

The conception that is of specific relevancy for legal issues is the set of theoretical assumptions about social, in our case, international, relations in the community. For instance, the shared theoretical assumptions about the characteristics of parliamentary democracy could be considered as a conception of a political order. Once the conception is used as the basis for a practice, it becomes a doctrine. It can be a political doctrine, if it is employed in political debates or a legal doctrine if such a conception or political doctrine is used in adjudicative processes, e.g., when the judge of a supreme court makes decisions in line with the doctrine on social equality.

The norm is the directive for behaviour and can be of different types, e.g., moral, legal and religious, depending on the key characteristics stipulated for differentiation.<sup>9</sup> We propose to find the key distinctive feature in the reaction to the breaches of the norm. This is not only one of the possibilities for making the differences between norms, but also the one we found suitable for the explanation of R2P.

Furthermore, the norm itself can be of two types: principle and rule.<sup>10</sup> On the one hand, the principle is a norm that is fundamental and underdetermined in a specific sense. It is fundamental because, among other things, it can be used as the ground for establishment of other norms and other established norms should be in line with a principle. When principles are the norms of the main parts or the whole normative system, they are considered to be fundamental principles.<sup>11</sup> The principle is underdetermined, because its content is general in a sense to anticipate all, or at least not sufficiently defined, ranges of situations to be applied to; or because the consequences of the norm are not determined enough. As the result of this specific uncertainty, the principles to be used in resolving the legal problem should be concretized in a way to identify a rule having

<sup>9</sup> Tim Dunne finds that R2P “is not a ‘legal norm’ in the conventional sense” and questions its quality of social norm, as well as inquires, what is the content of R2P as a moral norm. Dunne T. *The Responsibility to Protect and World Order*. In: Thakur R., Maley W. (eds.). 2015, p. 97.

<sup>10</sup> The explanation follows Riccardo Guastini’s description in: Guastini R. *La sintassi del diritto [The syntax of law]*. 2<sup>nd</sup> edition, Torino: Giappichelli, 2014.

<sup>11</sup> In the context of deliberation on the extent and limit of the R2P, Jean-Marc Coicaud refers to the “fundamental principles” at the core of international law. Coicaud J.-M. *International Law, the Responsibility to Protect and international crisis*. In: Thakur R., Maley W. (eds.). 2015, p. 163.



ground in the corresponding principle applicable in a case. Moreover, the principle “suffers” from the specific suitability for derogation, especially when in conflict with other principles. Since many principles of equal status exist in the system and among them colliding principles could be applied to the same situation (e.g., the principles of privacy and freedom of press can be applied to the situation of published information on illness of the president), the balancing of the principles is regularly used.<sup>12</sup> On the other hand, the rule is a norm sufficiently determined to be applied as the premise for the conclusion about the concrete legal situation and with more certainty that it will not be derogated by other norms in the same manner as a principle could be derogated.

From the above, it becomes clear how the conception, doctrine, principle and rule can be linked. The conception can become relevant for legal doctrine, and principles can be relevant for the determination of rules. The missing component is the link between the legal doctrine and principles. It is well known that, at least in some communities governed by law, some practitioners and especially importantly – those that apply the law, use the doctrine for the construction of implicit norms. Implicit norms are not identified as those formulated in texts or by studying the custom. They are the result of legal reasoning, and one of the possibilities to construct them is to rely on the theoretical construction that is adopted as a doctrine.<sup>13</sup> If it is the case that a judge constructs a norm based on the theoretical conception, then it can be said that doctrine has enabled the “discovery” of the principle in the system, i.e., the formulation of implicit norms. In the same way as the European Court of Justice has “discovered” the principle of direct effect, the international law-applying institutions can “discover” R2P principles.

## 1.2. Established and emerging norms

The second problem for a mutual understanding of R2P refers to another division of norms, i.e., “established” and “emerging norms”.<sup>14</sup> The R2P is often marked as an emerging norm<sup>15</sup> and sometimes even as an established norm although it is not always clear in the latter case whether it is seen as a political-moral or legal norm. The distinction between emerging and established norm is of great importance for legal scientists and for those political scientists<sup>16</sup> who think that a norm makes a greater impact when endowed with a legal status.

<sup>12</sup> Coicaud emphasized that “competitive relationships among fundamental principles are problematic but essential.” Coicaud J.-M. 2015, p. 165.

<sup>13</sup> On implicit norms and the role of theoretical assumptions, see: Guastini R. 2014.

<sup>14</sup> Carlo Focarelli describes it as “a norm situated in limbo halfway between existence and non-existence”. Focarelli C. 2008, p. 193.

<sup>15</sup> Focarelli finds that the opposition between advocates and critics of R2P “is supposed to be encapsulated by the notion that [R2P] is the subject of an international ‘emerging norm’”. Focarelli C. 2008, p. 192.

<sup>16</sup> The specific approach to R2P norm from the angle of political sciences is, for instance, the theory by Amitav Acharya on “norm circulation”. Acharya A. The Responsibility to Protect and a theory of norm circulation. In: Thakur R., Maley W. (eds.). 2015.

The legal scientists are interested in clarifying this distinction for two reasons and both are connected to the explanation of what law-applying institutions do or should do when applying law, e.g., Security Council, when making a decision on atrocities and doing this, for any reason, by applying the international law; or international courts, when resolving disputes connected to atrocities; or states, when making a decision on sanctioning other states for atrocities by applying international law.

On the one hand, a legal scientist is interested in distinguishing what belongs to the legal system and what is out of its scope, as well as discerning legally relevant and irrelevant elements amongst the latter. One way to make these distinctions is to state that only formulated norms (and possibly – customary norms, if not considered belonging to the legally relevant non-legal norms) are established norms (legal norms) of the system and that among non-legal norms, legal relevance pertains only to those which are explicitly directed by legal norms to be applied. Following these criteria, the emerging norms are out of the legal system and legally irrelevant. However, it is also possible to use other criteria that changes both statuses of a norm.

On the other hand, a legal scientist could be interested in description or prescription of how and when a norm, *prima facie* not seen to a legal norm or referred to by a legal norm, becomes a norm to be applied by a law-applying institution. One way is to explain the emerging norm as in some sense already being a part of the legal system. The other way is to be satisfied with its status of “legal relevancy”.<sup>17</sup> Although emerging norm is not “legal” in the same sense as being an established norm, regarding which it is clear that it is the member of the system – it is a legally relevant norm, because it has a significant capacity to be taken into consideration by law-applying institution and once when this happens to become an established norm.

## 2. The content of the R2P

Two years are very-well known to be of existential importance for R2P. In 2001, International Commission on Intervention and State Sovereignty (ICISS) produced the report “The Responsibility to Protect”.<sup>18</sup> Notably, the Commission was not an official agency empowered to produce international norms. Although the report is not a legal document produced by an official institution, it is produced

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<sup>17</sup> Krešić M. Compulsory adjudication: an emerging principle of European Law and the Western Balkans’ accession to the European Union? Paper presented at IVR Special Workshop on Ethnic Diversity, Plural Democracy and Human Rights in Europe. Luzern, 2019.

<sup>18</sup> International Commission on Intervention and State Sovereignty (ICISS). The Responsibility to Protect: Research, Bibliography, Background. Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty Responsibility. International Development Research Centre: Ottawa, 2001.

on the initiative of the UN Secretary General<sup>19</sup> and the members of the Commission were epistemic authorities in the area of international law. The second benchmark is the 2005, when UN General Assembly (UNGA) in its document<sup>20</sup> recognized some of the main theoretical assumptions of ICISS report. Neither this second document can be perceived as a legal document with norms of binding force. It is rather to be considered as a policy document of international community with the potential to be implemented (among other addressees) by the Security Council (UNSC). This potential exists and develops due to the activities of relevant actors and especially of the UN General Secretaries. Since the UNSC is an institution that *may* order the use of physical coercions based on the determination of the breach of international norms, we can consider it as a quasi-judicial institution. Based on this interpretation of facts, we can say that R2P conception is developed in 2001, and it becomes recognized as the political doctrine in 2005 with a potential to become a legal doctrine. Since the UNSC as a quasi-judicial institution has in the following years referred to R2P in its decisions, it could be claimed that the R2P conception has been recognized as a relevant legal doctrine.

The content of R2P conception discovers the revolutionary attempt of its authors to change the prevailing paradigm of international community. We claim that it can introduce a revolutionary shift<sup>21</sup> because its content refers to the change of six main pillars of the 1945 World Community recognized as the problematic by legal scholars from the very beginning of the UN appearance. The following six issues can be detected as the issues of concern of the R2P doctrine: sovereignty and human rights; sovereignty and intervention; restrictive and extensive interpretation of international delicts; political and legal approach to UNSC's decisions; aristocratic and democratic arrangement of world governance; and development and *status quo* of international law. The constraints of the current article do not permit to expose the doctrine in detail, following the matrix of these six pillars. For the purpose of this contribution, it is enough to understand that

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<sup>19</sup> The UN Secretary General Kofi Annan has a crucial role in stimulating the conceptualization of R2P before the establishment of ICISS and in transferring the R2P conception in UN system. See: Cater C., Malone D. M. The Genesis of R2P: Kofi Annan's Intervention Dilemma. In: Bellamy A. J., Dunne T. The Oxford Handbook of the Responsibility to Protect, Oxford: Oxford University Press, 2016, pp. 116–122.

<sup>20</sup> UN General Assembly. World Summit Outcome. Document A/RES/60/1, 24 October 2005.

<sup>21</sup> Charles Sampford and Ramesh Thakur used Thomas S. Kuhn's distinction between the normal and revolutionary phasis of science development – the former concerned with resolving puzzles within the dominant paradigm and the later with development of the new paradigm – to characterize the R2P as a new paradigm of international relations. Sampford C., Thakur R. From the Rights to Persecute to the Responsibility to Protect: Feuerbachian inversions of rights and responsibilities in state-citizen relations. In: Thakur R., Maley W. (eds.). 2015. In the similar vein, Anne Peters considers R2P “to definitely ousted the principle of sovereignty from its position as a *Letztbegründung* (first principle) of international law”. Peters A. Humanity as the A and  $\Omega$  of Sovereignty. The European Journal of International Law, Vol. 20, No. 3, 2009, p. 514.

the content of doctrine, when applied, introduces the change of international order that failed to be achieved through the process of international legislation.<sup>22</sup>

If the R2P is to be compressed in one norm it can only be that: international institutions – both states and centralized international institutions – are obliged to protect population from atrocities. The ICISS concretize this norm in a way which implies that the norm has a characteristic of a rule, although the Commission uses the term “principle”. The content of this norm, considered by ICISS to be “emerging norm” and “the core principle identified in this report”, is described, as follows. If “major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator” (antecedent), the “intervention for human protection purposes, including military intervention in extreme cases, is supportable” (consequent).<sup>23</sup> When we return to the more abstract content of the norm, as we have introduced it here, the implied norms can be extracted. Bellamy recognizes that R2P is consisted of two group of norms: “those relating to how states treat their own populations and those relating to a state’s responsibilities to contribute to the protection”.<sup>24</sup> Regarding the first group of norms, Bellamy claimed that they have been commonly understood as “well-established principles of international law”<sup>25</sup> and he focused his research on the normative nature of the second group of norms. Following Bellamy, we can say that R2P norm consists of two elements, i.e., it implies two fundamental norms: (N1) states have to protect its own population; and (N2) international institutions (including states) have to protect population. It is obvious that these norms are principles. We can further reconstruct the R2P norm and its two parts in a way to be considered as consisting of the following five principles.

- 1) Everyone has a right to be free from atrocities.
- 2) The violation of this right is an international delict that threatens the international peace.
- 3) A state has international duty to protect this right concerning the members of its population.
- 4) International institutions have duty to protect this right if a state failed to provide protection of its population.<sup>26</sup>

<sup>22</sup> Byers considers that R2P has not “exerted much influence on the rest of the international legal system”, but nevertheless finds that “the concept may – on an *ad hoc* basis – be influencing how states respond when another state violates the law seeking to prevent atrocities.” Byers M. 2015, p. 102. The fact that the concept may cause even this effect, shows the power of doctrine and its consequences depend on those who apply the doctrine.

<sup>23</sup> ICISS 2001, para. 2.25. See also: 8.2 and 2.24.

<sup>24</sup> Bellamy A. J. *The Responsibility to Protect Turns Ten*. 2015, p. 162.

<sup>25</sup> *Ibid.* On already existing obligation of state towards their citizens states see also: Focarelli C. 2008, p. 210; Orford A. *International Authority and the Responsibility to Protect*. Cambridge: Cambridge University Press, 2011, p. 23.

<sup>26</sup> On importance of distinction between power or duty to intervene, see Focarelli C. 2008, p. 210. Anne Peters considers that R2P doctrine implies “that Security Council is not only authorized, but – if the circumstances so warrant – morally or even legally obliged to act.” Peters A. 2009, p. 539. “[O]nce R2P is accepted as a fully-fledged legal principle” concrete legal obligations arise for Security Council and states. Peters A. 2011, p. 297.

- 5) The decisions of international institutions concerning the atrocities should be justified in accordance to the principle of proportionality.<sup>27</sup>

From these principles, different rules applicable in particular situations can be constructed, e.g., the rules for situation when a state has failed to perform its function to protect own population. The elaboration of all rules implied by R2P principles requires additional space out of the one limited for this contribution. However, it should be clear that, if relevant law-applying institutions in situation of addressing the cases of atrocity crimes (as exemplified above) started applying rules constructed in such a way, the consequences would be far-reaching for the international community.

### 3. The nature of R2P norm

#### 3.1. The identification of legal norms

The two main models of identifying legal norms appear in the discourse on international law. They can be shortly explained, as follows.<sup>28</sup> The positivist approach is focused on identifying the norms of the legal system by searching for them exclusively in valid legal document or custom. According to the non-positivist approach, the identification of legal norm does not necessarily depend on the actual practice of states or centralized international institutions for producing law through treaties or customs neither on the existing practice of law-applying institutions, i.e., states, nor international centralized law-applying organs. The non-positivist approach includes those attempts to establish a norm independently of the existing social practice of the legal organs. If a norm can be identified by one of methods proposed by proponent of non-positivist approach, it does not matter whether legal organs have omitted or wrongly applied these norms. These situations are qualified as a “legal error” made by these organs.<sup>29</sup>

One of the non-positivist approaches is PRA, based on determination of norms of political morality of the community which can be claimed to emerge as legal norms. The justification for such claim is based on “the theoretical thesis of the existence of the specific political responsibility of law-applying organs to apply

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<sup>27</sup> Meaning the principle of proportionality in a broader sense, as described by Robert Alexy, that includes the sub-principles of suitability, necessity and proportionality in the narrower sense. Alexy R. *A Theory of Constitutional Rights*. Oxford: Oxford University Press, 2002, pp. 66–69. His understanding of the principle as the optimization requirements relative to what is factual and legally possible encompasses the ICISS criteria for military intervention in case of atrocities: right intention, last resort, proportional means and reasonable prospects (ICISS, 2000, 32–37). On use of these criteria as form of practical moral reasoning see Bellamy A. J. *The Responsibility to Protect and the just war tradition*. In: Thakur R, Maley W. (eds.). 2015.

<sup>28</sup> See: Krešić M. About non-positivist perspective on legal values in international law. *Bratislava Law Review*, 2020, Vol. 4, No. 2, pp. 34–35.

<sup>29</sup> Krešić M. 2020, p. 35.

these as legal under specific conditions, even when the application of these norms has not yet been manifested in the practice of any law-applying organs.”<sup>30</sup>

### 3.2. The identification of emerging norms

One way to identify an emerging norm is to explain the process of emerging by equating it with the process of appearance of customary law. There are enough indicators for legal scholars to make such claims in regards to R2P. However, this approach is vulnerable to counterarguments showing that R2P is not a part of the international customary law.

There is another way to identify an emerging norm, which avoids this objection. It is focused on the central role of adjudicative or quasi-adjudicative body, whereby custom presents only one of the indicators of norm-emerging. Following this second approach, the emerging norm can be defined as “a norm experienced as developing the feeling from moral duty or conventional fact towards the feeling of the legal obligation; due to the manifestations specific for every normative context of: formulated legal norms, customs and culture; that if sufficiently strong can influence the normative ideology of the (quasi)adjudicative body to identify such a norm as the grounds of coercive enforcement.”<sup>31</sup>

The first approach, based on the identifying of the elements of custom, fits into the positivist approach to legal norms based on researching the texts and customs. The second approach which we propose to be followed in the case of the R2P, bridges the gap between the set of clearly established legal norms and the set of those norms that are in the process of emerging as legal norms.

### 3.3. R2P norm as a legal norm?

The positivist approach to answering the question of the nature of R2P norm can be found in Bellamy’s elaboration.<sup>32</sup> His research was focused on questioning whether the second group of R2P norms on the responsibility of international organs satisfy the criteria he considers to be the criteria for identifying established norms: practice, duty-content and reaction to the breaches of norm. Since the criteria proposed by Bellamy corresponds to what is required by the traditionally understanding of international custom – practice and *opinio iuris* – it can be said that his analysis is based on the positivist approach. The data collected and interpreted by Bellamy makes him to confirm the correctness of his hypothesis that: the first group of R2P norms are part of customary law even before R2P appears; the second group of R2P norms initially belonged to the group of emerging norms which later satisfied the criteria for becoming legal norms.

<sup>30</sup> Krešić M. 2020, p. 35 (note 7).

<sup>31</sup> Krešić M. 2019.

<sup>32</sup> Bellamy A. J. *The Responsibility to Protect Turns Ten*. 2015.

However, this claim regarding the R2P norms as established norms can be refused on the basis of counterarguments manifesting that R2P norms still are not part of international legal customs. In that case, the response can be to test a non-positivist approaches. Among these, the PRA seems to be the most suitable one, since R2P conception corresponds to the conception of political morality of the today's world order. This claim on R2P as a reflection of international political morality can be justified by the following arguments: the UN Charter is aimed at preventing the Second World War atrocities from repeating again; R2P doctrine was initiated as a response, required by UN, to changed circumstances and new challenges in the international community after 1990s; and moral consciousness shared by the world community causes strong reactions when atrocities appear.<sup>33</sup>

Even if the PRA has still not been applied by law-applying organ in a way to provide the R2P norm with the clear status of established legal norm, it can be claimed that PRA provides R2P norm with the status of an emerging norm, as it is defined above (the second approach to emerging norms). The aforementioned arguments on the political morality are also the arguments about the characteristics of cultural consciousness as one of indicators for the existence of an emerging norm. As such, they also play the role in justifying the claim on R2P as emerging norm. Arguments regarding the other two indicators of emerging norms – customs and norms formulated in existing international legal texts – strengthen such a justification. Bellamy's analysis of the customs shows that this indicator of emerging norm is strong enough, i.e., it cannot be denied that the practice relevant for a legal custom has already appeared in a significant measure and quality, even if one considers this practice, correctly or incorrectly, still insufficient for the legal decision on R2P as a legal custom. Finally, the text of UN Charter contains norms, e.g., on protection of peace, that could be used for construction of R2P norm as an implicit norm, e.g., if atrocities are seen as threats to peace.

## Conclusion

The discussion about R2P could be clear and sharp, if it were to take into account distinctions between conception and doctrine, as well as between principles and rules. The R2P conception has been recognized as a legal doctrine and, based on this doctrine, the principles and rules can be constructed. Since this legal doctrine appears as reflecting the political morality of the international community, the application of the PRA in the identification of R2P norm can easily be used by law-applying organs. In addition to political morality, customs and the international texts including the UN Charter, – as three indicators for

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<sup>33</sup> Šimonović finds R2P to be powerful 'concept' due to its universality, time boundlessness and consensual endorsement by world leaders. Šimonović I. Conclusion: R2P at a crossroads: implementation or marginalization. In: Jacob C., Mennecke M. (eds.). *Implementing the Responsibility to Protect: A future agenda*. London: Routledge, 2020, p. 262.

identification of emerging norms – make R2P norm suitable to be applied by law-applying organs.

The problems of international order addressed by R2P doctrine have existed from the very beginning of the UN. The argument regarding R2P as a legal norm that is formed by using the PRA and a specific concept of emerging norm is a sustainable legal argument that, if used by the law-applying organs, brings to the change of the international order, even without the amendments to the UN Charter. However, the implementation of these two tools depends on the law-applying organs; and in international community we find these organs in the Security Council, international courts and states themselves.

We have explained the sustainability of the first introductory assumption: theoretical conceptions, including the R2P conception presented as reflecting the current political morality, can be used by international law-applying organs as legal tools for resolving practical legal problems. It is the sustainability of the second assumption that makes the implementation problematic. The implementation of the PRA and the specific concept of emerging norm depends on whether law-applying organs consider the problem of atrocities to be a legal problem.

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## BLANKET BANS IN CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

**Keywords:** blanket bans, European Court of Human rights, Constitutional Court of the Republic of Latvia

### Summary

Irrespective of whether a human rights case is being decided in a national or international court, similar methodology is used when assessing whether a human rights restriction is justifiable. In some cases, however, the European Court of Human Rights and Constitutional Court of the Republic of Latvia use different approach for specific kind of human rights restriction – the blanket ban. This concept and applied methodology are still under the discussion regarding both courts. This article looks into concept of blanket ban, analyses influence of this concept to courts' assessment, as well as reflects objections to the concept.

### Introduction

Courts are not bound by the methodology they use as their task is to ensure fair proceedings and outcome. The consistent use of the methodology provides clarity for persons applying to the court.

Irrespective of whether human rights case is being decided in a national or international court, usually similar methodology is used when assessing whether a restriction of human rights is compatible with international legal sources or constitutions, for instance, the classical three-part test in case of the negative obligations.

In some cases, however, the European Court of Human Rights (hereinafter – the ECHR) as well as the Constitutional Court of the Republic of Latvia (hereinafter – the Constitutional Court) use a modified approach to assess interferences with human rights. These cases concern a specific kind of human rights restriction – the blanket

ban. The meaning of this term, specific methodology applied in these cases and its necessity are still under the discussion in the context of the both courts.

This article looks into the concept of the blanket ban in both mentioned courts, analyses the influence of this concept to courts' assessment in judgments, as well as reflects objections to the blanket ban concept made by judges in their dissenting opinions and arguments found in legal literature.

## 1. Blanket ban: The concept

Legal systems often face the challenge of finding the balance between legal certainty, on one hand, and flexibility and adaptability to individual circumstances, on the other hand. This challenge is particularly strong in human rights cases where individual circumstances may be particularly important in order to ensure protection of individual's rights.<sup>1</sup> Adopting only the kind of norms which provide for individual assessment, however, would be a disproportionate burden on a legislator and law enforcers, and could cause uncertainty. Therefore, legal systems have norms which are inflexible – not adaptable to individual circumstances – and automatically applicable to everyone within its scope. In some cases, such inflexible norms could cause an anomaly. Namely, in democratic states under the rule of law anyone has equal rights.<sup>2</sup> However, if for someone a certain right is denied in its entirety, an anomaly occurs. Such anomaly has far-reaching consequences considering the presumption that all persons in a given group without an individual assessment are subject to the certain human rights restriction.

The case law of the ECHR is not fully consistent in choice of terms to describe absolute human rights restrictions. For instance, in the case *Hirst v. the United Kingdom (No. 2)* the ECHR assessed a ban for prisoners to exercise their voting rights.<sup>3</sup> In this case ECHR used the term “blanket ban” describing it as a general, automatic and indiscriminate restriction.<sup>4</sup> Another case dealing with absolute human rights restrictions was *Animal Defenders International v the United Kingdom*.<sup>5</sup> Here, the ECHR assessed the statutory ban on all paid political advertising on television, including an advertisement by a non-governmental organization concerning the protection of animal rights. When describing this ban, the ECHR referred to general measures which apply to pre-defined

<sup>1</sup> See, for example, Gerards J. Abstract and Concrete Reasonableness Review by the European Court of Human Rights. *The European Convention on Human Rights Law Review*, 2020, No. 1(2):218.

<sup>2</sup> See, for example, United Nations, General Assembly. Report of the Secretary-General “In larger freedom: Towards development, security and human rights for all”, 2005, No. A/59/2005.

<sup>3</sup> ECHR judgment of 6 October 2005 in Case *Hirst v. the United Kingdom (No. 2)* (application No. 74025/01).

<sup>4</sup> ECHR judgment in Case *Hirst v. the United Kingdom (No. 2)*.

<sup>5</sup> ECHR judgment of 22 April 2013 in Case *Animal Defenders International v. the United Kingdom* (application No. 48876/08).

situations regardless of the individual facts of each case.<sup>6</sup> Similarly, in the case *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, the ECHR recognized the statutory blanket prohibition on secondary strike action as general measure.<sup>7</sup> The case law of the ECHR shows that whether a restriction is established for life is not a decisive factor in recognizing a ban as blanket, but it nevertheless affects the assessment of proportionality.<sup>8</sup>

Despite inconsistency in terminology, it is clear that the blanket ban in case law of the ECHR is a restriction applicable without exception to everyone falling within its scope regardless of individual circumstances. Legal doctrine concerning the case law of ECHR also refers to inflexible laws, which, without exception, have consequences for all those who fall within their scope, as well as laws that are “insensitive to facts”.<sup>9</sup>

The concept of the blanket ban was introduced in the Constitutional Court based on, *inter alia*, the case law of the ECHR.<sup>10</sup> In this case, the court assessed the ban for life on working as a teacher for people who had been convicted of intentional serious or particularly serious crime. To establish that, the prohibition included in a legal norm is a blanket ban, the Constitutional Court assesses whether this restriction: (1) applies to all persons belonging to a certain group without individual assessment of each particular case and exemptions, and (2) has been established for life.<sup>11</sup>

The definition of the blanket ban has been consistent since the beginning. The only exception is the slightly different application of it in one particular case in 2021. In this case, the court assessed the prohibition to be employed in contact with children for persons convicted of violent criminal offenses, regardless of the removal of the criminal record. The nature of this restriction differed from that assessed in the previous cases, as there were exceptions, namely, the restriction did not apply to, for instance, persons providing temporary services. Nevertheless, the Constitutional Court assessed this ban as blanket: although the exceptions narrow the range of subjects of the restriction included in the impugned norm, no exceptions are allowed in relation to sufficiently clearly defined subjects, furthermore, the ban is imposed for

<sup>6</sup> ECHR judgment in *Case Animal Defenders International v. the United Kingdom*.

<sup>7</sup> ECHR judgment of 8 September 2014 in *Case National Union of Rail, Maritime and Transport Workers v. the United Kingdom* (application No. 31045/10).

<sup>8</sup> See, for example, ECHR judgment of 6 January 2011 in *Case Paksas v. Lithuania* (application No. 34932/04).

<sup>9</sup> Cumper P, Lewis T. Uncertainty, irony and subsidiarity: Blanket bans and the European Court of Human Rights' procedural turn. *International and Comparative Law Quarterly*, 2019, No. 68(3), pp. 611–638.

<sup>10</sup> Judgment of the Constitutional Court of the Republic of Latvia of 24 November 2017 in Case No. 2017-07-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/03/2017-07-01\\_Spriedums.pdf#search=\[viewed 01.11.2021.\]](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/03/2017-07-01_Spriedums.pdf#search=[viewed%2001.11.2021.]).

<sup>11</sup> See, for example, judgment of the Constitutional Court of the Republic of Latvia of 5 December 2019 in Case No. 2019-01-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2019/01/2019-01-01\\_Spriedums.pdf#search=\[viewed 02.11.2021.\]](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2019/01/2019-01-01_Spriedums.pdf#search=[viewed%2002.11.2021.]).

life.<sup>12</sup> In view of the foregoing, the blanket ban in the case law of the Constitutional Court is a ban applicable to all persons in certain and clearly defined group and, in contrast with the ECHR, established for life.

Consequently, the understanding of the blanket ban is similar in both the case law of the ECHR and the Constitutional Court – a prohibition applicable to all persons in certain group without exception regardless of individual circumstances. The understanding differs only in the part where the criteria “established for life” is decisive in the Constitutional Court, but only affects the proportionality part in the ECHR.

## 2. Influence of the blanket ban concept on the courts’ assessment

As blanket bans have a highly restrictive nature and far-reaching consequences, the question arises – how do blanket bans influence assessment in judgments of both courts?

The ECHR in some cases, including blanket bans, has shifted towards the procedural review.<sup>13</sup> Namely, the ECHR primarily assesses the legislative choices underlying the blanket ban, the quality of parliamentary review and the persuasiveness of abstract justification for the blanket ban.<sup>14</sup> The quality of the parliamentary review of the necessity of the measure is of particular importance and goes directly to the proportionality of the measure in question.<sup>15</sup> The more convincing the general justifications for the blanket ban are, the less importance the ECHR will attach to its impact in the particular case.<sup>16</sup> The core issue is whether, in adopting the blanket ban and striking the balance it did, the legislature acted within the margin of appreciation afforded to it.<sup>17</sup>

Where there has been such a “proper” debate, this widens the margin of appreciation, allowing more weight to be given to the domestic legislature’s assessment.<sup>18</sup> Where the quality of debate at national level is strong, the ECHR should fully embrace its subsidiary role and approach the measure in question

<sup>12</sup> Judgment of the Constitutional Court of the Republic of Latvia of 25 March 2021 in Case No. 2020-36-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/07/2020-36-01\\_Spriedums.pdf#search=](https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/07/2020-36-01_Spriedums.pdf#search=) [viewed 29.10.2021.].

<sup>13</sup> Arnardóttir O. M. The “procedural turn” under the European Convention on Human Rights and presumptions of Convention compliance. Oxford University Press and New York University School of Law. *I•CON* (2017), Vol. 15, No. 1, pp. 9–35.

<sup>14</sup> Arnardóttir O. M. Organised Retreat? The Move from ‘Substantive’ to ‘Procedural’ Review in the ECtHR’s Case Law on the Margin of Appreciation. Available: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2709669](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2709669) [viewed 02.11.2021.].

<sup>15</sup> ECHR judgment in Case *Animal Defenders International v. the United Kingdom*.

<sup>16</sup> *Ibid.*

<sup>17</sup> ECHR judgment of 10 April 2007 in Case *Evans v. the United Kingdom* (application No. 6339/05).

<sup>18</sup> Cumper P., Lewis T. 2019, pp. 611–638.

with a presumption of deference to be rebutted only by weighty considerations.<sup>19</sup> This approach is part of the process of reformulating the substantive and procedural criteria that regulate the appropriate level of deference to be afforded to the Member States of European Convention of the Human Rights (hereinafter – the Convention)<sup>20</sup>, so as to implement a more robust and coherent concept of subsidiarity in conformity with Protocol No. 15 amending the Convention.<sup>21</sup> According to this protocol, the contracting parties affirmed that they, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the protocols and enjoy a margin of appreciation, subject to the supervisory jurisdiction of the ECHR.<sup>22</sup>

Legal experts have expressed an opinion the procedural review implies a more limited jurisdiction.<sup>23</sup> The ECHR, however, is not merely accepting the government's word that there has been some debate. The ECHR will look at whether or not the debate has been the right kind of debate, which takes into consideration the human right and weighs it in the balance against competing considerations of public policy.<sup>24</sup> For instance, in case *Shindler v. the United Kingdom* the ECHR noted that the existence of parliamentary scrutiny was “relevant, but not necessarily decisive, to the Court's proportionality assessment”.<sup>25</sup>

Similarly, the Constitutional Court focuses more on legislative process. Namely, the court requires the legislator to conduct a broader assessment of a restriction. Specifically, in addition to the “classical” methodology for constitutionality of the restriction of fundamental rights, the Constitutional Court always ascertains that the legislator has: (1) substantiated the need for the blanket ban, (2) examined the substance of the blanket ban and the consequences of its application and (3) substantiated that, if exemption to this blanket ban were envisaged, it would be impossible to reach its aim in the same quality.<sup>26</sup>

Under the first criterion the Constitutional Court evaluates the drafting materials of the law and analyses whether the legislator has substantiated the necessity of the blanket ban.<sup>27</sup> When analysing compliance with the second criterion, it is important whether the legislator has substantiated that a ban

<sup>19</sup> Cumper P., Lewis T. 2019, pp. 611–638.

<sup>20</sup> European Convention on Human Rights. Signed in Rome on 04.11.1950. [in the wording of 05.11.2021.].

<sup>21</sup> Spano R. *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*. *Human Rights Law Review*, 2014, 14, pp. 487–502.

<sup>22</sup> Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms. Signed in Strasbourg on 24.06.2013. [in the wording of 05.11.2021.].

<sup>23</sup> See, for example, Arnardóttir O. M. *Organised Retreat? The Move from ‘Substantive’ to ‘Procedural’ Review in the ECtHR's Case Law on the Margin of Appreciation*.

<sup>24</sup> Cumper P., Lewis T. 2019, pp. 611–638.

<sup>25</sup> ECHR judgment of 7 May 2013 in Case *Shindler v. United Kingdom* (application No. 19840/09).

<sup>26</sup> Judgment of the Constitutional Court of the Republic of Latvia of 17 December 2020 in Case No. 2020-18-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2020/03/2020-18-01\\_Lemums\\_ierosinasana.pdf#search=](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2020/03/2020-18-01_Lemums_ierosinasana.pdf#search=) [viewed 27.10.2021.].

<sup>27</sup> Judgment of the Constitutional Court of the Republic of Latvia in Case No. 2020-36-01.

is necessary to the specific extent, as well as assessed the consequences of its application.<sup>28</sup> The court attaches importance to the fact whether after the adoption of the impugned norm the legislator has reviewed this issue.<sup>29</sup> In addition, the legislator shall ensure that the consequences of the blanket ban are proportionate, for instance, taking into account that a person's behaviour and attitude towards a criminal offense committed, as well as the value system, may change over time.<sup>30</sup>

Lastly, the Constitutional Court examines if the legislator had made sure that the blanket ban is the only means whereby the legitimate aim can be achieved.<sup>31</sup> Exceptions to the blanket ban can vary, for example, a regulation that allows individual assessment in certain cases, exceptions specified in the law, a regulation that would provide for a periodic review of the need for a ban.<sup>32</sup> Later on, the Constitutional Court developed this criteria even further by recognizing that, when examining the constitutionality of the blanket ban, it assesses not only whether the legislator, when imposing such a prohibition, has weighed the opposite interests affected by the restriction, but also if the legislator has done so in accordance with general legal principles and other norms of the constitution.<sup>33</sup> This means that the Constitutional Court, just like the ECHR, also examines the constitutionality of the assessment and conclusions made by legislator.

Considering the above, both courts have developed specific approach for the assessment of the blanket ban, where focus is on legislative process underlying these bans, instead of a compliance with the Convention or the constitution by substance. This approach, however, does not mean that the courts are merely looking at whether or not there has been the debate – they also examine whether it has been the right kind of debate, which is compliant with the Convention or the constitution. The main difference in approaches used by both courts are the consequences of insufficient legislative deliberations. The ECHR will not grant a broader margin of appreciation for the state in that case and will assess the blanket ban according to classical approach. In the Constitutional Court that, however, shall lead to a conclusion that an impugned norm is not compatible with the constitution.

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<sup>28</sup> Judgment of the Constitutional Court of the Republic of Latvia in Case No. 2017-07-01.

<sup>29</sup> *Ibid.*

<sup>30</sup> Judgment of the Constitutional Court of the Republic of Latvia of 28 January 2021 in Case No. 2020-29-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/05/2020-29-01\\_Spriedums.pdf#search=](https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/05/2020-29-01_Spriedums.pdf#search=) [viewed 25.10.2021.].

<sup>31</sup> Judgment of the Constitutional Court of the Republic of Latvia in Case No. 2017-07-01.

<sup>32</sup> *Ibid.*

<sup>33</sup> Judgment of the Constitutional Court of the Republic of Latvia in Case No. 2020-36-01.

### 3. Objections to the concept of the blanket ban

Dissenting opinions of judges of the both courts and legal literature demonstrate that views on the concept of the blanket ban are ambiguous.

As regards the ECHR, in joint dissenting opinion of judges Ziemele, Sajo, Kalaydjieva, Vucinic and de Gaetano to case *Animal Defenders* argued that this approach ran the risk of establishing a double standard within the context of a Convention whose minimum standards should be equally applicable to all Member States.<sup>34</sup> Namely, the same kind of ban could be declared as compatible with the Convention, whereas in another case – not compatible. The case *VgT Verein gegen Tierfabriken v. Switzerland* similarly as *Animal Defenders*' case concerned ban on broadcasting video concerning animal defending.<sup>35</sup> In *VgT* judgment, however, the term “blanket ban” or similar was not mentioned. The ECHR, in contrast to *Animal Defenders*' case, found a violation of Article 10 of the Convention. In the ECHR's view, the Swiss authorities did not provide an “appropriate and sufficient” justification for the restriction in the applicant's particular circumstances.

Furthermore, the aforementioned judges pointed out that the fact that the blanket ban was enacted in a fair and careful manner by parliament should not alter the duty incumbent upon the ECHR to apply the standards established in the Convention, nor does it necessarily mean that the conclusion reached by the legislature is Convention compliant or alter the margin of appreciation accorded to the state. This may have the effect of sweeping away the commitments of High Contracting Parties under the Convention. Similarly, judges Tulkens, Spielmann and Laffranque argued that the central issue is the proportionality of the disputed ban.<sup>36</sup> Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens in their dissenting opinion to judgment in *Hirst (No. 2)* case considered that it was not for the ECHR to prescribe the way in which national legislatures carry out their legislative functions.<sup>37</sup>

In a legal literature, we can find objections that this procedural turn in the blanket ban cases may have serious consequences for the protection of the rights of those from some of Europe's most vulnerable minorities, whose voices may struggle to be heard in the democratic forums of state's parties, no matter how rigorous those institutions' processes are.<sup>38</sup> However, the ECHR is looking at whether or not the debate has been the right kind of debate, which takes

<sup>34</sup> Dissenting opinion of judges Ziemele, Sajo, Kalaydjieva, Vucinic and de Gaetano of 22 April 2013 in ECHR Case *Animal Defenders International v. the United Kingdom* (application No. 48876/08).

<sup>35</sup> ECHR judgment of 28 June 2001 in Case *VgT Verein gegen Tierfabriken v. Switzerland* (application No 24699/94).

<sup>36</sup> Dissenting opinion of judges Tulkens, Spielmann and Laffranque of 22 April 2013 in ECHR Case *Animal Defenders International v. the United Kingdom* (application No. 48876/08).

<sup>37</sup> Dissenting opinion of judges Wildhaber, Costa, Lorenzen, Kovler and Jebens of 6 October 2005 in ECHR Case *Hirst v the United Kingdom (No. 2)* (application No. 74025/01).

<sup>38</sup> Cumper P., Lewis T. 2019, pp. 611–638.



into consideration the competing interests.<sup>39</sup> Concerns are also expressed that procedural review, in effect, writes the individual applicant out of the equation, as it is difficult to see, from the right holder's perspective, why the quality and quantity of debate should have a determinative impact on whether there has been a violation of their rights.<sup>40</sup>

Consequently, the ECHR's approach in the blanket ban cases is criticized for its inconsistency, not providing wholesome protection of interfered human rights and unnecessary intervention with national legislative processes.

In regard to the Constitutional Court, some judges in their dissenting opinions have expressed objections not only against the methodology for assessing blanket bans, but also the concept as such. They believe that the definition of the blanket ban is too broad, as it effectively means that any prohibition without an individual assessment is regarded as the blanket ban. Namely, they consider that ban, e.g., for persons convicted of crimes related to violence shall be recognized as an exception already, and thus such bans are not blanket.<sup>41</sup> In their opinion, a ban is absolute only if it is comprehensive or unlimited, for instance, certain types of advertising are banned in all media.<sup>42</sup>

Regarding the methodology, the judges' main argument is that the constitutionality of any prohibition can be effectively examined by applying the classical methodology for assessing the constitutionality of the restriction of fundamental rights. Judges consider that overly detailed assessment of discussions during the legislation process causes the court to intervene, to a certain extent, with the issues of the internal work agenda of the legislator. The statements of the deputies cannot be the only decisive arguments for the objective assessment of the necessity of the restriction. The absence of a debate does not in any way mean that the legislature has not, in essence, assessed and justified the need for such a ban. The ban could be self-evident in a way that it does not require a detailed justification.<sup>43</sup>

Thus, the judges of the Constitutional Court in their dissenting opinions have pointed to the broadness of the blanket ban definition, as well as the fact

<sup>39</sup> ECHR judgment in Case *Hirst v. the United Kingdom* (No. 2).

<sup>40</sup> Lewis T. *Animal Defenders International v. United Kingdom*: sensible dialogue or a bad case of Strasbourg jitters? *The Modern Law Review*, 2014, 77 (3), pp. 460–474.

<sup>41</sup> Dissenting opinion of judge of the Constitutional Court of the Republic of Latvia Aldis Lavins of 8 December 2017 in Case No. 2017-07-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/03/2017-07-01\\_Atseviskas\\_domas\\_Lavins.pdf#search=\[viewed 02.11.2021.\]](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/03/2017-07-01_Atseviskas_domas_Lavins.pdf#search=[viewed 02.11.2021.]); Dissenting opinion of judge of the Constitutional Court of the Republic of Latvia Aldis Lavins of 18 December 2019 in Case No. 2019-01-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2019/01/2019-01-01\\_Atseviskas\\_domas\\_Lavi%C5%86%C5%A1.pdf#search=\[viewed 02.11.2021.\]](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2019/01/2019-01-01_Atseviskas_domas_Lavi%C5%86%C5%A1.pdf#search=[viewed 02.11.2021.]).

<sup>42</sup> Dissenting opinion of judge of the Constitutional Court of the Republic of Latvia Aldis Lavins of 18 December 2019 in Case No. 2019-01-01.

<sup>43</sup> Dissenting opinion of judges of the Constitutional Court of the Republic of Latvia Janis Neimanis un Aldis Lavins of 11 February 2021 in Case No. 2020-29-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/05/2020-29-01\\_Atseviskas\\_domas\\_Lavins\\_Neimanis.pdf#search=\[viewed 01.11.2021.\]](https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/05/2020-29-01_Atseviskas_domas_Lavins_Neimanis.pdf#search=[viewed 01.11.2021.]).

that it imposes disproportionate requirements on the legislator and unnecessarily intervenes with the legislative process.

Opposing the views above, the approach for assessing the blanket ban does not restrict the autonomy of the parliament, but allows the parliament to re-evaluate and justify, within the limits of its discretion, the need for a restriction that significantly curbs the fundamental rights. Thus, the public is provided with an explanation as to why such a far-reaching restriction of fundamental rights is necessary and whether no alternative, less restrictive means exist to achieve the legitimate aim.

## Conclusion

1. The ECHR and the Constitutional Court have developed the concept of the blanket ban in order to describe and assess absolute human rights restrictions. Understanding of this concept in both courts is similar – prohibition applicable to all persons in a certain group without exception, regardless of individual circumstances. In the Constitutional Court, however, another decisive factor is whether the ban is established for life, whereas for the ECHR it is the only circumstance to be considered in the proportionality part.
2. The approach for assessing the blanket ban in the ECHR and the Constitutional Court focuses on the quality of legislative processes instead of the proportionality of the particular restriction. Consequences of insufficient legislative debate, however, differs between these courts. The ECHR will not grant a broader margin of appreciation for the state in that case, and will assess the blanket ban according to the classical approach, whereas in the Constitutional Court that shall lead to a conclusion that an impugned norm is not compatible with the constitution.
3. The approach for assessing the blanket ban is not limiting the competence of the ECHR and the Constitutional Court. The both courts are not only making sure that there has been some legislative debate, but also look at whether this debate is compliant with the Convention or the constitution.
4. The judges in their dissenting opinions, as well as legal experts as regards the both courts have criticized the approach in the blanket ban cases, targeting unnecessary intervention with legislative processes. Opposing this view, the approach for the blanket ban does not restrict the autonomy of the parliament, but allows the parliament to re-evaluate and justify, within the limits of its discretion, the need for a restriction that significantly curbs the fundamental rights. The broader assessment is required to provide the public with an explanation as to why such a far-reaching restriction of fundamental rights is necessary, and whether no alternative, less restrictive means exist to achieve the legitimate aim.

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## EUROPEAN COURT OF HUMAN RIGHTS AND COVID-19: WHAT ARE STANDARDS FOR HEALTH EMERGENCIES?

**Keywords:** European Court of Human Rights, COVID-19, emergency, proportionality

### Summary

The European Court of Human Rights is currently facing a challenge in dealing with numerous applications linked to the COVID-19 pandemic and the related restrictions aiming to protect human life and health, which, at the same time, limit some of the most important human rights and fundamental freedoms. Legal scholars have voiced different views as to the complexity of this task, invoking the previous case law on infectious diseases and on military emergencies to infer standards that would be transferrable to COVID-19-related cases, or the margin of appreciation of domestic authorities pertaining to health care policy as the approaches ECtHR could take in this respect. The present paper argues that the ECtHR would be well advised to resort to a more systemic integrated approach, which implies the need to consider obligations emanating from other health-related international instruments in setting the standards against which it will assess the limitations of human rights during the COVID-19 outbreak. Hence, the authors reflect on the potential contribution of the integrated approach to the proper response of the ECtHR in times of the pandemic. The review shows that both the ECtHR's caselaw on the integrated approach, as well as its theoretical foundation leave enough room for a wide application by the ECtHR of the right to health, and likewise – soft law standards emanating from the various public health-related instruments, when adjudicating cases dealing with the alleged violations of human rights committed during the COVID-19 outbreak. Subsequently, the paper critically assesses to what extent the ECtHR has taken into account the right to health-related instruments in its previous case law on infectious diseases. This is followed by a review of the existing, albeit sparse, jurisprudence of the ECtHR in its ongoing litigations pertaining to restrictions provoked by COVID-19 pandemic, viewing them also in the context of the integrated approach. The analysis shows that ECtHR did not systemically utilize the integrated approach when addressing the right to health, even though it did seem to

acknowledge its potential. The authors then go on to scrutinize the relevant health emergency standards stemming from international documents and to offer them as a specific guidance to the ECtHR regarding the scope of the right to health which will help in framing the analysis and debate about how the right to health is guaranteed in the context of COVID-19. Consequently, building on the proposed integrity approach, examined theoretical approaches, and standards on the right to health acknowledged in relevant supranational and international instruments, the authors formulate guidance on the path to be taken by the ECtHR.

## Introduction

The current COVID-19 pandemic has pushed a number of States Parties to the European Convention on Human Rights (ECHR) to limit some of the most important human rights and fundamental freedoms, which are protected by the ECHR by putting in place COVID-19 restrictions predominantly aimed to protect human life and health. Some of those emergency measures have been already challenged at national and supranational levels.

Since applicants can bring complaints before the European Court of Human Rights (ECtHR) only after exhausting internal remedies, most applications lodged in response to the national restrictions of human rights that were imposed due to the COVID-19 outbreak are still pending before national courts and are expected to reach the ECtHR in the near future. The ones that have reached the ECtHR and the ensuing ECtHR practice already show the diversity of rights and testify to the difficult task faced by the ECtHR.<sup>1</sup> These applications raise questions under a broad range of ECHR provisions, including, but not limited to those pertaining to the right to life, the prohibition of torture and inhuman or degrading treatment, the right to liberty and security, the right to a fair trial, and the right to respect for private and family life. As of October 2021, there are over forty applications submitted to the ECtHR in relation to the COVID-19 health crisis. Most applications that have been brought before the ECtHR are yet to be judged. It is noteworthy that out of the cases in which a decision has been rendered, ECtHR found the violation of the ECHR rights only in one case, while all other applications were declared inadmissible.

There are differences in opinion regarding the extent of challenge the ECtHR is to face in response to COVID-19. Some authors argue that the ECtHR will not be faced with a difficult task, given that its case law on infectious diseases and public health issues is easily applicable to the current COVID-19 situation.<sup>2</sup> Others

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<sup>1</sup> Gambardella I. The COVID-19 pandemic and human rights: The European Court of Human Rights as the last resort for judicial oversight? 2021. Available: <https://www.iee-ulb.eu/en/blog/articles/the-covid-19-pandemic-and-human-rights-the-european-court-of-human-rights-as-the-last-resort-for-judicial-oversight/> [viewed 19.10.2021.].

<sup>2</sup> See, for instance: Tsampi A. Public Health and the European Court of Human Rights: Using Strasbourg's Arsenal in the COVID-19 Era. 2020. Available: <https://www.rug.nl/rechten/onderzoek/expertisecentra/ghlg/blog/public-health-and-the-european-court-of-human-rights-27-03-2020?lang=en> [viewed 18.09.2021.].

claim that the COVID-19 is the first pandemic the ECtHR has had to grapple with, and that the previous case law on public health and infectious diseases is sparse and as such – of minimal help with regard to the reviewing the limitations of human rights provoked by the COVID-19 outbreak.<sup>3</sup> In that context, some legal scholars offer the case law on military emergencies to infer standards that would be transferrable to the health emergency<sup>4</sup> triggered by the COVID-19 pandemic.<sup>5</sup> This approach does not seem optimal, as it neglects and misunderstands the specifics of the current pandemic and the distinction between health and military emergencies. Other scholars invoke and try to apply to COVID-19 situations the ECtHR dictum in *Shelley v the United Kingdom* according to which “[m]atters of health care policy [...] are in principle within the margin of appreciation of the domestic authorities who are best placed to assess priorities, use of resources and social needs”.<sup>6</sup> This approach also has some drawbacks, as it entails a danger of recognizing a broad margin of appreciation related to issues that are not only capable of having a profound adverse impact on human rights but are also inherently trans-national, given that the threat of COVID-19 is universal. Hence, the ECtHR’s intervention in these cases is particularly necessary.

Taking as a starting point the literature dealing with the unprecedented situation encountered by the ECtHR in applying a proportionality test to accommodate emergency coronavirus measures, the authors of this paper will argue that the ECtHR would be well advised to resort to a more systemic integrated approach, which implies the need to consider obligations emanating from other human rights instruments in setting the standards against which it will assess the limitations of human rights during COVID-19 outbreak.<sup>7</sup> Firstly, the authors will reflect on the potential contribution of the integrated approach to the proper response of the ECtHR in times of the pandemic. Subsequently, the paper will critically assess to what extent, if any, the ECtHR has taken into account the provisions of the right to health-related instruments in its previous case law on infectious diseases, as well as whether it has gone into that direction in its ongoing

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<sup>3</sup> Greene A. States Should Declare a State of Emergency Using Article 15 ECHR to Confront the Coronavirus Pandemic. 2020. Available: <https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/> [viewed 16.10.2021.]; Tzevelekos V. P., Dzehtsiarou K. Editorial: Normal as Usual? Human Rights in Times of COVID-19, *European Convention on Human Rights Law Review*, 2020, Vol. 1, No. 2, pp. 141–149.

<sup>4</sup> In this paper, the terms “health emergency” and “public health emergency” will be used interchangeably.

<sup>5</sup> Tzevelekos V. P., Dzehtsiarou K. 2020, p. 145; Jovičić S. COVID-19 restrictions on human rights in the light of the case law of the European Court of Human Rights. *ERA Forum* 21, p. 559, 2021. <https://doi.org/10.1007/s12027-020-00630-w>. p. 559.

<sup>6</sup> See, for example, Dzehtsiarou K. Article 15 Derogations: Are They Really Necessary during the COVID-19 Pandemic? *European Human Rights Law Review*, 2020, No. 4. pp. 360, 361; Tsampi A. 2020.

<sup>7</sup> Gambardella I. 2021.

litigations pertaining to restrictions provoked by COVID-19 pandemic.<sup>8</sup> Finally, the authors scrutinize the relevant health emergency standards stemming from international documents. Building on the proposed integrity approach, guidance on the path to be taken by the ECtHR in the context of health emergencies will be offered, by relying upon theoretical approaches, and standards governing the right to health which are already acknowledged in relevant supranational and international instruments.

## 1. Scope of the integrated approach of the European Court of Human Rights

The assessment in the following paragraphs will be focused only on the extent to which the ECtHR can afford protection to the right to health in the context of health emergencies. It is widely known that, with the exception of the First Protocol that governs the right to property and the right to education, the ECHR focuses almost entirely on civil and political rights.<sup>9</sup> While the right to health as a fundamental economic and social right is not included in the scope of the ECHR, there is a broad spectrum of prescribed limitations of ECHR's rights and freedoms based on the ground of "the protection of health".<sup>10</sup>

The integrated approach is an interpretive technique adopted by the ECtHR, which takes note of social and labour rights in the interpretation of civil and political rights granting them certain protection.<sup>11</sup> A long time ago, the ECtHR in its judgment in *Airey v Ireland* laid the foundations for further development of the integrated approach, holding that "there is no water-tight division separating" socio-economic rights from civil and political rights.<sup>12</sup>

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<sup>8</sup> The analysis of the ECtHR current caselaw relies on the information provided in the ECtHR. ECHR, Press Unit, Factsheet, COVID-19 health crisis of October 2021.

<sup>9</sup> Palmer E. Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights. *Erasmus Law Review*, 2009, Vol. 2, No. 4, p. 398.

<sup>10</sup> The "the protection of health" is expressly determined as a ground for the limitations of the exercise of the right to respect private and family life, freedom of thought, conscience and religion freedom of expression, freedom of assembly and association and freedom of movement. Moreover, Art. 5 guaranteeing the right to liberty and security of the ECHR also envisages restriction by stipulating that the "lawful detention of persons for the prevention of the spreading of infectious diseases" will not constitute the violation of the right to liberty and security.

<sup>11</sup> The given jurisprudential technique is not characteristic only of the ECtHR, but instead is also applied by other courts in order to protect social and labour rights at international, regional and domestic level. Mantouvalou V. Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation. *Human Rights Law Review*, 2013, Vol. 13. No. 3, p. 529.

<sup>12</sup> See the ECHR judgment of 9 October 1979 in Case *Airey v. Ireland* (application No. 6289/73, para. 26 as referred to in: Sychenko E. Enlarging the Scope of the European Convention on Human Rights: History Philosophical Roots and Practical Outcomes. *Zbornik PFZ*, 2015, Vol. 65, No. 2, p. 314; Palmer E. 2009, p. 398.



In order to understand the exact scope and nature of the ECtHR's integrated approach in the interpretation of the ECHR, it is important to consider the decision in the case *Demir and Baykara v. Turkey*,<sup>13</sup> which serves as an illustrative example of acknowledgement of the unhindered references to international law, as well as of a high level of the ECtHR's judicial activism in the area of social rights.<sup>14</sup> Taking the systematization offered by Forowicz as a point of departure, with regards to the extent of the reception of international law in the ECtHR, the case *Demir and Baykara v. Turkey* can be considered as an application of "open paradigm", being sharply opposed to instances of the "closed paradigm" characterized by judicial restraint and comparatively sparse referencing to international law.<sup>15</sup> In the given case, the respondent State challenged the use of International Labour Organization (ILO) materials in the interpretation of Art. 11 of the ECHR since it had not signed up to them. However, the ECtHR firmly observed in this connection that in searching for common ground among the norms of international law, it has never distinguished between sources of law according to whether they have been signed or ratified by the respondent State.<sup>16</sup> This approach initially triggered a wave of criticism from both the judges of the ECtHR and scholars, but this backlash gradually dissipated.<sup>17</sup> The ECtHR in its subsequent case law continued to apply the "open paradigm" approach, thus broadening the scope of the ECHR through its interpretation in "harmony with other rules of international law of which it forms part".<sup>18</sup>

Although Mantouvalou argues that the integrated approach to ECHR interpretation still needs a firm theoretical grounding,<sup>19</sup> it seems that Sychenko rightly claims that Sen's theory of capabilities may serve as a solid justification of this method of interpretation.<sup>20</sup> According to the theory of capabilities, the framework of human rights was missing a notion of "basic capabilities", which is understood to imply the necessity of protection of all the rights that influence a person's functioning. Such a notion thus rejects the conceptual differences

<sup>13</sup> ECHR judgment of 12 November 2008 in Case *Demir and Baykara v. Turkey*, Grand Chamber (application No. 34503/97).

<sup>14</sup> Sychenko E. 2015, p. 321.

<sup>15</sup> Forowicz M. *The Reception of International Law in the European Court of Human Rights*. New York: Oxford University Press, 2010, p. 4. as referred to in: Sychenko E. 2015, p. 321.

<sup>16</sup> See ECHR judgment of 12 November 2008 in Case *Demir and Baykara v. Turkey*, Grand Chamber (application No. 34503/97), paras. 85 and 86 referred to as in: Sychenko E. 2015, pp. 321 and 322.

<sup>17</sup> See on criticism: Wildhaber L., Hjartarson A. and Donnelly S. No Consensus on Consensus? The Practice of the European Court of Human Rights, *Human Rights Law Journal*, Vol. 33, No. 7–12, 2013, p. 252. and Nordeide R. *Demir & Baykara v. Turkey – European Court of Human Rights Judgement on Rights of Trade Union Formation and of Collective Bargaining*, *American Journal of International Law*, 2009, Vol. 103, No. 3, p. 572.

<sup>18</sup> ECHR judgment of 7 January 2010 in Case *Rantsev v. Cyprus and Russia* (application No. 25965/04), para. 274.

<sup>19</sup> Mantouvalou V. *Labour Law and Human Rights*. 2016. Available: [https://discovery.ucl.ac.uk/id/eprint/1526806/1/Mantouvalou\\_Labour%20Law%20and%20Human%20Rights.pdf](https://discovery.ucl.ac.uk/id/eprint/1526806/1/Mantouvalou_Labour%20Law%20and%20Human%20Rights.pdf) [viewed 18.10.2021.].

<sup>20</sup> Sychenko E. 2015, pp. 315–316.

between the first and second generation of human rights.<sup>21</sup> Sen further posits that reliance on the “open public reasoning” is critical for the understanding and protection of human rights.<sup>22</sup> The integrated approach so far applied by the ECtHR goes hand in hand with this Sen’s view, since the ECtHR in its caselaw considers the achieved compromise between the majority of European countries on a specific matter as a reliable sign for the integration of “new” rights into the ECHR.

Both the ECtHR’s caselaw on the integrated approach and its theoretical foundation leave enough room for a wide application of the right to health, as well as of soft law standards emanating from the various public health related instruments by the ECtHR when adjudicating cases dealing with the alleged violations of human rights committed during the COVID-19 outbreak.

### **3. Integration of health emergency standards in the case law of the European Court of Human Rights pertaining to infectious diseases**

The established ECtHR case law linked to infectious diseases is in fact rather sparse. In the past, the ECtHR dealt with cases concerning the prevention of the spreading of contagious diseases such as hepatitis, tuberculosis and HIV. After the examination of the previous case law on hepatitis, tuberculosis and HIV, the current jurisprudence on COVID-19 pandemic will be reviewed.

#### **3.1. Established jurisprudence related to hepatitis, tuberculosis and HIV**

The case law pertaining to HIV, as well as previous cases related to other infectious diseases, offer a useful glimpse of how the ECtHR has assessed communicable diseases in the past. At the same time, it shows the lack of full integration of the health emergency standards stemming from other international instruments.

With regard to judgments rendered in the context of the prevention of spreading tuberculosis and hepatitis in its case law addressing systemic problems of medical care in Georgian prisons during the 2000s, the ECtHR developed a relevant set of positive obligations needed to prevent the spread of tuberculosis and hepatitis.<sup>23</sup> However, those cases are not sufficiently applicable to COVID-19

<sup>21</sup> Sen A. *Elements of a Theory of Human Rights*. Philosophy & Public Affairs, 2004, Vol. 32, No. 4, pp. 345–348; Sen A. *Equality of What?* Tanner Lecture delivered at Stanford University. 1979. Available: [https://tannerlectures.utah.edu/\\_documents/a-to-z/s/sen80.pdf](https://tannerlectures.utah.edu/_documents/a-to-z/s/sen80.pdf) [viewed 23.08.2021].

<sup>22</sup> Sen A. 2004, p. 322.

<sup>23</sup> ECHR judgement of 24 February 2009 in Case Poghosyan v Georgia (application No. 9870/07) para. 70 and ECHR judgement of 3 March 2009 in Case Ghavtadze v. Georgia (application No. 23204/07), para. 105.

scenarios and nationwide measures, due to the fact that they concern health care measures in the limited context of prisons.

Nonetheless, a closer look at two relevant judgments in this context is warranted, as it shows that in its assessment ECtHR did not give equal regard to health standards emanating from other international instruments. While the judgment in the case *Poghossian v. Georgia* fully failed to consider health-related standards emanating from such instruments, the same does not apply to the case *Ghavitadze v. Georgia*. In the latter case, the ECtHR did not limit its efforts on the screening of the European Committee for the Prevention of Torture (CPT) report calling upon the Georgian authorities to persevere in their efforts to combat tuberculosis in the prison system, but also referred to the Guidelines for the Control of Tuberculosis in Prisons, which were jointly developed by the World Health Organization (WHO) and International Committee of the Red Cross. Furthermore, when determining the alleged violation of Art. 3 of the ECHR, the ECtHR again invoked the CPT report and found that competent authorities did not fulfil their positive obligation to protect the applicant's health.<sup>24</sup>

As for the previous pandemic-related cases, which hence imply nationwide measures that have been brought to the ECtHR before the COVID-19, these are cases that relate to HIV. The most relevant HIV related cases can be classified into three groups. The first group consists of cases that predominantly pertain to the protection of the confidentiality of information about a person's HIV infection.<sup>25</sup> The second group relates to quarantine, isolation, complete lockdown and other measures restricting the liberty or freedom of movement.<sup>26</sup> Finally, the third group of cases pertains to travel restrictions and restrictions on residence rights as means for the protection of public health against HIV.<sup>27</sup>

Although the Joint United Nations Programme on HIV/AIDS (UNAIDS) suggested in its recent report that the lessons learnt from the HIV experience should not be neglected when assessing limitations to human rights in the COVID-19 era, it seems that the HIV connected case law will have only limited impact on cases in times of COVID-19 pandemic. This is perhaps most visible with regards to the third group of HIV cases, pertaining to restrictions to the right to liberty

<sup>24</sup> ECHR judgement of 3 March 2009 in Case *Ghavitadze v Georgia* (application No. 23204/07), paras 56, 57, 93–95.

<sup>25</sup> ECHR judgement of 25 February 1997 in Case *Z v. Finland* (application No. 22009/93), para. 96; ECHR decision of 19 March 2015 in Case *Y.Y. v. Turkey* (application No. 14793/08), paras. 77–78; ECHR judgement of 25 November 2008 in Case *Armonienė v. Lithuania* (application No. 36919/02); ECHR judgement of 25 November 2008 in Case *Biriuk v. Lithuania* (application No. 23373/03); ECHR judgment of 3 October 2013 in Case *I. B. v. Greece* (application No. 552/10).

<sup>26</sup> ECHR judgement of 25 January 2005 in Case *Enhorn v. Sweden* (application No. 56529/00).

<sup>27</sup> ECHR, judgement of 10 March 2011 in Case *Kiyutin v. Russia* (application No. 2700/10) para. 68. That was the first time that the ECtHR ruled on the merits of a claim of discrimination on the ground of a person's HIV-positive status. *Timmer A. Kiyutin v Russia: Landmark case concerning the human rights of people living with HIV*, 2011. Available: <https://strasbourgobservers.com/2011/03/21/kiyutin-v-russia-landmark-case-concerning-the-human-rights-of-people-living-with-hiv/> [viewed 11.09.2021.]; ECHR judgement of 15 March 2016 in Case *Novruk and others v Russia* (applications Nos. 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14).

and freedom of movement, where the difference from the COVID-19 situations is undisputable. Namely, while HIV connected cases such as *Enhorn v Sweden* pertain to the compulsory detention of infected persons, the present COVID-19 crisis implies detentions and lockdowns of massive character where the entire population is subject to quarantine regardless whether they are infected at the material time.<sup>28</sup>

The HIV connected case law of the ECtHR likewise does not offer a systematic integration of the health-related standards stemming from international documents. In certain cases, such as *Z v. Finland*, and *Y.Y. v. Turkey*, pertaining to the protection of the confidentiality of information about a person's HIV infection, the ECtHR failed to give any regard to the right to health and health standards emanating from other international documents. In other cases concerning the same legal matter, ECtHR took an opposite, but still not fully coherent approach. More concretely, in two cases against Lithuania, ECtHR pursued a consistent approach of making a reference only to one document of the Committee of Ministers of the Council of Europe (CoE) regulating the ethical issues of HIV infection in the health care and social settings.<sup>29</sup> However, what was lacking in these judgments was the further contextualization of the referenced document. On the other hand, in the case *I.B. v. Greece*, the ECtHR took a more detailed approach by initially making a reference to a wide range of relevant hard and soft law international instruments, including the International Covenant of the Economic, Social and Cultural Rights (ICESCR), related General Comment No. 20 on Non-Discrimination,<sup>30</sup> and documents of the ILO and Parliamentary Assembly of the CoE (PACE) pertaining to AIDS and human rights<sup>31</sup> and then went on to base its argumentation on the some of the aforementioned documents.<sup>32</sup>

Although the *Enhorn v. Sweden* presents a landmark judgment in the area of compulsory isolation, the ECtHR's approach in this case is not sufficiently advanced in terms of providing full integration of other international documents pertaining to the right to health. Namely, while in *Enhorn v. Sweden* the ECtHR proceeded with making a reference to relevant international instruments,<sup>33</sup> it failed to further elaborate on these documents in its assessment.

<sup>28</sup> Tsampi A. 2020.

<sup>29</sup> Both refer to the Recommendation No. R (89) 14 on "The ethical issues of HIV infection in the health care and social settings", adopted by the Committee of Ministers of the CoE on 24 October 1989.

<sup>30</sup> General Comment No. 20: Non-Discrimination in economic, social and cultural rights (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2009.

<sup>31</sup> These are, as follows: ILO Recommendation concerning HIV and AIDS and the World of Work, 2010 (No. 200); PACE Recommendation 1116 (1989) on AIDS and human rights; PACE Resolution 1536 (2007) on HIV/AIDS in Europe.

<sup>32</sup> See ECHR judgment of 3 October 2013 in Case *I. B. v. Greece* (application No. 552/10), para. 84.

<sup>33</sup> These are International Guidelines on HIV/AIDS and Human Rights jointly issued in 2006 by the Office of the High Commissioner for Human Rights and UNAIDS and Recommendation no. R (89) 14 on "The ethical issues of HIV infection in the health care and social settings", adopted by the Committee of Ministers of the CoE on 24 October 1989.

In its jurisprudence on the restriction of residence rights and travel restrictions, the ECtHR gave due regard to the international health standards. Such a more systematic approach may be explained by the fact that travel restrictions in times of pandemics are of crucial interest, while the ECtHR seemed to suggest an approach that diverged from the one formally recommended by the WHO.<sup>34</sup> Notably, in *Kiyutin v. Russia* case, concerning travel restrictions, the ECtHR referred to relevant international documents including those of the WHO, United Nations (UN) Commission on Human Rights, UNAIDS, IOM, and PACE<sup>35</sup> and even more importantly, relied on them in its balancing exercise. Finally, in *Novruk and others v. Russia* dealing with residence restrictions, the ECtHR attributed less weight to international instruments, but in its reliance on the arguments from *Kiyutin v. Russia*, the ECtHR indirectly took into account relevant international documents and reports.<sup>36</sup>

The above discussion indicates that the ECtHR does not pay equal levels of attention to international health standards in its case law on infectious diseases. The reason behind its selective approach remains unclear, since it is not attributable to the chronological development of ECtHR doctrine nor to legal matters engaged.

### 3.2. Current jurisprudence related to COVID-19

Between March and April 2020, ten states have officially derogated from their obligations under the ECHR, invoking the public health emergency posed by the pandemic. In doing so, they applied Art. 15 of the ECHR related to the “derogation in time of emergency”.<sup>37</sup> The ECtHR position with regards to cases against the said ten countries is particularly challenging in that respect since the COVID-19 pandemic is the first time in the history that the ECtHR will have to deal with cases against states where the official derogations are in place based on the proclaimed public health emergency under Art. 15 of the ECHR. The reasons are twofold.

<sup>34</sup> Tsampi A. 2020.

<sup>35</sup> These are, among others: Declaration of Commitment on HIV/AIDS (Resolution S-26/2) of 27 June 2001 adopted by the UN General Assembly; UN Commission on Human Rights Resolution No. 1995/44 on the protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS), adopted at its 53<sup>rd</sup> meeting on 3 March 1995; UN Commission on Human Rights Resolution No. 2005/84, adopted at its 61<sup>st</sup> meeting on 21 April 2005; ICESCR; PACE Recommendation 1116 (1989) on AIDS and human rights; PACE Resolution 1536 (2007) on HIV/AIDS in Europe; UN Commission on Human Rights Resolution No. 1995/44 on the protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS) adopted at its 53<sup>rd</sup> meeting on 3 March 1995; International Guidelines on HIV/AIDS and Human Rights jointly issued in 2006 by the Office of the High Commissioner for Human Rights and the UNAIDS.

<sup>36</sup> ECHR judgement of 15 March 2016 in Case *Novruk and others v. Russia* (Applications Nos 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14), paras 81–130.

<sup>37</sup> Jovičić S. 2021, p. 547.

Firstly, neither the public health grounds, nor the notion of health emergencies are explicitly included in Art. 15 of the ECHR. Therefore, the ECtHR will have to rely on other international hard and soft law instruments when assessing the proportionality of the exercised derogations. Secondly, before the COVID-19 pandemic, the ECtHR has not dealt with the derogations under Art. 15 in the context of public health emergencies, but instead only in the context of armed conflicts and terrorism.<sup>38</sup>

Some applications submitted against states which derogated from the ECHR under Art. 15, based on the proclaimed public health emergency in the context of COVID-19 pandemic, were communicated to the respective national governments,<sup>39</sup> while the ECtHR has already declared inadmissible one application against Romania.<sup>40</sup> The said application relates to the period when the official Art. 15 derogation was in place in Romania. In the given case, the WHO, as a relevant international actor in the field of health emergencies, was referenced, although its actions did not by any means influence the ECtHR decision. Namely, the ECtHR declared the application inadmissible as it found it to be incompatible with the provisions of the ECHR.<sup>41</sup> Therefore, the ECtHR, for the time being, did not decide on the merits of any of the cases when it comes to the applications against the states which derogated from Article 15 in the context of COVID-19 pandemic. Hence, it remains yet to be seen how the ECtHR will address those unprecedented situations.

The tasks of the ECtHR seem equally demanding in cases when it deals with COVID-19-related applications lodged against countries in the absence of their official Article 15 derogations on public health grounds. Thus far, the ECtHR has found the violation of the ECHR's rights only in one case (*Feilazoo v. Malta*).<sup>42</sup> Nevertheless, it did so without making any reference to the right to health or to other health emergency related instruments. Other relevant ECtHR decisions in which it rejected applications as inadmissible likewise do not refer to the right to health, nor do they provide any sufficient insights into the respective international materials

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<sup>38</sup> Jovičić S. 2021, p. 550.

<sup>39</sup> See, for instance: ECHR application in pending Case *Spinu v. Romania* communicated to the Romanian Government on 1 October 2020 (application No. 29443/20) and ECHR application in pending Case *Rus v. Romania* communicated to the Romanian Government on 11 June 2021 (application No. 2621/21).

<sup>40</sup> ECHR, decision on the admissibility of 20 May 2021 in Case *Terheş v. Romania* (application No. 49933/20).

<sup>41</sup> More specifically, the ECtHR found in the Case *Terheş v. Romania* that the lockdown ordered by the authorities to tackle the COVID-19 pandemic could not be equated with house arrest. Furthermore, the level of restrictions on the applicant's freedom of movement had not been such that the lockdown ordered by the national authorities could be deemed to constitute a deprivation of liberty. Therefore, in the ECtHR's view, the applicant could not be said to have been deprived of his liberty within the meaning of Art. 5 para. 1 of the ECHR. See: ECHR, Press Unit, Factsheet, COVID-19 health crisis of October 2021, p. 5.

<sup>42</sup> ECHR judgement of 11 March 2021 in Case *Feilazoo v. Malta* (application No. 6865/19) as referred to in: ECHR, Press Unit, Factsheet, COVID-19 health crisis of October 2021, pp. 2–3.

pertaining to the health emergencies and other health-related issues.<sup>43</sup> The only bright exceptions in that regard are the partial decision on admissibility in *Fenech v. Malta* and the decision on admissibility in *Le Mailloux v. France*.<sup>44</sup> In *Fenech v. Malta*, the ECtHR explicitly refers, within its overview of relevant international materials, to both the WHO and CoE documents. More precisely, it invokes the toolkits and statements of the CoE pertaining to COVID-19 sanitary crisis and WHO's interim guidance concerning prevention and control of COVID-19 pandemic in prisons and other places of detention.<sup>45</sup> The reference to the aforementioned documents can be considered as a significant development on the road to integrating COVID-19 specifics in the ECtHR approach to interpretation of the ECHR. However, such referral has only limited practical effects, since the ECtHR in its further assessment of the alleged breach of Art. 5 failed to turn back to those CoE and WHO documents, and to elaborate them by shedding more light on their relevance for the given case.<sup>46</sup> Conversely, in *Le Mailloux v. France*, the ECtHR did not specify any relevant international documents with regard to health emergencies. The case is nevertheless relevant in the context of the present discussion, since the ECtHR's identified a link between the right to health, on the one hand, through acknowledging that such a right is not guaranteed by the ECHR, and "a positive obligation to take the measures necessary to protect the lives of persons within their jurisdiction and to protect their physical integrity, including in the area of public health", on the other.<sup>47</sup> While the ECtHR did not have to decide whether the respondent state failed to fulfil these positive obligations, as it held the application is inadmissible since the applicant failed to demonstrate that he was "directly affected" by the contested measure,<sup>48</sup> the approach taken by the ECtHR in establishing the link between the right to health and the positive obligations of the state related to public health is commendable.

Despite these two examples, the systematic integration of the health emergency standards in the recent COVID-19 related case law of the ECtHR is lacking. This inadequacy may be explained by the fact that so far only a negligible number of cases have been decided on by the ECtHR, with most of the submitted applications yet to be adjudicated. Moreover, it makes sense that admissibility

<sup>43</sup> See for instance, ECHR decision on the admissibility of 22 June 2021 in *Case Bah v. the Netherlands* (application No. 35751/20); ECHR decision of 15 October 2020 in *Case D. C. v Italy* (application No. 17289/20); ECHR decision on the admissibility of 7 October 2021 in *Case Zambrano v. France* (application No. 41994/21); ECHR decision on the admissibility of 8 June 2021 in *Case Aytaç Ünsal and Ebru Timtik v. Turkey* (application No. 36331/20).

<sup>44</sup> See: ECHR, partial decision on the admissibility of 23 March 2021 in *Case Fenech v. Malta* (application No. 19090/20) and ECHR, decision on the admissibility of 5 November 2020 in *Case Le Mailloux v. France* (application No. 18108/20).

<sup>45</sup> ECHR, partial decision on the admissibility of 23 March 2021 in *Case Fenech v. Malta* (application No. 19090/20), paras 60–65.

<sup>46</sup> ECHR, partial decision on the admissibility of 23 March 2021 in *Case Fenech v. Malta* (application No. 19090/20), para. 88.

<sup>47</sup> ECHR, decision on the admissibility of 5 November 2020 in *Case Le Mailloux v. France* (application No. 18108/20), para. 9.

<sup>48</sup> ECHR, decision on the admissibility of 5 November 2020 in *Case Le Mailloux v. France*, para. 10.

decisions do not require a profound argumentation of the ECtHR, as it would be the case with decisions on the merits.

Having this in mind, and in support of the previous discussion on the theoretical and potential practical implications of ECtHR pursuing a more focused integrated approach when deciding on the merits in COVID-related case, an overview of relevant standards emanating from supranational and international instruments that the ECtHR may rely on is provided in the following section.

#### **4. Standards emanating from international public health-related documents**

The obligation of the ECtHR to apply the provisions governing the right to the highest attainable standard of health, as determined by the ICESCR and provisions of the International Health Regulation (IHR) of the WHO is undisputable.<sup>49</sup> It is not only a natural consequence of the application of the integrated approach to the interpretation of the ECHR. It also derives from the explicit wording of Art. 15 of the ECHR which envisages as a separate requirement that, in time of public emergency, States Parties may derogate from their obligations under the ECHR, as long as such measures are not inconsistent with their other obligations under international law.

It is certain that both the ICESCR and IHR impose clear obligations on the ECHR states parties, since all of them also ratified the ICESCR, and are WHO member states, legally bound by the IHR. Therefore, the obligations contained in the ICESCR and IHR can be considered as “other obligations under international law” in the sense of Art. 15. The normative authority of the ICESCR and IHR is further reinforced by the provision of the Vienna Convention on the Law of Treaties of 1969, which provides that international standards “may be interpreted in the light of any relevant rules of international law applicable in the relations between the parties.”<sup>50</sup>

When it comes to the ICESCR, its Art. 12 is of key importance, as it contains an unambiguous human rights obligation imposed on the states parties to take measures to combat epidemic diseases.<sup>51</sup> The General Comment No. 14 (GC 14),

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<sup>49</sup> At the time of writing of this paper, the World Health Assembly is yet to hold a session on the development of a convention, agreement or other international instrument on pandemic preparedness and response (see: Decision WHA74(16) adopted by the Member States at the Seventy-fourth World Health Assembly). The potential contents of such an instrument and its ramifications on the IHR remain out of the scope of the paper.

<sup>50</sup> Vienna Convention on the Law of Treaties of 1969, done at Vienna on 23 May 1969. Entered into force on 27 January 1980. UN, Treaty Series, Vol. 1155, p. 331, Art. 31.

<sup>51</sup> More specifically, Art. 12 stipulates that states parties should take steps necessary for “the prevention, treatment and control of epidemic, endemic, occupational and other diseases.” See International Covenant of the Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by UN General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with Art. 27.



issued by the Committee on Economic, Social and Cultural Rights is also a relevant document in this context, given that it provides an explanation of the meaning and scope of the right to health. It is informative for infectious disease control and consequently in the context of COVID-19, as it pinpoints the weak spots in states' responses to this crisis in health decision-making, through offering an authoritative set of standards which should provide guidance to the actions by states. GC 14 identifies a set of core and comparable priority obligations, which are both particularly relevant to the COVID-19 crisis.<sup>52</sup> They include, *inter alia*, ensuring access to health facilities, goods, and services on a non-discriminatory basis; provision of essential drugs as defined by the WHO and immunization against major infectious diseases occurring in the community; as well as taking measures to prevent, treat, and control epidemic and endemic diseases. Furthermore, the GC 14 underscores that States have the "burden of justifying" control measures aimed at curbing the spread of infectious diseases in terms of their legality, proportionality, and necessity.<sup>53</sup>

In a similar vein, the International Covenant on Civil and Political Rights (ICCPR) envisages that measures restricting the guaranteed rights and freedoms may be justified on the basis of protecting the public's health during emergencies. Those limitations are further articulated in the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR (Siracusa Principles).<sup>54</sup> Although neither GC 14 nor Siracusa Principles explicitly refer to health emergencies, both are relevant and may serve as additional guidance to the ECtHR when deciding whether restrictive measure undertaken in the context of health emergencies were necessary and proportionate.

While both the GC 14 and the Siracusa Principles are soft law instruments, this does not preclude them from being taken into consideration by the ECtHR since the application of integrated approach is not limited only to the rights and obligations originating from ratified hard law instruments, but even the soft law instruments should be considered as long as they reflect "a common ground in modern societies". A common shared value of the GC 14 and Siracusa Principles is that they make a reference to the WHO. The latter document is even more clear in that regard as it explicitly stipulates that, in interpreting the notion of public health 'due regard shall be had to the international health regulations of the World Health Organization'.<sup>55</sup> Similarly, the IHR envisages that States should implement the IHR 'with full respect for the dignity, human rights and fundamental

<sup>52</sup> Toebes T. Forman L. and Bartolini G. Toward Human Rights-Consistent Responses to Health Emergencies: What Is the Overlap between Core Right to Health Obligations and Core International Health Regulation Capacities? *Health and Human Rights Journal*, 2020, Vol. 22, No. 2, p. 102.

<sup>53</sup> General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) Adopted at the Twenty-Second Session of the Committee on Economic, Social and Cultural Rights (CESCR), on 11 August 2000 (Contained in Document E/C.12/2000/4), paras 28 and 29.

<sup>54</sup> Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR (Siracusa Principles), American Association for the International Commission of Jurists, 1985.

<sup>55</sup> Siracusa Principles 1985, para. 26.

freedoms of persons'.<sup>56</sup> This interrelated approach should be commended, as it enables systematic interpretation of two international covenants, ECHR and other relevant human rights instruments with the IHR. In that context, Toebes et al. rightly argues that such an interpretation would help resolve the problem of fragmentation of international law and will provide a more human rights-consistent implementation of the IHR.<sup>57</sup>

In this context, it should be recalled that the IHR is a hard law instrument, providing an overarching legal framework which specifies states' rights and obligations in handling public health events and emergencies that have the potential to cross borders.<sup>58</sup> The IHR contains duties which are functionally similar to the ICESCR's duty to prevent, treat, and control epidemic, endemic, and other diseases, while keeping a stronger universal focus as opposed to the mainly domestically oriented duties imposed by the ICESCR. Parallels and overlaps between the core right to health obligations under the ICESCR and the core capacities under the IHR are striking.<sup>59</sup> However, the IHR should be given special weight, given that it is indeed *lex specialis* in the area of infectious disease.<sup>60</sup> Unlike other aforementioned instruments, the IHR contains the notion of health emergencies of international concern and provides criteria which shall be considered in its determination. The IHR thus specifies the available scientific principles, evidence and other relevant information as well as results of the respective risk assessments as relevant criteria in this regard. In addition, the IHR underscores, that public health measures "shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection". Therefore, in deciding whether to implement certain restrictions, states should again take into consideration the existing scientific principles and evidence, as well as the specific guidance or advice from the WHO.<sup>61</sup>

In light of the above discussion, and given the WHO specific expertise and authority, it seems that the legality, proportionality and necessity of human rights restrictions in health emergencies can be best assessed by the ECtHR based on

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<sup>56</sup> Revision of the International Health Regulations, WHA58.3, Fifty-Eight World Health Assembly 2006, Art. 3, paragraph 1.

<sup>57</sup> Toebes T. Forman L. and Bartolini G., 2020, p. 100. For the opposite view, see: Rachovitsa A. The Principle of Systemic Integration in Human Rights Law. *International and Comparative Law Quarterly*, 2017, Vol 66, pp. 557–588.

<sup>58</sup> World Health Organization. International Health Regulations. Available: [https://www.who.int/health-topics/international-health-regulations#tab=tab\\_1](https://www.who.int/health-topics/international-health-regulations#tab=tab_1) [viewed 18.09.2021.]

<sup>59</sup> Toebes T. Forman L. and Bartolini G. 2020, p. 104.

<sup>60</sup> Ó Cathaoir K. Human Rights in Times of Pandemics Necessity and Proportionality. In: COVID-19 and Human Rights, Kjaerum M., Davis F. M. and Lyons A. (eds.). New York: Routledge Studies in Human Rights, 2021, p. 43.

<sup>61</sup> Revision of the International Health Regulations, WHA58.3, Fifty-Eight World Health Assembly 2006, Art. 12 and 43.

state's responsiveness in its dialogue with the WHO, its proactivity to collect and follow scientific evidence and its overall compliance with the IHR.<sup>62</sup>

The presented standards deriving from the hard and soft law instruments are not sufficiently precise nor articulated and consequently not properly tailored to be used as a single tool by the ECtHR in identifying and addressing concrete COVID-19 related human rights violations. Nevertheless, the identified standards may provide specific guidance to the ECtHR on the contours of the right to health and help in framing the analysis and debate about how the right to health is guaranteed in the context of COVID-19.

## Conclusion

The current COVID-19 pandemic has pushed a number of States Parties to the ECHR to limit some of most important ECHR's human rights and fundamental freedoms by putting in place COVID-19 restrictions predominantly aimed to protect human life and health. Some of those emergency measures have been already challenged at national and supranational level. Most cases are still pending before national courts and are expected to reach the ECtHR in the near future. The ones that have reached the ECtHR already testify to the difficult task faced by the ECtHR for a number of reasons.

Firstly, the ECHR focuses almost entirely on civil and political rights. Secondly, the pandemic is the first time in history that the ECtHR will have to deal with cases against states where the official Art. 15 derogations are in place based on the proclaimed public health emergency. Finally, since neither the public health grounds, nor the notion of health emergencies are explicitly included in Art. 15 of the ECHR it seems evident that ECtHR will have to rely on other international hard and soft law instruments when assessing the proportionality of the exercised derogations.

The ECtHR would do so by resorting to the integrated approach, an interpretive technique which takes note of social and labour rights in the interpretation of civil and political rights. The obligation of the ECtHR to apply the provisions governing the right to the highest attainable standard of health, as determined by the ICESCR and provisions of the IHR seems indisputable. It is not only a natural consequence of the application of the integrated approach to the interpretation of the ECHR. It also derives from the explicit wording of Art. 15 of the ECHR, envisaging that in time of public emergency, States Parties may derogate from their obligations under the ECHR, as long as such measures are not inconsistent with their other obligations under international law. It is certain that both the ICESCR and IHR

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<sup>62</sup> According to the IHR, states parties have a wide range of obligations, such as informing the WHO, within 48 hours, about the implementation of additional health measures and their health rationale. See: Art. 43, para. 5 of the Revision of the International Health Regulations, WHA58.3, Fifty-Eight World Health Assembly 2006.

impose clear obligations on states parties of the ECHR, since all of them ratified the ICESCR, and are also WHO member states, legally bound by the IHR. Thus, the obligations contained in the ICESCR and IHR can be considered as “other obligations under international law” in the sense of Art. 15.

However, in its jurisprudence pertaining to infectious diseases before the COVID-19 pandemic, the ECtHR was not coherent in utilizing the integrated approach. The reason for its selective approach is unclear, since it is not attributable to the chronological development of ECtHR doctrine nor to legal matters engaged. Even in cases where the ECtHR made full reference to the international instruments governing health emergency standards, such referrals often had limited practical effects, since their further contextualization was missing. The ECtHR's currently sparse jurisprudence with regard to COVID-19 cases is limited both in terms of its scope, and the depth of the analysis, given that the cases adjudicated so far have been in fact decisions on admissibility and not on merits with only one exception. This, however, provides a window of opportunity for the ECtHR to fully and systematically resort to authoritative standards contained in other relevant international hard law and soft law instruments. Furthermore, although the ECtHR refers to certain WHO documents, it is interesting that it so far has never made reference to the IHR nor to the right to health in the sense of the ICESCR and its respective GC 14.

Given the specific expertise and authority of the WHO, it seems that the legality, proportionality and necessity of human rights restrictions in health emergencies can be best assessed by the ECtHR based on state's responsiveness in its dialogue with the WHO, on its proactivity to collect and follow scientific evidence as well as on its overall compliance with all the provisions of the IHR. In that way, the ECtHR will push states to implement the IHR more consistently and by doing so help overcome the lack of enforceable sanctions, which constitutes one of the most important structural shortcomings of the IHR.

The standards deriving from the hard and soft law instruments are not precisely tailored to be used as a single tool by the ECtHR in addressing COVID-19 related human rights violations. Nevertheless, they may provide specific guidance to the ECtHR on the contours of the right to health and help in framing the debate about how this right is guaranteed in the COVID-19 context.

The proposed stronger emphasis of the ECtHR on the integrated approach would be consistent with its existing jurisprudence on both health-related issues and cases dealing with other rights guaranteed by the ECHR and would be considered as an application of “open paradigm” approach. Furthermore, it would contribute to reducing fragmentation in international law and provide more human rights-consistent implementation of the health emergency standards.

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## SECTION 7

# THE DEVELOPMENT OF NEW REGULATIONS IN THE FAST-CHANGING DIGITAL WORLD



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## THE INTERACTION BETWEEN ALGORITHMIC TRANSPARENCY AND LEGALITY: PERSONAL DATA PROTECTION AND PATENT LAW PERSPECTIVES

**Keywords:** artificial intelligence, transparency, data protection, patent

### Summary

Artificial Intelligence and its sub-field Machine Learning in the European Union has been directed as one of the political priorities towards the augmentation of human prosperity. However, due to its characteristics, for instance, the “black-box” problem, AI may pose challenges within the existing legal framework.

The article focuses on analysing the legality of algorithmic transparency in two fields in the EU-data protection (obligation to provide information to the data subject) and under the criteria of “sufficient disclosure” of the patent legal framework – to improve legal clarity concerning the issue.

### Introduction

Artificial Intelligence (hereinafter – AI) and its sub-field Machine Learning (hereinafter – ML)<sup>1</sup> are promising innovations having the potential to increase our life quality. They have many advantages and potential to augment human

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<sup>1</sup> ML focuses on enabling computers to self-learn by identifying data patterns, building explaining models, and conducting predictions without programmed models and rules. Some algorithms follow a pre-defined function; others, more sophisticated algorithms consist of neural networks and are attributed to deep that mimics representation learning of biological processes.  
Maini V., Sabri S. Machine Learning for Humans. Available: <https://everythingcomputerscience.com/books/Machine%20Learning%20for%20Humans.pdf> [viewed 09.10.2021.], pp. 9, 71–77.

prosperity<sup>2</sup>. However, one of the drawbacks that may be displayed by the ML in deep learning models is the lack of algorithmic transparency or the so-called “black box” paradigm<sup>3</sup>. Namely, it is unclear how AI makes the “decision”. The lack of transparency could relate to 1) inability to explain the underlying logic of data correlation; 2) deficiencies (misrepresentation) in the input, training data. At the same time, transparency is required by data protection and patent law. Therefore, there is a tension between the transparency requirement originating from the General Data Protection Regulation<sup>4</sup> (hereinafter – GDPR) and the condition of sufficient disclosure of a patented invention provided by the European Patent Convention<sup>5</sup> (hereinafter – the EPC) and algorithmic transparency.

The authors outline challenges that algorithmic transparency may face regarding compliance with legality requirements in the EU, particularly those stemming from GDPR and “sufficient disclosure” criteria of the patent legal framework under the EPC. The authors of the article also aim to analyse potential solutions and their sufficiency preliminarily. The interaction between both regimes is considered to render “black box” algorithms to “white box” (understandable).

## 1. Personal data protection and algorithmic transparency

The GDPR contains several requirements that must also be fulfilled for AI applications. For instance, the data subject<sup>6</sup> must be informed on the existence of automated decision-making, including profiling and meaningful information about the logic involved<sup>7</sup>. The requirement is also enlightened in the SyRi case<sup>8</sup>. Additionally, automated decision-making and profiling are prohibited (Art. 22(1)) except in the specific cases ensuring adequate safeguards (Art. 22(2)(3)) including a human in the loop; privacy by design, default (Art. 25), and others.

In the “black box” algorithms, issues might appear to determine who should or can pursue an oversight and what other safeguards may prevent risk. For instance,

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<sup>2</sup> The European Parliament. Report on a comprehensive European industrial policy on artificial intelligence and robotics. Available: [https://www.europarl.europa.eu/doceo/document/A-8-2019-0019\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-8-2019-0019_EN.html) [viewed 09.10.2021.].

<sup>3</sup> *Ibid.*, p. 5.

<sup>4</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. Luxembourg: Official Journal of the European Union, L 119, 2016.

<sup>5</sup> The Convention on the Grant of European Patents. Signed in Munich on 05.10.1973 [in the wording of 17.11.2020.].

<sup>6</sup> The data subject is an identified or identifiable natural person whose personal data is processed (GDPR Article 4 (1)).

<sup>7</sup> GDPR Article 13 (3) f).

<sup>8</sup> Rechtbank Den Haag judgment of 5 February 2020 in Case No. C-09-550982-HA ZA 18-388. Available: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:1878> [viewed 09.10.2021.].

anonymization may not guarantee complete depersonalization if person-specific characteristics are processed<sup>9</sup>. Besides, there might be an overarching desire to cloak disclosure of information under trade secrets as was in the COMPAS<sup>10</sup> case.

To tackle issues with AI, additionally to the relevant guidelines regulating the legality of AI applications, there has been a proposal to enact an AI Act<sup>11</sup> that prohibits specific AI applications, classifies high-risk applications, as well as sets respective safeguards. For instance, mandatory, confidential disclosure of underlying data, source code, a certification that would approve the safety and the legality of the AI system, and others.

In this regard, the authors take a stand that coverage under the trade secrecy would be hindered for high-risk systems that want to place AI system on the market or put it into service and use in the EU. It also appears that the AI Act tries to establish features of *sui generis* legal framework for AI that will also have an impact on indirectly linked fields.

Additionally, the authors deem that apart from pure disclosure of the input and training data, the description should outline in detail the source, the relevance of data (for instance, only historical data may not be appropriate to predict future behaviour), the impartiality of data (demographic, geographical coverage) and other aspects to facilitate validation of the AI system.

Besides, AI Act does not foresee that “black box” algorithms *per se* without a noted effect, application (Art. 5, 6) should be prohibited or identified as high-risk. Nevertheless, non-prohibited, non-high-risk algorithms due to the “black box” could still bring challenges of realization of respective rights. For instance, applications related to lifestyle, well-being (water consumption, step counter), the function, and posed risk of which are not as such to classify and certify them as medical devices. Thus, the authors of this article opine that equivalent certification could be offered at least as voluntary to tackle outlined challenges with non-prohibited, non-high-risk “black box” algorithms.

Alternatively, there is a suggestion of “experimental proportionality”<sup>12</sup>, according to which unproven AI systems are placed in use upon informing the data subjects and prohibited if proven disproportionate or unsafe. Although, to some extent, this correlates with the existing approach; however, this suggestion could

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<sup>9</sup> Council of Europe. The protection of individuals with regard to automatic processing of personal data in the context of profiling and explanatory memorandum. Available: <https://rm.coe.int/16807096c3> [viewed 09.10.2021.], p. 36.

<sup>10</sup> Decision of the Supreme Court of Wisconsin of 13 July 2016 in Case No. 2015AP157-CR. Available: <https://caselaw.findlaw.com/wi-supreme-court/1742124.html> [viewed 09.10.2021.].

<sup>11</sup> Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts. Available: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:S2021PC0206> [viewed 09.10.2021.].

<sup>12</sup> Marion O., Grace J., Urwin S., Barnes G. C. Algorithmic risk assessment policing models: lessons from the Durham HART model and ‘Experimental’ proportionality, *Information & Communications Technology Law*, 2018, No. 27(2), p. 242.

have difficulties fulfilling other AI transparency requirements in the EU, especially if the AI Act is enacted.

Besides, in the view of the authors, in cases of non-high-risk “black box” algorithms, the revelation of underlying data and source code proposed in the AI Act could instead serve as the last option, if least revealing measures, namely, the written description, could not be sufficient to verify safety and legality of the algorithm.

## 2. The criteria of “sufficient disclosure” in the patent legal framework

Art. 83 of the EPC stipulates that “patent application shall disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art”. Rule 42 of the Implementing Regulations<sup>13</sup> states the criteria for the content of the description, generally requiring a written form. Besides, according to Art. 100(b) of the EPC, non-compliance with Art. 83 could serve as a ground for the opposition to revoke the patent.

Rule 42 does not require the expert to carry out the invention (for example, write a code or train a model). Realization *per se* is related to: a) usefulness – the feasibility to realize the technical problem (the desired outcome) from the provided description, examples; b) completeness (realization could be conducted by simple verification tests applying reasonable effort without additional experimentation); c) repeatability (the invention could be reproduced with a statistically acceptable frequency)<sup>14</sup>.

Under “clearness” essential features, their interconnection, impact on the result cannot be omitted, ambiguous due to the mass of information<sup>15</sup>. For example, the patent application T 161/18<sup>16</sup> was rejected because the suitable input and training data were not expressly mentioned limiting the description to “such data should cover a wide range of patients”. Additionally, it was stated that only an indication that “weight values are determined by learning” does not exceed the prior state of the art.

The *ratio* of training data disclosure is that the performance of an identical process does not guarantee the same output if the logic remains unknown. An algorithm could not be disclosed if the invention does lie in the data that is not

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<sup>13</sup> Implementing Regulations to the Convention on the Grant of European Patents. Signed in Munich on 05.10.1973 [in the wording of 15.12.2020.].

<sup>14</sup> Haedicke M., Timmam H. Patent Law: A Handbook on European and German Patent Law. München: Verlag C. H. Beck, 2014, pp. 207–208, 210–211.

<sup>15</sup> *Ibid.*, p. 211.

<sup>16</sup> Decision of the European Patent Office Board of Appeal dated 12 May 2020 No T 161/18. Available: <https://www.epo.org/law-practice/case-law-appeals/recent/t180161du1.html> [viewed 09.10.2021.].

a part of the algorithm<sup>17</sup>. Thus, both input and output should be considered<sup>18</sup>. It should be noted that disclosure only of the algorithm, training data without explaining the origin of data and other related aspects as previously outlined could still not be sufficient to carry out the invention.

In this regard, instead of disclosure of the actual library of data as such or the source code of the algorithm in all cases, the description of steps taken to create training data<sup>19</sup>, features and parameters, amount of these data, training approach, functions, the model architecture and impact of each of the essential elements could be explained, if feasible. For instance, “images of human faces”, considering that the invention could, in general, be reproduced by the algorithm, involved training steps (in cases of classification algorithms)<sup>20</sup>.

Under the criteria of “completeness” (level of detail of the description), for instance, general data processing technology terms (kernel, and others) may pertain to specific technical aspects solely if explained in a level of detail that provides a sufficient picture of the architecture of the system and interaction between the constituting components<sup>21</sup>. For example, and for comparison, the patent application by Microsoft was initially rejected by the United States Patent and Trademark Office due to the lack of disclosure of the specific ML model<sup>22</sup>. Also, EPO deems that AI-related inventions may require disclosure of training steps and underlying algorithms; pure reference to the abstract models as “neural network”, “support vector machine”, and others lack technical character if claimed *per se*<sup>23</sup>.

There is no requirement for the invention to be ready for commercialization; also, such aspects as the risk of injury, danger, and others do not prevent completeness and patentability<sup>24</sup>. In this regard, the authors deem that requirements of the AI Act for high-risk AI systems as well as AI applications

<sup>17</sup> European Patent Office. Report from the IP5 expert roundtable on artificial intelligence. Available: [https://www.fiveipoffices.org/material/AI\\_roundtable\\_2018\\_report](https://www.fiveipoffices.org/material/AI_roundtable_2018_report) [viewed 09.10.2021.], p. 3.

<sup>18</sup> European Patent Office. Patenting Artificial Intelligence. Conference Summary, 30 May 2018, Munich. Available: [https://e-courses.epo.org/pluginfile.php/23523/mod\\_resource/content/2/Summary%20Artificial%20Intelligence%20Conference.pdf](https://e-courses.epo.org/pluginfile.php/23523/mod_resource/content/2/Summary%20Artificial%20Intelligence%20Conference.pdf) [viewed 09.10.2021.], p. 8.

<sup>19</sup> European Patent Office. Guidelines for Examination: G II 3.3.1 Artificial intelligence and machine learning. Available: [https://www.epo.org/law-practice/legal-texts/html/guidelines/e/g\\_ii\\_3\\_3\\_1.htm](https://www.epo.org/law-practice/legal-texts/html/guidelines/e/g_ii_3_3_1.htm) [viewed 09.10.2021.].

<sup>20</sup> European Patent Office. WIPO Conversation on Intellectual Property (IP) Artificial Intelligence. Revised Issues Paper on Intellectual Property Policy and Artificial Intelligence: Comments by the European Patent Office (EPO). Available: [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=499504](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=499504) [viewed 09.10.2021.], pp. 9–10.

<sup>21</sup> Haedicke M., Timmamm H. Patent Law: A Handbook on European and German Patent Law, pp. 220, 222–223.

<sup>22</sup> Lee J. A., Hilty R., Liu K. C. Artificial Intelligence & Intellectual Property. Oxford: Oxford University Press, 2021, p. 118.

<sup>23</sup> European Patent Office. Patenting artificial intelligence at the EPO. Available: [https://www.wipo.int/edocs/mdocs/scp/en/scp\\_32/scp\\_32\\_c\\_quality.pdf](https://www.wipo.int/edocs/mdocs/scp/en/scp_32/scp_32_c_quality.pdf) [viewed 09.10.2021.].

<sup>24</sup> Decision of the European Patent Office Board of Appeal dated 25 June 1997 No. T 881/95. Available: <https://www.epo.org/law-practice/case-law-appeals/recent/t950881du1.html> [viewed 09.10.2021.].

that are intended to be prohibited in the scope of jurisdiction of the AI Act will not affect the patentability of such systems only in exceptional cases. Namely, if the patent is claimed in the country that is a member of EPC but will not be the subject of the AI Act. Delineating, if AI Act is enacted, it will become a part of *ordre public* of the respective states. Thus, non-compliance with the AI Act may serve as grounds to refuse patentability, especially because the AI Act (Recital 11) is intended to apply also to AI systems that are not yet placed in the market or used or put into service in the EU.

In the case of the “black box”, difficulties might appear mainly in the process patents to describe the technical structure and steps, for instance, in diagnostics cases<sup>25</sup>. In this regard, the authors of this article opine that if the inventive step lies in the algorithm, then apart from the mentioned general features, appropriate datasets should be disclosed or the description on the data correlation. For instance, the application should reveal experimentation results following the proposed AI Act approach and the sample verification cases. Alternatively, the general description indicating the appropriate datasets could be supported by clinical, scientific evidence, decomposition, or building model-agnostic explainers as suggested to certify AI-related medical devices in “black box” cases<sup>26</sup>.

It has been suggested that in the case of the application of deep neural networks, the requirement of sufficient disclosure could be supplemented with a model deposit requirement similarly as-is for biological materials<sup>27</sup> or training data deposit to foster understanding of output generation<sup>28</sup>. This approach might not be supported since the existing EPO system does not foresee substituting written description by a deposit. Besides, deposition of the whole algorithm could contradict trade secrets since “sufficient disclosure” does not require disclosing everything related to the invention to the public.

Nevertheless, the authors opine that in the case where the patent is claimed in the EU and for the inventions where disclosure of the input, training data is the only option to suffice the disclosure requirement under the patent legal framework of the EPC. The revelation of underlying data, source code that could be a part of the certification proposed in the AI Act could be used as a pre-step to evaluate the fulfillment of the criteria of “sufficient disclosure”. In this regard, certification could serve as an addition to the written description, not a substitution for it. Besides, this would facilitate that data is disclosed only once, not imposing

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<sup>25</sup> The Joint Institute for Innovation Policy, IViR. Trends and Developments in Artificial Intelligence: Challenges to the Intellectual Property Rights Framework. Available: <https://digital-strategy.ec.europa.eu/en/library/trends-and-developments-artificial-intelligence-challenges-intellectual-property-rights-framework> [viewed 09.10.2021.], pp. 11–114.

<sup>26</sup> Ordish J., Murfet H., Hall A. Algorithms as medical devices, Report. Available: <https://www.phgfoundation.org/media/74/download/algorithms-as-medical-devices.pdf?v=1&inline=1> [viewed 09.10.2021.], pp. 26, 38.

<sup>27</sup> The Joint Institute for Innovation Policy, IViR. Trends and Developments in Artificial Intelligence: Challenges to the Intellectual Property Rights Framework, European Commission Report, p. 113.

<sup>28</sup> Ebrahim T. Y. Artificial Intelligence Inventions & Patent Disclosure. Penn State Law Review, 2020, Vol. 125, No. 1, pp. 215–217.

the additional burden for the inventors. Furthermore, those inventors who, upon enactment of the AI Act, will want to obtain the patent under the EPC regime and will want to place the AI system on the market or put it into service and use in the EU will, in any case, have to comply with both regimes. In this case, a revelation of the underlying data to the extent to suffice disclosure condition may not necessarily be required to be rendered public since the certification under AI Act could affirm the feasibility of realization. This proposal of cooperation between both systems would facilitate incentive to innovate in the EU, place the AI system on the market or put it into service and use in the EU. Besides, it would not require legal amendments but rather acceptance from the EPO.

## Conclusion

Data protection and the existing AI-related soft law addresses various aspects of tackling the “black box” paradigm. However, the proposed AI Act will bring a significant addition to overcoming these challenges. Thus, this approach could be followed with non-high-risk “black box” algorithms.

Although EPO practice provides respective guidance about the criteria of “sufficient disclosure”, more explanatory guidelines of how to manoeuvre it in AI-related patent applications, especially those that deploy deep neural networks, would be welcomed. By then, the approach proposed in the AI Act or that to certify “black box” medical devices could be applied.

AI Act proposes to establish features of *sui generis* legal framework for AI. It will also impact indirectly linked fields, for instance, patentability under the EPC, especially if the patent is claimed in the country that is a member of EPC and will be the subject of the AI Act.

One possibility to render “black box” systems as “white box” would be to establish cooperation between the proposed input, training data revelation under the AI Act and the EPC. Thus, it would suffice the invention disclosure criteria in cases where the revelation of the underlying data would be the only option.

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# SECTION 8

## TOPICAL CHALLENGES IN PRIVATE LAW

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## TERMINATION OF OWNERSHIP RIGHTS BY WAY OF CONFISCATION AND PUBLIC RELIABILITY OF THE LAND REGISTER IN LATVIA

**Keywords:** *bona fide* acquirer, confiscation, criminally acquired, immovable, registration, reliability

### Summary

Confiscation of property has several meanings. All of them could be reduced to “coercive deprivation by state institutions”. In modern democracies, the use of this force should be exercised carefully and in accordance with the duty of the state to protect peaceful enjoyment of possession by the subjects of the state.

This report is devoted to examination of one specific kind of confiscation, which has the following characteristic features: it is not applied as a punishment following a conviction; it could be applied to an immovable property and so interferes with the public reliability of the Land Register; and it could be applied to a person who not only is in no way linked to illegal activities, let alone a criminal offence, but who has acquired the immovable property subject to confiscation being unaware of any criminal or other fraudulent acts by other persons regarding the immovable (a *bona fide* acquirer). The aim of this report is to find out whether the principle of protection of everyone’s right to property as a universal human right is adequately implemented in Latvia.

### 1. Confiscation as termination of ownership rights without an intentional act by the owner

Confiscation of property is described as compulsory alienation (i.e., without an intentional act by the owner) without compensation of property owned by a convicted person (by way of sentence) to State ownership (Art. 42

of the Criminal Law,<sup>1</sup> Art. 1033 of the Civil Law),<sup>2</sup> or property acquired as a result of committing an administrative offence or the object of committing an administrative offence, or property related to an administrative offence (Art. 83 of the Law on Administrative Liability).<sup>3</sup> Apart from the aforementioned measures of confiscation, another measure has recently been developed, which has become known as the confiscation of property without conviction.<sup>4</sup>

The property may be recognized as criminally acquired by a court ruling or during pre-trial criminal proceedings (Art. 356 of the Criminal Procedure Law<sup>5</sup>, part (1) and part (2) respectively). Only the former is usually described as confiscation whereas the latter is usually understood as restitution of property to the victim of crime.<sup>6</sup> However, some authors have come very close to admitting that restitution carried out as provided by Art. 356, part (2) of the Criminal Procedure Law amounts to confiscation, since this method involves two steps: before restoring the ownership of the victim of a crime, the criminally acquired property must be forfeited from the person who was regarded as the owner at the moment when the procedure for reinstating the rightful owner started.<sup>7</sup> The procedure as provided by Art. 356, part (2) of the Criminal Procedure Law could seem as restoration of the property right from the point of view of the victim of the crime. However, from the point of view of the person with whom the property was found, the same procedure will seem like an *in rem* proceeding brought by the government against property that was acquired as a result of criminal activity, i.e., forfeiture,<sup>8</sup> or confiscation. If an immovable is the subject of such procedure, then confiscation also interferes with the principle of public reliability of the Land Register, from which the right of an acquirer in good faith (*bona fide* acquirer) derives because, in order to restore the ownership, which the victim of crime has lost, rectification (i.e., removal) of the current owner from the Register is an inevitable precondition.

Whether the above-described procedure of seizure could be applied to an immovable is by no means clear from the plain wording of the law. Art. 356 of

<sup>1</sup> Available: <https://likumi.lv/ta/en/en/id/88966-criminal-law> [viewed 27.10.2021.].

<sup>2</sup> Available: <https://likumi.lv/ta/en/en/id/225418-the-civil-law> [viewed 27.10.2021.].

<sup>3</sup> Available: <https://likumi.lv/ta/id/303007-administrativas-atbildibas-likums> [viewed 27.10.2021.].

<sup>4</sup> Kūtris G. Tiesības uz īpašumu un īpašuma konfiskācija [Right to property and confiscation of property]. Protecting values enshrined in the Constitution: perspectives of different fields of law. Collection of research papers of the 77<sup>th</sup> International Scientific Conference of the University of Latvia. Riga, University of Latvia Press, 2019, p. 81.

<sup>5</sup> Available: <https://likumi.lv/ta/en/en/id/107820-criminal-procedure-law> [viewed 27.10.2021.].

<sup>6</sup> Meikališa Ā., Strada-Rozenberga K. Mantas konfiskācijas tiesiskais regulējums Latvijā un Eiropas Savienībā, tās izpildes mehānisma efektivitātes nodrošināšana [Regulation of confiscation of assets by law in Latvia and in the European Union, securing the effectiveness of the mechanism for confiscation], p. 22. Available: [https://www.tm.gov.lv/sites/tm/files/2020-01/Documents/lv\\_ministrija\\_imateriali\\_mantkonf.pdf](https://www.tm.gov.lv/sites/tm/files/2020-01/Documents/lv_ministrija_imateriali_mantkonf.pdf) [viewed 27.10.2021.].

<sup>7</sup> Kūtris G. Cilvēktiesību ievērošana mantiskajos jautājumos kriminālprocesā [Criminal proceedings: Human rights guarantees in financial matters]. Legal Traditions and Legal Identities in Central and Eastern Europe. Collection of research papers of the 76<sup>th</sup> International Scientific Conference of the University of Latvia. Riga. University of Latvia Press, 2018, p. 307.

<sup>8</sup> Black's Law Dictionary 1451, editor-in-chief Bryan A. Garner, West Group 7<sup>th</sup> ed., 1999, p. 661.

the Criminal Procedure Law in Latvian uses the word “manta” to describe the object of seizure. This term has several meanings. It could be translated as “property”, “thing”, “estate”. Although in Latvian the term “manta” could not be regarded as synonymous with “lieta” (thing), it could mean a person’s entire property<sup>9</sup> (estate). The usage and meaning of this term also have significant transformations since it is part of the local civil code where this term could be used both in a more abstract meaning, as an ownership right, and also in more empirical sense, i.e., pointing to things corporeal. In the former case, the term “manta” is close to what would be called “assets”, while in the latter case the term is closer in meaning to “thing”. One must be extremely careful not to become confused while using this term.<sup>10</sup> More recent research has questioned whether application of the term “manta” to an immovable (Art. 846 of the Civil Law) should be regarded as a mistake.<sup>11</sup>

The ambiguity of the term “manta” as used in Art. 356 of the Criminal Procedure Law has led to rather a wide variety of interpretations of this article when the Constitutional Court had to examine whether the contested norm is in compliance with the Constitution of Latvia, i.e., if Art. 356 is applicable not only to movable but also to immovable property, in Case No. 2016-07-01<sup>12</sup> “On Compliance of Section (Article) 356 (2) and Section (Article) 360 (1) of the Criminal Procedure Law with Article 1, first sentence of Article 91, Article 92 and Article 105 of the *Satversme* (Constitution) of the Republic of Latvia.”

Expert witnesses (who were summoned) were split in their opinion on whether the contested norms could be applied to the immovable. Three of them<sup>13</sup> considered that the contested norms could not be applied to immoveable property whereas one directly,<sup>14</sup> another – implicitly<sup>15</sup> concluded exactly the opposite. The Constitutional Court held that the contested norms applied to immoveable property.

The distinction between the abovementioned terms is subtle. For instance, it is asserted that the Civil Law deliberately has avoided using the terms “manta”

<sup>9</sup> Kalniņš E. *Laulāto manta laulāto likumiskajās mantiskajās attiecībās* [Property in the legal remunerable relations of the spouses]. Rīga, Tiesu namu aģentūra, 2010, p. 30.

<sup>10</sup> *Civillikumi ar paskaidrojumiem. Otrā grāmata. Lietu tiesības.* [Civil Laws with explanations. Second Book. Rights *in Rem.*]. Compiled by Sen. F. Konradi un Rīgas apgabaltiesas loceklis A. Walter [Judge of the Supreme court Mr. F. Konradi and judge of the Regional Court of Riga Mr. A. Walter]. Likuma teksts Prof. *Dr. iur.* A. Būmaņa, H. Ēlersa un J. Lauvas tulkojumā [translation of the Civil Law from Russian by Mr. A. Būmanis, H. Ēlerss and J. Lauva]. „Grāmatrūpnieks” izdevumā. 1935. Neoficiāls izdevums, p. 7.

<sup>11</sup> Kalniņš E. *Pētījums par Civillikuma lietu tiesību daļas pirmās, otrās un trešās daļas modernizācijas nepieciešamību* [Research on the need to modernise parts one, two and three of the chapter on rights in Rem of the Civil Law]. Available: <http://petijumi.mk.gov.lv/node/2029> [viewed 27.10.2021.].

<sup>12</sup> The Constitutional Court of the Republic of Latvia, Judgment in Case No. 2016-07-01, p. 46. Available: [https://www.satv.tiesas.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/05/2016-07-01\\_Spriedums\\_ENG.pdf#search=](https://www.satv.tiesas.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/05/2016-07-01_Spriedums_ENG.pdf#search=) [viewed 27.10.2021]

<sup>13</sup> Judgment in Case No. 2016-07-01, para. 8, p. 15; para. 9, p. 16; para. 11, p. 31.

<sup>14</sup> Judgment in Case No. 2016-07-01, para. 10, p. 18.

<sup>15</sup> Judgment in Case No. 2016-07-01, para. 13, p. 22.

and “lieta” when describing a gift as “transfer of ownership” (Art. 1914 of the Civil Law).<sup>16</sup> One item of person’s entire property could be substituted by another item if the latter is of the same value as the former (principle of surrogation).<sup>17</sup>

Confiscation as a specific measure under criminal and administrative law must be distinguished from expropriation. The characteristic feature of expropriation is fair and reasonable compensation of the owner.<sup>18</sup>

## 2. Confiscation and the constitutional right to own property as a human right

By the Law of 15 October 1998, the legislature inserted into the Constitution, a new Chapter VIII on fundamental rights including the new Article 105 of the Constitution.<sup>19</sup>

*The use of the term “special law” in Article 105 of the Constitution [...] indicates that each individual expropriation measure falls within the exclusive remit of the legislature, that is to say, Parliament. As the Constitutional Court observed in its judgment of 16 December 2005, this is a specific feature of the Latvian legal system in comparison with that of other countries [...]. In this system any expropriation is always based on two legislative instruments: the general law, determining the rules of expropriation in general, and a special targeted law by which Parliament orders the expropriation of designated property in a specific case.*<sup>20</sup>

However, the fact that the wording of the Constitution specifically points at expropriation for public purposes and does not expressly provide for such forms of compulsory alienation of the property as confiscation could not mean that protection of everyone’s right to property is not protected by the Constitution.

The internal connection between Art. 105<sup>21</sup> of the Constitution and Art. 1 of Protocol 1 of the European Convention on Human Rights has been emphasized

<sup>16</sup> Torgāns K. Saistību tiesības. Otrais papildinātais izdevums [The Rights of Obligations. Second supplemented edition]. Rīga, 2018, p. 298.

<sup>17</sup> Kalniņš E. Laulāto manta laulāto likumiskajās mantiskajās attiecībās [Property in legal remunerable relations of spouses]. Rīga, Tiesu namu aģentūra, 2010, p. 139.

<sup>18</sup> Grigore-Bāra E. Nekustamā īpašuma piespiedu atsavināšana valsts vai sabiedriskām vajadzībām pret atlīdzību Latvijā. Promocijas darbs [Dissertation “Compulsory alienation of immovable property against compensation for state or public needs in Latvia”], pp. 16–17 (in Latvian). Available: [https://dspace.lu.lv/dspace/bitstream/handle/7/5142/23550-Elina\\_Grigore\\_Bara\\_2013.pdf?sequence=1&isAllowed=y](https://dspace.lu.lv/dspace/bitstream/handle/7/5142/23550-Elina_Grigore_Bara_2013.pdf?sequence=1&isAllowed=y) [viewed 27.10.2021.].

<sup>19</sup> Available: <https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia> [viewed 27.10.2021.].

<sup>20</sup> European Court of Human Rights. Judgment in the Case Vistiņš and Perepjolkins v. Latvia, para. 53. Available: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-114277%22%5D%7D> [viewed 27.10.2021.].

<sup>21</sup> Everyone has the right to own property. Property shall not be used contrary to the interests of the public. Property rights may be restricted only in accordance with law. Expropriation of property for public purposes shall be allowed only in exceptional cases on the basis of a specific law and in return for fair compensation.

in several judgments of the Constitutional Court (2000-03-01;<sup>22</sup> 2001-08-01;<sup>23</sup> 2003-04-01;<sup>24</sup> 2004-10-01<sup>25</sup>; 2004-18-0106<sup>26</sup>; 2005-12-0103<sup>27</sup>).

In Case No. 2014-34-01<sup>28</sup>, the Constitutional Court of Latvia found that application of confiscation as a criminal punishment is compatible with Art. 105 of the Constitution.

In its Judgement in Case No. 2016-07-01, the Constitutional Court examined, *inter alia*, whether applying the contested norms amounted to confiscation.

In this case, the applicant, *inter alia*, pointed out that the good faith of a third person must be assessed. The applicant also cited Directive 2014/42/EU.<sup>29</sup>

The Court dismissed both arguments.

The Court found that the contested regulation is aimed at returning immovable property to its owner, who lost it as the result of a criminal offence (para. 17, Judgment in Case No.2016-07-01). Therefore (sic) the Constitutional Court concluded that ECHR case law on confiscation of property was not applicable to the case under review [para. 23.1]. This conclusion is wrong. The premise that returning an immovable to the rightful owner *per se* does not amount to expropriation in the sense of the fourth sentence of Art. 105 of the Constitution does not inevitably lead to the conclusion that the Art. 105 does not deal with confiscation. Nor does this premise lead to the conclusion that returning an immovable to the previous owner does not amount to confiscation. As returning an immovable which is already registered under the name of the Applicant<sup>30</sup> as *bona fide* acquirer in the Land Register, such restitution is impossible without rectifying (removing) the name of the Applicant from the Register. The issue whether such

<sup>22</sup> Available: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2000-03-01\\_Spriedums.pdf#search=](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2000-03-01_Spriedums.pdf#search=) (in Latvian) [viewed 27.10.2021.].

<sup>23</sup> Available: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2001/08/2001-08-01\\_Spriedums\\_ENG.pdf#search=](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2001/08/2001-08-01_Spriedums_ENG.pdf#search=) [viewed 27.10.2021.].

<sup>24</sup> Available: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2003/02/2003-04-01\\_Spriedums\\_ENG-1.pdf#search=](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2003/02/2003-04-01_Spriedums_ENG-1.pdf#search=) [viewed 27.10.2021.].

<sup>25</sup> Available: [http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2004-10-01\\_Spriedums.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2004-10-01_Spriedums.pdf) [viewed 27.10.2021.].

<sup>26</sup> Available: [http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2004-18-0106\\_Spriedums.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2004-18-0106_Spriedums.pdf) [viewed 27.10.2021.].

<sup>27</sup> Available: [http://st-preprod.flamingoservices.lv/wp-content/uploads/2016/02/2005-12-0103\\_spriedums.pdf](http://st-preprod.flamingoservices.lv/wp-content/uploads/2016/02/2005-12-0103_spriedums.pdf) [viewed 27.10.2021.].

<sup>28</sup> Available: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2014-34-01\\_Spriedums.pdf#search=](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2014-34-01_Spriedums.pdf#search=) (in Latvian) [viewed 27.10.2021.].

<sup>29</sup> Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042> [viewed 27.10.2021.].

<sup>30</sup> The immovable was already registered in the Latvian Land Register in the name of the Applicant. The Office of the Land Register had received the decision by the official in charge of proceedings of 15 July 2015 on terminating criminal proceedings, which, *inter alia*, envisaged that the immoveable property should be returned to its initial owner. Since this decision did not comply with any type of document defined in Section 44 of the Land Register Law (available: <https://likumi.lv/ta/en/en/id/60460-land-register-law> [viewed 27.10.2021.]), which could be the grounds for corroborating rights *in rem*, the instructions included in the decision could not be fulfilled, but the document was annexed to the Land Register file.

rectification (removal) of the *bona fide* acquirer from the Register is fair should be separated from the issue whether such act amounts to compulsory alienation of an immovable, i.e., confiscation.

This conclusion is not only contrary to logic. It is also at odds with the idea that contested norms must be compatible with the constitutional protection of the right to property as human right.

There are only two options: either Art. 105 of the Constitution covers all kinds of deprivation of any person of their ownership or the Constitution does not deal with this issue at all.

If the Court were to choose the former option, then the conclusions by the Constitutional Court would fall in line with previous conclusions of the same Court, namely, that Art. 105 of the Constitution contains a meaning which is identical to that of the First Protocol ECHR.

If the Court found that the contested norms were not connected with the fourth sentence of Art. 105 of the Constitution, then the same Court should inevitably return to examination of the compatibility of contested norms with other parts of Art. 105.

If the Court found that neither the first, second, third nor fourth sentence of Art. 105 were applicable, then either such criteria should be found in other parts of the Constitution, or the Constitution of Latvia does not protect the right to property at all. The latter conclusion would be at odds with previous jurisdiction.

### **3. Confiscation and public reliability of the Land Register in Latvia**

The Constitutional Court rightly pointed out in Case No. 2016-07-01 that the contested norms provide an exception to the principle of public reliability of the Land Register in Latvia. The Constitutional Court considered this as a tolerable “exception”.

If the Constitutional Court found that the contested norms provided an “exception” to the public reliability of the Land Register, then inevitably the Court would also have to consider the amount to which such “exception” impacts the whole system. In every case, where the said exception would be applied, a *bona fide* acquirer of an immovable could not rely on the Register. This was one of the arguments by the Applicant: that its reliance on the Land Register was disrupted by enforcing the contested norms.

The Constitutional Court in para. 24.1 of the Judgment dismissed this argument stating that

*when persons become involved in legal relations and conclude legal transactions, they concurrently assume various risks (civil turnover risks) [...] The legislator does not have the obligation to adopt legal regulation that would envisage compensating from the state budget for any risk that a person assumes by becoming involved in private law relations.*



The Constitutional Court mistook reliance of a third person on the Land Register data regarding the ownership right for reliance on a legal transaction. Civil turnover risk is not the same thing as reliance on the data provided by public register which is under the guidance of special state institutions. It is established in the case law of the European Court of Human Rights that

*the authorities have to put in place an effective exchange of information in order to ensure the reliability of public data. Failure to do so weighs in favour of individuals who become victims of such an omission, after acting in good faith.*<sup>31</sup>

The Constitutional Court weighed the negative impact upon the public reliability of the Land Register against the legitimate aim to eradicate unlawful transfer of property involving actions amounting to a criminal offence. The fact that the enforcement of the contested norms has already caused damage to the land registration system was already admitted by the Constitutional Court.

#### 4. Effectiveness of confiscation of criminally acquired property

No scientific data are available as to whether and to what degree the intended aim of the contested norms was achieved. Anecdotal evidence, however, suggests that cases of owners losing their immovable property as a result of fraud keep appearing in Latvian case law. The pattern of how the thieves got their hands on innocent victims' property after the contested norms were implemented involved defrauding the owner of their immovable and soon afterwards the immovable was registered under the name of another person who took out a loan from the bank mortgaging the defrauded immovable property.<sup>32</sup> This pattern is not covered and could not be prevented by the contested norms. Since the contested norms were examined by the Constitutional Court, they have been amended by the legislator several times: Art. 356 of the Criminal Procedure Law three times (22 June 2017; 27 September 2018 and 21 November 2019); Art. 360 of the Criminal Procedure Law – twice (22 June 2017 and 4 March 2021). The amendments of 22 June 2017 provided for implementation of the aim of the contested norms – to transfer a criminally acquired immovable to the previous owner, as the contested norms initially did not provide for such outcome regarding an immovable.<sup>33</sup> The latest amendments to Art. 360 of the Criminal Procedure Law of 4 March 2021 were triggered by the particular case of seizure of criminally acquired property in order to prevent inevitable confiscation of the immovable in issue from the *bona*

<sup>31</sup> Judgment in Case Dzirnīs v. Latvia, para. 85. Available: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-170461%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-170461%22]}) [viewed 27.10.2021.].

<sup>32</sup> Judgment in Case SKC-284/2017 by the Supreme Court (28 December, 2017). Available at limited access site of Latvian court administration accessible by judges and attorneys-at-law, members of the Latvian bar: file:///C:/Users/JanisR/Downloads/Anonimizets\_nolemums\_339678-2789.pdf [viewed 27.10.2021.].

<sup>33</sup> See the witness statement of the summoned person – the Office of Land Register of the Vidzeme Suburb Court of the City of Riga, para. 7 Judgment in Case No.2016-07-01 [viewed 27.10.2021.].

*fide* acquirer. The legislator moved into reverse after public outrage over this case which received wide publicity after the *bona fide* acquirer complained publicly about the inevitable confiscation of the immovable which – as it turned out – had been investigated for several years. The police, however, did not bother to inform the Land Register and the tainted property remained in civil circulation until the unsuspecting acquirer bought that immovable. The Court (February 17, 2021) satisfied a request by the police investigator and declared the apartment as criminally acquired.<sup>34</sup> The amendments to Art. 360 of the Criminal Procedure Law of 4 March 2021 prevented the next step provided by the contested norm, i.e., confiscation of the apartment acquired in good faith and registered under the name of the acquirer. Implementation of the said amendments could signify returning to square one, i.e., whatever the means used in order to acquire the immovable prior to a *bona fide* acquirer, the latter could retain their ownership.

## Conclusion

1. Confiscation of property could be implemented as an additional punishment for certain kinds of criminal offence.
2. Confiscation could be also implemented as a precondition of restitution of ownership lost by a victim of crime.
3. Confiscation as a precondition for restitution could be applied without conviction.
4. Confiscation without conviction could be applied to a *bona fide* acquirer.
5. An immovable could be subject to confiscation without conviction.
6. Confiscation of an immovable without conviction interferes with the principle of public reliability of the Land Register.
7. Recent amendments to the Criminal Procedure Law are aimed at deconstructing some measures of confiscation without conviction.

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<sup>34</sup> Tiesneša Zigmunda Dundura skaidrojums mākslinieka Aivara Vilipsona dzīvokļa lietā (press release by Judge Zigmunds Dundurs in a case over an apartment owned by painter Mr. Aivars Vilipsons). Available: <https://www.ta.gov.lv/lv/jaunums/tiesnesa-zigmunda-dundura-skaidrojums-makslinieka-aivara-vilipsona-dzivokla-lieta> (in Latvian) [viewed 27.10.2021.].

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## POSSIBLE IMPROVEMENT OF PROVISIONS OF LATVIAN CIVIL LAW CONCERNING LIABILITY FOR DAMAGES, CAUSED BY ABNORMALLY DANGEROUS ACTIVITY

**Keywords:** tort law, strict liability, negligence, insurance

### Summary

As members of society, we all substantially benefit from various activities, which impose increasing danger. Our PCs and mobile smartphones include several metals obtained through mining operations, numerous household items have been made by using chemical reactions. If we are ill, we may need medication, which is made by using chemical reactions and biological experiments. Autonomous vehicles and flying devices are gaining increasing popularity and extended application in both commercial and non-commercial use.

Some more radical members of society may say that we do not need these things and may withdraw from their use. However, it would be more realistic to contend that the society would never give up existing comfort, even if it is gained at least partly by activities creating increased danger. Therefore, the question is, how to regulate the liability for damages, caused by the activities incurring increased or abnormal danger to ensure that these regulations provide sufficient protection for injured parties and, at the same time, do not discourage potential operators from carrying out these activities, which create significant positive effect, despite of their danger.

Various jurisdictions are dealing with this question in different manner. The most important Latvian regulations are included mainly in the Art. 2347 para. 2 of Latvian Civil Law, adopted in 1992 and mainly mirroring the legal provisions of the earlier 20th century, with slight adjustments, introduced in 2012.

The author of the present paper holds an opinion that this Latvian regulation should be revised on the basis of more recent examples from other jurisdictions, such as Netherlands, and partially taking into account the findings and proposals, made in such splendid example of international academic cooperation as Principles of European Tort Law (hereinafter – PETL). The author of the current article makes such comparative analysis, as well as examines case law, discusses findings of some other authors and, consequently, proposes several amendments, which should be considered in order to improve the Latvian regulations, dealing with liability for damages caused by abnormally dangerous activity.

## 1. Characteristics of abnormally dangerous activity

First of all, the author proposes a brief view at terminology. Apart from term “abnormally dangerous activity”, the terms “actions with dangerous things, mechanisms, processes and substances”, “source of abnormal danger”, and “major source of danger” are used. As the author has explained in one of his previous papers, the interaction of the man with certain things, mechanisms, processes and substances are the ones, who may cause the abnormal danger.<sup>1</sup> Therefore in the further text of this paper the author will mainly use the term “abnormally dangerous activity”, which will have the same meaning as other terms referred to above.

The characteristics of abnormal danger form the substance of definition of abnormally dangerous activity. In actual disputes, these characteristics also help to determine, whether the activity under question is abnormally dangerous. The answer to this question, in its turn, is essential in order to decide whether the special provisions of liability for damages caused by abnormally dangerous activity shall be applied in particular case. Therefore, one shall not underestimate the importance of the said characteristics. However, as it often appears with crucial legal instruments, the exact list of these characteristics is far from being clear.

The purpose of PETL “...is to serve as a basis for enhancement and harmonisation of the law of torts in Europe”,<sup>2</sup> provide several substantial characteristics of abnormally dangerous activity and important commentaries in this respect. Art. 5:101 para. 2 PETL stipulates, that “an activity is abnormally dangerous, if a) it creates a foreseeable and highly significant risk of damage even all due care is exercised in its management and b) it is not a matter of common usage”. Para. 3 adds that “[a] risk of damage may be significant having regard to its seriousness or the likelihood of the damage”. Hence, the abnormally dangerous activity is characterized by (1) foreseeability; (2) highly significant risk of damage; (3) inability to prevent this risk, even all due care is exercised in its management; (4) not being the activity of common usage. The rather long list of characteristics suggests that abnormally dangerous activities could occur relatively rarely. One of the authors of PETL Professor Bernhard A. Koch confirms the narrow approach, when the activity under question is abnormally dangerous and strict liability is applicable. Such narrow approach is particularly determined by the requirement that calls for an action not to be a matter of common usage in order to find the respective activity abnormally dangerous.<sup>3</sup>

Notably, the commentaries of PETL does not provide further explanation regarding 1) foreseeability of damage and 2) inability to prevent highly significant

<sup>1</sup> Rasnačs L. Regimes of Liability for Damages Caused by Abnormally Dangerous Activities. In: *Juridiskā zinātne / Law*, No. 12, 2019, p. 189.

<sup>2</sup> Spier J. (author of the chapter). *European Group on Tort Law. Principles of European Tort Law*. Wien, New York: Springer, 2005, p. 16.

<sup>3</sup> Koch B. A. The “European Group on Tort Law” and Its “Principles of European Tort Law” *The American Journal of Comparative Law*, Vol. 53, Issue 1, Winter 2005, p. 195

risk, even all due care is exercised in its management. Perhaps, the authors of PETL does consider these two characteristics as self-evident. Perhaps they are, but their importance nevertheless shall not be underestimated. The foreseeability of damage is characterised by the likelihood, that certain activity may turn into something, which will cause damages, as it was described in famous UK *Rylands v. Fletcher* case regarding the artificial water reservoir, built by defendants, namely: “the rule applies to bringing onto the defendant’s land things likely to do mischief if they escape, which have been described as ‘dangerous things’”.<sup>4</sup> In other words, foreseeability of damage in this sense means typical risks, usually associated with the certain activity, which may cause substantial damage for other persons.

Inability to prevent highly significant risk, even all due care is exercised in its management, is important in order to substantiate, why strict liability should be applied for damages, caused by abnormally dangerous activity, instead of liability for faults. If the person can entirely eliminate the said risks by obtaining certain steps, it illustrates the existence of standard of conduct, which, pursuant to the Art. 4:101 PETL is characteristic for the liability for fault and the application of strict liability simply does not have any sense.

Let’s take a look to the characteristics, given to abnormally dangerous activities in some European jurisdictions.

Art. 1056 para. 2 of Estonian Law of Obligation suggests that: “A thing or an activity is deemed to be a major source of danger if, due to its nature or to the substances or means used in connection with the thing or activity, major or frequent damage may arise therefrom even if it is handled or performed with due diligence by a specialist.” Para. 1 of the same article adds about “danger characteristic to a thing constituting a major source of danger or from an extremely dangerous activity”.<sup>5</sup> Hence, the Estonian law makes emphasis on the fact, that the risks, associated with major source of danger or abnormally dangerous activity, may not be prevented even by exercising the due diligence in handling them or performing them. Estonian law also adds criteria of “specialist” as the one, with whom the comparison shall be made. In addition, Estonian law speaks also about “characteristic danger”, which is already the same “typical risk”, mentioned above.

Quite interesting is the approach of Dutch law. Art.s. 6:173–6:177 of Dutch Civil Code does not provide one general definition of abnormally dangerous activity.<sup>6</sup> Instead, Dutch Civil Code stipulates several, more certain examples – dangerous equipment, dangerous constructed immovable things, dangerous substances, dumping grounds and mining operations. All of them have property of great or special danger. Quite an interesting provision can be found in Art. 6:177 of the Dutch Civil Code. Namely, this provision provides a list of typical risks for

<sup>4</sup> Waite A. J. Deconstructing the Rule in *Rylands v. Fletcher*. In: *Journal of Environmental Law*, Vol. 18, Issue 3, 2006, 432

<sup>5</sup> Estonian Law of Obligations Act. Available: <https://www.riigiteataja.ee/en/eli/S06112013011/consolide> [viewed 01.05.2021.].

<sup>6</sup> Dutch Civil Code. Available: <http://www.dutchcivillaw.com/civilcodebook066.htm> [viewed 01.05.2021.].

mining operations, hence substantially contributing in clarity, in which situations respective legal provisions are attributable.

Provisions of Latvian Civil Law, namely, Art. 2347<sup>7</sup> para. 2, are not made on the basis on Civil Laws of the Baltic Provinces (of former Russian Empire), as the most part of the Civil Law,<sup>8</sup> but instead are based on the example of Art. 469 of the Civil Code of Latvian Socialist Republic.<sup>9</sup> The wording of Art. 2347 para. 2 Latvian Civil Law is, as follows:

*A person whose activity is associated with increased risk for other persons (transport, undertakings, construction, dangerous substances, etc.) shall compensate for losses caused by the source of increased risk, unless he or she proves that the damages have occurred due to force majeure, or through the victim's own intentional act or gross negligence. If a source of increased risk has gone out of the possession of an owner, holder or user, through no fault of theirs, but as a result of unlawful actions of another person, such other person shall be liable for the losses caused. If the possessor (owner, bailee, user) has also acted without justification, both the person who used the source of increased risk and its possessor may be held liable for the losses caused, having regard to what extent each person is at fault.*

Art. 2347 para. 2 Latvian Civil Law does not explicitly refer to the [abnormally dangerous] “activity”. Instead, the Latvian law uses wording “source of abnormal danger” (in Latvian: *paaugstinātas bīstamības avots* – ). Latvian author *Dr. iur.* Jānis Kubilis explains that the source of abnormal danger is thing or activity, which is not usual and which in certain circumstances creates the increased risk of substantial damage to the other persons. Whether the damage is substantial shall be evaluated according to the harshness and likelihood of the damage in certain situation.<sup>10</sup> From this clarification one may conclude, that this clarification does not pay particular attention to the details of foreseeability or typical risk and inability to prevent this risk, even if all due care is exercised in its management. Importance of the criteria of inability to prevent the risk, even if all due care is exercised in its management, is already analysed above. Importance of typical risk will be analysed in the section 3 of the present paper. Although the clarification, provided by *Dr. iur.* Jānis Kubilis, emphasizes the criteria of source of abnormal danger as being something “not usual”, the criteria of “not a subject of common usage” are not explicitly included in the Art. 2347 para. 2 of Latvian Civil Law and

<sup>7</sup> Latvian Civil Law. Available: <https://likumi.lv/ta/id/90220-civillikums-ceturta-dala-saistibu-tiesibas> [viewed 01.05.2021.].

<sup>8</sup> Švarcs F. Latvijas 1937. gada 28. janvāra Civillikums un tā rašanās vēsture [The Civil Law of the Republic of Latvia from 28 January 1937 and history of its making]. Rīga: Tiesu Namu Aģentūra, 2011, p. 47.

<sup>9</sup> Kubilis J. Atbildības par paaugstinātas bīstamības avota radītu kaitējumu problemātika un modernizācija [The Current Issues and Modernisation of Liability Caused by Abnormally Dangerous Activity]. In: Tiesību efektīvas piemērošanas problemātika. Latvijas Universitātes 72. zinātniskās konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2014, p. 200.

<sup>10</sup> Kubilis J. 2014, p. 205.



is also the matter of debate in broader sense. The author will analyse this criterion its meaning and application in the section 2 of this paper.

Another interesting detail is that with amendments from 29 November, 2012 some examples of source of abnormal danger – “transport, undertakings, construction, dangerous substances” were added to the wording of Art. 2347 para. 2 of the Latvian Civil Law. These examples, however, are not exhaustive and, moreover, they are far away from adding the clarity to the meaning of the source of abnormal danger. Instead, they may raise a question, whether every transport, every undertaking shall be treated as a source of abnormal danger. The author will examine this matter in the section 3 of the present paper.

Consequently, although the provisions of Art. 2347 para. 2 of Latvian Civil Law, like statutory provisions of several other European jurisdictions, stipulate some relatively clear examples of actions, which shall be considered as dangerous and at the same time provide also possibility to treat also other actions, not explicitly mentioned in the list as dangerous, these provisions could not be considered as sufficient, as they are not providing certain preconditions, upon which these actions shall be treated dangerous and they do not provide sufficiently clear indication of possibly liable person and, moreover, they completely neglect such important aspect as typical risk, associated with the actions with dangerous things, mechanisms, processes and substances. Moreover, the list of examples of actions, which may be considered as dangerous pursuant to the Art. 2347 para. 2 of Latvian Civil Law, shall be made clearer, specifying, for instance such broad terms as “construction” or “enterprise”, which, in fact, includes several different groups of actions.

## **2. Matter of common or uncommon usage**

As noted above, one of the particularities of abnormally dangerous activity is that the respective activity is not a matter common usage. In simple words, it means that this activity is not carried out by everyone.

An otherwise ordinary activity may be deemed abnormally dangerous when it is carried out in ultrahazardous manner. Field burning was found abnormally dangerous, because it created hazards beyond the ordinary risks of common use of fire. Pest control by means of fumigation was found abnormally dangerous, because it is “specialised activity”.<sup>11</sup> Hence, it may be concluded that in those cases when respective activity must be carried by some sort of specialists, it might be found that this is abnormally dangerous activity (of course, if it also has the other necessary properties).

Although the requirement that the respective activity must be carried out by specialist may indicate that this activity is not a matter of common usage, in

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<sup>11</sup> Spinaci V. Lessons from BP: Deepwater oil drilling is an abnormally dangerous activity. *Nova Law Review*, Vol. 35, Issue 3, 2011, p. 817.

some cases, as an exemption, the requirement of specialist may be absent. This aspect may be illustrated by concept of “unusual and dangerous occupation” (in German: die ungewöhnlichen und gefährlichen Beschäftigung ), established in German law. This concept is not limited solely to business activities performed by professionals, although the professionals carry out the respective occupations in most cases. The judgment, issued by the regional court of appeal of city Hamm (Oberlandesgericht Hamm) provide an illustration thereof. In this case, the insured person sought the payment of insurance indemnity under personal insurance policy, which had an exemption of insurance coverage if the damage were to be caused by unusual and dangerous occupation. The damage in question was caused in the course of “sexual game” with another person, when the plaintiff put a belt around the other person’s neck, thus causing the shortness of breath, and dragged her on her around the apartment as an imagined “slave”. At one point, the other person collapsed in unconsciousness, was taken to the hospital, where several bodily injuries were discovered. Although there was no dispute that this other person entered this “sexual game” willingly, it was qualified as a criminal activity and the plaintiff was sentenced with monetary fine, which he later sought to claim from the insurance company under the personal insurance policy. In the civil case, the court found that the said “sexual game” should be considered as “unusual and dangerous occupation”. Obviously, tightening a belt around the neck – especially if it is used, as here, to achieve shortness of breath and is associated with “dragging” the injured party, as she crawled along on all fours through the apartment – is objectively dangerous. Regarding the unusualness, the court provided that general activity was unusual, if its nature, even assessed according to generous scale, clearly fell outside the scope of the usual types of activity. Whether or when this is the case, it can only be answered on a case-by-case basis. In the opinion of the court, the differentiation necessary in this context must be based on what, according to today's understanding of the general public, and not only in individual cases, can still be regarded as normal activity in the context of a private household, whereby the average citizen, but not the customs of certain groups, applies as a yardstick. In the opinion of the court, the limits of the dangers of daily life for which the defendant is responsible are, in any case, transgressed, if the activity in question would no longer reasonably be carried out by an average informed policyholder due to the risks associated with it. That's how it was found here.<sup>12</sup>

Sometimes the question about not being the matter of common usage is applied like a dogma. For instance, it is stated that the manufacture, storage, transportation and use of high explosives are not matters of common usage,<sup>13</sup> although it might be

<sup>12</sup> Oberlandesgericht Hamm Hinweisbeschluss v. 27.4.2011 – I-20 U 10/11, BeckRS 2011, 18634, European Case Law Identifier (ECLI): ECLI:DE:OLGHAM:2011:0427.I20U10.11.00

<sup>13</sup> Smith A. O. Manufacture and distribution of handguns as an abnormally dangerous activity. University of Chicago Law Review, Vol. 54, Issue 1, 1987, p. 386.

argued at least in the context of the USA, where the possession of various guns and ammunition is, in fact, quite common.

In the USA, the requirement of not being the matter of common usage is often applied together with additional criteria of location appropriateness. For instance, in case when the damage was caused by service station's underground storage tanks for gasoline located close to the residential water wells, it did create a strict liability, as such place for the said tanks was inappropriate.<sup>14</sup> Other cases attest to whether the choice of place could be considered as a "non-natural use" of particular place.<sup>15</sup> In case with placing of huge amount of phosphate slime behind earthen walls in connection with the mining of phosphate rock, the court applied strict liability for the damage caused when the earthen walls broke, because of the scale of the activity and the magnitude of its attendant risk.<sup>16</sup>

However, the application of requirement for respective activity not being a matter of common usage in Latvian case law is applied rather confusingly. In the judgment in Case No. SKC-549/2013 of 6 February 2013, the Civil Cases Department of the Senate of the Supreme Court of the Republic of Latvia analysed the application of law in the situation regarding the compensation of material and non-material damages caused by the severe consequences of a traffic accident.<sup>17</sup> Worthy of note, it was found that the respective traffic accident was caused by the driver of cargo van "Renault Master", driving of which, according to the publicly available information, required the driver's licence of category B,<sup>18</sup> i.e. same as any vehicle of personal use. Hence, it may be concluded that driving of such car may be considered as a matter of common usage. However, in given circumstances, the Civil Cases Department completely overlooked this aspect, which would logically lead to the conclusion, that Art. 2347 para. 2 of Latvian Civil Law was not applicable, as the case did not concern the damages caused by source of abnormal danger. Instead, the Civil Cases Department in the point 10.1 came to an excessively broad conclusion that the owner of the vehicle, whose employee was the driver who caused the accident, was liable for all the damages caused by the accident.

After a year, in Case No. SKC-156/2014 of 27 November 2014, the Civil Cases Department of the Senate of the Supreme Court of the Republic of Latvia came to a rather opposite conclusion.<sup>19</sup> Namely, in point 6 of the judgment, the Civil Cases

<sup>14</sup> Boston, G. W., *Strict liability for abnormally dangerous activity: The negligence barrier*. San Diego Law Review, Vol. 36, Issue 3, 1999, p. 659.

<sup>15</sup> Boston, G. W. 1999, p. 660.

<sup>16</sup> *Ibid.*, p. 662.

<sup>17</sup> Judgment of the Civil Cases Department of the Senate of the Supreme Court of the Republic of Latvia of 6 February 2013 in Case No. SKC-549/2013. Available: <http://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/tiesibu-aktu-raditajs> [viewed 03.05.2021.].

<sup>18</sup> See, for instance: <https://busu-noma.lv/pakalpojums/renault-master-maxi/> [viewed 03.05.2021.].

<sup>19</sup> Judgment of the Civil Cases Department of the Senate of the Supreme Court of the Republic of Latvia of 27 November 2014 in Case No. SKC-156/2014. Available: <http://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/tiesibu-aktu-raditajs> [viewed 03.05.2021.].

Department provides that Art. 2347 para. 2 of Latvian Civil Law does not preclude liability of the person who has caused the traffic accident. Hence, the court prefers to apply “standard” liability model of fault instead of wide application of strict liability for damages caused by object of abnormal danger.

American scholar Steven Shavell has made far-reaching proposal regarding the requirement of not being the matter of common usage. Namely, he criticizes this requirement and suggests that the strict liability regime applicable for damages caused by abnormally dangerous activities shall be expanded also to the liability caused by dangerous common activities. He emphasizes that no other country employs the uncommon activity requirement, noting that in France strict liability has been the dominant form of liability in tort since about 1930, without apparent untoward consequences.<sup>20</sup> Worth to mention that this criticism of Steven Shavell is addressed mainly to the USA’s first Restatement of Torts.

Hence, the proposal of Steven Shavell comes into direct contradiction with approach of PETL, which suggests limited and narrow application of the strict liability applied for the damages caused by abnormally dangerous activity, and such narrow application is achieved mainly via requirement for not being a matter of common usage.<sup>21</sup> The authors of PETL clarify that an activity is plainly of common usage, if it is usually carried on by a large fraction of the people in the community. From that perspective, driving a motor car is certainly a matter of common usage and for that reason falls outside the scope of the abnormally dangerous activity (although, as noted above, Latvian courts sometimes have come to the different conclusions).<sup>22</sup>

The author of the present paper does not agree with proposal of Steven Shavell to drop the requirement of not being the matter of common usage, which would inevitably lead to the broader application of strict liability.

Firstly, the author suggests to keep in mind that liability regimes themselves do not always prove to be an effective tool for preventing damages. Usually, the state has its own mechanisms for controlling potentially dangerous activities, such as use of weapons, chemicals, powerful vehicles, etc. Hence, it is important that the state ensures the mechanisms for reducing the relevant risks, such as adopting the requirements for persons carrying out these activities or maybe even providing that certain activities may be carried out only by certain specialists. However, the use of such mechanisms will ensure also the possibility to determinate, whether the activity under question shall be treated as a matter of common usage or not.

Secondly, the wide application of strict liability will lead to what in German is called “Haftungslawinen” or “avalanches of liability”, i.e., the situation that substantial number of natural and legal persons may be exposed to civil liability. However, will it make our society safer? The author disagrees. A greater level of

<sup>20</sup> Shavell St. The Mistaken Restriction of Strict Liability to Uncommon Activities. *Journal of Legal Analysis*, Vol. 10, 2018, p. 42.

<sup>21</sup> Koch B. A. 2005, p. 195.

<sup>22</sup> *Ibid.*, pp. 106, 107.

safety could be rather reached via various preventive measures, which, as noted above, serve also as tool in order to determine whether the particular activity shall be treated as a matter of common usage, hence using this criterion as one of tools for determining whether the respective activity shall be treated as abnormally dangerous and the strict liability shall be applied or not.

Consequently, one of the mandatory requisites of abnormally dangerous activity is that this activity is not a matter of common usage. This aspect usually, but not always, means that the law requires this activity to be performed by a specialist or a professional.

The question whether the activity is not a matter of common usage, should be answered on case-by-case basis, not as a dogma.

Likewise, the Latvian law should include the requirement of not being a matter of common usage as a mandatory requisite of the abnormally dangerous activity.

### **3. Meaning and importance of typical risks and degree of danger**

As already mentioned, the present wording of Art. 2347 para. 2 of the Latvian Civil Law provide several non-exhaustive examples of source of abnormal danger – “transport, undertakings, construction, dangerous substances”. However, these examples are rather confusing. As Professor Kalvis Torgāns has emphasized, not every accident which happens in respect to the transport or during the construction, should be attributed to the consequences caused by source of abnormal danger.<sup>23</sup> The yardstick, which may help to draw the line as to what should be attributed to the consequences caused by a source of abnormal danger, are the so-called typical risks of respective abnormally dangerous activity.

The answer to question whether we are dealing with a typical risk, is important from at least two perspectives.

On the one hand, these criteria help to distinguish whether the primary cause of the respective damages is the particularities of abnormally dangerous activity, which could not be completely controlled, or merely intent or negligence. For example, if a box with high explosives detonates due to reaction to moderate shake during its transportation, it might be a typical risk pertaining to these explosives. Then again, if the employee, who has the duty to ensure safe carrying of these explosives, negligently puts them close to the heat and the explosives detonate due to the heat, the explosion is attributable primarily to the negligence of the respective employee, in the absence of which there would not be an explosion. Hence, in the latter case there is also no reason to apply strict liability, as the case could be solved with application of liability for intent or negligence. Moreover, as it is provided in the commentaries of the PETL, using similar example with a box of explosives, it is important to establish whether the damage has been caused by

<sup>23</sup> Torgāns K. *Saistību tiesības* [Law of Obligations]. Otrais papildinātais izdevums. Rīga: Tiesu Namu Aģentūra, 2018, p. 479.

materialisation of abnormal danger, which substantiates the application of strict liability regime, or not.<sup>24</sup>

On the other hand, the criteria of typical risk help to distinguish whether the damage was caused during the situation which the potentially liable person (usually the one who performs and/or directly controls the performance of abnormally dangerous activity) should take into account as potential risk, or during the situation which is beyond the limits of foreseeability. However, the foreseeability of risk of damage is one of the attributes of abnormally dangerous activity, pursuant to the Art. 5:101 para. 2 subpara. (a) of PETL.

Foreseeability is one of the attributes to fortuitous or accidental event.<sup>25</sup> Latvian author Dr. iur. Jānis Kubilis explains that the possessor of object of excessivedanger also bears the risk of accidental damages in the meaning that he is, inter alia, liable for such damages.<sup>26</sup> Most likely, Jānis Kubilis derives such conclusion from the wording of Art. 2347 para. 2 of Latvian Civil Law, which at least explicitly does not mention that accidental event may serve as an excuse, releasing the potentially liable person from the liability for damages caused by the object of excessivedanger. However, at least in broader terms than the wording of the said legal provision of Civil Law, the said approach of Jānis Kubilis cannot be supported.

As it is validly emphasized by Professor Jānis Kārklīņš, at least part of manifestations of fortuitous event, including the third party fault, is a reason releasing from liability for damages caused by abnormally dangerous activity.<sup>27</sup> As such, the third-party fault is stipulated also in Art. 7:102 para. 1, subpara. b of PETL. Such approach is justified with the purpose to avoid an overly broad application of strict liability.

The criteria of typical risks, attributable to the particular abnormally dangerous activity, serves a similar purpose, i.e., to reasonably limit the application of strict liability, which, if applied too broadly, may prevent the persons from carrying out abnormally dangerous activities, which, in spite of their dangerous nature, also deliver a certain valuable result for society in terms of production.

Taking into account such considerations, the author suggests to include the criteria of typical risks in the Latvian law regulating the liability for damages caused by abnormally dangerous activity and, to extent possible, provide the list of such risks, associated with particular activity, similarly as it is done in the Art. 6:177 of the Dutch Civil Code regarding the list of typical risks for mining operations.

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<sup>24</sup> Koch B. A. 2005, pp. 106, 107.

<sup>25</sup> Kārklīņš J. (author of the chapter), Torgāns K., Bitāns A. *Ligumu un deliktu problēmas Eiropas Savienībā un Latvijā* [Issues of Contracts and Torts in the European Union and Latvia]. Rīga, Tiesu Namu Aģentūra, 2017, p. 306.

<sup>26</sup> Kubilis J. 2014, p. 204.

<sup>27</sup> Kārklīņš J. *Third Party's Fault as an Exclusion from Strict Liability*. In: *Legal Science: Functions, Significance and Future in Legal Systems II. The 7<sup>th</sup> International Scientific Conference of the Faculty of Law of the University of Latvia*, 16–18 October 2019, Rīga. LU Akadēmiskais apgāds, 2019, p. 379.

#### 4. In search of proper liable person

No doubt, that one of the crucial issues in tort law is determining which person shall be held liable for particular damages. The case when damages are caused by actions with dangerous things, mechanisms, processes and substances, is no exception.

The general rule of tort law is that the liability shall be imposed on the person, who's fault shall be found in respect to the cause of damages. This is a common general requirement of fault as a mandatory requisite of fault in both legal systems – those of continental Europe and common law, where English legislation also states that “[s]ome would go so far as to say that fault is always necessary”.<sup>28</sup> The requirement of fault goes back to the Roman law<sup>29</sup> and later – natural law, providing that a person can be held liable only if he has done what he ought not to have done, or if he has not done what he ought to have done.<sup>30</sup> Hence, the requirement of fault provides an objective test for assessment of one's actions or inaction, and also a measurement of fairness for the assessment whether it would be fair to impose a civil liability on a particular person.

However, the requirement of fault is not relevant, at least explicitly, in case if the damages are caused by abnormally dangerous activities. At the same time, different opinions exist as to whether in such cases the requirement of fault should be completely abandoned.

The authors of PETL seem to have entirely abandoned the requirement of fault in cases when the damages are caused by abnormally dangerous activities. They provide that carrying on an abnormally dangerous activity does therefore not require that the person ultimately liable has been directly and actively involved in the activity in the sense of “hands-on” action. Moreover, they, inter alia, emphasise the aspect of availability of compensation (including deep pocket arguments, which tend to attribute compensating for the loss to the party who can best afford it),<sup>31</sup> which has nothing in common with requirement of fault.

Art. 2347 para. 2 of Latvian Civil Law imposes the liability for damages caused by the source of abnormal danger, on the possessor of this source. Latvian author Dr. iur. Jānis Kubilis emphasizes that the question whether possessor's actions shall be considered faulty, per se is not a precondition for liability for said damages. He also goes so far as to suggest to exclude from Art. 2347 para. 2 of Latvian Civil Law the present provision – that the possessor of source of abnormal danger shall be released from liability, if he, she or it has lost the possession over

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<sup>28</sup> Rogers W. V. H. England, PETL Fault, No. 1, quoted from Widmer P. (author of the chapter). European Group on Tort Law. Principles of European Tort Law. Wien, New York: Springer, 2005, p. 64.

<sup>29</sup> Zimmerman R. The Law of Obligations. Roman Foundations of the Civilian Tradition. 2<sup>nd</sup> ed., Oxford: Oxford University Press, 1996, p. 1027.

<sup>30</sup> Ibid., p. 1034.

<sup>31</sup> Koch B. A. 2005, p. 109.

the said source.<sup>32</sup> It means that not only fault, but to the large extent also the actual ability to control the source of abnormal danger plays very little role in application of civil liability.

The author of the present paper does not agree that the liability for the damages caused by the abnormally dangerous activity could be viewed as something so distant from the fault and even the actual control over the respective object. In this context, it is worth to emphasise the findings of the eminent Dutch Professor Cees van Dam, “that there is no exact borderline to be drawn between negligence and strict liability”, “the dichotomy between negligence and strict liability is outdated” and “legislators and courts look for the right balance by mixing negligence and strict elements.”<sup>33</sup>

The requirement of right balance by mixing negligence and strict elements is not a mere matter of trend. Actually, it is a matter of finding the right balance between the interests of injured party and the wrongdoer. The injured party must have reasonable prospects to have his, her, its damages compensated. The wrongdoer must face the liability for situations, where he, she or it has had at least a partial possibility to assess the risk and prevent the damages. In other words, the liability cannot be applied as a strike of doom to someone, who just has appeared in a wrong place and a wrong time. Such application may prevent the persons from carrying out the respective activities, although such activities may, in general, be beneficial. In other words, the question is about balancing of the rights of persons to life, bodily integrity, health, etc., against the society’s pivotal freedom to act.<sup>34</sup> In order to find the right balance between the interests of injured party and the wrongdoer, the author would like to make the following proposals.

Although at the first glance the strict liability may seem more favourable to the injured party regarding the prospects to have his/her damages compensated, in fact, it brings such result only in part of the relevant cases. Otherwise stated, in one case it may bring such result, whereas in another – not. The only real instrument, which will definitely improve the possibilities of injured party to receive the compensation for damages, is a compulsory civil liability insurance, availability of which plays a very important role as a balancing act between person’s rights and society’s freedom to act.<sup>35</sup> Therefore, Latvian legislator should likewise consider possibilities to reasonably expand the duty of mandatory civil liability insurance on the persons, which may be found liable for damages, caused by abnormally dangerous activities. In order to reasonably expand the said duty, the list of possibly liable persons should be made clearer.

First of all, the application of liability should stress, which person exercises an actual control over the respective dangerous activities. Interesting findings

<sup>32</sup> Kubilis J. *Latvijas deliktu tiesību modernizācijas galvenie virzieni* [The Main Ways of Modernizing the General Rules of Latvian Tort Law]. Rīga: Latvijas Universitāte, 2017, p. 228.

<sup>33</sup> van Dam C. *European Tort Law*. Oxford: Oxford University Press, 2013, p. 306.

<sup>34</sup> van Dam C. 2013, p. 219.

<sup>35</sup> *Ibid.*, p. 221.



are brought by the judgment in Case No. SKC-51/2020 of 20 January 2020 by the Civil Cases Department of the Senate of the Supreme Court of the Republic of Latvia.<sup>36</sup> In this case, the court analysed the distribution of liability between the owner of building (tower) crane and its lessee, who was at the same time also the lessee of the real estate, where the crane was used for construction works and caused damage. The court emphasized that, although the owner of the crane may be considered as its possessor, the lessee of the crane exercised the actual control over the operations with the crane and was entitled to give binding instructions to the operator of the crane. Hence, it may be concluded that the possessor of abnormally dangerous activities is the one, who exercises an actual control over these activities and therefore is in the best position to evaluate possible risks and prevent the damages.

Secondly, it must be kept in mind that one requisite of object of excessive danger is the requirement that the respective activity is not a matter of common usage. As it was said in the section 2 of the present paper, it usually, but not always means that the respective activity must be carried out by specialist or professional. These specialists and professionals shall be considered as possessors of the respective abnormally dangerous activities. If necessary, the legislator must consider the necessity to expand the duty of compulsory civil liability insurance, imposed on these professionals.

## Conclusion

1. Although the provisions of Art. 2347 para. 2 of Latvian Civil Law, similarly to the statutory provisions of several other European jurisdictions, stipulate some relatively clear examples of actions, which are considered as dangerous, and at the same time provide also the possibility to treat also other actions, not explicitly mentioned in the list, as dangerous, these provisions could not be considered as sufficient, since they fail to provide certain preconditions, upon which these actions shall be treated as dangerous and they do not give a sufficiently clear indication of the possibly liable person. Moreover, they completely neglect such an important aspect as typical risk associated with the actions with dangerous things, mechanisms, processes and substances.
2. The list of examples of actions, which may be considered as dangerous pursuant to the Art. 2347 para. 2 of Latvian Civil Law, shall be made clearer, specifying, for instance, such broad terms as “construction” or “enterprise”, which, in fact, includes several different groups of actions.
3. One of the mandatory requisites of abnormally dangerous activity is that this activity is not a matter of common usage. This aspect usually, but not always,

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<sup>36</sup> Judgment of the Civil Cases Department of the Senate of the Supreme Court of the Republic of Latvia of 20 January 2020 in Case No. SKC-51/2020. Available: <http://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/tiesibu-aktu-raditajs> [viewed 26.06.2021.].

means that the law requires this activity to be performed by a specialist or a professional. The question whether the activity is or is not a matter of common usage, should be answered on case-by-case basis, not as a dogma. The Latvian law must, likewise, include the requirement of not being a matter of common usage as a mandatory requisite of the abnormally dangerous activity.

4. The author suggests to include the criteria of typical risks in the Latvian law regulating the liability for damages caused by abnormally dangerous activity and, to extent possible, provide the list of such risks, associated with particular activity, similarly as it is done in the Art. 6:177 of the Dutch Civil Code regarding the list of typical risks for mining operations.
5. The law must explicitly stipulate that the provisions of strict liability, set in the Art. 2347 para. 2 of Latvian Civil Law, should be applied in cases when the damage is caused by the typical risk associated with particular activity, and also, to the extent possible, the list of such typical risks.
6. The law should also specify more clearly the liable person for damages caused by actions with dangerous things, mechanisms, processes and substances. In general, it may be the person who operates (performs) a particular activity, but in cases where possible, the specification should be made even clearer, to extent possible focusing on specialists and professionals who have better prospects for assessing the risks and preventing the damages.
7. The law should reasonably expand the duty of compulsory civil liability insurance on the persons which may be found liable for damages caused by the respective abnormally dangerous activities.

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## THE PRINCIPLE OF APPROPRIATE AND PROPORTIONATE REMUNERATION IN COPYRIGHT CONTRACTS AND ITS IMPLEMENTATION IN THE BALTIC STATES

**Keywords:** authors, performers, appropriate and proportionate remuneration, Directive 2019/790, contract

### Summary

The Digital Single Market Directive 2019/790 constitutes a significant milestone in the field of copyright, especially its provisions aimed to ensure the fair remuneration for authors and performers. This publication focuses on Art. 18 of the Directive, which establishes the principle of appropriate and proportionate remuneration. This principle follows from the general understanding of authors and performers as a weaker bargaining party.

Being formulated abstractly, the principle of appropriate and proportionate remuneration leaves broad discretion for its implementation. Therefore, the article presents case studies concerning the implementation of the said principle into national laws of the three Baltic States: Estonia, Latvia, and Lithuania. The first task is to check the operation of the principle of appropriate and proportionate remuneration in the national legal acts before the implementation of the Digital Single Market Directive. The second task is to compare and assess the prepared national draft legal acts and how they implement this principle. The article concludes that all three Baltic States have chosen a “minimalist” implementation strategy and, as a consequence, the appropriate and proportionate remuneration principle most likely will have no real independent value.

## Introduction

The term “authors’ law” is a more precise term in continental European countries than the term “copyright”.<sup>1</sup> This is clearly seen at the national terminology level: *Urheberrecht* in German, *droit d’auteur* in French, *derechos de autor* in Spanish, *autoriõigus* in Estonian, *autortiesības* in Latvian, *autorių teisė* in Lithuanian, and so on. This semantic aspect reflects the traditional explanation and justification of copyright law, that is, to benefit authors, rewarding them for their creative results. The same justification is used when speaking about performers and their protection. Relying on this traditional justification, authors and performers are granted exclusive rights<sup>2</sup>, allowing them to control the use of their works/performances and – most importantly – to reap the financial profits from such use. As it is illustratively stated in WIPO Glossary of Copyright and Related Rights Terms, “[t]he right to claim remuneration [...] is an inseparable corollary of [exclusive] right”.<sup>3</sup>

There is a generally accepted view that authors and performers, despite their central position, do not sufficiently benefit from copyright protection. The empirical studies confirm that the earnings of authors are significantly below the average<sup>4</sup>. It is also widely accepted in legal doctrine<sup>5</sup> and at political level that the reason for this mismatch is the weak bargaining power of authors and performers. This idea is directly formulated in the Recital 72 of the Digital Single Market Directive<sup>6</sup> (the DSM Directive): “Authors and performers tend to be in the weaker contractual position when they grant a licence or transfer their rights”. These circumstances show that existing copyright law simply does not fulfil what it promises.

The latest regulatory attempt to fix this structural failure was made by the DSM Directive. In particular, Art. 18 of this Directive establishes the principle of appropriate and proportionate remuneration (the APR principle). At the same time, the APR principle should be counterbalanced against the freedom of

<sup>1</sup> Yet, in order to avoid multiplication and discrepancies among the legal concepts, further in this article the more traditional English concept of “copyright” is used.

<sup>2</sup> Authors are increasingly often granted non-exclusive rights to remuneration. These rights are discussed further in the article.

<sup>3</sup> Guide to the Copyright and Related Rights Treaties Administered by WIPO And Glossary of Copyright and Related Rights Terms. WIPO publication 891. World Intellectual Property Organization, 2004.

<sup>4</sup> Kretschmer M., Hardwick P. Authors’ Earnings from Copyright and Non-Copyright Sources: A Survey of 25,000 British and German Writers. Available: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2619649](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2619649) [viewed 08.11.2021.].

<sup>5</sup> Birštonas R. et al. Intelektinės nuosavybės teisė. Vadovėlis [Intellectual Property Law. Textbook]. Vilnius, Registrų centras, 2010, p. 187; Guibault L., Salamanca O., van Gompel S. Remuneration of authors and performers for the use of their works and the fixations of their performances. A study prepared for the European Commission. 2015. Available: [http://publications.europa.eu/resource/cellar/c022cd3c-9a52-11e5-b3b7-01aa75ed71a1.0001.01/DOC\\_1](http://publications.europa.eu/resource/cellar/c022cd3c-9a52-11e5-b3b7-01aa75ed71a1.0001.01/DOC_1) [viewed 08.11.2021.], p. 4

<sup>6</sup> Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC. OJ L 130, 17.05.2019, pp. 92–125.

contract and not become too burdensome for other market players. Besides, being formulated abstractly, the APR principle leaves European Union (EU) Member States with broad discretion for its transposition. Accordingly, the EU Member States may choose from the vast array of legal instruments such as the inalienability of specific authors' and performers' rights, contract interpretation rules or widening of non-voluntary collective management. This leads to the demand for comparative research of implementation of the APR principle at the national level.

The current article addresses these issues, i.e., how the APR principle will be implemented in the copyright law of the three Baltic States: Estonia, Latvia and Lithuania and what similarities or differences of the application of this principle can be noticed from a comparative perspective.

To achieve this aim, firstly, international and the EU regulation of the APR principle is discussed. Secondly, the national case studies of Estonia, Latvia, and Lithuania before the DSM Directive are presented and comparatively evaluated. Thirdly, the already prepared national draft legal acts and how they implement the APR principle are compared and assessed.

## 1. The APR principle in the international and EU law

The structural weakness of authors and performers mentioned above was never sufficiently addressed at the international level. While it may be pointed to certain legal provisions such as *droit de suite* (Art 14ter of the Berne Convention<sup>7</sup>) this is more an exception than a rule. One of the explanations of this situation is found in significant national differences, leading to a very different legal philosophy. For example, common law countries traditionally are orientated not so much to authors but toward disseminating works and performances. This also explains a much greater reliance on the principle of the freedom of contract in these countries. In this international vacuum, the issue of the appropriate remuneration for authors and performers had to be addressed either at the national or regional level.

Turning to the European regulation, before the DSM Directive copyright contracts remained one of the few areas which were left outside the harmonization of copyright in the EU. As a consequence, no general provisions on the remuneration for authors and performers were provided.

It is true, notwithstanding, that several isolated and restricted solutions were provided. In particular, Art. 5 of the Rental and Lending Directive<sup>8</sup> granted the right to remuneration after the transfer of exclusive rental right. Such a solution

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<sup>7</sup> Berne Convention for the Protection of Literary and Artistic Works. Signed in Berne on 09.09.1886.

<sup>8</sup> Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version). OJ L 376, 27.12.2006, pp. 28–35.

in the legal doctrine started to be called “a residual right”. It is notable that beneficiaries of this residual right were both authors and performers.

Secondly, the Directive 2001/84/EC on the resale right<sup>9</sup> provided remuneration for resale of original works of art and let their authors to participate in the future (rising) value of such works. This Directive protects the interest of the authors of works of graphic or plastic art.

Thirdly, supplementary remuneration for performers, if they transferred their rights for non-recurring remuneration, was established<sup>10</sup>. However, this right is conditioned on many additional requirements, among them, that it becomes operative only after 50 years after the transfer has passed.

Summing up, these isolated and fragmented solutions were far from satisfactory. One could consider the fact alone that residual right to remuneration after the exclusive right to rental has been transferred, due to expansion of digital dissemination of works and performances, nowadays plays minimal or no role at all.

## 2. National solutions in the Baltic States

Reacting to this lack of regulation at the international and EU levels, EU Member States independently created or applied a wide spectrum of mechanisms to increase the bargaining power of authors and performers. Without trying to give a comprehensive description, the following instruments can be named:

- general civil law mechanisms (e.g., invalidity of transactions, contract interpretation rules, revocation of contracts);
- specific copyright law provisions (*ex ante* and *ex post*);
- restrictions on transferability of economic rights,
- author-centred rules of contract interpretation,
- specific grounds for contract revocation (e.g., for non-use),
- specific rules on remuneration in copyright contracts,
- residual remuneration rights after the transfer of exclusive rights<sup>11</sup>.

Turning to, in particular, the Baltic States, the co-authors of the article have composed the table, presenting the most notable protective instruments in these countries:

<sup>9</sup> Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art. OJ L 272, 13.10.2001, pp. 32–36.

<sup>10</sup> Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights. OJ L 265, 11.10.2011, pp. 1–5.

<sup>11</sup> For a broader overview see Dusollier S. et al. Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, 2014. Available: [https://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/juri/dv/contractualarrangements\\_/contractualarrangements\\_en.pdf](https://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/contractualarrangements_/contractualarrangements_en.pdf) [viewed 08.11.2021.], pp. 28–65.

**Table 1. Legal provisions aimed at ensuring the fair remuneration for authors and performers in Lithuania, Latvia and Estonia**

Measure	Lithuania	Latvia	Estonia
Specific provisions concerning the amount of remuneration	None, with the only exception to the subsequent editions (royalty not less than 5 per cent of the publisher's revenues)	None	None
Remuneration for every transferred exclusive right	No general rule, but in specific cases only (audiovisual authors and performers)	No general rule, but in one specific case (audiovisual performers)	None
Special interpretation rules on copyright contracts	Yes	Yes, but only one with regard to the license agreement scope, restricted by the purpose-limited exploitation rule	None
Residual remuneration rights (except the rental right)	None	None	Yes, for authors who transferred rights to audiovisual producer

As can be seen, while all three Baltic States have implemented certain provisions to strengthen the position of authors and performers, the particular arrangements in each country differ significantly. Not a singular measure can be found identically formulated in all three states. Presumably, the most protective regulation is in Lithuania, which provides for the most extensive interpretation rules, also have some specific, albeit narrow, provisions regarding the amount of the remuneration and requirement to have separate remuneration for each transferred right. On the other end of the spectrum stands Estonia, which is relying mostly on the contractual freedom, while Latvia falls somewhere in between. However, it is important to note, that in Estonia residual remuneration rights are set for authors who transferred rights to audiovisual producer. Such provision is absent both in Lithuania and Latvia, while in practice the mechanism employed in Estonia is considered among the most efficient ones.

It should be added that all three countries have transposed the instruments, mentioned in Chapter 1 of this article, that is, residual right to remuneration for a transferred rental right, resale right and supplementary payment for performers.



### 3. The principle of appropriate and proportionate remuneration in the DSM Directive

With the enactment of the DSM Directive, the question of fair remuneration for authors and performers took a significant turn. Interesting to note that the original Directive's proposal<sup>12</sup> was more modest and suggested introducing only transparency obligation, contract adjustment mechanism and dispute resolution mechanism. The principle itself was not separately mentioned, except that the title of the then third chapter was "Fair remuneration in contracts of authors and performers".

During the negotiation stage, the proposal was significantly changed and the final adopted version contains Art. 18(1), which provides for a general APR principle:

*Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration.*

But it is also important to notice that in Art. 18(2) Member States are empowered to choose the particular and different mechanisms to implement this principle and, by doing this, they should take into account the principle of contractual freedom and a fair balance of rights and interests. This provision leaves Member States with a wide discretion and at the same time opens ambiguity as to the interpretation of the newly created concept of appropriate and proportionate remuneration. Recitals of the DSM Directive are not informative either, naming only collective bargaining as the possible mechanism (Recital 73 of the DSM Directive). Besides, it is made clear that the APR principle is compatible with a lump-sum payment, albeit it should not be the rule, or the authorization to use works and performances for free (Recital 73 and 82 of the DSM Directive).

The APR principle is further supported by the special mechanisms: transparency obligation, contract adjustment mechanism, alternative dispute resolution procedure and right of revocation (Art. 19–23 of the DSM Directive), which are provided in a much more detailed manner.

### 4. Implementation of the APR principle in the Baltic States

It should be started with an observation that despite the deadline for the implementation of the DSM Directive was 7 June 2021, none of the Baltic States managed to do that up to the time of preparation of this article (November, 2021).

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<sup>12</sup> Proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market COM(2016) 593 final.

Estonia<sup>13</sup> and Lithuania<sup>14</sup> have prepared the draft laws, which are still under discussion in these countries. In contrast, in Latvia even a draft law was not officially available, although the basic decision regarding the APR principle seems already taken.

Based on the national reports received from each jurisdiction, the national solutions can be summarized in the following table.

**Table 2. The implementation of the APR principle in Lithuania, Latvia and Estonia**

Lithuania	Latvia	Estonia
The already existing general provisions concerning authors' right to remuneration for the use of their works is supplemented by the expression that this remuneration should be "appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights" (Art. 5 of the Lithuanian draft Copyright Law Amendment Act). The same rule provided with respect to performers contracts and contracts between authors of audiovisual work and producers (Art. 22 and 11 respectively).	Unclear, but, presumably, the already existing provisions concerning authors and performers' right to remuneration for the use of their works and performances will be supplemented by the expression "appropriate and proportionate".	The already existing provisions concerning authors' right to remuneration for the use of their works is supplemented by the expression "appropriate and proportionate" (Art. 14(1) of Estonian draft Copyright Amendment Act). The same is done for performers, as well (Art. 68(1)).
No specific provisions	Presumably, no specific provisions	No specific provisions

As can be seen, Lithuania and Estonia have taken identical approach and implemented the APR principle by its literal transposition and without additional provisions. Latvia, arguably, will follow the same pattern.

The vagueness of the APR principle was reflected during the implementation process both in Estonia and Lithuania. According to the Explanatory memorandum to the Estonian Copyright Amendment Act the APR principle is, by its nature,

<sup>13</sup> Autoriõiguse seaduse muutmise seaduse eelnõu [Estonian draft Copyright Amendment Law Act]. Available: [https://www.riigikogu.ee/tegevus/eelnoud/eelnou/d3d07943-9d1c-4ebe-94a4-8ae1ebdf7a68/Autori%C3%B5iguse%20seaduse%20muutmise%20seadus%20\(autori%C3%B5iguse%20direktiivide%20%C3%BClev%C3%B5tmine](https://www.riigikogu.ee/tegevus/eelnoud/eelnou/d3d07943-9d1c-4ebe-94a4-8ae1ebdf7a68/Autori%C3%B5iguse%20seaduse%20muutmise%20seadus%20(autori%C3%B5iguse%20direktiivide%20%C3%BClev%C3%B5tmine) [viewed 07.11.2021].

<sup>14</sup> Autorių teisių ir gretutinių teisių įstatymo Nr. VIII-1185 2, 3, 5, 11, 15, 21, 22, 23, 25, 32, 46, 48, 51, 53, 56, 58, 59, 63, 65, 7213, 7230, 75, 89, 91, 93, 96 straipsnių, 3 priedo pakeitimo ir papildymo 151, 152, 211, 221, 222, 401, 402, 403, 571, 651 straipsniais, VIII ir IX skyriaus įstatymas [Lithuanian draft Copyright Law Amendment Act]. Available: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/c0973cc1a25c11ebb458f88c56e2040c?positionInSearchResults=2&searchModelUUID=b2bafd6b-1da3-4bb5-aeeb-cda6b95b99d5> [viewed 07.11.2021].

declaratory compared to, e.g., the equitable remuneration guaranteed by Article 5 of the Rental and Lending Directive.<sup>15</sup> The question is how authors and performers can efficiently enforce the remuneration principle as the other party can always claim that the remuneration is fair and proportionate.

In Lithuania, the implementation of the APR principle turned to be the most controversial in the entire implementation process of the DSM Directive. Lithuanian collective management organizations put forward several proposals how to implement this principle into Lithuanian copyright law. The most notable and uniting solution in these proposals was based on the three elements: firstly, radical expansion of remunerations rights, which survives the transfer of authors and performers' exclusive rights, based on the model of the equitable remuneration introduced by Art. 5 of the Rental and Lending Directive; secondly, these new remuneration rights are non-transferable; thirdly, remuneration rights are mandatory managed by the collective management organizations. Despite the heated debates, the current Lithuanian draft have not included this solution and stick to the verbatim formulation of the APR principle.

Finally, transparency obligation, contract adjustment mechanism, alternative dispute resolution procedure and right of revocation, which are directly connected to the APR principle, are quite literally implemented in the national draft laws in Estonia and Lithuania.

## Conclusion

The conducted research shows that all three Baltic States have chosen a “minimalist” approach, meaning that the implementation of the APR principle is restricted to the literal repetition of the said principle in the national draft statutes, but no moves beyond this literal transposition have been made. Such choice leads to the question of whether this implementation strategy has been correct, because the practical application of the principle requires more than a statement in the black letters of the law. Being too abstract and without a more detailed support, the implementation of the APR principle is left for the courts that will shape its practical application on a case-by-case basis.

This is not to say that authors' and performers' interests in concluding copyright contracts in the Baltic States are left unprotected. Some protective mechanisms (with significant variations) were applied even before implementing the DSM Directive, and their further application will continue. Besides, of a greater importance are more concrete norms transposed from the DSM Directive, which aim to protect authors and performers against the other contractual party (such

<sup>15</sup> Autoriõiguse seaduse muutmise seaduse (autoriõiguse direktiivide ülevõtmine) eelnõu seletuskiri [Explanatory memorandum to the Estonian Copyright Amendment Act]. Available: [https://www.riigikogu.ee/tegevus/eelnoud/eelnou/d3d07943-9d1c-4ebe-94a4-8ae1ebdf7a68/Autori%C3%B5iguse%20seaduse%20muutmise%20seadus%20\(autori%C3%B5iguse%20direktiivide%20%C3%BClev%C3%B5tmine](https://www.riigikogu.ee/tegevus/eelnoud/eelnou/d3d07943-9d1c-4ebe-94a4-8ae1ebdf7a68/Autori%C3%B5iguse%20seaduse%20muutmise%20seadus%20(autori%C3%B5iguse%20direktiivide%20%C3%BClev%C3%B5tmine) [viewed 07.11.2021.], p. 12.

as contract adjustment mechanism or right to revocation). This leads to the final conclusion that just a literal transposition of the APR principle most likely will have no real independent value.

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## ADOPTION OF SHAREHOLDER RESOLUTIONS IN POST-COVID ERA. EXAMPLE OF ESTONIAN LAW

**Keywords:** shareholder rights in a general meeting, general meeting of shareholders, Estonian Commercial Code, Estonian company law, company law, corporate law

### Summary

In 2020, the COVID-19 pandemic forced the world to find the right balance between protecting health, minimizing economic and social disruption and retaining the rights of individuals. States imposed a number of restrictions in order to prevent the spread of the pandemic, including restrictions on the movement of persons and restrictions on gathering. Traditionally, shareholders' meetings of companies have been taken place in the form of physical meetings. Company law also been based on the assumption that meetings are held physically. In the new situation, it was no longer possible to hold meetings in this way, at least for some time. This forced companies to use digital solutions. The legislator was also faced with the question of how to resolve this situation.

Different countries reacted differently in order to find company law solutions. In Estonia, new rules were adopted in May 2020 that allowed legal persons to adopt decisions using digital solutions, among other things, it is allowed to make decisions in a full virtual meeting. The central question in the way companies make decisions is whether the use of virtual solutions is possible, but whether the law provides companies with sufficiently flexible options, which would enable decisions to be taken in the light of the specificities and needs of each company and whether such practices ensure the exercise of shareholders' rights. This article analyses whether and how these objectives have been achieved in Estonian law.

There are three ways to adopt company's resolutions in Estonia: a meeting, a written resolution or a vote by letter. Meetings can take place physically, virtually or in a hybrid form. It is not possible to infringe the rights of the shareholder in making a written resolution, since if such a method is used, the resolution decision is adopted only if all shareholders agree. In the case of voting by letter, the law does not take into account the fact that in a shareholder of a public limited company has the right to receive information from directors only at the general meeting.

Therefore, the future case-law must lay down the principles of communication between the shareholder and the public limited company in the situation when the resolution has been adopted by using such option. The law stipulates that if digital means are used to hold a meeting, shareholders must be guaranteed all the same rights as they have in the event of a physical meeting. Since these rules have been in force only for a short period of time, there are no court cases based on them. Although the legal literature has been expressed some views on the use of digital solutions, it is not yet known how the courts will resolve these issues if disputes arise.

## Introduction

In 2020, the COVID-19 pandemic forced the world to find the right balance between protecting health, minimizing economic and social disruption and retaining the rights of individuals. On 30 January 2020, the World Health Organisation (WHO) declared a public health emergency of international importance.<sup>1</sup> The spread of the virus did not stop and on 11 March 2020 the WHO declared a global pandemic situation due to the COVID-19 outbreak.<sup>2</sup> Since then, European states imposed several restrictions to prevent the spread of the pandemic, including restrictions on the movement and gathering of people. In Estonia, the government declared a state of emergency in 12 March 2020<sup>3</sup> and the next day the government issued a regulation on the content of the restrictions adopted<sup>4</sup>, two days later, restrictions on crossing the border were introduced.<sup>5</sup> The new situation in which the world was put overnight had also a direct impact on company law. Namely, the principle that shareholder resolutions are to be taken at the physical meetings lays at the heart of company law.<sup>6</sup> In the new situation, it was no longer possible to hold physical meetings, at least for some time. The situation was also complicated by the fact that the spring of 2020, when lockdowns were implemented

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<sup>1</sup> Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV). WHO 30.01.2020. Available: [https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)) [viewed 05.11.2021.].

<sup>2</sup> WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020. Available: <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020> [viewed 05.11.2021.].

<sup>3</sup> Order of government on declaration of emergency situation in the administrative territory of the Republic of Estonia. RT III, 13.03.2020, 1. Available: <https://www.riigiteataja.ee/en/eli/517032020002/consolide> [viewed 05.11.2021.].

<sup>4</sup> Order of government on application of measures of emergency situation. RT III, 14.03.2021, 1. Available: <https://www.riigiteataja.ee/en/eli/517032020005/consolide> [viewed 05.11.2021.].

<sup>5</sup> Order of government on temporary restriction on crossing the state border due to the spread of the coronavirus causing the COVID-19 disease. RT III 15.03.2020, 1. Available: <https://www.riigiteataja.ee/en/eli/517032020004/consolide> [viewed 05.11.2021.].

<sup>6</sup> Hüffer U., Koch J. Beck'scher Kurz-Kommentare. Band 53. Aktiengesetz [Beck's short comments. Volume 53. Stock Corporation Act]. Verlag C.H. Beck München, 15. Auflage 2021. – Aktiengesetz § 118, Rn 6.

everywhere, was the usual time when annual meetings of the majority of companies were ahead and it was not known how long the restrictions will continue.

Therefore, most countries were in an urgent need for a legislative response and for an outcome where, despite everything, the annual reports of the companies could be approved. National solutions were different.<sup>7</sup> It can be argued that most countries opted for temporary measures, limiting their implementation in time.<sup>8</sup> Some countries did nothing. At the same time, some countries made more radical decisions and legitimised the possibility of adopting resolutions without physical assembly on a permanent basis. However, some countries had already foreseen such an opportunity in advance.

In March 2020, Estonia had no legislation on virtual shareholder meetings and therefore it was necessary to make legislative changes. On May 23, 2020, Estonian parliament passed a law supplementing, among other things, Art. 33<sup>1</sup> of the General Part of the Civil Code Act<sup>9</sup>, which allowed members of the bodies of all legal persons to attend the meeting through electronic channels. The amendment entered into force the following day. The law implemented a general rule that applies to all types of legal entities and is applicable to all their bodies. This is a default rule, since the articles of association can exclude such a method of decision-making. As a matter of fact, considering circumstances, choosing an opt-out regulation was essentially the only option as the main aim of the new law was to resolve an unexpected situation and give companies the opportunity to hold virtual meetings also in case the articles of association of the company did not provide for such solutions. The restrictions on gatherings also prevented shareholders to adopt resolutions on amending the articles of association. It should be noted that being a default rule it leaves a company a possibility to exclude an option to hold virtual meetings in the articles of association, but the actual experience shows that this option is not being used.

Although the topic of virtual meetings has become substantial in connection with the COVID crisis, it has actually raised a much broader question of whether company law overall provides a sufficiently good and flexible way to adopt resolutions. It is clear that holding a physical meeting continues to be the very essence of many countries' respective rules but it has clearly become evident that

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<sup>7</sup> Zetzsche D., Anker-Sørensen L., Consiglio R., Yeboah-Smith M. COVID-19-Crisis and Company Law – Towards Virtual Shareholder Meetings. Available: <https://ssrn.com/abstract=3576707> [viewed 05.11.2021.], p. 10 ff.

<sup>8</sup> For example, Germany adopted an Act to Mitigate the Consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law which included temporary rules as regards virtual general meetings of public limited companies (See: Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht Vom 27. März 2020 [Law to mitigate the consequences of the COVID-19 pandemic in civil, insolvency and criminal procedure law of 27 March 2020]. Bundesgesetzblatt Jahrgang 2020 Teil I Nr. 14, ausgegeben zu Bonn am 27. März 2020).

<sup>9</sup> Tsiviilseadustiku üldosa seadus [General Part of the Civil Code Act]. 28.03.2002, RT I 2002, 35, 216. Available: <https://www.riigiteataja.ee/en/eli/ee/S01042021006/consolide/current> [viewed 05.11.2021.].



this cannot be the best or preferred option in a situation where technology allows to arrange the communication and decision-making process more flexibly and conveniently.

Virtual meetings are a reality today, and the question of whether holding a meeting virtually is better or worse than a physical meeting cannot be considered a legal issue. It is, among others, a question of human interaction, psychology, cognition and technology. The legal question is whether adopting shareholder resolutions is something that necessarily requires a physical meeting of people in one room at the same time, or whether it is possible to guarantee the rights of individuals even without physical gathering. It is therefore not a question whether the meeting should be physical or virtual, but first of all, whether the law establishes for companies the possibilities to adopt resolutions without physical meeting. The legal question is also are the rights of shareholders guaranteed in case of using these alternatives. The fundamental rights of shareholders thereby include the right to speak, to vote, to make proposals and to ask questions.<sup>10</sup>

This article focuses on Estonian company law and analyses the regulations on private limited companies and public limited companies. The purpose of the article is to analyse what are the methods to adopt shareholder resolutions under Estonian law and to evaluate whether the Estonian law gives companies flexible opportunities to adopt such resolutions and is the protection of shareholders' rights thereby guaranteed.

## 1. Decision-making possibilities in Estonian company law

The possibilities for adopting resolutions prescribed by Estonian company law are slightly different depending on the form of a legal person. Firstly, the difference is somewhat inevitable since the different legal forms might need different solutions to establish the best possible decision-making process. The second reason, however, is more legislative in its nature as the various legal entities are regulated by different legal acts, which have been amended several times and it must be acknowledged that the amendment of law has not always taken place systematically.<sup>11</sup>

The laws adopted after Estonian re-independence in the early 1990s were based on the laws of other countries at the same time, according to the general logic that the main possibility to adopt resolutions was at the physically held shareholders' meeting. However, already the original text of the Commercial

<sup>10</sup> EMCA European Model Company Act (EMCA), 1<sup>st</sup> ed., 2017. Available: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2929348](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929348) [viewed 05.11.2021.], p. 252.

<sup>11</sup> Legislative inconsistencies in the regulation of this issue have also been referred to in the Terms of reference for the review of company law. See: Ühinguõiguse revisjoni lähteülesanne [Terms of reference for the review of company law]. Tallinn: Justiitsministeerium, 2016. Available: [https://www.just.ee/sites/www.just.ee/files/uhinguoiguse\\_revisjoni\\_lahteulesanne\\_loplik\\_10.5.2016.pdf](https://www.just.ee/sites/www.just.ee/files/uhinguoiguse_revisjoni_lahteulesanne_loplik_10.5.2016.pdf) [viewed 05.11.2021.], p. 127.

Code,<sup>12</sup> adopted in 1995, provided for the possibility for private limited companies to adopt resolutions by a letter (§ 173). After that, the rules regulating the adoption of shareholder resolutions have been amended several times. However, the overall direction of these changes has been rather inconsistent. On one hand, the legislator has tried to reduce formalization and has provided for more flexible options. For example, in 2006 the law explicitly allowed private limited companies to adopt written resolutions, thereby the explanatory memorandum to the draft clearly stated the objective of facilitating decision-making.<sup>13</sup> On the other hand, at the same time, the legislator has also tried to clarify and supplement many of those rules which has once again made the regulations more rigid.<sup>14</sup> Lots of above-mentioned amendments have, of course, also had objective reasons, since some of them have been introduced to solve problems arising in legal practice. Sometimes new rules have been introduced, for example, mainly for the purpose of implementing the opinions arising from the case-law of the Supreme Court into law. On several occasions the transposition of the EU Directives has also increased the inconsistency of company law regulations. Shareholder Rights Directive<sup>15</sup> can be named as one example and one must admit that the way it was transposed was not well reasoned. According to article 1 of the Directive, it applies only to listed companies. Among other things, the directive also includes rules providing for the possibility for shareholders to cast their votes without attending a meeting, including in digital form (Art. 8). Estonia imposed the relevant rules not only on listed companies, but on all public limited companies and some of the rules even on private limited companies. Such extensive imposition meant that the law provided for inflexible procedures even for small companies and raised, inter alia, the question whether private limited companies were still allowed to provide for different arrangements in their articles of association or whether the provisions of the law were supposed to be mandatory. The prevailing view in the legal literature is that the rules of law regulating the internal relations of a private limited company are overwhelmingly default in its nature and that shareholders have an extensive

<sup>12</sup> *Äriseadustik* [Commercial Code] 15.02.1995, RT I 1995, 26, 355. Available: <https://www.riigiteataja.ee/en/eli/ee/522062017003/consolide/current> [viewed 05.11.2021.].

<sup>13</sup> Explanatory memorandum to the draft Act amending the Commercial Code [Seletuskiri äriseadustiku muutmise seaduse eelnõu juurde], 2005. Available: <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/3c7833d5-7972-3348-8cca-c210ab5e36ea/%C3%84riseadustiku%20muutmise%20seadus> [viewed 05.11.2021.].

<sup>14</sup> In 2018 Estonian company law revision working group completed its final analysis and stated that, according to opinions of stakeholders, the problem of the law in force in Estonia is that the rules for convening and conducting shareholder meetings is excessively rigorous, complex, unreasonably diverse and inflexible. In addition, stakeholders have pointed out that the procedures, deadlines and requirements for convening of the meetings of different types of legal persons are unreasonably different. See: Käerdi M., Kärson S., Kõve V., Pavelts A., Saare K., Volens U., Vutt A., Vutt M. *Ühinguõiguse revisjon. Analüüs-kontseptsioon* [Company law revised. Analysis-concept]. Tallinn: Justiitsministeerium, 2018. Available: [https://www.just.ee/sites/www.just.ee/files/uhinguoiguse\\_revisjoni\\_analuus-kontseptsioon.pdf](https://www.just.ee/sites/www.just.ee/files/uhinguoiguse_revisjoni_analuus-kontseptsioon.pdf) [viewed 05.11.2021.], p. 527.

<sup>15</sup> Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies. OJ L 184, 14.7.2007, pp. 17–24.

private autonomy to agree differently. This view is well justified as the purpose of the regulation of a private limited company is to ensure the flexibility as well as the possibility for shareholders to establish, through the articles of association, the most appropriate regulation for both the relations between the shareholders and the relations between the shareholders and the company.<sup>16</sup> One must therefore conclude that the relevant rules are not mandatory *per se*, but there remains the question to what extent do the shareholders have the right to deviate in their articles of association from these extremely detailed rules foreseen in law. So far, the case-law has not to this question.

Before the amendments implemented in May 2020, the most general principle for adopting resolutions was that all the bodies of all legal persons adopt resolutions at the traditional general meeting.<sup>17</sup> In addition to this there were (and still are) two other options provided by law: a written resolution or a vote by a letter. However, the latter decision-making methods were regulated differently as regards different legal entities. The previous law (being a result of the transposition of the Shareholder Rights' Directive) also allowed to hold so-called hybrid meetings. This means that a company could stipulate in its articles of association that the shareholders may participate in the general meeting and exercise their rights using electronic means without physically attending the general meeting and without appointing a representative if it is possible in a technically secure manner. The law also provided some examples of electronic participation:

- 1) Participation at a general meeting by means of real-time two-way communication throughout the general meeting or in another similar electronic way, which enables the shareholder to watch the general meeting from a remote location, vote using electronic means throughout the general meeting on each draft of the resolution and address the general meeting at the time determined by the chairman of the meeting;
- 2) electronic voting on the draft resolutions prepared in respect to the items on the agenda using electronic means prior to the general meeting or during the general meeting if it is possible in a technically secure manner.<sup>18</sup>

## 2. Written resolution

In case a resolution is adopted in writing, the text of the resolution must be drawn up as a document, and the resolution shall be deemed adopted, if the document is signed by all the members of the body concerned. For example,

<sup>16</sup> Saare K., Volens U., Vutt A., Vutt M. Ühinguõigus I. Kapaliühingud [Company Law I. Limited Companies]. Tallinn: Juura, 2015, p. 358; Vutt, M. Convening the General Meeting of Shareholders of a Limited Company: Estonian Law in a Digital Perspective. *International Comparative Jurisprudence*, 2020, Vol. 6, No. 1, pp. 95–107.

<sup>17</sup> E. g. Arts 290 (1) and 170 (1) of Commercial Code.

<sup>18</sup> Those complex rules were abolished with the amendments of the General Part of Civil Code Act in May 2020 and replaced by more general and flexible rules.

in the case of a private limited company, the company must be signed by all the shareholders. In such case, it is not necessary to comply with any formal decision-making requirements, e.g., it has no meaning whether the persons involved in the decision-making process have been previously notified or not. Since a resolution is considered to be adopted only if it has been signed by everyone, every person who considers that his or her rights have somehow been infringed has the right to refuse to sign the document, in which case no resolution has been adopted. Signature is subject to all general rules for making declarations of intent (General Part of Civil Code Act, Art. 69 and following). The document can be signed using all the permitted means, i.e., the signature can be either handwritten or digital (General Part of Civil Code Act, Arts 78 and 80). In a situation where, for example, different shareholders can sign a document using different forms of signature, it is also accepted in practice that there are two documents with the same content, one signed in hand by one shareholder and the other digitally by the other. Resolutions of both private and public limited companies shall be taken in writing if the company has only one shareholder. In this case, it is extremely convenient to make a written resolution, since in principle the sole shareholder can take resolutions at any time. The only requirement is that the resolutions must be documented and therefore the shareholder cannot later rely on the fact that he or she has taken a resolution, even though it was not properly documented.

The advantage of adopting written resolutions in comparison with the other decision-making options is, *inter alia*, that the written resolution cannot, in most cases, be challenged. Therefore, once a resolution has been adopted in writing, everyone has full confidence that it will remain in force. Generally, contestation of resolutions is possible under Estonian law either by a declaration of nullity of the resolution or by a request for revocation of the resolution (General Part of Civil Code Act, Art. 38). In the case of the declaration of nullity, the main basis for the claim in practice is a breach of the requirements of the convocation of the meeting or the decision-making procedure, but since the written resolution is adopted only when it has been signed by all shareholders, it is not possible to infringe any procedural rules. In such case, the shareholder can only contest his or her vote, but even if the vote turns out to be void, it will only have an impact on the validity of the resolution, if the existence of the resolution depends on that vote. The comments to the Act state that invalidity of voting may occur if the will to vote has been formed based on incorrect circumstances caused by the members of the body of the same company.<sup>19</sup> However, such cases are very rare in practice.

The resolution can also be claimed null and void if it infringes a provision of law established for the protection of creditors or public interest or if it does not conform to good morals (CC Art. 177<sup>1</sup> (1)). Although the law does not include such restriction, the damage to the interests of creditors can be relied on, in particular, in case of the bankruptcy of the company. However, the current practice shows

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<sup>19</sup> Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne [General Part of Civil Code Act. Commented edition]. Varut et al. (eds.). Tallinn: Juura, 2010, p. 118.

that in case of the bankruptcy it is common to use remedies foreseen in bankruptcy law (Insolvency Act<sup>20</sup>, Art. 109 and following) rather than contest the shareholder resolutions. The nullity of a resolution resulting from the contradiction of the resolution with good morals is exceptionally rare in practice and it is difficult to imagine a situation in which a shareholder who has voted in favour of a resolution can afterwards claim that it is null and void because it contradicts good morals.

There are also procedural regulations regarding the revocation of a resolution that make it difficult to apply to court to revoke a written resolution. Namely, Estonian law provides that a claim of the revocation of a resolution can only be filed by a shareholder who has clearly expressed his or her objections to the resolution (for example, in private limited company this rule is foreseen in CC Art. 178 (3)). In such situations deficiencies of a resolution can only arise from the shortcomings of a given vote, but if a vote has been cast in favour of a resolution, the resolution cannot be challenged without contesting the vote. As already noted above, the shortcomings arising from the casting of votes are rare in practice.

One can therefore conclude that since a written resolution assumes that all persons agree with the resolution, it is possible to use this form of decision-making in a situation where two presumptions are met: there are few shareholders with voting rights and there is no dispute between them. It is therefore the most convenient decision-making option especially for small private limited companies, as well as for the boards of all kinds of legal persons of private law. Practice shows that the vast majority of resolutions of small private limited companies are made in writing.

### 3. Voting by a letter

When voting by a letter, the resolution shall be adopted without a shareholders' meeting taking place. Instead, the shareholders are given the possibility to vote the drafts sent to them by the board. This form of decision-making must be distinguished from the situation where the shareholders' meeting takes place, but the shareholders are given, *inter alia*, the opportunity to cast their votes in writing.

When voting by a letter, the decision-making procedure first requires the draft of the resolution to be sent (at least in a form which can be reproduced in writing<sup>21</sup> to all shareholders, setting a time limit within which the shareholders must submit

<sup>20</sup> Pankrotiseadus [Bankruptcy Act] 22.01.2003, RT I 2003, 17, 95. Available: <https://www.riigiteataja.ee/en/eli/521012021001/consolide> [viewed 05.11.2021.].

<sup>21</sup> According to Art. 79 of General Part of Civil Code Act, the form which can be reproduced in writing means that the transaction shall be entered into in a form enabling repeated written reproduction and shall contain the names of the persons entering into the transaction but need not contain hand-written signatures. These requirements are met, e.g. in case of submitting one's votes by e-mail or fax.

their votes (again, at least in a form which can be reproduced in writing).<sup>22</sup> When sending their votes, the shareholders must follow the deadline which means that the declaration of the intent that includes his or her vote must reach the company before the end of the deadline.<sup>23</sup> If a shareholder does not reply within the time limit set by the board, he or she shall be deemed to have voted against the resolution. After the voting the board shall draw up a voting record that reflects the results of the voting. The record shall also be sent to all the shareholders.

One must note that when voting by a letter, shareholders will be able to vote, for example by a regular mail, but also by e-mail. Shareholders have the right to choose the specific means of communication as long as the form requirements are met. In principle, it is also possible to use web solutions that allow to make these types of declarations of intent. However, one must take into account that the chosen web environment must allow to identify the voters and therefore a simple web poll with answers “yes” or “no” but without identification of the persons giving their answers is not enough to meet the standards. Namely, the voting record must include both the votes and the names of all the persons who gave their votes. The purpose of this requirement is to ensure that it is afterwards possible to verify that all the votes have been correctly counted. The same objective is ensured by the requirement that the shareholders' responses must be added to the voting record.<sup>24</sup>

It is clear that if resolutions are adopted allowing shareholders to vote by a letter, the shareholders cannot be guaranteed absolutely all the same rights they have at the meeting. In particular, the shareholders' right to ask questions and express their opinions might be hindered.

Considering that every shareholder of a private limited company has the right to receive information from the management board at any time (CC Art. 166 (1)), it is in itself possible to obtain answers to his or her questions. However, the shareholder will probably not be able to receive these answers so quickly that it would affect his or her decision-making process in a particular vote. The problem appears to be even more considerable in a public limited company, where the shareholders' right to information is more limited. Namely, a shareholder of a public limited company can request information from the company only at the general meeting (CC Art. 287 (1)). One must admit that since the possibility to

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<sup>22</sup> The law does not prescribe how much time must be given to shareholders to vote, but the Supreme Court has expressed the view that the time given for voting must be reasonable according to the circumstances. See: Judgement of Supreme Court of 23 May 2018 in the Civil Case No. 2-16-9415, s. 22.

<sup>23</sup> In its nature, voting by a letter is making a declaration of intent to an absentee, which is regulated in Art. 69 (2) of General Part of Civil Code.

<sup>24</sup> In Estonian case law, there has been a case where a company organised voting in web environment. When applying to commercial register in order to change the relevant data the company provided the registrar with a voting record that only contained the results of an anonymous voting, and it was not possible to identify the persons who voted. Alas, the Supreme Court, solving the case, did not analyse the material problems as regards the voting and annulled the decision of the circuit court only for procedural reasons.

vote by a letter has only been possible for public limited companies for the last year and a half, there is currently no case law on this issue.

The fact that the law does not provide shareholders the right to ask questions in case of voting by a letter, seems to be a legal gap. The authors of the article are of the opinion that despite the lack of legal regulations, the management board must provide shareholders with information on draft resolutions also when voting by a letter. This obligation can be deduced from Art. 32 of the GPCCA, according to which the shareholders of a company and the members of the directing bodies of a company must act in accordance with the principle of good faith and consider each other's legitimate interests in their mutual relations.

The principle that shareholders vote on the drafts of resolutions is in fact similar regardless of the form of voting. Therefore, if the shareholders vote by a letter, the same principles must be applied to the provision of information on the draft that are applicable when the draft is put to the vote at the general meeting.

As regards Estonian case law, there have so far been only disputes about the draft resolution in connection with the election of members of the directors. In general, it can be concluded that in case of voting in written form, shareholders must be given the opportunity to present their candidates for the election before voting.<sup>25</sup>

For private limited companies the possibility to adopt resolutions by a letter, has been available from the beginning. Public limited companies, on the other hand were given such an opportunity only with the amendments of the Commercial Code in 2020. At present, there is no case law as regards the resolutions of public limited companies adopted by a letter, but the occurrence of such disputes cannot be ruled out.

There is also a separate problem related to listed companies, as the law allows them to adopt resolutions by a letter. However, the authors are of the opinion that this decision-making form could be justified in listed companies only in extremely rare cases where exceptional circumstances arise which make it impossible to hold a meeting. The Corporate Governance Rules<sup>26</sup> are also based on the assumption that the shareholders of listed companies adopt resolutions at the meeting. One must agree with the opinion expressed in the legal literature that it is reasonable to organize voting by a letter in case the issue to be decided is rather of a technical nature. However, when it comes to deciding on an issue that requires substantive discussion, a meeting should be convened.<sup>27</sup> One may also ask whether choosing an inappropriate form of adopting a resolution could lead to the possibility of contestation of a resolution. This issue has not yet been resolved in case law, but the authors are of the opinion that it cannot be ruled out.

<sup>25</sup> Vutt A., Vutt M. Shareholders' Draft Resolutions in Estonian Company Law: An Example of Unreasonable Transposition of the Shareholder Rights Directive. *Juridica International*, 2019, Vol. 27, p. 75 ff.

<sup>26</sup> Corporate Governance Recommendations. Tallinn, 2004. Available: [https://www.fi.ee/failid/HYT\\_eng.pdf](https://www.fi.ee/failid/HYT_eng.pdf) [viewed 05.11.2021.], s. 1.1 ff.

<sup>27</sup> Saare K. et al. 2015, p. 187.

#### 4. Virtual vs physical general meetings

One important difference between a physical and a virtual meeting is that in case of a physical meeting, the shareholder must confirm his or her attendance at the meeting with a signature (Arts 171(4) and 297(3) of the Commercial Code). If a shareholder participates in the meeting by electronic means of communication, there is no such requirement. This may later make it more difficult for both the company and the shareholder to prove the attendance at the meeting and it must be borne in mind that in case of a dispute, both the company and the shareholder must be prepared to prove that the shareholder attended (or did not attend).

The possibility of holding virtual general meetings was introduced into Estonian law in 2020. Prior to that, their admissibility was legally unclear. It is clear that it was possible to foresee such an option in the articles of association of a private limited company. As regards public limited companies, it should rather be considered that it was not possible to provide for the virtual meetings in the articles of association. However, it is rather an impractical question to ask as the legal situation has now changed and the possibilities to initiate a legal dispute regarding the previous situation are more likely theoretical. Under Estonian law, a physical meeting and a virtual meeting have the same legal meaning. The board always has the right to choose which form of the meeting to use, unless the articles of association explicitly preclude the holding of virtual meetings. One must note that the legal provisions on virtual meetings also do not preclude the holding of hybrid meetings, which means that the meeting can also be held so that shareholders have the choice whether to attend the meeting physically or by electronic means. As far as the authors know, there are currently no pending court cases regarding virtual meetings. The grounds for challenging the resolutions adopted at a virtual meeting are probably to be, at least partly, different from those for challenging those adopted at physical meetings. Among other things, technical problems related to the meeting may give ground to a challenge the resolution of a virtual meeting. In summary, the Estonian legal literature has taken the view that technical problems in conducting a virtual meeting can provide a basis for contesting the resolutions in case these problems were within the scope of the company.<sup>28</sup>

#### Conclusion

The crisis caused by the global coronavirus pandemic has given the world a chance to change. The same applies to company law and today it should be clear that the traditional model where shareholders make resolutions only at a physical meeting is outdated. The aim of this article was to analyse which possibilities are granted to shareholders to adopt resolutions under Estonian law and to evaluate

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<sup>28</sup> Vutt M. Digital Opportunities for – and Legal Impediments to – Participation in a General Meeting of Shareholders. *Juridica International*, Vol. 29, 2020, pp. 43–44.



whether Estonian law gives companies flexible opportunities to adopt shareholder resolutions and whether the protection of shareholders' rights is thereby guaranteed.

It can be concluded that Estonian law gives companies a variety of possibilities to choose between: shareholders can adopt resolutions at physical meetings and virtual meetings as well as hybrid meetings. In addition to that, shareholders can adopt written resolutions and vote by a letter. At the same time, the companies themselves can prescribe more detailed rules of procedure in the articles of association, as well as exclude the use of some of the above-mentioned possibilities. Thus, it can be concluded that Estonian law gives companies a sufficient list of possibilities and every company can choose the best option that allows the most flexible interaction between the company and the shareholders. At the same time, it must be borne in mind that regardless of whether resolutions are adopted at a physical or a virtual meeting or voting by a letter, all essential shareholder rights must be guaranteed to shareholders. As a result of the analysis, one can conclude that the adoption of resolutions outside the physical meetings does not automatically entail infringements of the rights of shareholders.

At the time of writing this article, there is yet no case law related to virtual shareholder meetings in Estonia, and it is therefore difficult to predict the exact legal problems that may arise as regards virtual meetings. However, the disputes related to technical issues related to virtual meetings will probably arise in the future. The authors of the article are of the opinion that as regards technical difficulties, the principle that everyone is responsible for technical problems that fall within their sphere of influence must be applied. Therefore, one can conclude that technical problems can give ground to challenge a resolution only if the problems have significantly impeded the holding of a meeting or the exercise of shareholders' rights and in case it was within the company's sphere of influence to prevent those problems.

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## PATIENT PROTECTION UNDER FRENCH LAW: THE EXAMPLE OF MEDICAL INFORMATION

**Keywords:** medical liability, physicians, medical establishments, patient's information duty, ethical fault, proof, compensation

### Summary

The duty of physicians and health institutions to inform patients about medical risks is a much-debated source of liability in French law. Ethical misconduct resulting from breaches of these obligations is likely to call into question the balance of relations between health professionals and patients. Case law, and then the French law of 4 March 2002, have constantly improved the possibilities of action for victims of incomplete or imperfect information, by making it easier for them to prove the lack of information and by establishing the compensable damages, which are distinct from bodily injuries. However, one may wonder whether this increased protection of patients is not now excessive, by transferring the burden of the medical decision and the related risks onto them, once they have been fully informed.

### Introduction

French medical liability law was deeply reformed by a law on the rights of users of the health system, the “Kouchner Law” of 4 March 2002<sup>2</sup>, so named because it was inspired by our then Minister of Health, Bernard Kouchner, who is well known for having founded the association “Médecins sans frontières”.

To sum up, this law separates the damages caused by the liability of physicians and health establishments, which can be compensated by private insurers, and

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<sup>1</sup> The theme of this presentation was discussed with Mustapha Mekki, Professor at the University of Paris 1, Panthéon-Sorbonne.

<sup>2</sup> Loi No. 2002-303 du 4 mars 2002 “Relative aux droits des malades et à la qualité du système de santé” [Law No. 2002-303 of 4 March 2002 “On the rights of patients and the quality of the health system”].

the consequences of the most serious medical hazards, which are compensated by a public guarantee fund (ONIAM<sup>3</sup>).

Regarding liability, French law envisages a different treatment of technical misconduct, such as diagnostic errors or negligence during operations, and so-called ethical misconduct, which affects the information and consent of the patient. Indeed, medical information is at the junction of ethical values and of the legal standard. Whereas ethics tends to define a base of commonly accepted values, their positivity, postulates a conjunction with the legal rule, which is defined by its compulsory nature: the principle and amount of the damages that can be compensated are hardly debated, because they guarantee the effectiveness of the legal rule.

In this case, patients can claim compensation for a breach of their right to be informed, in violation of our Public Health Code, which manages the protection of persons in contact with the French health system. Thus, health rules now provide that information belongs to the “rights” of the person, and that it should regard “frequent risks or normally predictable serious risks”<sup>4</sup> of the treatments prescribed. These ethical faults have caused significant litigation, which is in continuous development for approximately twenty years, and the subject is yet not completely controlled by the supreme French courts, the “Court of Cassation” and the “Conseil d’État”<sup>5</sup>. For example, the issue of patient information and consent has become particularly relevant since the COVID health crisis<sup>6</sup>, as it also concerns the administration of health products such as vaccines, which currently raise medical questions about the extent of the risks involved.

A good medical information appears to be the key to the trust relationship between the physician and the patient. More importantly, it allows to obtain the informed consent of the patient, while being appropriate, adapted to his understanding and to his sensitivity. Litigation in this area is extensively publicised due to its ethical dimension, rebalancing relationship between the medical sphere and patients, insofar as they were until recently too opaque. We may, however, wonder if the increased repression of ethical faults, intended to protect health users, will not be Pyrrhus victory, by transferring on the latter the weight of medical and technical decisions. This paradox emerges with the debate on the proof of medical information (viewed in Section 1 below), but also with the issue of compensation of insufficient information, which enables ethical principles to find their legal sanction (considered in Section 2 below).

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<sup>3</sup> Office National d’Indemnisation des Accidents Médicaux, des Affections Iatrogènes et des Infections Nosocomiales [National Compensation Office for Medical Accidents, Iatrogenic Diseases and Nosocomial Infections].

<sup>4</sup> Code de la Santé publique [Public Health Code], Art. L. 1111-2

<sup>5</sup> The jurisdiction of these supreme Courts depends on whether the dispute is public or private.

<sup>6</sup> See Pierre P. Le risque médical au temps du COVID 19 [Medical risk at the time of COVID 19]. Resp. civ. et ass. oct. 2020, Etude 9.

## 1. Proof of medical information: A new balance between physicians and patients

### 1.1. The way to achieving this new balance

The world of providing information to the patient has been totally transformed when, in the beginning of 1997, our Court of Cassation changed the principles it had applied for decades, stating “that the person who is legally or contractually bound to a specific obligation to inform should give evidence of the enforcement of the obligation thereof”<sup>7</sup>. In this case, it concerned a colonoscopy which had led to an intestinal perforation – a risk concerning which the patient pretended that he had not been informed by the surgeon. Until then, it was up to the victims to prove the inaccuracy or the lack of information about the risks incurred, which posed two series of difficulties to them.

Firstly, they came up against difficulties of access to medical documentation, even against a tacit solidarity of practitioners, since many experts were themselves practitioners who were likely to be personally sued in other litigation<sup>8</sup>.

Secondly, the evidence to be provided was a *probatio diabolica*, the proof of negative fact – failure to inform – was much more difficult to report than a positive fact such as a technical mistake, the slip of a knife, etc.

Due to these difficulties, the Court of Cassation completely changed its mind, a change, for all that, applicable to all professionals, whatever their specialty, such as notaries, lawyers, bankers, but also – to return to the sphere of medicine – to the laboratories producing vaccines, and the practitioners injecting them<sup>9</sup>. Anyway, the “Kouchner Law” approved the solution, since the Art. L. 1111-2 of Public Health Code provides that the evidence of the information release is incumbent upon “the professional or the medical institution”. Moreover, the law provides for everyone the right to have direct access to one’s medical record,<sup>10</sup> whereas previously it was necessary to obtain a doctor’s approval. This certainly facilitates a lot the evidence of medical malfunctioning.

<sup>7</sup> Cass. 1<sup>ère</sup> civ., 25 fév. 1997, n° 94-19.685. Available: <https://www.legifrance.gouv.fr> [viewed 15.11.2021.].

<sup>8</sup> Cayol J. Réflexion sur la responsabilité médicale à la suite de l’introduction du dossier médical personnel [Thoughts on medical liability following the introduction of the personal medical file]. *Médecine et Droit*, 2006, No. 78, p. 85.

<sup>9</sup> Cass. 1<sup>ère</sup> civ., 23 janv. 2014, Resp. civ. et assur. 2014, comm. 116, note Hocquet-Berg S.No. 12–22.123. Available: <https://www.legifrance.gouv.fr> [viewed 15.11.2021.].

<sup>10</sup> Code de la Santé publique [Public Health Code]. Art. L. 1111-7 : “Any person shall have access to all information concerning his or her health held, in whatever capacity, by health professionals, by health establishments, by health centres, by the armed forces health service or by the National Invalids Institution, which is formalised or has been the subject of written exchanges between health professionals, in particular examination results, consultation, intervention, exploration or hospitalisation reports, protocols and therapeutic prescriptions implemented, monitoring sheets, correspondence between health professionals, with the exception of information mentioning that it has been collected from or concerning a third party not involved in the therapeutic management. She may access this information directly or through a doctor she designates...”.

## 1.2. Assessment of such an evolution

At a first glance, this sounds like a victory for the patients. Nevertheless, the practice of medical information which has entirely changed within duration of almost twenty years, leads to relativization of those advances in the patients' rights.

Thus, the precautions taken by physicians and medical institutions to escape legal sanctions have significantly increased. This led to a profusion of informative documents signed by patients, such as extremely detailed "consent forms", which at the beginning gave rise to a very lucrative market, as they were sold by companies. The problem arose from the reach of information which has to be passed on to health users. Our rules impose that all serious risks must be specified, including the most exceptional ones, such as a death risk following a general anaesthesia, a blood contamination by the AIDS virus during a skin transplant, which, statistically, only represents a "chance" in several millions... Because of this defensive medicine, which protects itself by pointing out risks which hitherto were not mentioned in the patient's interest, a shift progressively appeared: the purely medical choice – such as the decision of a treatment, or getting a vaccine – which was previously refereed by professionals who mastered the advantage/cost ratio, is most often transferred to the patients, naturally in a weakened state and lacking a sufficient background in medicine. So much so that some medically appropriate decisions have been wrongly postponed, since the patient's consent could not, in principle, be ignored.

Fortunately, public authorities have now taken over the control of informational documents by publishing official guidelines about good practices expected<sup>11</sup>. However, there is an "ethical valve" considering the patient's will to be informed<sup>12</sup>. In other words, the patient retains control regarding obtaining of information he wishes to receive, and nothing may stop him, once access is opened by the doctor or the medical institution, from being fully informed about all the risks incurred. To put it simply, it will be up to him to make it known to the health professional, by way of a document clearly expressing his will, to keep something in the dark...

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<sup>11</sup> Regarding Haute Autorité de Santé [HAS – the High Authority for Health] guidelines, see: <https://www.has-sante.fr>.

<sup>12</sup> Code de la Santé Publique [Public Health Code]. Art. L 1111-4 al. 3, art. R. 4127-36: "Any physician has the duty to respect the person's wishes after having informed him or her of the consequences of his or her choices and of their seriousness. If the person's decision to refuse or interrupt any treatment puts his/her life in danger, he/she must reiterate his/her decision within a reasonable time. He or she may call on another member of the medical profession. The entire procedure is recorded in the patient's medical file..."

## 2. Compensation for the lack of medical information: Which positivity?

### 2.1. An ethical dimension or a classical compensation for personal injury?

Any lack of information compromises the relationship between the physician and his patient, especially the trust that the latter has placed in the former. Does this loss of trust, even this feeling of betrayal suffered by the patient, not account for the non-pecuniary damage that can be compensated as such, regardless of the evolution of the patient's physical condition? Accordingly, all things considered, it would not matter much that the unreported or poorly reported medical risk has occurred or not, the compensation being based on finding out the latter, afterwards, and the resulting anxiety and fright. Conceived like that, the compensation of the lack of information would then take on all its ethical dimension, but also threaten to aggravate the paralysis of the medical profession.

However, another reasoning would link up the compensation of the lack of information to the bodily harm that the patient actually suffered. Following this inclination, the risk has occurred after the victim was deprived of a choice between running this risk or choosing another treatment. Adequately informed, the patient might – or might not – have declined the treatment or the operation, which eventually were to turn out to be damaging. Consequently, the compensation of the poor information will go through the calculation of the chances of avoiding this risk, had the patient been well informed... How far, up to which percentage, the latter would have behaved differently and been medically satisfied? This probability theory leads to compensate only a “loss of chance” – the paradise of irresolute judges, assessed by applying a percentage to the amount of money that compensate bodily harms: 10% of the disability compensation, 10% of the *pretium doloris*, etc...<sup>13</sup>.

### 2.2. The jurisprudence positions

To begin with, it should be noted that the “Kouchner Law”, which is very detailed concerning the purpose and proof of medical information, remains silent regarding the terms of compensation, if not complied with. This question has therefore been left exclusively to the French jurisprudence. The Court of Cassation had a lot of hesitation facing a hard doctrinal controversy<sup>14</sup>. Firstly, our Highest Jurisdiction has stated that “the only principle that can be compensated following

<sup>13</sup> On this calculation method, concerning the loss of chance: Cass. 1ère civ., 7 déc. 2004, No. 02-10.10-957; CE 20 nov. 2020, No. 419778. Available: <https://www.legifrance.gouv.fr> [viewed 15.11.2021.].

<sup>14</sup> Feu l'arrêt Mercier ? Revue Des Contrats 2011, p. 335, débats, par M. Bacache, F. Leduc, Ph. Pierre [Late stoplight Mercier? Review of Contracts 2011, p. 335, debates by M. Bacache, F. Leduc, Ph. Pierre].



the non-observance by the doctor of the obligation to inform, obligation in view of obtaining the patient's consent, is the loss of chance of avoiding the risk which eventually occurred"<sup>15</sup>. This was the end of the non-pecuniary damage, replaced by a "corporalization" of the compensation of lack of information.

However, this position was only a step toward the actual solution. In fact, jurisprudence has since qualified its approach, distinguishing between two main hypotheses. Either, as we have seen, the patient has been deprived of a real choice between two treatments or a therapeutic abstention, and the compensation for the loss of a chance remains relevant, as previously exposed. Or, and this is the novelty since a few years, the patient, had he been correctly informed, would still have chosen to run the risk that was not pointed out to him. In retrospect, he would certainly have preferred to expose himself to a risk of nosocomial infection, for example, in order to put an end to the unbearable pain caused by a herniated disc. In this case, the Court of Cassation now states that "the failure of a health professional to comply with his duty to inform causes the person to whom the information was owed, when this risk occurs, to suffer moral prejudice resulting from a failure to prepare for the consequences of such a risk, which, once it is invoked, must be compensated"<sup>16</sup>. Notably, in this case, the damage is purely moral, it results from the psychological shock suffered by the patient, it is not a percentage of the bodily injury like the loss of chance. On the other hand, the case law requires that the bodily risk must have actually occurred. In other words, even if the Court of Cassation formally targets the right to the patient's dignity in its decisions, the current solution does not go as far as proposing compensation for ethical fault, including the cases when the silence has had no consequences because the unreported risk did not appear.

## Conclusion

This case law is certainly subtle and complex in relation to the sometimes-low financial stakes, as compensation for moral prejudice is often limited to a few hundred or a few thousand euros. However, it increases the protection of the patient, as he will win the case on a symbolic level, and even on an economic level, as the loser will have to reimburse the costs of the trial, which are often very high in medical matters, much more than the compensation for the moral shock itself.

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<sup>15</sup> Cass. 1<sup>ère</sup> civ., 6 déc. 2007, No. 06-19.301. Available: <https://www.legifrance.gouv.fr> [viewed 15.11.2021.].

<sup>16</sup> Cass. 1<sup>ère</sup> civ., 23 janv. 2014, No. 12-22.123. Available: <https://www.legifrance.gouv.fr>, Cass. 1<sup>ère</sup> civ., 9 déc. 2020, No. 19-22.055. Available: <https://www.legifrance.gouv.fr> [viewed 15.11.2021.].

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## PROTECTION OF THE WEAKER PARTY – TO WHOM IS LABOUR LAW STILL APPLICABLE?

**Keywords:** labour law, international standards, personal scope, ILO, Council of Europe, Court of Justice of the European Union

### Summary

National law is affected by a number of different international regulations and agreements. International agreements provide for rules aimed at harmonizing certain requirements and understandings that different countries should follow. In labour relations, international standards are set at two different levels – on the one hand, by the International Labour Organization (ILO), and on the other by regional standards – by the Council of Europe and the directives and regulations adopted by the European Union.

All these international rules have important implications for national labour law. However, such international norms do not provide a clear personal scope – that is, it is not clearly defined to whom such international norms apply. Although the various international rules do not directly define the persons to whom those norms apply, – the implementation of international rules remains a matter for national law. Thus, the concept of both employee and employment relationship is shaped by national law.

The exception here is the European Union, where the European Court of Justice has given an autonomous meaning to the concept of worker (particularly in the context of freedom of movement for workers). Although the concept of a worker and of an employment relationship has been developed by the Court of Justice of the European Union, Member States retain the right to define the employment relationship in accordance with the law in force in the respective Member State.

The main factor in shaping employment relationships is the employee's dependence on the person providing the work, and the person providing the work also has an obligation to pay remuneration for the work performed.

Although the scope of those rules is defined differently by different international rules, the characteristics generally applicable to the definition of an employee and the employment relationship are similar to those used in national law.

## Introduction

Internationally, employment relations are regulated at different levels. Most intensively, industrial relations are regulated internationally at the level of the International Labour Organisation (hereinafter – ILO). The ILO has adopted both conventions and recommendations aimed at setting standards for employment relations and ensuring the protection of workers' rights. The ILO conventions do not define who is a worker and what constitutes an employment relationship. Once Member States have ratified the ILO conventions, the implementation of ILO standards is a matter for national law, and it is up to the Member State to decide to whom and to what extent to apply the standards laid down by the ILO.

In addition to the ILO standards, the case law of the European Committee of Social Rights (hereinafter – the Committee) on the application of the European Social Charter is also important. The European Social Charter does not define to whom, for instance, working conditions must be applied. Although the European Social Charter is largely addressed to the Member States, it is important to clarify who is meant by the European Social Charter as a worker.

The European Union, through its directives and regulations, lays down standards for employment relations by ensuring that the conditions for certain aspects of employment relations (e.g., collective redundancies, minimum health and safety requirements, etc.) are the same in all EU countries. In addition, the interpretations of the European Court of Justice on the concept of worker and the characteristics associated with it play a significant part.

All of these organisations have an important role to play in shaping the conditions of employment relations, and Member States must take these conditions into account if they wish to develop national labour law.

One important question is to whom one should apply these standards and when? What is the definition of an employment relationship, who is the employee? An important question is whether and to what extent international labour standards could apply? Is it possible to identify a universal concept of worker for the three organisations mentioned above, to which the international labour standards could be applied, or do the various intergovernmental organisations have different understandings of the concept of worker and the employment relationship?

This article is divided into four parts. The first section analyses the scope of ILO conventions and recommendations. The second chapter analyses the concept of worker and employment relationship as provided for in the European Social Charter. The third chapter discusses the concept of worker and employment relationship in the light of European Union Law. The fourth chapter explores the concept of workers and employment relationship in the light of Estonian labour law.

## 1. International Labour Organisation standards and characteristics of an employment relationship

The International Labour Organisation has adopted conventions and recommendations since its formation. ILO conventions and recommendations have not generally defined the scope of application of these instruments.<sup>1</sup> In general terms, the ILO has taken as its starting point a single concept of worker and employment relationship, without giving it any more specific meaning. The fundamental conventions of ILO have also failed to specify to whom specifically these conventions should extend. Thus, e.g., the Freedom of Association and Protection of the Right to Organise Convention, 1948 provides that the convention shall extend “...to workers and employers without distinction whatsoever...”<sup>2</sup> The Convention itself does not specify who specifically is meant by worker and employer.

The ILO itself has given no formal definition of either the employment relationship or the worker. However, the Committee of Experts on the Application of Conventions and Recommendations has stressed in practice that the type of employment relationship, as well as the persons who might be protected by international standards, remains a matter for national decision. It is for each Member State to define the characteristics of the employment relationship, and it is through this that compliance with international labour standards is ensured.

While the ILO has not defined in its conventions to whom and to what extent these standards should apply (leaving open the notions of worker and employment relationship), in 2006 the ILO adopted Recommendation 198 on the characteristics of an employment relationship.<sup>3</sup> In accordance with that recommendation – Employment Relationship Recommendation – this recommendation applies to “...workers who perform work in the context of an employment relationship...”. The Recommendation is addressed to the Member States, and consequently the ILO has indicated which indicators Member States could use when they wish to define an employment relationship. The ILO does not, however, provide a definitive list of the elements through which an employment relationship could be defined.

In the Recommendation, the ILO has identified the following possibilities for defining an employment relationship:

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<sup>1</sup> See also De Stefano V. Not as Simple as it Seems: The ILO and the Personal Scope of International Labour Standards, 2021 Available: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3790766](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790766) [viewed 07.11.2021.].

<sup>2</sup> The Freedom of Association and Protection of the Right to Organise Convention, 1948, No. 87. Available: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312232](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232) [viewed 07.11.2021.].

<sup>3</sup> Employment Relationship Recommendation, 2006, No. 198. Available: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::NO:12100:P12100\\_ILO\\_CODE:R198:NO](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::NO:12100:P12100_ILO_CODE:R198:NO) [viewed 07.11.2021.]; See also THE EMPLOYMENT RELATIONSHIP: An annotated guide to ILO Recommendation No. 198, Available: [http://old.adapt.it/adapt-indice-a-z/wp-content/uploads/2015/11/ILO\\_GUIDE\\_Recommendation\\_198.pdf](http://old.adapt.it/adapt-indice-a-z/wp-content/uploads/2015/11/ILO_GUIDE_Recommendation_198.pdf) [viewed 07.11.2021.].

1. For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the national policy referred to in this Recommendation, consider the possibility of the following:

- (a) allowing a broad range of means for determining the existence of an employment relationship;
- (b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and
- (c) determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.

In addition to the above, the ILO Recommendation 198 stresses that for the purposes of the national policy referred to in this Recommendation, Members may consider clearly defining the conditions applied for determining the existence of an employment relationship, for example, subordination or dependence.

In addition, the ILO Recommendation 198 highlights the conditions that Member States could take into account when they need to determine the employment relationship:

- (a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;
- (b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.

Analysing the guidelines set out in the above Recommendation, it can be concluded that the ILO, in this Recommendation, is basing its approach to the employment relationship on features that have been defining labour law and employment relations for a long time. However, the named Recommendation is addressed only to Member States in a situation where they should define the employment relationship and its content. Whether such a definition proposed by the ILO and such characteristics are also applicable in the implementation of the ILO Conventions remains unclear. While the implementation of the ILO Conventions takes place through national law, in the final stage, in order to determine whether and to what extent international labour standards apply, the national understanding of

the employment relationship and the characteristics of the employment relationship that are applied to determine the employment relationship is still essential.

## 2. Employee notion in the European Social Charter

The European Social Charter (hereinafter – the Charter) contains different rights that are focused upon the employment relations. The European Social Charter uses notion of worker, but it does not give any explanation, who is the worker and what are the characteristics of a worker.

In principle, the rights set forth in the Charter apply to all workers in the economy of a state party, regardless of the sector (for example, public and private sector) and form of employment (employed or self-employed, home workers, etc.).<sup>4</sup> However, there are explicit exceptions in particular regarding foreign workers. The Appendix to the ESC, which outlines the personal scope of the Charter, generally limits the application *ratione personae* to “nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned”.

In the case of collective employment, however, the European Committee of Social Rights has concluded that collective rights (e.g., the right to negotiate a collective agreement) should be guaranteed to both employed and self-employed workers. As the nature of employment relationships is changing, such changes must also be taken into account for rights arising from employment relationships. As the European Committee of Social Rights has stated,

*... the world of work is changing rapidly and fundamentally with a proliferation of contractual arrangements, often with the express aim of avoiding contracts of employment under labour law, of shifting risk from the labour engager to the labour provider. This has resulted in an increasing number of workers falling outside the definition of a dependent employee, including low-paid workers or service providers who are de facto “dependent” on one or more labour engagers. These developments must be taken into account when determining the scope of Article 6§2 in respect of self-employed workers.*<sup>5</sup>

Following those observations, it can be stated that the European Committee of Social Rights does not understand the notion of worker in its strict sense, but the notion of worker can be much broader to include all workers who are in one way or another subordinated to the person providing the work. However, it should be pointed out here that, particularly in the context of collective employment

<sup>4</sup> The Revised European Social Charter. An Article by Article Commentary by Karin Lukas. Elgar Commentaries series, 2021, pp. 9–10.

<sup>5</sup> Irish Congress of Trade Unions (ICTU) v. Ireland, Complaint No. 123/2016, European Committee of Social Rights, 12 December 2018. Available: <http://hudoc.esc.coe.int/fre/?i=cc-123-2016-dmerits-en> [viewed 07.11.2021.].

relationships<sup>6</sup>, the European Committee of Social Rights has extended the rights conferred on workers to include both employees (those working under an employment contract) and self-employed persons.

### 3. The concept of an employee in European Union law

According to European Union law, it is important to distinguish between the fact that the concept of employee has a dual function. On the one hand, the concept of employee is a concept of primary law of the European Union. The concept of employee is linked to the principle of free movement of workers. As this is a concept in EU primary law, the ECJ shapes the features of this concept according to the needs of the European Union.

On the other hand, EU secondary law – directives and regulations – do not define the concept of employee and employment relationship, merely stipulating that the directive extends to employees<sup>7</sup> or that the concept of employee and employment relationship is determined by national law<sup>8</sup>. As a new elaboration, recent European Union directives governing certain aspects of the employment relationship no longer refer to the possibility of the employment relationship being determined by national law but must also take into account European Union case law in addition to national law.<sup>9</sup> Thus, the Member States of the European Union are not so free in shaping the characteristics of the employment relationship but must take into account the positions of the CJEU.

What, in the light of European Union case law, must Member States take into account when shaping and clarifying the employment relationship?

<sup>6</sup> See, e.g., Tavits G. Collective labour relations and digital economy – do they co-exist? In: Legal Science: Functions, Significance and Future in Legal Systems II (PDF). The 7<sup>th</sup> International Scientific Conference of the Faculty of Law of the University of Latvia 16–18 October 2019, Riga. Collection of Research Papers, Riga: University of Latvia, pp. 412–424, DOI: 10.22364/iscflul.7.2.33.

<sup>7</sup> Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EEC). Available: <https://eur-lex.europa.eu/eli/dir/1989/391> [viewed 07.11.2021.].

<sup>8</sup> Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001L0023> [viewed 07.11.2021.].

<sup>9</sup> See, e.g., Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union. Available: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32019L1152> [viewed 07.11.2021.]; also Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU. Available: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2019.188.01.0079.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.188.01.0079.01.ENG) [viewed 07.11. 2021.].



The Court of Justice of the European Union has identified the following important aspects to be considered when assessing the employment relationship<sup>10</sup>:

- economic activity
- dependence
- genuine nature of the activity
- remuneration

The characteristics above are required to be followed and assessed by Member States. In doing so, the Court of Justice of the European Union has paid considerable attention to dependence from the employer. The competence of the person to decide the place and manner of work is relevant. If such an opportunity is limited, it should be rather regarded as employment relationship. However, the Court of Justice of the European Union distinguishes between employment relationships and relationships between a service provider and the self-employed.

In the case law of the European Union, the members of the company's management board have also been granted the status of employees.<sup>11</sup> Thus, the Court has ruled that a member of a company's board of directors may, in certain cases, be treated in the same way as an employee. This can be feasible in particular situations. Where a member of the company's management board does not have a shareholding in a particular company and is invited to be a member of the company's management board, he is subject to the instructions of the general meeting, this may be an employee-employment relationship.

The European Union has sufficiently clearly defined the scope of the various directives and regulations. They are applicable to employees. Although in certain cases this must be determined by national law, the European Union developed a clear enough case-law in defining the concept of employee, which the Member States must follow.

#### **4. Definition of employee and employment relationship in Estonian national law**

According to the Estonian Employment Contracts Act, the concepts of an employee are not defined. The Employment Contracts Act (hereinafter – ECA)

<sup>10</sup> For the extensive summary, see Risak M., Dullinger T. The Concept of 'Worker' in EU Law: Status Quo and Potential for Change, ETUI, 2018. Available: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3190912](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3190912) [viewed 07.11.2021.]; For recent case law: Gramano E. On the notion of 'worker' under EU law: new insights, March 15, 2021. Research Article. Available: <https://doi.org/10.1177/2031952521998812>. [viewed 07.11.2021.]; also: CJEU judgement of 31 August 2020, in Case C-692/19, B v. Yodel Delivery Network Ltd. Available: [https://curia.europa.eu/juris/document/document\\_print.jsf?docid=225922&text=&dir=&doclang=EN&part=1&occ=first&mode=lst&pageIndex=0&cid=8111564](https://curia.europa.eu/juris/document/document_print.jsf?docid=225922&text=&dir=&doclang=EN&part=1&occ=first&mode=lst&pageIndex=0&cid=8111564) [viewed 07.11.2021.].

<sup>11</sup> CJEU judgement of 12 May 2014 in Case C-229/14, Ender Balkaya v. Kiesel Abbruch- und Recycling Technik GmbH. Available: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=165652&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=711336> [viewed 07.11.2021.].

defines the characteristics of an employment contract and the precondition for an employment contract. Pursuant to § 1 of the ECA, the existence of an employment contract is presumed, if one person has to work under the authority of another person.<sup>12</sup> There is also a presumption that if such work is performed, a remuneration must also be guaranteed for it. Consequently, an important feature of an employment relationship is the existence of a relationship of subordination and the obligation of the other party to pay remuneration for the work.

In its case law, the Estonian Supreme Court has developed the characteristics of an employment relationship.<sup>13</sup>

In a situation where the contract features the characteristics of both an employment contract and another contract for the provision of a service governed by the law of obligations, so that the employment contract must be presumed, the assumed employer has the burden of proving that the parties entered into another kind of contract.

In order to identify the nature of the contractual relationship at issue, it is necessary to compare the characteristics of the contracts. In order to rebut the presumption provided for in § 1(2) of the ECA, the assumed employer must prove, in particular, that the employee was not subject to his or her management and control and was significantly independent in choosing the manner, time and place of work. Besides, other circumstances of the individual case must be taken into account. The law does not provide for establishing a legal relationship solely on the basis of the title of a written contract or the terms used in it. Identifying the legal nature of the disputed agreement presupposes its interpretation. The will of the parties to enter into an employment contract and the actual wish of both parties must be revealed.

In order to identify the nature of the contract, it is practicable to take into account, among other things, the following facts: who organized and managed the work process, who paid for work equipment, materials, equipment, premises and other work-related costs, whether the work was paid for periodically, whether the employee had to be ready for work, whether the employee acted for several employers or received all or a substantial part of his income from the alleged employer, how did the parties interpret the disputed relationship outside the dispute, e.g., in relations with other persons or in the performance of their other duties. In this way, taking into account, *inter alia*, the entries in the employment register and the party's disclosures in other proceedings may be justified. The criteria on the basis of which the legal relationship is identified and relied on must be considered as a whole.

Thus, a significant part of Estonian case law also pays attention to the existence of a relationship of subordination and the identification of these criteria.

<sup>12</sup> Employment Contracts Act. Available: <https://www.riigiteataja.ee/en/eli/502112021003/consolide> [viewed 07.11.2021.].

<sup>13</sup> Judgement of Estonian Supreme Court of 20 May 2020 in Case 2-18-6908. Available in Estonian: <https://www.riigikohus.ee/et/laheidid/marksonastik?asjaNr=2-18-6908/47> [viewed 07.11.2021.].

In Estonian law, attention must be paid to another category of employees – an employee with independent decision-making competence. Pursuant to the Employment Contracts Act, the application of an employment contract is excluded if the employee is significantly independent in deciding on working hours, workplace and ways of working. However, the category of an employee with independent decision-making authority is provided for in the Sport Act<sup>14</sup>. According to the Sport Act, an athlete can act on the basis of an employment contract as an employee with independent decision-making competence. At the same time, independent decision-making competence means that the athlete decides for himself/herself regarding the working hours, place of work and way of working (in essence, it means a situation where the athlete is free to organise his/her training). How to classify an employee with independent decision-making competence in the employment relationship system is still problematic in Estonian labour law. If the athlete is an employee with independent decision-making authority, it is difficult in such a situation to identify the necessary relationship of subordination that would shape both the employment relationship and the protection required by the employment relationship in general.

## Conclusion

The conventions and recommendations adopted by the ILO do not clearly define the employees who should be protected by international labour standards. The concept of employee and employment relationship must be defined by each Member State. If ILO Recommendation No. 198 of 2006 sets out certain criteria that a Member State can use, whereas the use of such criteria is left to the discretion of the Member State. As the ILO 2006 Recommendation also places a high priority on the criterion of subordination, it is one of the main criteria for identifying the employment relationship.

In its practice, the European Committee of Social Rights does not rule out the application of employees' rights to the self-employed. Above all, employees and the self-employed are on an equal footing in collective labour relations, though it is currently unclear whether and to what extent employees and the self-employed can enjoy the same rights when it comes to protecting individual employment rights.

The most comprehensive approach to the concept of employee exists at EU level. In case of the implementation of different directives, it is up to the Member States to define the concept of employee and the concept of employment relationship. Concurrently, the Court of Justice of the European Union has developed considerable case law on the concept of employee.

To sum up, it may be argued that there is no universal concept of employee. Nevertheless, the following circumstances are decisive for an employee: doing

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<sup>14</sup> Sport Act. Available: <https://www.riigiteataja.ee/en/eli/511032020002/consolide> [viewed 07.11.2021.].

work for someone else; the relationship of subordination to the party in whose favour the work is performed, as well as the obligation of the other party to pay remuneration for the work performed. The more intensely a person is subject to another party, the more likely is that there might be an employment relationship and that such an employee is subject to all the rules of international law, as well as to those of national employment law.

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## THE NEW CHALLENGES OF CORPORATE SOCIAL RESPONSIBILITY: SUSTAINABLE ECONOMIC DEVELOPMENT AND CULTURAL DISTRICTS

**Keywords:** corporate social responsibility, sustainable economic development, cultural districts, enhancement of small villages

### Summary

Starting from the principles of corporate social responsibility and those, including recent ones, of cultural heritage, the purpose of this study is to illustrate the possibilities of intervention in the sector of cultural districts in order to enhance them, improve the environment in which they are established and the quality of life of those who reside there, increase job opportunities and the economic development of the area. The article also contains a reference to the Italian and EU regulatory context, with the recent introduction of the concept of Cultural and Creative Enterprise in 2018.

### Introduction

Nowadays, the concept of “Corporate social responsibility” is neither a theoretical nor an abstract elaboration of legal doctrine. It has become part of company regulation.

It has been introduced in the Italian Civil Code, Art 2428(2) on “Management Report” and Legislative Decree 30.12.2016, No. 254, implementing EU Directive 2014/95 of 22.10.2014 on “non-financial reporting” to provide in addition to annual balance sheets, thus dictating a law in the early stages which will be certainly enlarged in the near future.

Public opinion and civil society are more and more sensitive to this concept. Today, the principles of “Corporate social responsibility” are applied to the ecology and environment sector to achieve sustainable economic development.

This brief essay aims to apply these principles to the sector of cultural heritage, which though not directly productive is of high relevance to civil society because of the extensive cultural heritage of Italy.

This purpose can be actualized by using a juridical instrument introduced by the Italian legislator by means of Law 27.12.2017, No. 205, Art.1(57), in force since 01.01.2018 though not yet operational, that is, the “Impresa Culturale e Creativa”, I.C.C. (Cultural Creative Enterprise, CCE). This is a no-profit enterprise which is managed by external “Stakeholders”.

This new type of enterprise could operate within “cultural districts” which are numerous in Italy. A number of operative suggestions are proposed here in view of achieving a better management system alongside applying these principles to areas of small dimensions like Italy’s “small borghi”, which though small villages are rich in cultural, artistic and archaeological sites of art in order to achieve, on the local level, greater economic development and better social conditions through enhancement of the culture of a particular area.

## 1. Corporate Social Responsibility

Corporate Social Responsibility (CSR) constitutes a new frontier of company law, both public and private. It is a new challenge for greater and better integration between commercial companies, public bodies, institutions and workers, citizens and the whole of society. It aims to guarantee a better quality of life not only for employees in the workplace but for society in its entirety in the environment in which people live and work<sup>1</sup>.

For many years, corporate companies have been concerned about the societal impact on the environment in which they operate and intervene to improve it through a series of initiatives and activities, not only in favour of their employees but also benefitting the surrounding community. This is the “corporate social responsibility”, which ultimately aims to ensure a better quality of life in all its implications, economic and social.

Italy has an extensive cultural heritage. In this and in other sectors of paramount social importance, companies and private subjects, though distinct from production companies that apply the principle of social responsibility but not connected to them, can intervene autonomously, to autonomously carry out a series of initiatives and projects contributing to conservation and enhancement of cultural heritage.

The principle finds many applications with reference to commercial companies and businesses, as well as private individuals, who can independently intervene in sectors of great social importance. This is the case in the Italian cultural heritage sector.

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<sup>1</sup> AA.VV. Corporate responsibility. For the thirty years of Commercial Law, Milano, Giuffrè, 2006.

## 2. Legal notion and regulation of corporate social responsibility

From a regulatory point of view, there is no single legal notion and no articulated discipline of corporate social responsibility. However, some general principles are indicated in the Italian Constitution and in two EU Resolutions of 2001 and 2011.

A general principle is set out in Article 41 of the Italian Constitution: “private economic initiative is free”, but “it cannot take place contrary to social utility”. Article 41 also specifies that “The law determines the appropriate programs and controls for public and private economic activity to be directed to social purposes”. These are broad indications, preceptive, and of great relevance today.<sup>2</sup>

In the Green Book of 18.07.2001, the European Commission defined corporate social responsibility as the “voluntary integration of the social and ecological concerns of companies in their commercial operations and in their relations with interested parties”.<sup>3</sup> EU Communication No. 681 of 25.10.2011 modified and restricted it and redefined it as the “responsibility of companies for the impact that they produce on society”.<sup>4</sup>

The EU Treaty, Art. 3(3) sets the achievement of a “sustainable development based on [...] a highly competitive social market economy” as a fundamental objective of the Union.

In Italy, with regard to financial statements, Art. 2428, para. 2 of the Italian Civil Code provides that directors should provide “information relating to the environment” in the “Management Report”.<sup>5</sup>

Legislative Decree No. 81 of 09.04.2008, concerning the protection of health and safety in the workplace, in Art. 3(1, following letters), defines it as the “voluntary integration of the social and ecological concerns of companies [...] in their commercial activities and in their relations with interested parties”.

Finally, in Italy as in the other countries of the EU, Legislative Decree No. 254 of 30.12.2016, implementing Directive 2014/95/EU of 22.10.2014, introduced a “non-financial reporting” starting from the financial year beginning on 01.01.2017, i.e., since 2018. Groups and some companies have been obliged, since 2018, to submit, together with the annual financial statements, a “Non-Financial Report”, which is essentially a Corporate Social Responsibility Report. At present, it is mandatory, according to Art. 3, only for large companies with at least 500 employees and a consolidated balance sheet exceeding 20 million euros, or with

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<sup>2</sup> Hereinafter, all citations from Italian legal documents into English are the author’s translations from Italian into English.  
Constitution of the Italian Republic, in the Official Gazette of 27.12.1947, No. 298 (Extraordinary edition).

<sup>3</sup> European Commission, Green Paper, “Promoting a European framework for corporate social responsibility”, 18.7.2001, C. E., 2001 / a, [lex.europa.eu/com/2001](http://lex.europa.eu/com/2001).

<sup>4</sup> European Union, Communication No. 681 of 25.10.2011, redefines the notion of “corporate social responsibility”.

<sup>5</sup> Civil Code, promulgated with Royal Decree 16.3.1942, No. 262.



net revenues exceeding 40 million euros. Pursuant to Art. 7, other companies with different and minor features may submit the Report on a voluntary basis. This obligation will extend over time, though some large groups, such as *Unipol s.p.a.* in the insurance sector and *Prada* in the luxury clothing sector, have already conformed to it, and many other groups, large and small ones, are becoming aware of the issue. In particular, in its first Report, the *Prada* group acknowledges that it has taken “an attitude closer to the needs of civil society” and dedicates an entire chapter to its own “Commitment to the world of culture”.

This fairly recent principle has rapidly spread all over the world and today urges companies to adopt a “socially responsible” behaviour that meets the expectations of the “stakeholders”. From this it follows that: 1. There is a balance between internal and external interests, of the two distinct categories of stakeholders, in carrying out business activities; not only the internal stakeholders of the corporate body, but also the external stakeholders, traditionally customers and suppliers, as well as citizens and the entire community living in the surrounding area. 2. In addition to the interests of the Stakeholders of the two different categories, the environmental issues that can be determined by the production activity of the company must also be considered by inserting a moral obligation, a fiduciary commitment to improve the environmental situation of the area, resulting in improvement in the quality of life of the people living in those areas. 3. The social and ecological intervention of the company originally begins as a voluntary intervention, as a decision of the company, however, once assumed, it imposes a legal obligation on the entrepreneur who is required to comply with it.<sup>6</sup>

Today, some rules concerning corporate social responsibility exist, though confusedly, and are mandatory for companies. Failure to comply with them entails the legal responsibility of the entrepreneur or defaulting company directors.

With the concept of Corporate Social Responsibility (C.S.R), ethical limits are placed on the economy. In the last fifteen years, there is an increasing number of companies, especially large ones, which are conforming to the principles and rules of the C.S.R. These self-imposed rules of the C.S.R. have undoubted juridical relevance, but have also relevance in the extra-judicial sphere.<sup>7</sup>

### 3. Economic development

The economic development of an area, a region, a state no longer depends only on the degree of industrialization and employment, but also on the degree of cohesion and social progress, as well as on the ability to create social development, with spaces for aggregation, including those of artistic and cultural nature, subject to environmental compatibility with the territory. The factory, the office,

<sup>6</sup> See Alpa, Costi, Conte, Libertini, Di Cataldo, Vella and many other authors, with a vast literature on CSR.

<sup>7</sup> Conte G. (ed.). Corporate social responsibility. Roma-Bari, 2005, p. 77 et seq.

the workplace, but also and above all the external environment, in which the individual and the social community live and operate outside work, must become liveable, healthy and rewarding. This is the only way to create and develop social cohesion and participation that, in addition to improving the quality of life and interpersonal relationships increases productivity, creates well-being, boosts consumption, and therefore contributes to the development of the economy. Finally, it is necessary for the territory to create a condition of environmental compatibility for a harmonious economic development.

The promotion of individual and collective well-being, the removal of the causes of inequalities is a specific task of the state, must be one of the fundamental objectives of public policies, also in implementation of Article 3 of the Italian Constitution, which states, in para. 1, that “All citizens have equal social dignity”, and in para. 2: “It is the duty of the Republic to remove the obstacles of an economic and social nature which, by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country”.

The State must intervene in benefitting and protecting the entire community and the national territory, for the implementation of the constitutional provision. The private intervention is, likewise, increasingly required and desirable with regard to individual areas and the activities carried out therein. The “private subject can contribute their interventions not only through voluntary work, which supports the State in some sectors of social activity, but also by means of entrepreneurs who operate in the area in which they carry out their economic activity, simultaneously working to benefit meeting the social needs outside the company, compared to internal ones, which mainly concern labour policies. This is the principle that inspires “corporate social responsibility”, which is applied to the most disparate sectors, including those relating to the management of cultural districts.

#### **4. Sustainable development**

Economic development must also be “sustainable”, that is, respectful not only of society and culture, but also of the environment. Economic growth must go hand in hand with the growth of society and individuals, in order not to generate social and individual imbalances and tensions, and always respecting and protecting the environment.

The notion of “sustainable development” comes from afar, that is, from the 1972 United Nations Conference on human environment, which elaborates the Stockholm Declaration. In 1987, the UN for the Environment and Development elaborates the “Brundtland Report”, which defines it as “the development that allows the present generation to meet their needs without compromising the ability of future generations to satisfy their own”. In 1992, the UN draws up and approves the “Rio Declaration on Development and Environment”, which paved the way to the Convention on Biological Diversity in 1993 and the Convention on Climate

Change in 1994. In 1994, in Aalborg (Denmark) and in 1996 in Lisbon (Portugal) the I and II European Conference on sustainable cities take place. These approve the “Report on sustainable cities”. In 1997, the “Kyoto Protocol” on climate change, which promotes, among other things, incentives for forms of sustainable economy, was signed. In 2012, the “UN Doha Conference” extends it until 2020 and sees its ratification by as many as 193 states. Italy joined it and has mapped out the objectives for the conservation of biodiversity since 2009.

In 1993, Art. 2 of the Convention on Biological Diversity defines “sustainable ... the use of biological resources in ways and at a pace that do not lead to a long-term reduction of resources and that preserve the ability to meet the needs of present and future generations”.

In 1995 the Charter of Lanzarote (Canary Islands) on sustainable tourism was worked out. The UN Johannesburg Conference in 2002 and the EU Conference at Gothenburg (Sweden) in 2011, with the approval of the “Strategy for sustainable development” broaden the original notion and identify three forms of sustainability: environmental, economic and social, with the task of ensuring that the conditions of human well-being are equally distributed. The EU decides that “In the long term, economic growth, social cohesion and environmental protection must go hand in hand”.

In Italy, Legislative Decree 09.04.2008, No. 81, concerning the protection of health and safety in the workplace, in Art. 3(1, following letters), defines it as “voluntary integration of the social and ecological concerns of companies in their commercial activities and in their relations with interested parties”. Here, too, the social and ecological intervention of the company originates as a voluntary intervention by the company, but then becomes a legal obligation to comply with.

As already mentioned above, administrators are required to provide “information relating to the environment”, pursuant to Art. 2428, para. 2, of the Italian Civil Code, and Legislative Decree 30.12.2016, No. 254 which, in implementation of Directive 2014/95/EU of 22.10.2014, introduced, in 2018, the “non-financial reporting” for groups and some companies.

## **5. Environmental, social, economic sustainability**

Starting from the seventies, the need to recognize the institutional responsibility of single states for an environmentally-friendly economic growth, divided into economic, environmental and social Public Responsibility, began to be felt. The three dimensions of sustainable development have also become the inspiring principles and objectives to be achieved that are included in the Green Book on corporate social responsibility of the EC in 2001.

The Charter of Goteborg (Sweden), as mentioned above, in 2011 defined the three forms of sustainability: environmental, economic and social, to promote and guarantee the uniform growth, in all EU countries, of well-being for people, the environment and the society in which they live. The 2015 UN Resolution,

“Transforming the World, the 2030 Agenda for Sustainable Development”, based on these well-established principles, has identified 17 objectives to achieve, which are divided into 169 Targets.<sup>8</sup>

The sustainability of economic development has also become a principle of international environmental law, which is now included in numerous treaties.

Environmental sustainability must ensure the availability and quality of natural resources.

Social sustainability must ensure the quality of life, safety and services for citizens.

Economic sustainability must ensure economic efficiency and income for companies.

To achieve the sustainability of economic development, the State can be supported by a private subject. Thus, nothing prevents the Institutional, public, state responsibility from being added the responsibility of private subjects, who work alongside the State to achieve these goals. It is in this way that the notion of corporate social responsibility originates, as it comes out of (goes, acts outside) the company, and in the last fifteen years evolves and directs towards a social and cultural dimension.

Even private subjects place themselves at the service of the public, the community, society and culture.

## 6. Cultural district

The theme of “cultural districts” fits well in the context of a harmonious sustainable development of society with the intervention of the private subject alongside that of the state.

The cultural district is a territory in which there are numerous cultural and environmental assets, services and productive activities in synergy. They are identified and studied by the State, in its territorial articulations, in order to enhance them, improve the environment in which they are embedded and the quality of life of the people living there, increase job opportunities and the economic development of the territory.

To identify, promote, study, formulate and implement projects, the State, the Regions and other local Bodies must intervene, but private subjects having development and social well-being at heart can also actively intervene. These private subjects can be individuals, volunteers, patrons, and also private individuals who work professionally in other sectors of productive activity, that is, individual entrepreneurs and collective enterprises, and commercial companies. But we will return to this.<sup>9</sup>

<sup>8</sup> Resolution of the UN General Assembly 25.9.2015 No. 70/1, Transforming our world: the 2030 Agenda for Sustainable Development, A / Res / 70/1 of 21.10.2015.

<sup>9</sup> Valentino P. The cultural districts, new opportunities for territorial development. Milan, 2009.

Italy has an enormous cultural heritage, within which cultural districts must be identified. In their management and for their enhancement, alongside the State, the Regions and local Bodies, private individuals, entrepreneurs and commercial companies can also intervene, as mentioned above. These are subjects with respective and specific skills, that also operate outside the company.

## 7. Social responsibility, culture and cultural enterprise

The sectors in which the principle of corporate social responsibility is implemented concern above all environmental protection, respect for fundamental rights and social development, including cultural values. It is also possible to experiment on new forms of social responsibility of the company.

Corporate companies have been concerned for many years about the social impact on the environment in which they operate and have intervened to improve it not only in favour of their employees but also in favour of the surrounding community. Corporate social responsibility projects itself towards a new dimension, more specifically in the cultural sector, in which it can intervene today through the new juridical figure of the cultural enterprise, an institution introduced by Law 27.12.2017, No. 205, Art.1 (57), in force since 01.01. 2018, but not yet operational due to failure to issue the M.D. of implementation.<sup>10</sup> (10)

The EU foresees, for social and cultural development, investments allocated for financing in a specific sector of social and cultural relevance. However, regardless of the tool that can be used by the “socially responsible” company, even a private subject, unrelated to the company, can independently decide to invest in the sector for the same social or, more specifically, cultural purposes.

Traditionally, for a cultural purpose, a company or an enterprise can make a donation in a sector or in a cultural activity. However, those who are willing to invest and not donate, may want at least to recover what they have invested, though with no profits, in order to commit themselves to social or cultural issues. These investors are subjects external to the company, subjects other than traditional internal “Stakeholders” but can be equated to these as showing social interests, though more general but also useful for the corporate company that pursues them. These private subjects have no relationship with businesses and commercial companies, but are concerned with raising and enhancing the social and cultural level of the territories in which they live and operate, and of the places where the businesses are located.

Private subjects, as mentioned above, can operate in the cultural sector with traditional or innovative forms:

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<sup>10</sup> Law 27.12.2017, No. 205, Budget Law 2018, Art. 1, paras 57, 58, 59, 60. Official Gazette, General Series, No. 302 of 29.12.2017, Ordinary Supplement No. 62.

- a) through the sponsorship of events, recovery or restoration of cultural heritage; with the Art-bonus, established by the Code of Cultural Heritage, Legislative Decree 22.1.2004 (traditional forms of financing);
- b) through the “cultural enterprise”, which is an autonomous enterprise, a new innovative form, even if not yet operational, of intervention in the sector of culture and cultural district.

It is a private subject that invests in society and in the specific sector of culture, through the establishment of an autonomous cultural enterprise. It is an external dimension, compared to the traditional concept of corporate social responsibility, that extends its field of action beyond the boundaries of the specific activity carried out by the company, integrates into the local community, dialogues with and involves public authorities.

A private subject constitutes a cultural enterprise that invests in the specific sector of culture. Culture is a tool for the evolution of civil society; companies can carry out cultural activities for social purposes directly or indirectly, by financing them. Today, with a further step forward, culture itself has become an enterprise; no longer an instrument of corporate social responsibility, but a direct purpose to be pursued for social improvement and evolution, culture becomes the social object if the company is organized in a corporate form. The cultural and creative enterprise was based on this concept.

## 8. Cultural and creative enterprise

It is possible that, upon input from the directors of a Company, some subjects external to it come to set up an autonomous company acting in the cultural sector, in the general social interest, with a direct connection not with the activity carried out by the Company but with the interest it has in improving the social and cultural life of the area in which it operates.

The first difference with respect to the ordinary exercise of corporate social responsibility is that they are two distinct legal subjects acting for the same social purpose. The second difference is in the disbursement of funds, which in the first case is direct, in the second takes place through a loan.

I will limit myself to briefly illustrating the notion of a cultural and creative enterprise, without an analysis of the content of the law, not yet operational, due to the lack of the two D.M. of implementation.

The “Cultural and creative enterprise” originally starts with purposes other than those typical of the figure of private law entrepreneur, governed by Art. 2082 of the Civil Code.<sup>11</sup>

It is not the company that exploits cultural assets and uses them in the consumer market to make a profit; it is instead the company that arises from a social need, “it is

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<sup>11</sup> In Italy, pursuant to Art. 2082 of the Civil Code, “An entrepreneur is someone who professionally carries out an organized economic activity to produce or exchange goods and services”.

the natural evolution of a community whose needs in the field of culture are growing, which [...] demands that the collective assets constituting the cultural heritage be made usable".<sup>12</sup>

A cultural and creative enterprise carries out a stable and continuous activity, has its registered office in Italy or in one of the Member States of the European Union, is a taxable subject in Italy, and has as its corporate purpose, exclusively or predominantly.<sup>13</sup>

The corporate purpose is extremely broad, but the particular qualification, necessary to operate, is subject to registration in a special ministerial register, to be established with the Ministerial Decree, which has not yet issued to date. The law has been in force since 1 January 2018 but is not yet operational due to failure to issue such Ministerial Decree.

The qualification of cultural enterprise gives the right only to tax relief, to a tax credit of 30% on the costs incurred. This is an example of a zero-cost reform, typical of Italian legislation.

The cultural enterprise originally starts with a public purpose: it uses public goods, has institutional purposes of conservation of public goods, "organizes" them not for profit, but to offer the public the use of cultural and artistic heritage. Since it does not produce profit, "subjective profits", it needs to obtain public funding to be supported.

The Italian cultural heritage is very broad and is also susceptible of economic use. All this constitutes the "system of cultural heritage", though it is devoid of financial autonomy

In cultural enterprises, a legal institution of private law, the "purpose of profit" is theoretically possible and achievable, as objective profit, though it is difficult to predict the amount of "profit". Conversely, the criterion of "economy", understood as a balance between costs and revenues, is well applicable to the use of public goods by a private entrepreneur.<sup>14</sup> It is sufficient that the activity is carried out with an "economic method", in order to cover the costs with the revenues.<sup>15</sup>

For some time now, cultural heritage has had its own public legislation, with the Code of Cultural Heritage and Landscape, introduced with Legislative Decree

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<sup>12</sup> Meo G., Nuzzo A. (eds.). The cultural enterprise. A possible contradiction. Editorial, in *Legal Analysis of the Economy*, il Mulino, 2007, No. 1, p. 4.

<sup>13</sup> Art. 1, para. 57, Law 27.12.2017, No. 205.

<sup>14</sup> Ascarelli, Bonfante, Cottino Graziani, Ferrara and many others.

<sup>15</sup> For all of them, see Campobasso G. F. *Commercial law*. Vol. I, Business Law, 7<sup>th</sup> ed., UTET, Turin, pp. 31–32. See also Angelici, Buonocore, Galgano, Libonati, Oppo, Rivolta, and others.

24.03.2006, No. 156 and with Legislative Decree 24.03.2006, No. 157, amended several times since 2006<sup>16</sup> and a complex and articulated discipline.<sup>17</sup>

## 9. Continued – the current legislation

Let us now briefly examine Law No. 205 of 27.12.2017, which entered into force on 1.1.2018 though not yet operational, in particular Art. 1(S7–60), which established the Cultural and Creative Enterprise.

Art. 1(S7), second sentence, provides a definition of the Cultural and Creative Enterprise and establishes its subjective conditions and the object, which it improperly defines “social”, thus allowing us to infer that it can also have a corporate form. The “subjects” can also be pre-existing companies, which carry out a “stable and continuous activity” and are based in Italy, in a member state of the EU or in one of the states adhering to the Agreement on the European Economic Area, as long as they are taxable subjects in Italy.

The “social object”, which must be “exclusive or prevalent”, is wide and includes all the categories that are included in the concept of cultural property:

*the conception, creation, production, development, diffusion, the conservation, research and enhancement or management of cultural products, understood as goods, services and intellectual works inherent in literature, music, figurative arts, applied arts, live entertainment, cinematography and audiovisual, archives, libraries and museums as well as cultural heritage and related innovation processes.*

It even includes a new category, the “applied arts”, not foreseen in the various schematizations previously elaborated. One has the impression of being faced with a new “type” of business.

CCEs can be Associations, foundations, single or collective companies operating in the cultural sector, a strategic system for our country, which produces 6% of the wealth produced in Italy. They have their own specificity, which consists in the “ability to reconcile economic, cultural and social value”. An example of this is the cooperative of S. Gennaro Catacombs in Napoli (Campania, Italy).

For the CCE to become operational, para. 58 prescribes that acknowledgment of its qualification by the Ministry of Cultural Heritage and Activities should be made with a specific Decree that must be adopted by the Ministry within ninety days from the entry into force of the law but has not yet been adopted to date.

The issuing Ministerial Decree (MD) will define the “cultural and creative products”, thus placing a fixed point on the categories that have so far been

<sup>16</sup> In implementation of Delegation Law 6.7.2002, No. 137, with Legislative Decree 22.1.2004, No. 42, the T.U. introduced with Legislative Decree 29.10.1999, No. 490 was repealed and replaced by the Code of Cultural Heritage and Landscape, introduced with Legislative Decree 24.3.2006, No. 156 and Legislative Decree 24.3.2006, No. 157, with subsequent amendments.

<sup>17</sup> For a detailed exposition, cf. De Cocci M. The discipline of cultural heritage. In: The cultural enterprise, a possible contradiction in Legal analysis of the economy, Il Mulino, 2007, No. 1, pp. 41–57.



elaborated in various ways by scholars and technicians. “Adequate forms of advertising” will also be envisaged, and probably its registration in a specific Section of the Business Register. The MD must provide for the coordination of the new discipline with that contained in the so-called “Third Sector Code”, recently repealed with Legislative Decree of 03.07.2017, No. 117. At present, it is difficult to distinguish between the new I.C.C. and the social enterprise with a cultural object as governed by the Third Sector Code.

Before the definition of the CCE., para. 57, first sentence, the legislator allocates a fund of € 500 000.00 for 2018 and € 1 000 000.00 for each of the two years, 2019 and 2020, for recognition to CCEs. of a tax credit of 30% of the costs incurred for the development, production and promotion of cultural and creative products and services. We can see in this an odd and unusual legislative technique that allocates funds to a subject that does not yet legally exist, being introduced and defined only in the following period.

Para. 59 then establishes that the tax credit, to use within the limits of the EU *de minimis* aid Regulation No. 1407/2013, does not contribute to the formation of taxable income and, above all, can be used “exclusively in compensation”. In fact, the allocation of 2 500 000.00 euros over three years, provided for by para. 57, is only virtual, as it results in a lower income for the State, but nothing goes into the coffers of the CCE, and it is therefore only an indirect financing.

Finally, para. 60 provides that the Minister of Cultural Heritage and Activities adopts, again within ninety days from the entry into force of the law, an additional MD, for the monitoring and verification of compliance with the spending limits, the types of eligible expenses. and of the respective admissible limits, as well as for the verification and inspection of the effectiveness of the expenses incurred, to the eventual accumulation with other concessions. It will then have to provide for the causes of forfeiture and revocation of the benefits granted and establish the procedure for the recovery of the tax credit allocated, in the event of its illegitimate use. A series of timely checks by the Ministry are therefore envisaged on the performance of the activity and on the use of the benefit, as well as an adequate sanctioning procedure. Unfortunately, not even has this MD been enacted yet.

From this brief analysis of the meagre legislation issued, it emerges that, apart from the private definition of the new institution, all other provisions are of a public nature.<sup>18</sup>

## 10. Cultural districts and social responsibility

Thus, what is the link among sustainable economic development, corporate social responsibility and cultural district?

<sup>18</sup> Zampella E. The cultural and creative enterprise, a new reality. In: Di Nanni C. (in honor of). Writings of minor commercial law, Vol II, pp. 1151–1163, ESI, Napoli, 2018.

We have already given a definition of a cultural district as a territory in which there are numerous cultural and environmental assets, services and productive activities in synergy. These are identified and studied to enhance them, in order to improve the environment in which the District is located and the quality of life of the people who reside in its territory.<sup>19</sup>

There is no overt reference legislation on the subject, both as regards the notion and the types of intervention and financing that are necessary for the survival, enhancement and management of our immense cultural heritage.

The Faro Convention, dated 22.10.2005, entered into force on 01.06.2011 and ratified by Italy on 27.02.2013 as “Framework Convention on the value of cultural heritage”, commits itself to “formulate integrated strategies” and promote “an approach integrated with policies concerning cultural, biological, geological and landscape diversity”, involving “public institutions in all sectors and at all levels”. Two further 2014 EU Documents identified a policy of cooperation at different levels between the institutions for a new governance of cultural heritage.

Italy has a huge cultural heritage, often pulverized in small entities that are difficult to manage; thus, cultural districts have very heterogeneous types and are widespread in the area, with features often different from area to area. The legislation is mainly constituted by Regional Laws, from Abruzzo, which is the first (RL No. 22/2009) to Friuli Venezia Giulia (RL No. 16/2014), to Lombardia (RL No. 25/2916), with seven Regions altogether (Campania has only one RDG No. 4459/2002).<sup>20</sup> Almost all the Regions have identified one or more cultural districts, a planning document, and tenders.

Private subjects have been more active, in particular some large companies, insurance companies and banks, through their banking foundations. Firstly, the CARIPLO Foundation, beginning in 2004, developed two interesting projects: “Sviluppo Sud” and “Cultural districts”; then, in 2018 it signed a collaboration agreement for PICs (Integrated Plans for Culture) with Lombardia Region and Unioncamere Lombardia (Integrated Plans of Culture)<sup>21</sup>, followed by UNIPOL, Benetton and others. Each of them adopts its own strategy and its own project, which does not always contribute to enhancing the cultural heritage.

The Regions, instead, have followed different institutional paths and procedures and are progressively orienting themselves more and more towards cultural and creative activities, as an active tool for local development. Lombardia

<sup>19</sup> There is ample literature on Cultural Districts. Among outstanding scholars: Valentino Pietro Antonio, *The plots of the territory. Development policies of territorial systems and cultural districts*, Milan, 2003; Sacco P. and Pedrini S. *The cultural district: myth or opportunity?* In: *Il Risparmio*, 2003; Sinatra A. *Why cultural districts do not exist*, 2004.

<sup>20</sup> L. R. Abruzzo No. 22/2009; D.G.R. Campania No. 4459/2002; L. R. Friuli-Venezia Giulia No. 16/2014. L. R. Lombardia 7/10/2016 No. 25, in *Off. Bull. Lombardy Region*, Supplement No. 41 of 11.10.2016.

<sup>21</sup> The CARIPLO Foundation has carried out a study: *The Cultural Districts. General pre-feasibility study*, Milan 2006. It also elaborated two Projects, “Southern Development” and “Cultural Districts”, see Cerquetti M. and Ferrara C. *Cultural districts and policy actions in comparison Il Capitale cultura*, Suppl. No. 3, 2015, pp. 137–163.

Region has dedicated the Regional Law cited entirely to the tangible and intangible cultural heritage (Art. 1) which has identified and regulated, also assigning and distributing functions respectively among the Region, Provinces, Municipalities, Bodies, Institutions and “Places of culture” (Articles 3–5), has planned interventions and provided for financial coverage. It has not limited its action to the regulatory provision, but disciplined its implementation through an operational program, approved with P.G.R. 4.3.2019, No. X / 1332.<sup>22</sup>

## 11. Proposals *de jure condendo*

The Cultural District aims to make the production of “culture” more efficient and effective in order to achieve, on a local level, greater economic development and improvement in social conditions. “Culture” should be understood in its broadest sense; it aims, through manifestations and events, to enhance the specific culture of the territory, the typical products and other resources. It is therefore also a driving force for relaunching local economy.

There are numerous examples of cultural districts set up throughout Europe. One of the best known is in Spain, the 1989 “Strategic Plan for the Revitalization of Bilbao”.<sup>23</sup>

In Italy, promoting and implementing projects is the responsibility of the State, Regions and local Bodies, though private subjects, Entrepreneurs, Companies operating professionally in other sectors of activity can also intervene. The Cultural District also contributes to economic development, which expands and becomes greater if corporate social responsibility is used.

The problem with the Districts is that the cultural assets are almost always owned by the public, the State and the local authorities. Thus, the power of protection, veto or authorization belongs to a government body. In Italy, cultural heritage is protected by the Code of cultural heritage and all powers belong to the Ministry of Cultural Heritage. Consequently, its management is up to the owner of the assets or their delegates, almost always the State, with the consequence that management is often not dynamic and efficient.

Conversely, to achieve the purposes for which the District was established, the management could be made more essential and effective, distinguishing a Political Power, entrusted to one or more representatives of the State, the owner of public assets, from a Technical Power, also of private subjects, to whom to entrust the effective management of the District. A Power of Collaboration with

<sup>22</sup> P.G.R. 4.3.2019, No. X / 1332, Official Bulletin. Lombardy Region, Ordinary Series No. 11, 12.3.2019.

<sup>23</sup> In 1989 the Basque Government (Spain) launched a “Strategic Plan for the revitalization of Bilbao”, centered on the “cultural centrality” of the numerous critical areas in crisis. The project has been successful and, over time, cultural infrastructures have been created: Palazzo dei Congressi and the Concerts, Museum of Fine Arts, Historical, Archaeological, Ethnographic Museum, Maritime Museum; 2 600 new jobs were created, the GDP of the whole Basque Country increased by 0.47%.

the two leaders could be entrusted to Universities, Research Centers, single Scholars, for the sectors of their competence, who would offer their consultancy for the realization of the project.

The Technical Management Power could also be entrusted to a cultural and creative company, that is, to a legal subject capable of doing business professionally, though not for profit. Italy, with its immense cultural heritage, could create highly targeted cultural districts, entrust their management to Cultural and Creative Enterprises, with the result of obtaining great advantages both for the conservation and enhancement of cultural heritage and for local economic development and social security of the District's territory.

## 12. The Small Villages

There is a very recent call for the enhancement of small inhabited centers, partly in a situation of neglect, embedded in the territory of a cultural district, today rediscovered and enhanced due to the COVID-19 pandemic. They are part of the cultural districts of their respective Regions.

Two examples are the "Guarcino 2025" project, currently at an advanced stage of implementation, for the economic and social revitalization of a small medieval town of 1 500 inhabitants in the province of Frosinone, in Lazio Region, embedded in a District for the production of paper mills only, but developed and carried out by private subjects, with the direct participation of the municipality<sup>24</sup>, and the project for Cairano Irpino, a very small town of 300 inhabitants in Irpinia, started in 2017.

The "Guarcino 2025" project, an example of collaboration between public institutions (Municipality) and private associations, is divided into five thematic areas, Business, Health, Culture, Sport-Environment-Landscape, Accommodation.

## Conclusion

Corporate social responsibility is now projecting itself into a new dimension.

In conclusion, the principle of corporate social responsibility can also be extended and applied to cultural districts, with the creation of cultural and creative companies, distinct from private commercial companies and the public body that

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<sup>24</sup> Lazio Region introduced the Districts with Regional Law No. 36 of 2001 and identified three types of industrial districts, defined as "territorial areas characterized by a high concentration of small and medium-sized enterprises, specialized in a specific production sector".

The Municipality of Guarcino is part of the local paper production system, which includes 16 municipalities in the province of Frosinone, with 86 companies and 801 employees, with an average of less than (Communication No. 681 of 25.10.2011) ten employees per company. The Region has set up a Lazio Development Agency s.p.a. for the study of the territory and businesses, with the collaboration of the Universities, Chambers of Commerce and ISTAT. It also provided for a special fund to finance educational projects.

owns the assets, which operate with specific skills within the cultural district, in a well-identified territory which they intend to enhance.

It is thus possible to achieve a better management, neither improvised nor politicized, which favours the economic and social development of the District's territory, which shows respect for the environment and which, combined with similar actions of other Districts, contributes to a harmonious sustainable economic development, reducing inequalities - social, cultural, economic – from area to area.

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## FINANCIAL MARKET REGULATORS AND CRISIS OF PANDEMIC

**Keywords:** financial markets, economic regulation, regulatory authorities, pandemic crisis

### Summary

The pandemic has affected all sectors of economy and finance. Having outlined the characteristics of the financial market regulatory authority, the question arises as to the role it should play in this context. Given that the authority is not an expression of popular sovereignty, the conclusion is that it cannot take action to counter the crisis generated by the pandemic, as it cannot define its own autonomous political and economic guidelines.

### Introduction

Economic regulators have the task of making the right of economic freedom effective<sup>2</sup>.

The role assigned to the economic regulatory authorities is to ensure “the mere efficiency of the markets”<sup>3</sup>, thereby rendering the right of economic freedom effective<sup>4</sup>.

A prerequisite for economic freedom is that competition is guaranteed and, even more importantly, that there is legal certainty. The legal system entrusts

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<sup>1</sup> The opinions expressed are personal and in no way involve Consob.

<sup>2</sup> Merusi F. Il potere normativo delle autorità indipendenti [The regulatory power of independent authorities]. In: *L'autonomia privata e le autorità indipendenti* [Private autonomy and independent authorities]. A cura di G. Gitti, 2009, p. 48.

<sup>3</sup> Bruti Liberati E. *La regolazione indipendente dei mercati Tecnica, politica e democrazia* [Independent Market Regulation Technology, Politics and Democracy]. Torino, Giappichelli, 2019, p. 201.

<sup>4</sup> Merusi F. 2009, p. 48.

independent regulatory authorities with the fulfilment of both conditions. The independent authorities therefore take on the role of arbitrators. Their function is technical and their power is, likewise, technical and not political. In order to protect their technical function, the legal system recognises the independence and autonomy of the regulatory authorities. Functional independence is closely linked to structural independence, and both are instrumental to the exercise of their function.

Recognition of the dual independence, functional and structural, creates a delicate balance on which these authorities are based, requiring them to strictly respect the scope of their competences. This is all the truer in view of the exclusion, by definition, of these authorities from the circuit of political representation. Regulatory authorities cannot, by derogation from the principle of popular sovereignty, formulate their own political guidelines.

Legal certainty guarantees both the orderly functioning of the financial market and its development by enabling market participants to foresee the consequences of their actions and, in the event of disputes, to take calculable decisions<sup>5</sup>.

The calculability of judicial decisions is based on the existence of a case, to which the judge refers when deciding the dispute<sup>6</sup>. The judge's action consists in relating the concrete case to the facts and applying the consequences that the legislator himself has already foreseen when the event occurs<sup>7</sup>. When this logic is abandoned, i.e., the principles of formal law are not respected, the decision is entrusted to the judge's discretion, allowing him not to apply the law in a formal and egalitarian manner<sup>8</sup>.

“A law, impoverished or emptied of abstractness, i.e., incapable of anticipating future cases (and therefore of reducing them to typical figures and patterns of probability), is an incalculable law, which is outside the expectations of any kind of capitalism”<sup>9</sup>.

A precondition, therefore, for the full exercise of economic freedom is the certainty of the rules<sup>10</sup>. The task of independent regulation is to guarantee that economic operators “have at their disposal rules which are adequate on a technical-economic level, defined in advance and tend to be stable (or at least predictable) in their evolution”<sup>11</sup>.

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<sup>5</sup> Trimarchi M. *Stabilità del provvedimento e certezze dei mercati* [Stability of the measure and market certainty]. *Dir. amm.*, 2016, p. 323, il quale rinvia a M. Weber, *Economia e società*, III, *Sociologia del diritto* [Economy and Society, III, *Sociology of Law*], Milano, Giuffrè, 1980, p. 189.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> Irti N. *Capitalismo e calcolabilità giuridica (letture e riflessioni)* [Capitalism and legal calculability (readings and reflections)]. *Riv. soc.*, 2015, p. 812.

<sup>10</sup> Di Benedetto M. *Leconomia sociale di mercato e le sfide del diritto amministrativo* [The social market economy and the challenges of administrative law]. *Sociologia*, 2009, p. 127.

<sup>11</sup> Bruti Liberati E. 2019, p. 206.



A condition, on the other hand, for the exercise of the right to economic freedom is that the market players are placed on an equal footing in “participating in that encounter between rights that is legally called contradictory and economically competitive”<sup>12</sup>; that is, that they are guaranteed “equality of arms”. In other words, that they are guaranteed “equality of arms”<sup>13</sup>. The main task of the regulatory authorities is, in fact, “to replace all or part of the negotiating acts of the private parties who take part, or should take part, in the competitive debate when they do not express themselves spontaneously”<sup>14</sup>. This type of activity is properly called regulation<sup>15</sup>.

Economic regulation, therefore, stems from the attempt to correct market failures “with intervention instruments and corrective measures of an authoritative (or command and control) nature”<sup>16</sup>, where failures represent those situations in which the deregulated market is not able, with the sole instruments of private law, to adequately protect the interests of the community<sup>17</sup>.

The function of regulation thus presupposes the superiority of the market over the State, so that it is the intervention of the State that must be justified and not the exercise of economic freedom by virtue of the principles of the civil code and common law<sup>18</sup>. From this conception of the State-market relationship derives the principle of proportionality on the basis of which the regulator must use as corrective instruments, among those theoretically possible, those that have the least impact on the freedom of enterprise<sup>19</sup>.

The choices to which the Regulatory Authorities are called, therefore, are not free in the sense that they are aimed at guaranteeing the preservation, in relation to a specific activity, “of a given set of interests, which already includes objectively established values and aims”<sup>20</sup>. In fact, “the object of power – the competitive market – is always and in any case predetermined by the legal system”<sup>21</sup>.

<sup>12</sup> Merusi F. *op.cit.*, p. 48.

<sup>13</sup> Schlesinger P. Il “nuovo” diritto dell’economia [The “new” economic law]. In: *L’autonomia privata e le autorità indipendenti* [Private autonomy and independent authorities]. A cura di G. Gitti, 2009, p. 55.

<sup>14</sup> Merusi F. 2009, p. 48.

<sup>15</sup> *Ibid.*

<sup>16</sup> Clarich M. Alle radici del paradigma regolatorio dei mercati [The roots of the market regulation paradigm]. *Riv. reg. mer.*, 2020, p. 231.

<sup>17</sup> *Ibid.*

<sup>18</sup> Clarich M. 2020, p. 233.

<sup>19</sup> *Ibid.*

<sup>20</sup> Lazzara P. La regolazione amministrativa: contenuto e regime [Administrative regulation: content and regime]. *Dir. amm.*, 2018, p. 347; Guarino G. Le Autorità Garanti nel sistema giuridico [The Guarantee Authorities in the legal system]. In: *Autorità indipendenti e principi costituzionali, Atti del Convegno di Sorrento* [Independent Authorities and Constitutional Principles, Proceedings of the Sorrento Conference], 30 maggio 1997, Padova, 1999, p. 41.

<sup>21</sup> Merusi F. 2009, p. 49.

Therefore, the intervention of the regulatory authorities cannot have any other purpose than restoring the violated *par condicio* competition<sup>22</sup>.

Any other intervention is not a regulation but “public intervention in the economy”, which has different objectives and must be justified on the basis of different rules from those which grant powers to the regulatory authorities<sup>23</sup>. Regulation presupposes that the market is governed by free competition and is therefore not subject to economic policy assessment<sup>24</sup>.

It is not possible for the regulatory authorities to formulate their own political guidelines by way of derogation from the principle of popular sovereignty.

This view is confirmed by the well-known judgment of the European Court of Justice of 22 January 2014, Case C-270/12<sup>25</sup>. In that judgment, it is stated that it is not permissible to attribute to bodies not provided for by the Treaties a “discretionary power entailing wide freedom of assessment and capable of expressing, by the use made of it, a genuine economic policy”. On the other hand, only “clearly circumscribed executive powers, the exercise of which, for that reason, is subject to strict control on the basis of objective criteria” are conferred on such bodies.

In the case of independent authorities, there is a consistency between their structure, which is technical and independent, and their function, which is technical and free of political choice<sup>26</sup>.

The function to which they are called is to “identify and appreciate complex technical facts, the reconstruction of which includes questionable elements, or to identify the technical solution that achieves the best balance between the many interests involved, also taking into account the overall functioning of the system”<sup>27</sup>.

The regulatory authorities, contrary to the recent opinion of the Italian Constitutional Court<sup>28</sup>, do not operate according to administrative discretion, i.e., they do not make political choices – they do not decide to what extent to satisfy one interest to the detriment of another<sup>29</sup>.

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<sup>22</sup> Ivi, p. 48.

<sup>23</sup> Ibid.

<sup>24</sup> Lazzara P. 2018, p. 343.

<sup>25</sup> Cfr. Bruti Liberati E. 2019, p. 127.

<sup>26</sup> Torricelli S. Per un modello generale di sindacato sulle valutazioni tecniche: il curioso caso degli atti delle autorità indipendenti [Towards a general model for reviewing technical assessments: the curious case of the acts of independent authorities]. *Dir. amm.*, 2020, p. 100.

<sup>27</sup> Torricelli S. 2020, p. 99.

<sup>28</sup> Corte Cost., No. 13/2019, “The fact that the Authority is a party to the proceedings reflects, moreover, the nature of the power conferred on it: a discretionary administrative function, the exercise of which entails weighing the primary interest against the other public and private interests at stake. In fact, the Authority, like all administrations, is the bearer of a specific public interest, namely the protection of competition and the market (Articles 1 and 10 of Law No. 287 of 1990), and is therefore not in a position of indifference and neutrality with respect to the interests and subjective positions that come into play in the performance of its institutional activity (see, to this effect, Council of State, Special Commission, Opinion No. 988/97 of 29 May 1998)”.

<sup>29</sup> Torricelli S., 2020, p. 101.

On the contrary, they operate on the basis of technical discretion, – the technical duty to decide how to allow each involved interest the maximum possible satisfaction in compliance with the constraints imposed by the legal system<sup>30</sup>.

In the technical decision, it is not up to the assessor to define how much to affect the interests involved as this is only the effect of the technical duty to decide<sup>31</sup>.

The *raison d'être* of the Regulatory Authorities is, as we have seen above, to re-establish a level playing field for competition, since they are not involved in defining the structure of interests, – this is the task of the legislative body and, more generally, of politics. This is because popular sovereignty, the cardinal principle of democracy, “requires (also) that the choices involving political discretion and entrusted to the various levels of administration are the expression of the political direction defined by the politically representative bodies”<sup>32</sup>.

Instead, by definition, the independent regulatory authorities are excluded from the circuit of political representation<sup>33</sup>.

The character of independence has been accentuated by the new model of regulatory authority that has been introduced by the European Union legislator since 2009. It should be mentioned that the regulatory approach to the market<sup>34</sup> was called into question following the financial crisis of 2008. At the same time, however, there has been a “consolidation of the model of the regulatory authorities”, the tangible signs of which are the extension of functions and the establishment of European regulators<sup>35</sup>.

The model of the networks composed of national regulators has been replaced “through the institution of ‘stable platforms of collaboration’ that revolve around European agencies with legal personality and a statute of common independence both towards national governments and towards the Commission and the other European institutions”<sup>36</sup>. The European legislator also lays down rules specifically designed to protect the organisational and decision-making autonomy of regulators<sup>37</sup>. Thus, members of the regulatory authorities are prohibited from

<sup>30</sup> Torricelli S., 2020, p. 101.

<sup>31</sup> Ibid.

<sup>32</sup> Bruti Liberati E. Regolazione dei mercati, tutela dell'affidamento e indipendenza dalla politica. Riflessioni a partire dai lavori di Nicola Bassi [Market regulation, protection of trust and independence from politics. Reflections from the work of Nicola Bassi]. *Rivista della Regolazione dei Mercati*, 2017, p. 237.

<sup>33</sup> Ibid.; Id. 2017, p. 76.

<sup>34</sup> Clarich M. 2020, p. 230 and ss.

<sup>35</sup> Ramajoli M. Consolidamento e metabolizzazione del modello delle Autorità di regolazione nell'età delle incertezze [Consolidation and metabolisation of the Regulatory Authorities model in the age of uncertainties]. *Riv. reg. mer.*, 2018, p. 171.

<sup>36</sup> Turchini V. I mercati di settore europei verso una regolazione realmente indipendente [European sector markets towards truly independent regulation]. *Riv. trim. dir. pubbl.*, 2020, p. 781; Bruti Liberati E. 2019, p. 64.

<sup>37</sup> Bruti Liberati E. 2019, p. 65.

“soliciting or accepting instructions” in the performance of their duties, with a corresponding explicit prohibition for political bodies and, in general, for third parties, whether public or private, to issue such instructions<sup>38</sup>.

Consequently, in the event that instructions are issued by a political body in violation of the aforementioned explicit prohibition, the authority receiving them must simply ignore them, since the “contrary nature of any political act to European law certainly entails the right/duty of the authorities to disregard it when exercising their powers”<sup>39</sup>.

In the context of the matters covered by the aforementioned prohibition, the national legislator cannot interfere with the activity of the independent regulator<sup>40</sup>. Similarly, the Government may not interfere in the technical-discretionary activity of the authorities, “while it may adopt general policy guidelines that the authorities themselves must adequately consider in the exercise of their political-discretionary powers”<sup>41</sup>.

In order for independence to be true, the body must be autonomous, i.e., it must have legal personality, the power to organise its own structure and find the financial resources necessary to achieve the mission entrusted to it by the founding law<sup>42</sup>.

Legal personality represents the basis on which an autonomous body can be built, even if, as has been pointed out, its absence does not particularly affect independence “because if it is true that legal personality in itself guarantees a certain independence from the state administration, it is also true that autonomy depends on the power actually attributed to subjects even without legal personality”<sup>43</sup>.

Financial dependence, it is evident, represents a possible lever that gives those holding the “purse strings” the power to condition the will of the financially dependent subject. The importance of financial autonomy as an instrument of guarantee for the full exercise of its mandate by the regulatory authorities has also been recognised by the Court of Justice. The Court has, in fact, ruled that national regulations affecting the financing of independent authorities are unlawful if they

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<sup>38</sup> Ibid. See, with reference to the European Securities and Markets Authority (ESMA), EU Reg. 1095/2010, Article 42, which states “When carrying out the tasks conferred upon them by this Regulation, the Chairperson and the voting members of the Board of Supervisors shall act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from Union institutions or bodies, from any government of a Member State or from any other public or private body. Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the members of the Board of Supervisors in the performance of their tasks”. The same article is provided for with reference to the European Banking Authority (EBA) in Reg. EU 1093/2010 and, with reference to the European Insurance and Occupational Pensions Authority (EIOPA), in Reg. EU 1094/2010.

<sup>39</sup> Bruti Liberati E. 2019, p. 85.

<sup>40</sup> Ivi, p. 91.

<sup>41</sup> Bruti Liberati E. La regolazione indipendente dei mercati Tecnica, politica e democrazia, cit., p. 106.

<sup>42</sup> Ivi, 122; Merusi F. e Passaro M. Le autorità indipendenti, il Mulino, 2011, p. 73 and ss.

<sup>43</sup> Merusi F. e Passaro M. 2011, p. 74.

do not allow the independent regulatory authorities to carry out their institutional functions correctly<sup>44</sup>.

The external, technical and independent aspect that characterises regulatory authorities is, as we have seen, closely linked to the very essence of the authorities, i.e., the functions that the legal system assigns to them. Consequently, as long as the legal system confers the functions described above on the authorities, their structural independence must also be guaranteed. The independence enjoyed by the regulatory authorities requires, however, that they exercise their activities within the framework strictly reserved to them by law. Functional autonomy, i.e., their duty to take technical decisions, is not an intrinsic quality of the authority that can be used for purposes other than those for which it was established.

The technical nature of the regulatory authorities must be referred to their function and not to their competences. In no way, as argued above, does the technical nature of the regulatory authorities legitimise them in defining their own political direction, which differs from that defined by the bodies expressing popular sovereignty. Similarly, the regulatory authorities, relying on their technical expertise, cannot be involved in the definition of political policy. In accordance with the same principle of popular sovereignty, it is not acceptable for enhanced participation in the procedure for the formation of the act to legitimise the definition of a policy that differs from that formulated by the democratically elected bodies.

The COVID-19 epidemic has generated a significant deterioration of the Italian economic-productive fabric<sup>45</sup>, affecting both the financial structure of companies, generating a liquidity crisis, as well as the capital structure, generating a need for capital. In the face of these needs, the economic fabric has been unable to recover in the short term from the damage inflicted by the crisis. These circumstances have made Italian companies particularly vulnerable to foreign competition.

The European Commission, given that the aforementioned situation is also common to other EU Member States, introduced a temporary derogation from the rules on State aid in its Communication “Temporary framework for State aid measures to support the economy in the current COVID-19 emergency” in order to allow action to support the liquidity and recapitalisation of companies.

The pandemic has affected all sectors of the economy and finance but, for all the above reasons, the regulatory authorities cannot take action to counter

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<sup>44</sup> CJ 28 July 2016, Case C-240/15; 19 October 2016, Case C-424/15.

<sup>45</sup> Schema di decreto del Ministro dell'economia e delle finanze, sentito il Ministro dello sviluppo economico, recante “Requisiti di accesso, condizioni, criteri e modalità degli interventi del Patrimonio Destinato” ai sensi dell'articolo 27, comma 5, del decreto legge 19 maggio 2020, No. 34, convertito, con modificazioni, dalla legge 17 luglio 2020, No. 77 [draft decree of the Minister for the Economy and Finance, after consultation with the Minister for Economic Development, on “Access requirements, conditions, criteria and modalities of the interventions of the Assigned Heritage” pursuant to Article 27, paragraph 5, of Decree-Law No. 34 of 19 May 2020, converted, with amendments, by Law No. 77 of 17 July 2020. 77]. Available: [www.camera.it](http://www.camera.it) [viewed 01.09.2021].

the crisis generated by the pandemic as they cannot define their own independent economic policy guidelines.

## Conclusion

In no way does the technical nature of the regulatory authorities legitimise them in setting their own political guidelines that differ from those defined by the bodies that express popular sovereignty. The regulatory authorities, relying on their technical expertise, cannot be involved in the definition of political policy. The set of powers vested in the regulatory authorities is an expression of “technical duty” and not of “political power”.

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## SECTION 9

# CONSUMER SALE IN THE CHANGING WORLD: RECENT EU DIRECTIVES AND CHALLENGES FOR THE NATIONAL LEGISLATOR



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## **THE IMPLEMENTATION OF THE NEW CONSUMER SALES DIRECTIVES IN THE BALTIC STATES: A STEP TOWARDS FURTHER HARMONISATION OF CONSUMER SALES**

**Keywords:** consumer sales, goods with digital elements, digital content, digital service, contract law, data protection law, Directive 2019/770, Directive 2019/771

### **Summary**

The present article deals with the implementation of the new Consumer Sales Directives (Directives 2019/770 and 2019/771) into the national law of the Baltic States. The topicality of the paper is related to the implementation of the new Consumer Sales Directives into national law in a particular region, i.e., the Baltic States, by analysing implementation approaches and

difficulties during the implementation and post-implementation periods from a comparative perspective of all three Baltic states. At the outset, the paper notes the differences in the existing regulation of consumer sales in the Baltic States. Lithuania and Estonia incorporated consumer sales in their civil codifications, whereas Latvia has chosen a different path by regulating consumer sales on the basis of *sui generis* regulation in the Consumer Rights Protection Law. As a result of such initial situation before the implementation of the new Consumer Sales Directives, different implementation strategies were used in the Baltic States, consequently leading to different consequences and difficulties during the implementation process of the new Consumer Sales Directives. Likewise, the application process of the new Consumer Sales Directives itself has created significant problems and risks. The available legal acts together with their *travaux préparatoires* in the Baltic States demonstrate the possibility that the new regulation implementing the new Consumer Sales Directives may contradict the existing contract law regulation and data protection law, and have implications thereon.

## Introduction

Recently, a reform was undertaken in the EU concerning consumer sales with the aim to improve the current regulation of consumer sales in existence since 1999, when the Consumer Sales Directive 1999<sup>1</sup> was adopted. This reform has resulted in the adoption of two new consumer sales directives, i.e., the Consumer Sales Directive 2019<sup>2</sup> and the Consumer Digital Sales Directive<sup>3</sup>, in 2019. Both directives aim to achieve higher protection of consumers in the modern digital world concerning the conclusion and fulfilment of sales contracts. As the European Commission has admitted, “[t]he general objective of the proposals [for adoption of the above directives – authors’ remark] is to contribute to faster growth of opportunities offered by creating a true Digital Single Market, to the benefit of both consumers and businesses”.<sup>4</sup>

The new rules included in these two recent directives are not completely novel but to a great extent based on the regulation of consumer sales included

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<sup>1</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sales of consumer goods and associated guarantees [Consumer Sales Directive 1999]. OJ, L 171, 7.7.1999, pp. 12–16.

<sup>2</sup> Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [Consumer Sales Directive 2019]. OJ, L 136, 22.5.2019, pp. 28–50.

<sup>3</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [Consumer Digital Sales Directive]. OJ, L 136, 22.5.2019, pp. 1–27.

<sup>4</sup> Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods COM(2015) 635 final, Chapter 1.

in the previous directive, i.e., the Consumer Sales Directive 1999.<sup>5</sup> Indeed, the application scope set in the previous directive is also introduced in the new Consumer Sales Directives by covering movables (with exceptions)<sup>6</sup> and the main institutes of consumer sales such as the conformity of the purchase object with the contract, available remedies, and time limits. At the same time, the new Consumer Sales Directives deepen and broaden the scope of regulation of consumer sales in the European Union (EU) law as initially provided by the Consumer Sales Directive 1999. On the one hand, the previous regulation has been further deepened with new developments, especially considering longer time limits, the types of conformity with the contract, and the guarantee. On the other hand, the new regulation envisaged by the new consumer sales directives takes into account important developments within the modern digital environment by introducing new consumer sales objects, i.e., the so-called digital things, such as goods with digital elements, digital content and digital services. Introduction of such new consumer sales objects, in turn, raises new challenges and issues concerning the implementation strategies and the relationship between the new rules and other branches of law, especially contract law and data protection law. Consequently, the new regulation will have a significant impact on national law of EU Member States not only from the perspective of consumer protection but also from contract law in general. Although the new consumer sales directives are exhaustive harmonisation directives unlike the Consumer Sales Directive 1999 which is a minimum harmonisation directive, certain legislative choices are left to EU Member States. Though the implementation term of the new directives is set as 1 July 2021, neither Latvia nor Estonia has timely implemented these directives. Draft legal acts in Latvia and Estonia were submitted to their Parliaments in 2021 and were available before the preparation of this article, however, none of them were adopted at the moment of preparation of this article: the draft legal act was submitted to the Parliament in Latvia in October 2021<sup>7</sup>, while in Estonia – in May 2021.<sup>8</sup>

<sup>5</sup> This conclusion is supported by the European Commission which indicated that the proposal concerning the current Consumer Sales Directive 2019 “takes the rules of Directive 1999/44/EC as a basis” (Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods COM(2015) 635 final, Chapter 1).

<sup>6</sup> Article 2(1) and (5) Consumer Sales Directive 2019; Article 1(1) and (2)(b) Consumer Sales Directive 1999.

<sup>7</sup> Likumprojekts “Grozījumi Patērētāju tiesību aizsardzības likumā” [Draft Law “Amendments into the Consumer Rights Protection Law”] (Nr. 1179/Lp13). Available in Latvian: <https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/946D649B5CF1D56CC22587680040405B?OpenDocument> [viewed 08.11.2021.].

<sup>8</sup> Volaõigusseaduse ja tarbijakaitseaduse muutmise seadus (digitaalse sisu, tarbijalemüügi ning muudetud tarbija õiguste direktiivide ülevõtmine) 404 SE [Act of Amendment of the Law of Obligations Act and the Consumer Protection Act (transposition of the Digital Content, Consumer Sales and Amended Consumer Rights Directives) 404 SE]. Third reading took place on 10 November 2021.

Only in Lithuania the legal act for implementation of the new Consumer Sales Directives was adopted in timely manner on 29 June 2021.<sup>9</sup>

The topicality of the present paper relates to the implementation of the new Consumer Sales Directives into national law in a particular region, i.e., the Baltic States, and potential problems and risks related to application of the new regulation. The paper uses the comparative approach by considering these issues from the perspective of all three Baltic States.

At the beginning of the article, the paper analyses the starting point in the Baltic States before implementation of the new consumer sales directives by discussing the place of consumer sales in the current national law in each Baltic State. The article proceeds to discuss implementation strategies and employed approaches in each country considering different starting points analysed before. The article concludes with discussion of potential difficulties and risks concerning the application of the new rules in the post-implementation era.

## 1. Starting position in the Baltic States before the implementation

The implementation of the new consumer sales directives deals with adjusting the existing regulation of consumer sales in the Baltic States by covering both contract law and consumer protection law. Therefore, it is necessary to discuss the starting position which exists in the Baltic States before the implementation of the new Consumer Sales Directives, especially considering the integration (or lack of it) of rules concerning consumer sales into existing regulation of contract law. Despite the fact that all three Baltic States share similar legal, economic, and historical roots, yet there are different starting positions before the implementation (i.e., transposition) of the new Consumer Sales Directives into national law of the Baltic States which may be explained by different approaches taken after the restoration of independence at the beginning of 1990s.

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Available in Estonian: [https://www.riigikogu.ee/tegevus/eelnoud/eelnou/18196fee-86c7-4116-aa70-11449eba0364/Võlaõigusseaduse%20ja%20tarbijakaitseaduse%20muutmise%20seadus%20\(digitaalse%20sisu,%20tarbijalemüügi%20ning%20muudetud%20tarbija%20õiguste%20direktiivide%20ülevõtmine\)](https://www.riigikogu.ee/tegevus/eelnoud/eelnou/18196fee-86c7-4116-aa70-11449eba0364/Võlaõigusseaduse%20ja%20tarbijakaitseaduse%20muutmise%20seadus%20(digitaalse%20sisu,%20tarbijalemüügi%20ning%20muudetud%20tarbija%20õiguste%20direktiivide%20ülevõtmine)) [viewed 08.11.2021.].

<sup>9</sup> Lietuvos Respublikos civilinio kodekso 1.125, 6.228-1, 6.228-12, 6.228-14, 6.363, 6.364, 6.419 straipsnių ir priedo pakeitimo ir Kodekso papildymo 6.228-17, 6.228-18, 6.228-19, 6.228-20, 6.228-21, 6.228-22, 6.228-23, 6.228-24, 6.350-1, 6.364-1, 6.364-2, 6.364-3, 6.364-4 straipsniais įstatymas (The law amending Articles 1.125, 6.228-1, 6.228-12, 6.228-14, 6.363, 6.364, 6.419 and the Annex to the Civil Code of the Republic of Lithuania and Supplementing the Code Articles 6.228-17, 6.228-18, 6.228-19, 6.228-20, 6.228-21, Articles 6.228-22, 6.228-23, 6.228-24, 6.350-1, 6.364-1, 6.364-2, 6.364-3, 6.364-4). The law will enter into force since 2022-01-01. Available in Lithuanian: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/d3dbc880dd5f11eb866fe2e083228059?jfwid=18yngnjrr> [viewed 08.11.2021.].

On the one hand, both Estonia<sup>10</sup> and Lithuania have incorporated consumer sales in the regulation of contract law included in their civil codifications. In Lithuania, consumer contracts, considered as private law contracts, fall within the scope of the Lithuanian Civil Code.<sup>11</sup> Consumer contract of sales and other consumer contracts were specifically regulated in Part IV of Book 6 in the Civil Code (Separate types of contracts) as the special subtypes of contracts. Back in 2013, the Lithuanian Civil Code was amended (changes entered into force in June 2014) and the new separate chapter on consumer contracts (including digital content contracts) was included in Book 6, Part II of the Civil Code dealing with general part of contracts.

On the other hand, Latvia historically has chosen a different path by artificially differentiating contract law from consumer sales. The force of the Civil Law was restored in 1992–1993.<sup>12</sup> However, the Civil Law is not familiar with the concept of ‘consumer’ and, therefore, does not contain any rules on consumer protection.<sup>13</sup> At the same time, *sui generis* regulation on consumer sales has been and still remains included in the Consumer Rights Protection Law. Such dual regulation led to incompatibility of this regulation with contract law generally regulated by the Civil Law concerning the scope of liability of the seller.<sup>14</sup>

These differences concerning the regulation of consumer sales among the Baltic States also influence the character of current regulation included in a special legal act on consumer protection law in the Baltic States: if this regulation in Estonia and Lithuania is mainly of public law character, however, in Latvia this regulation contains both public law norms and contract law norms in regulation of consumer sales (as well as other aspects, such as pre-drafted contract terms,

<sup>10</sup> Estonia implemented digital content directive, the new consumer sales directive and modernisation directive 2019/2161 into Estonian law at the same time as all three directives are linked in substance. The implementation of the three directives complements the Law of Obligations Act (hereinafter – LOA) and the Consumer Protection Act. The Consumer Protection Act incorporates the definitions contained in the directives, the existing provisions on collective consumer protection and the administrative provisions related to the prevention of illegal activities of a trader. The rules of private law are implemented into LOA. Law of Obligations Act (*võlaõigusseadus*), 1 July 2002. Available in English: <https://www.riigiteataja.ee/en/eli/ee/512012021002/consolide/current>; Consumer Protection Act (*tarbijakaitseadus*), 1 March 2016. Available in English: <https://www.riigiteataja.ee/en/eli/ee/505032021002/consolide/current> [viewed 08.11.2021.].

<sup>11</sup> Civil Code of the Republic of Lithuania. Available: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.245495> [viewed 08.11.2021.].

<sup>12</sup> For a brief discussion of adoption of the Civil Law and subsequent restoration of its force, see Torgāns K., Kārklīņš J., Mantrov V., Rasnačs L. *Contract Law in Latvia*. AH Alphen aan den Rijn: Kluwer Law International, 2020, pp. 25–27.

<sup>13</sup> For a useful discussion of Latvian contract law, see Torgāns K., Kārklīņš J. *Contract Law and Non-Contractual Obligations*, in: Kerikmäe T., Joamets K., Pleps J., Rodiņa A., Berkmanas T., Gruodytė E. (eds.). *The Law of the Baltic States*. Cham: Springer, 2017, pp. 291–298.

<sup>14</sup> Mantrovs V. *Jaunā patērētāja pirkuma Direktīva (Direktīva 2019/771): izaicinājumi un iespējas Latvijas likumdevējam [New Consumer Sales Directive (Directive 2019/771): Challenges and Opportunities for the Latvian Legislator]*. In: *Starptautisko un Eiropas Savienības tiesību piemērošana nacionālajās tiesās: Latvijas Universitātes 78. starptautiskās zinātniskās konferences rakstu krājums*. Rīga: LU Akadēmiskais apgāds, 2020, pp. 322–324.

information, division of liability, and other matters). Such an initial situation, in turn, determines different implementation strategies in the Baltic States, thereby leading to different consequences and difficulties during the implementation process of the new Consumer Sales Directives.

Therefore, different starting points before the implementation of the new Consumer Sales Directives in the Baltic States determine different implementation strategies in every country. Estonia and Lithuania already implemented new regulation in their civil codifications, while Latvia – in a consumer protection legal act without making any changes in the existing contract law. In this regard, two issues may be mentioned. First, one may refer to different difficulties during the implementation process. It seems that the main issue in Lithuania and Estonia was ensuring consistency with the existing regulation of contract law in general, relegating consistency of consumer protection to the second place. At the same time, in Latvia the situation is different, as the main concern is to ensure consistency with the existing consumer protection law. However, the aim of Latvia to reach such a consistency would inevitably lead in future to a problem with interaction of consumer sales including the new regulation, with the existing contract law regulation.<sup>15</sup> Second, different rationale for the use of available choices for a national legislature concerning deepening of the current consumer sales regulation and its broadening in respect of digital things. The latter aspect will be discussed in the next chapter of the article.

## **2. The use of available choices by a national legislator during the implementation process**

The new consumer sales directives endow a national legislator with the discretionary power to opt for a higher consumer protection in certain situations within the scope of both directives. Both directives will be further considered separately, starting with the Consumer Sales Directive 2019.

### **2.1. The Consumer Sales Directive 2019**

From the point of view of effective consumer protection, the most important situations relate to time limits: information about the lack of conformity with the contract, the burden of proof, and second-hand goods. Likewise, the nature of this time limit either being as preclusionary or limitation period is an important choice, but it will be discussed in the next sub-chapter.

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<sup>15</sup> For a discussion on interrelation between contract law and the new regulation on consumer digital sales objects in Latvia, see Kārklīņš J., Mantrov V. The Place of Contract for Digital Thing in Latvian Contract Law Within the Context of the Consumer Sale Directives 2019. The Journal of the University of Latvia Law, 2021, Vol. 14, pp. 68–79.

First, the national legislator may choose a two-year time limit instead of one-year time limit for the burden of proof concerning conformity of the purchase object with the contract.<sup>16</sup> Not a single legislator in the Baltic States has chosen such an option. Consequently, the seller in the Baltic States shall ensure conformity with the contract within 2 years from the delivery of the purchase object to the consumer, while the consumer enjoys a more favourable burden of proof only within the first year from that delivery.

Second, the national legislator may introduce a shorter period for conformity of the purchase object with the contract in the case of second-hand goods, i.e., not shorter than 1-year time limit instead of a 2-year time limit.<sup>17</sup> Only Lithuania chose such an option in Art. 6.364(3) of the Civil Code, however, it is purely a contractual choice left for the parties. It may be assumed that sellers of second-hand goods will be using such an option in their concluded contracts. At the same time, a consumer will have little possibility to oppose such a shorter period if selected by the seller.

Third, the national legislator may maintain or introduce a time limit for the consumer to inform the seller of a lack of conformity within a period of at least 2 months of the date on which the consumer detected such lack of conformity.<sup>18</sup> This term is already available in Latvia<sup>19</sup> and Estonia<sup>20</sup>. Nothing suggests that this situation will change as the national legislators in both countries are not going to refuse from this term. The situation is different in Lithuania where this term was not previously envisaged. However, this term was introduced during the implementation of the Consumer Sales Directive 2019 as the Lithuanian Civil Code was supplemented with a new Article 6.3641 whose paragraph 8 will reflect this term.

There are also other opportunities for the national legislator to use its discretionary power, which is explicitly allowed by the discussed Directive. The national legislator may exclude from the scope of the regulation by which the Consumer Sales Directive 2019 is implemented contracts for the sale of second-hand goods sold at public auction and live animals<sup>21</sup>; allow consumers to choose a specific remedy, if the lack of conformity of the goods becomes apparent within a period after delivery, not exceeding 30 days<sup>22</sup>; whether and to what extent a contribution of the consumer to the lack of conformity affects the consumer's right to remedies<sup>23</sup>; modalities for return and reimbursement in the case of termination of the contract<sup>24</sup>; and the so-called extended guarantees<sup>25</sup>.

<sup>16</sup> Article 11(2) Consumer Sales Directive 2019.

<sup>17</sup> Article 10(6) Consumer Sales Directive 2019.

<sup>18</sup> Article 12 Consumer Sales Directive 2019.

<sup>19</sup> Article 27(1) Latvian Consumer Rights Protection Law.

<sup>20</sup> Article 220(1) second sentence Estonian Law of Obligations Act.

<sup>21</sup> Article 3(5) Consumer Sales Directive 2019.

<sup>22</sup> Article 3(7) first sentence Consumer Sales Directive 2019.

<sup>23</sup> Article 13(7) Consumer Sales Directive 2019.

<sup>24</sup> Article 16(3) second sub-paragraph Consumer Sales Directive 2019.

<sup>25</sup> Article 17(4) Consumer Sales Directive 2019.

The Estonian legislator did not use the options provided for in these situations with two exceptions. The prospect to regulate the effect of the consumer's own infringement on the right to choose a remedy provided for in Article 13(7) of the Consumer Sales Directive 2019 has been used. Also, the obligation of the trader to reimburse the consumer in 14 days period after the reduction of the price or termination of the contract has been introduced.<sup>26</sup>

At the same time, the Latvian legislator (as far as the current draft Law is concerned) used none of these opportunities as one may observe from the very text of the Latvian draft act<sup>27</sup> which is approved by the Annotation to this draft itself<sup>28</sup>.

The Lithuanian legislator has used the opportunity to exclude from the scope of consumer sales contract the sales of second-hand goods sold at public auctions and live animals<sup>29</sup>, as well as introduced the modality that a consumer should be reimbursed in 14 days period in the case of termination of the contract<sup>30</sup>.

Therefore, one may observe from the discussion in this sub-chapter that the national legislators in the Baltic States were actually unwilling (with a few exceptions discussed above) to use available choices in the new Consumer Sales Directives by preferring to implement the regulation of these directives in the regular way.

## 2.2. The Consumer Digital Sales Directive

There are much poorer legislative choices for a national legislator in the Consumer Digital Sales Directive by containing just a few options for the national legislator. The most important of these situations relates to the character of the time limit for conformity with the contract. Indeed, the Digital Consumer Sales Directive (similarly as the Consumer Sales Directive 2019<sup>31</sup>) allows for the EU Member States to provide that this time limit has the character of the limitation period.<sup>32</sup> However, none of the Baltic States, except Lithuania, have opted out for this option as one may observe from the adopted legal acts in the Baltic

<sup>26</sup> According to the Estonian law, if the goods manufactured from the material and under instructions of the consumer, the trader is not liable for the non-conformity of work resulting from the instructions provided by the customer, defects in the material supplied by the customer or preliminary work performed by third parties if the contractor had sufficiently checked the instructions of the customer, the materials or the preliminary work (§ 208(5) and § 641(3) LOA).

<sup>27</sup> Likumprojekts "Grozījumi Patērētāju tiesību aizsardzības likumā" [Draft Law "Amendments into the Consumer Rights Protection Law"] (Nr.1179/Lp13). Available in Latvian: <https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/946D649B5CF1D56CC22587680040405B?OpenDocument> [viewed 08.11.2021.].

<sup>28</sup> Likumprojekta "Grozījumi Patērētāju tiesību aizsardzības likumā" sākotnējās ietekmes novērtējuma ziņojums (anotācija), 1. tabula "Tiesību akta projekta atbilstība ES tiesību aktiem" [Initial impact assessment report (annotation) to the Draft Law "Amendments to the Consumer Rights Protection Law", Table 1 "Compliance of the draft act with EU legal acts"].

<sup>29</sup> Art. 6.3501 (3) of the Lithuanian Civil Code.

<sup>30</sup> Art. 6.3643 (4) of the Lithuanian Civil Code.

<sup>31</sup> Article 10(4)-(5) Consumer Sales Directive 2019.

<sup>32</sup> Article 11(2) third sub-paragraph and (3) second subparagraph Consumer Digital Sales Directive.



States concerning the implementation of the new Consumer Sales Directives. In Lithuania, the limitation period of two years was provided.<sup>33</sup>

In addition, EU Member States are free to regulate the consequences of the withdrawal of the consent for the processing of the consumer's personal data.<sup>34</sup> It would be important from the perspective of the interaction effects of the General Data Protection Regulation (GDPR), as it will be revealed in greater detail in the section 3.3. of this paper. However, it is sufficient to note in this regard that the Latvian and Lithuanian legislators, unlike those of Estonia, did not take the opportunity to clarify the key elements of the effects in the area of data protection law.

### **3. The situation in the Baltic States after the implementation: The potential problems with application of the new regulation**

The application of the new regulation will be potentially connected with significant challenges and risks in all Baltic States. The available adopted legal acts and their travaux préparatoires demonstrate the possibility that the new Consumer Sales Directives might contradict and have implications on the existing regulatory framework, contract law regulation and data protection law and countries may be liable for incorrect implementation of these directives into national law. Each of these aspects will be further discussed separately.

#### **3.1. Interrelation with the current regulatory framework of civil law**

At the beginning, a place of new consumer sales regulation in the framework of consumer protection in general and consumer sales in particular should be discussed. Three issues must be noted here. Application problems of the new regulation may arise due to shortcomings of the regulation included in the new Consumer Sales Directives. For instance, the new regulation puts greater emphasis on contract terms than statutory standard concerning conformity with the contract, therefore, drafting contract terms may circumvent the available consumer protection on conformity of the purchase object with the contract. Correspondingly, shortcomings of the implementation process of the new Consumer Sales Directives may play a role in correct application of the new regulation. For instance, the Latvian draft law currently does not distinguish objective and subjective conformity grounds, as it has already been pointed out in a report submitted to the legislator.<sup>35</sup> Finally, the effectiveness of consumer

<sup>33</sup> Art. 1.125(8) of the Lithuanian Civil Code.

<sup>34</sup> Consumer Digital Sales Directive, preamble, Recital 40.

<sup>35</sup> Ziņojums par likumprojekta "Grozījumi Patērētāju tiesību aizsardzības likumā" (Nr. 1179/Lp13) zinātnisko sākotnējo izvērtējumu (*ex ante*) [Report on the Scientific Preliminary Assessment (*ex ante*) of the Draft Law "Amendments to the Consumer Rights Protection Law" (No. 1179/Lp13)]. Available in Latvian: <https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/OFD2149542AA3059C2258775006312BD?OpenDocument> [viewed 08.11.2021.].

protection concerning new digital things may be questioned, as the European legislator has put a greater emphasis on subjective than objective grounds of the conformity of the purchase object with the contract. However, it is a more general problem which is outside of the scope of the current article.

### 3.2. Interrelationship with contract law

Potentially, problems may arise due to introduction of the concept of digital things and their regulation, as these new consumer sales objects were previously unknown in the Baltic States as objects of sales contract. Also, consumer data as a remuneration could cause necessity for further explanation concerning its reconciliation with existing contract law. Likewise, interrelation with existing regulation, especially concerning time limits (limitation period), remedies, etc. should be considered.

Under Latvian law, contracts objects of which are digital content or digital services have to be viewed as *sui generis* contracts. The reasoning for the above-mentioned statement is, as follows: a unifying feature of alienation contracts (gift, purchase, etc.) is that the conclusion or performance of these contracts transfers ownership, which, in turn, means that the object of the contract must be of the kind over which ownership can be exercised at all. As indicated in Article 927 of the Civil Law, ownership can be exercised only over a thing (both tangible or intangible). This division has passed into Latvian legal system by adoption of Roman law.<sup>36</sup> Since digital content does not have any dimensions, nor does it have any matter, digital content cannot be classified as a tangible thing, as these characteristics are obligatory for something to be classified as “tangible”. At the same time, digital content cannot be recognized as an intangible thing, either. Article 841 of the Civil Law contains a definition of “intangible thing”, stipulating that intangible thing means “... various personal, property or liability rights insofar as they are part of property”. This means that intangible things are the subjective rights of the person, which have a material value, or subjective rights valued in money.<sup>37</sup> Currently, the Latvian legislator still has not acknowledged the previously highlighted situation by making changes in the Latvian Civil Law or by stipulating new regulation in the Consumer Rights Protection Law and, consequently, contracts whose object is digital content or digital service may be characterised as *sui generis* contracts only.

Under Lithuanian law, implementing the provisions of the Consumer Digital Sales Directive, consumer contracts for the supply of digital content or digital services, arguably, should also be considered as *sui generis* contracts. This conclusion can be drawn from the fact that these contracts were separately regulated in the Part II of the Book 6 of the Lithuanian Civil Code, instead of supplementing the pre-existing norms concerning sales or service contracts. Secondly, Art. 6.22817 (8),

<sup>36</sup> Balodis K. *Ievads civiltiesībās* [Introduction to Civil Law]. Rīga: Zvaigzne ABC, 2007, p. 111.

<sup>37</sup> Kalniņš E. *Privāttiesību teorija un prakse* [Theory and Practice of Private Law]. Rīga: Tiesu namu aģentūra, 2005, pp. 35–36.

following the Art. 3(6) of the Directive, clearly separates contracts for the supply of digital content or digital services from other sales or service contracts. Thirdly, on a more conceptual level, contracts for the supply of digital content or digital services hardly can be considered as falling under the regulation of any of the pre-existing contracts. While it seems that Lithuanian regulation of sales contracts is more flexible than in Latvia, and rules on sales could be extended also to digital content (although the possibility to acquire ownership to data remains unclear and somewhat problematic under Lithuanian law), it is notable that the same cannot be said with respect to digital services. Another problem with the applicability of sales contract is tied with the requirement for buyer to pay monetary consideration. Cases where consideration is personal data of a consumer are not compatible with sales contracts. Similar obstacles preclude application of other contracts foreseen in the special part of the Lithuanian Civil Code, such as contract of service or rent. Having said that, it must be noted that the question of the legal nature of the supply of digital content or digital services is not directly addressed in the Civil Code. Further complications can arise from the fact that these contracts are regulated in the general part of the Book 6 of the Civil Code, while all the specific contracts are laid out in the special part of contracts (Part IV of the Book 6 of the Lithuanian Civil Code). Therefore, the final legal qualification of the contracts of the supply of digital content or digital services remains to be seen.

The Estonian legislator has decided to reduce the risk of possible problems with specific regulation based on the object of the contract by placing all rules concerning the contracts of supply of digital content and digital services into a special section in the General Part<sup>38</sup> of the LOA. It could be inferred from the title of the division that this is a *sui generis* contract. However, the text of the provision does not allow such a conclusion to be drawn. Namely, according to § 625 of the LOA, unless otherwise provided, the provisions of the general part and the type of contract to which the contract for the supply of digital content or digital services corresponds shall also apply. It does mean that 'special' rules should be applied in conjunction with the rules laid down for a particular type of contract. For example, in the case of the sales of digital content – with the rules in sales contracts<sup>39</sup>, in the case of the provision of a digital service – with rules of mandate, lease, contract for work or other contracts depending on the nature of the contract.<sup>40</sup>

<sup>38</sup> Structure of the Part 1 (General Part) of the LOA is the following: Chapter 1: General Provisions. Chapter 2: Contract. Division 1: General Provisions; Division 2: Standard Terms; Division 3: Off-premises Contract; Division 4: Distance Contracts; Division 5: Contracts Entered into through Computer Network. New Division 6: Contract for the supply of digital content and digital services.

<sup>39</sup> See for example Kalamees P., Sein K. Connected consumer goods: Who is liable for defects in the ancillary digital service? *EuCML*, 2019, p. 14.

<sup>40</sup> See more on application of the new consumer sales regulation on contracts used in different business models in I. Kull, K. Vider, T. Mets, A. Kelli, K. Lindén, Krister. Compatibility of business models of Estonian language technology entrepreneurs with regulatory framework on the use of digital content. (2020) *International Comparative Jurisprudence*, 6(1), pp. 70–83. It should be noted that amendments were made only in the provisions of the contract of sale. See § 208 LOA.

### 3.3. Interrelationship with data protection law

The Consumer Digital Sales Directive raises important issues related to the need to regulate the situation, where consumers' personal data are extracted at no cost by online services. Article 3(1) of the Consumer Digital Sales Directive provides that the Directive "shall also apply where the trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data to the trader". This norm assumes that consumers may agree to provide traders with as a counter-performance for services or accessory monetary or other benefits provided by the trader.<sup>41</sup> At the same time, the Consumer Digital Sales Directive also recognises that the protection of personal data is a fundamental right and that therefore personal data cannot be considered as a commodity.<sup>42</sup> This norm is in line with the opinion of the European Data Protection Board which has stressed that personal data cannot be considered as a "tradeable commodity".<sup>43</sup> The EU legislator has not yet chosen between the two models – whether personal data may be regarded as a tradable commodity or they should be viewed as an inalienable asset, one that cannot be traded for a consideration – nor has it found a way to reconcile them.<sup>44</sup> The question on how to overcome the current situation, where consumers pay by other than monetary means, i.e., personal data, time or attention, and where the acquired personal data are used to modify consumers' behaviour, has become highly important and calls for new regulation.

Despite these challenges, Article 3(1) of the Consumer Digital Sales Directive entitles consumers to invoke rights and remedies provided for in the Directive even when he or she does not pay a fee but instead provides personal data to the trader. It is expressly recognized that the consumer will be able to carry out the provided remedies in the event of failure to supply or lack of conformity of the service or digital content.<sup>45</sup>

Moreover, EU data protection law should fully apply to the processing of personal data in connection with any contract falling within the scope of the Consumer Digital Sales Directive. It should be without prejudice to the rights, obligations and non-contractual remedies provided for by GDPR<sup>46, 47</sup>. In the

<sup>41</sup> Sartor G. New aspects and challenges in consumer protection. Digital services and artificial intelligence, 2020. Available: [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2020\)648790](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2020)648790) [viewed 08.11.2021.].

<sup>42</sup> Consumer Digital Sales Directive, preamble, Recital 24.

<sup>43</sup> EDPB. (2021) Statement 05/2021 on the Data Governance Act in light of the legislative developments. Available: [https://edpb.europa.eu/system/files/2021-05/edpb\\_statementondga\\_19052021\\_en\\_0.pdf](https://edpb.europa.eu/system/files/2021-05/edpb_statementondga_19052021_en_0.pdf) [viewed 08.11.2021.].

<sup>44</sup> Sartor G. 2020.

<sup>45</sup> Consumer Digital Sales Directive, preamble, recital 24.

<sup>46</sup> European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ, L 119, 04.05.2016.

<sup>47</sup> Consumer Digital Sales Directive, preamble, Recital 38 and Article 3 (8).

event of conflict between the provisions of this Directive and EU law on the protection of personal data, the latter prevails (Article 3 (8) of the Consumer Digital Sales Directive). When implementing the requirements of that Directive into the Latvian Consumer Rights Protection Law, it is recommended to include a provision clarifying the relationship between the new Consumer Sales Directives and EU and national data protection law, as set out in the Directive.<sup>48</sup>

Estonian adopted provisions which consist of rules concerning the obligation to comply with the GDPR as it is demanded under the Consumer Digital Sales Directive. Similarly, Lithuanian law provides for the obligation to comply with the GDPR and the priority of the latter (Art. 22817 (7) of the Lithuanian Civil Code).

Where personal data is provided by the consumer to the trader, the trader should comply with the obligations under the GDPR (Recital 38 of the Digital Content Directive). Digital Content Directive acknowledges that the facts leading to a lack of compliance with requirements of the GDPR may, depending on the circumstances of the case, also be considered to constitute a lack of conformity of the digital content or digital service with subjective or objective requirements for conformity stipulated by this Directive (Recital 48). The right of the consumer to terminate the contract in accordance with Digital Content Directive should be without prejudice to the consumer's right under GDPR to withdraw any consent given to the processing of the consumer's personal data (Recital 39 of the Digital Content Directive).

In Estonia, the most controversy was caused by the need to regulate the legal consequences of the withdrawal of consent to the processing of personal data.<sup>49</sup> Recital 40 in the preamble to the Directive confers on the Member States the power to regulate the contractual consequences of the withdrawal of consent. It is clear, that the withdrawal of the consumer's consent to the processing of personal data does not automatically lead to the termination of the contract, which means that the trader is no longer entitled to process the personal data provided by the consumer. Under current law, this would obviously be a valid reason for a withdrawal from long-term contract (§ 196(1) LOA). Yet what matters is not so much whether the trader can withdraw from the contract, but whether it can seek remedies against the consumer. Recital 42 of the GDPR provides that consent should not be regarded as freely given, if the data subject has no genuine or free

<sup>48</sup> Ziņojums par likumprojekta "Grozījumi Patērētāju tiesību aizsardzības likumā" (Nr. 1179/Lp13) zinātnisko sākotnējo izvērtējumu (*ex ante*) [Report on the Scientific Preliminary Assessment (*ex ante*) of the Draft Law "Amendments to the Consumer Rights Protection Law" (No. 1179 / Lp13)]. Available in Latvian: <https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/0FD2149542AA3059C2258775006312BD?OpenDocument> [viewed 08.11.2021.].

<sup>49</sup> See, for example, a discussion in Kull I. Withdrawal from the consent to process personal data provided as counter-performance: contractual consequences. *Journal of University of Latvia "Law"*, 2020, No. 13, pp. 33–49; Kull I. Digisīsu ūleandmine ja digiteenuste osutamine isikuandmete esitamise vastu. *Euroopa Parlamendi ja nōukogu direktiiv (EL) 2019/770 [Supply of Digital Content and Digital Services in Return for Providing Personal Data. Directive (EU) 2019/770 of the European Parliament and of the Council]*. *Juridica*, 2019, No. 8, pp. 578–588.

choice or is unable to refuse or withdraw consent without detriment.<sup>50</sup> Therefore, the consumer must be able to exercise the rights conferred on him without fear of negative legal consequences. In accordance to the § 6218 of the LOA, withdrawal of the consumer's consent to the processing of personal data shall not be considered a breach of contract and the trader shall not be able to seek remedies against the consumer. Traders and third persons obligation to comply with the relevant obligations of GDPR to protect personal data after termination of the contract can be found in the § 6215 of the LOA.

### **3.4. Interrelationship with regulation on prohibition of unfair commercial practices**

It is important to note that the breach of the national regulation implementing the new Consumer Sales Directives may be simultaneously considered as an act of unfair commercial practice according to the Unfair Commercial Practices Directive and respective national legal acts.<sup>51</sup> As the theme of unfair commercial practices goes beyond the scope of the present article, it is not possible within this article to elaborate on this issue, yet respective situations may be outlined for the sake of clarity. For example, a trader misleads consumers about the remedies in the case of lack of conformity of a digital content or digital service with the contract or does not adequately inform consumers how their personal data are going to be processed. These acts could be considered as a misleading practice in addition to the possible breaches of the discussed national regulation. There is a court case where a consumer rights protection authority fined an online platform holder for misleading consumers during the registration due failing to immediately and adequately inform them during the creation of the account that the data provided would be used for commercial purposes and, more generally, of the remunerative purposes underlying the service, emphasising instead the free of charge nature of the service.<sup>52</sup>

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<sup>50</sup> See more on interrelation between contract law and data protection issues in Kelli A., Tavast A., Linden K., Birstonas R., Labropoulou P., Vider K., Kull I., Tavits G., Varv A., Mantrov V. Impact of Legal Status of Data on Development of Data-Intensive Products: Example of Language Technologies. In: Legal Science: Functions, Significance and Future in Legal Systems II. The University of Latvia Press, pp. 383–400.

<sup>51</sup> Reich N., Micklitz H. W., Rott P., Tonner K. European Consumer Law. 2<sup>nd</sup> edition. Cambridge: Intersentia, 2014, pp. 82–83; Davida Z. Economic analysis in legal argumentation of unfair commercial practice. New Challenges of Economic and Business Development – 2019: Incentives for Sustainable Economic Growth: 11th International Scientific Conference, May 16–18, 2019, Riga, University of Latvia: Proceedings/organised by Faculty of Business, Management and Economics, University of Latvia Riga: University of Latvia, 2019, pp. 193–203.

<sup>52</sup> European Commission. Commission Notice: Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, 2021/C 526/01. OJ, C 526, 29.12.2021, p. 68.

## Conclusion

By starting in different legal situations concerning regulation of consumer sales, the Baltic States did not prefer to use legislative choices offered by the new Consumer Sales Directives (with a few exceptions). At the same time, each Baltic State faced their own difficulties during the implementation of the new Consumer Sales Directives, which would be more clearly observed in the post-implementation era of these directives. Among these difficulties, one may mention the risk of ambiguity in the application of general and specific rules of contract law, on the one hand, and the new regulation on consumer sales, on the other. However, the new regulation will not generally change already settled provisions and concepts drastically but lead to the addition of important new concepts to the existing conceptual apparatus of contract law in general and consumer sales regulation in particular.

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## CONSUMER PERSONAL DATA AS A PAYMENT – IMPLEMENTATION OF DIGITAL CONTENT DIRECTIVE IN POLAND AND LATVIA

**Keywords:** Directive 2019/770, consumer, contract law, digital content, digital service, data protection law

### Summary

The new Digital Content Directive is seen as an important step in adapting European private law to the requirements of the digital economy. However, the Directive gives the Member States a wide margin of discretion in determining many important legal aspects, for example, the Directive leaves contract typology to the competence of Member States. This has led to considerably varied legislative choices of Member States. Business models where consumers' data are used as payment are available in different forms in a considerable part of the market, but to this moment it does not have a specific regulatory framework. Consumer data as remuneration is a challenge to many national legal systems because it establishes a new legal phenomenon in those countries, Latvia and Poland among them. Therefore, this article deals with the implementation of the Digital Content Directive into the national law of Latvia and Poland limiting it to cases where the consumers do not pay the price but provide personal data to the trader. The paper aims to evaluate the implementation provisions and to identify potential gaps in the regulation of the analysed area, and finally, assess whether the goals of the Digital Content Directive are achievable. The research results of the paper reflect the current legal situation in Latvia and Poland, compare the planned strategies for the implementation of the Directive in both countries, and finally, provide some concluding remarks.

## Introduction

In recent decades, the Internet and the development of digital technologies have led to the appearance of new digital products. New business models have emerged, in which digital content or digital services are also provided where the consumers do not pay a price but instead provide personal data to the traders. Such business models are used in different forms in a considerable part of the market. For example, a consumer can play the *Google Play's* app game "My Talking Tom 2" for free if he or she agrees to share the data with *Facebook*, *Google*, *Snapchat*, and numerous other AdTech companies to serve targeted ads.<sup>1</sup>

Hoofnagle and Whittington refer to Chris Anderson's book "Free: The Future of a Radical Price", arguing that in the digital world, free pricing is an inevitable and normatively acceptable approach to pricing internet services.<sup>2</sup> Free has become the default price of internet service.<sup>3</sup> Personal data is commercially valuable, because it can be used to better understand consumer interests and patterns of behaviour, and it can lead consumers into a position of vulnerability. Hence, it was not a surprise that the Digital Content Directive does not only apply to digital content or digital services provided in exchange for the payment of a price in money, but also to situations where the consumer provides or undertakes to provide the trader with personal data with two exceptions: 1) where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content or digital service following Digital Content Directive, and the trader does not process those data for any other purpose or 2) for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose. The Directive fully recognises that the protection of personal data is a fundamental right and that therefore personal data cannot be considered as a commodity. Despite this, Directive ensures that consumers are, in the context of such business models, entitled to contractual remedies.<sup>4</sup>

Notwithstanding the fact that for the last two decades such business models have been very common in practice, the legal scientific reports about

<sup>1</sup> Norwegian Consumer Council. Report: Out of Control. Available: <https://fil.forbrukerradet.no/wp-content/uploads/2020/01/2020-01-14-out-of-control-final-version.pdf> [viewed 26.10.2021.], pp. 76–78.

<sup>2</sup> Hoofnagle Ch. J., Whittington J. Free: Accounting for the Costs of the Internet's Most Popular Price. *UCLA Law Review*, 2014, 607, p. 608; Anderson Ch. Free: The Future of a Radical Price. First Edition. New York: Hyperion, 2009.

<sup>3</sup> Hoofnagle Ch. J., Whittington J. Free: Accounting for the Costs of the Internet's Most Popular Price. *UCLA Law Review*, 2014, 607, p. 670.

<sup>4</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services. Available in English: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019L0770> [viewed 26.10.2021.], Recital 24.

EU countries<sup>5</sup> show that consumer data as remuneration is a challenge to many national legal systems because it establishes a new legal phenomenon in those countries, Latvia and Poland is amongst these countries. The authors of the paper analyse and compare the implementation of the Digital Content Directive and its effects in the field of contract and data protection law in Poland and Latvia, in cases where the consumer does not pay the price but instead provides personal data to the trader. The paper aims to evaluate the implementation provisions and to identify potential gaps in the regulation in the analysed area, and finally, assess whether the goals of the Digital Content Directive are achievable. The research results of the paper reflect the current legal situation in Latvia and Poland, compare the planned strategies for the implementation of the Directive in both countries and, finally, the authors provide some concluding remarks.

## **1. Transposition of the Digital Content Directive into Polish and Latvian legal systems**

The Digital Content Directive was adopted in 2019 to ensure better access for consumers to digital content and digital services and make it easier for businesses to supply digital content and digital services. This Directive tries to strike the right balance between achieving a high level of consumer protection and promoting the competitiveness of enterprises. The transposition term of the Digital Content Directive is set on 1 July 2021, but still many Members States have not fully transposed it. At present, both Poland and Latvia have drafted legal acts, the Latvian one is already submitted to the Parliament, while the Polish draft law is still at the pre-parliamentary stage, at the phase of inter-ministerial opinion.<sup>6</sup>

### **1.1. A brief overview of the Digital Content Directive from the consumer personal data as payment point of view**

As already indicated, the Digital Content Directive has explicitly allowed business models in which payment for the supply of digital content is made through the supply of personal data and this is not a situation in which the data are necessary for the supply of digital content or the provision of service but are equivalent to that service and, as a consequence, the personal data are used not for the performance of the contract but other purposes of the trader, e.g., its marketing purposes. The European legislator has chosen the idea formulated by Norbert Reich and Hans W. Micklitz to separate the regulation of digital content contracts

<sup>5</sup> For example, Loos M. B. M. The (Proposed) Transposition of The Digital Content Directive in The Netherlands. JIPITEC, 2021, 12, 229 para 1.

<sup>6</sup> Draft act on the amendment of the Act on Consumer Rights and the Civil Code (Projekt ustawy o zmianie ustawy o prawach konsumenta oraz ustawy – Kodeks cywilny). Available: <https://legislacja.rcl.gov.pl/projekt/12341810/katalog/12752756#12752756> [viewed 07.11.2021.].

from the classic consumer sale regulation – the Consumer Sales Directive 99/44,<sup>7</sup> which will soon be repealed by the new Consumer Sales Directive.<sup>8</sup> Legal scholars justify the need for a separate EU directive in the consumer *acquis* with the hybrid nature of digital content contracts.<sup>9</sup>

The Proposal of the Digital Content Directive was the result of a high level of uncertainty surrounding the rights and remedies of digital consumers.<sup>10</sup> Consumers who pay for the supply of digital content with personal data were already entitled to some protection under the Unfair Commercial Practices Directive,<sup>11</sup> Consumer Rights Directive<sup>12</sup> and Unfair Contract Terms Directive<sup>13</sup> because their legal protection and EU consumer policy are based on the consumer concept, according to which “consumer” denotes any natural person who is acting for a purpose that is outside his trade, business, craft, or profession.<sup>14</sup> This means that consumer *acquis* generally applies also to consumers who are using their data as a remuneration for the supply of digital content by traders. Despite this, the Digital Content Directive is novel and important for the development of new trends in EU consumer protection and contract law. The Directive for the first time in the EU consumer *acquis* determines and provides specific regulation for the contracts in which the consumer provides his or her data to the trader as remuneration for the supply of digital content.

<sup>7</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. Available in English: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31999L0044> [viewed 26.10.2021.].

<sup>8</sup> Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC. Available in English: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2019.136.01.0028.01.ENG&toc=OJ:L:2019:136:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.136.01.0028.01.ENG&toc=OJ:L:2019:136:TOC) [viewed 26.10.2021.].

<sup>9</sup> Micklitz H.-W., Reich N. Sale of Consumer Goods. In: Micklitz H.-W., Reich N., Rott P. EU consumer law, 2<sup>nd</sup> ed. Antwerpen; Portland, Oregon: Intersentia, 2014, p. 97.

<sup>10</sup> Narciso M. “Gratuitous” Digital Content Contracts in EU Consumer Law. *EuCML*, 2017, Issue 5, p. 198.

<sup>11</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (“Unfair Commercial Practices Directive”). Available in English: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32005L0029> [viewed 26.10.2021.].

<sup>12</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. Available in English: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0083> [viewed 26.10.2021.], Recital 19.

<sup>13</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. Available in English: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31993L0013> [viewed 26.10.2021.].

<sup>14</sup> Howells G., Twigg-Flesner Ch., Wilhelmsson T. Rethinking EU Consumer Law. London: Routledge, 2018, p. 26.

## 1.2. Legislative choices of Poland and Latvia

The legislative choices of EU countries vary considerably even within the civil law countries, including transposing the digital content provisions in the general part of contract law (Germany, Lithuania, Estonia), in the special part following the rules of sales contract (Netherlands) or even developing a separate act outside the civil code that integrates consumer contract law norms both on digital content as well as consumer sales (Austria, Poland,<sup>15</sup> Latvia). Interestingly, Poland and Latvia have followed a similar legislative choice, which makes the discussion of this article more nuanced and practically more valuable to legal scholars of both countries and implementers of the Directive.

The Digital Content Directive's provisions regarding the consumer data as remuneration will be transposed in Latvian law in the Consumer Rights Protection Law<sup>16</sup>, but in Polish law in the Act on Consumer Rights.<sup>17</sup> As can be seen, both Latvia and Poland have chosen a *sui generis* regulation approach.

The amendment made to the Polish Civil Code<sup>18</sup> is aimed only at returning to the de-codification of regulation of consumer statutory warranty and guarantee, now also introduced into the Act on Consumer Rights.<sup>19</sup> By the way, it is worth noting that the implementation of the Omnibus Directive<sup>20</sup> in Poland is also planned through amendments to, *inter alia*, the Act on Consumer Rights, and so far, no thought has been given to their systemic coherence in the drafts prepared.

According to recital 16 of the Digital Content Directive, Member States are free to extend the application of the rules of the Directive to contracts that are excluded from the scope of the Directive, for example, to natural or legal persons that are not consumers within the meaning of the Directive. According to Article 3 (1) of the Digital Content Directive, the Directive applies only if a trader provides or undertakes to provide digital content to a consumer. A consumer is “any natural person who, in relation to contracts covered by this Directive, is acting for purposes which are outside that person’s trade, business, craft, or profession”.

*Business to consumer* (B2C) contracts where digital content or digital services are supplied for personal data as counter-performance will be regulated by *sui generis* regulation (in Latvia with the Consumer Rights Protection Law and Poland with the Act on Consumer Rights), but the same type *business to business* (B2B)

<sup>15</sup> Sein K., Ebers M. Editorial. JIPITEC, 2021, 12, 94 para 1, p. 3.

<sup>16</sup> Consumer Rights Protection Law of the Republic of Latvia. Available in English: <https://likumi.lv/ta/en/en/id/23309-consumer-rights-protection-law> [viewed 26.10.2021.].

<sup>17</sup> O.J. 2020, No. 287 with further changes.

<sup>18</sup> O.J. 2020, No. 1740 with further changes.

<sup>19</sup> Namysłowska M., Jabłonowska A., Wiaderek F. Implementation of Digital Content Directive in Poland: A fast ride on a tandem bike against the traffic, JIPITEC 2021 Issue 1, p. 241.

<sup>20</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules. Available in English: <https://eur-lex.europa.eu/eli/dir/2019/2161/oj> [viewed 26.10.2021.].

or *consumer to consumer* (C2C) contracts – by the general contract law (Polish Civil Code and Latvian Civil Law). That means that Latvia and Poland will have different legal regulations depending on the subject. However, this choice is still open to discussion: do Poland or/and Latvia need special provisions about data as remuneration concerning contract law generally or only to contract law for B2C? In the authors' view, this issue should be discussed in depth, as shared regulation creates uncertainty and inequality (see more in the next section of this article).

## 2. Relationship with contract law

Likewise, the Digital Content Directive should not determine the legal nature of contracts for the supply of digital content or a digital service, and the question of whether such contracts constitute, for instance, a sales, service, rental, or *sui generis* contract, should be left to national law.<sup>21</sup> Consequently, the Directive covers almost any type of contract for the supply of digital content and digital services to consumers.

In Latvia, contracts where digital content or digital services are supplied for personal data as counter-performance cannot be qualified as purchase contracts (also alienation contracts) by Civil Law of the Republic of Latvia for two reasons: 1) digital content or digital services is not recognized as an object whose ownership can be transferred to another person; 2) the purchase price must be expressed in money, not in data. These are mandatory requirements of Civil Law. At the same time, the Consumer Rights Protection Law does not provide an answer, but only explains:

*Provisions of this Law that regulate the provision of a service shall be applied to digital content which is not supplied in a tangible medium unless it is otherwise provided for in the norms governing consumer rights protection.*

Accordingly, the services provisions of the Consumer Rights Protection Law apply to the contract of digital content, but this does not mean that this contract can be considered as a contract for the purchase of goods or services.<sup>22</sup>

Therefore, the Consumer Rights Protection Law applies to the contracts which have as their object digital content and consumer data as remuneration. In the cases where the Consumer Rights Protection Law cannot be applied to a digital content contract (for example, to the contractual relations, especially validity of a contract, concluding and consequences unless otherwise provided

<sup>21</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services. Available in English: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019L0770> [viewed 26.10.2021.], Recital 12.

<sup>22</sup> Karklins J. Understanding the Object of Purchase Agreement in the Light of the New Consumer Sales Directives. Collection of research papers of the 79<sup>th</sup> International Scientific Conference of the University of Latvia. Riga: University of Latvia Press, 2021, p. 17.

for in the Consumer Rights Protection Law)<sup>23</sup> they are currently subject only to the general rules of contract law.

Consequently, two problems emerge in the Latvian legal system: 1) as a digital content institute is a novel in the Latvian legal system, the currently proposed draft law does not eliminate the incompatibility of this institute with the Latvian civil law system; 2) the contracts which are concluded by subjects – B2B or C2C are out of the regulation of the Consumer Rights Protection Law, which include their exclusion from specific regulation of the digital content institute.

In the Polish draft act implementing Digital Content Directive, the legislator decided to introduce a definition of the contract for the supply of digital content<sup>24</sup>. The definition indicates the parties' main obligations thus determining *essentialia negotii* of the contracts concerned, which merely explains the statutory terms, but not the legal nature of the contract itself<sup>25</sup>. From the perspective of payment with personal data as a counter-performance, the definition of this contract has important elements. Firstly, it only covers B2C relationships, and secondly, it directly defines the provision of data as an alternative counter-performance to price payment. The adoption of such a solution, however, does not result in legal clarity and some important problems remain unnoticed by the legislator. The explanatory memorandum of the Polish draft also does not acknowledge the analysed issue of payment with personal data and the relationship of the implemented Digital Content Directive to the General Data Protection Regulation and the E-privacy Directive and the consequences in the area of contract law in cases of data payments, particularly in the case of withdrawal of the consent for data processing or exercising consumer rights to withdraw from the contract<sup>26</sup>.

Generally, it should be assumed, this has been left to the general provisions on contracts in the Polish Civil Code, but it does not address all the questions. There is also no clarity as to what happens when the consumer withdraws from the contract, regardless of the mode (i.e., during the cooling off period or in the event of a defect). How does such a withdrawal affect the existence of autonomous legal basis for data processing, especially since the service rendered by giving consent to data processing is not a service that can be returned by the trader?

There also remains the issues of the trader's use of the data in the period between giving consent as an element of remuneration and the withdrawal from

<sup>23</sup> Consumer Rights Protection Law of the Republic of Latvia. Available in English: <https://likumi.lv/ta/en/en/id/23309-consumer-rights-protection-law> [viewed 26.10.2021.], Section 2.<sup>1</sup> (2).

<sup>24</sup> Art. 1 (3) (a) of the draft act on the amendment of the Act on consumer rights and the Civil Code (Projekt ustawy o zmianie ustawy o prawach konsumenta oraz ustawy – Kodeks cywilny). Available: <https://legislacja.rcl.gov.pl/projekt/12341810/katalog/12752756#12752756> [viewed 07.11.2021.].

<sup>25</sup> Namysłowska M., Jabłonowska A., Wiaderek F. Implementation of Digital Content Directive in Poland: A fast ride on a tandem bike against the traffic, JIPITEC 2021 Issue 1, p. 241

<sup>26</sup> The explanatory memorandum of the draft act on the amendment of the Act on consumer rights and the Civil Code (Projekt ustawy o zmianie ustawy o prawach konsumenta oraz ustawy – Kodeks cywilny). Available: <https://legislacja.rcl.gov.pl/projekt/12341810/katalog/12752756#12752756> [viewed 07.11.2021.].



the contract by the consumer and possible settlement of the benefit thus obtained or consumed.

### 3. Relationship with data protection law

The concept of payment with personal data has important implications given the complex intertwining of the General Data Protection Regulation.<sup>27</sup> It is explicitly resolved in Recital 37 that Digital Content Directive is without prejudice to General Data Protection Regulation and Directive on privacy and electronic communications.<sup>28</sup> This framework applies to personal data processed in connection with contracts falling within the scope of the Digital Content Directive. Consequently, personal data should be collected or otherwise processed under the General Data Protection Regulation and the Directive on privacy and electronic communications. In case of a conflict between the Digital Content Directive and Union law on the protection of personal data, the latter should prevail.<sup>29</sup> The Latvian and Polish draft laws do not include such a remark, however, to prevent inconsistencies in the application of legal norms, it would be advisable to provide for it.

Under General Data Protection Regulation, the consumer has the right to withdraw his or her consent to the processing of their data at any time. Member States still have enough freedom to create or maintain different regulations.<sup>30</sup> Latvia did not use this possibility in the draft law. The Polish draft law, likewise, contains no specific regulation of the interaction effects of General Data Protection Regulation in the area of contract law in the case of data payments.

Although it is clear that none of the drafted provisions is intended to establish any specific basis for the processing of personal data, what is consistent with the intention of the EU legislator as expressed in recitals 37 to 40 of the Digital Content Directive and the “payment” with personal data is realized through the fulfilment of the relevant autonomous legal basis for the processing of personal data, primarily through the consent under General Data Protection Regulation.

<sup>27</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Available in English: <https://eur-lex.europa.eu/eli/reg/2016/679/oj> [viewed 26.10.2021.].

<sup>28</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications). Available in English: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002L0058> [viewed 26.10.2021.].

<sup>29</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services. Available in English: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019L0770> [viewed 26.10.2021.], Recital 37.

<sup>30</sup> Hoekstra J., Diker-Vanberg A. The proposed directive for the supply of digital content: is it fit for purpose? *International Review of Law, Computers & Technology*, 2019, 33:1, pp. 100–117.

However, this still does not resolve the aforementioned problem – what happens when the consumer withdraws from the contract, regardless of the mode. The question of what legal mechanisms should be used to restore the equivalence of performances in the case of withdrawal of consent for data processing by the consumer, which was a counter-performance also remains open.

## Conclusion

To sum up, in line with Latvia's and Poland's legislative tradition, the Digital Content Directive will be implemented in the *sui generis* law. Latvia and Poland will have different legal regulations depending on the subject. B2C contracts where digital content or digital services are supplied for personal data as counter-performance will be regulated by *sui generis*, but the same type B2B or C2C contracts – by the general contract law.

Latvia named the legal nature of contracts for the supply of digital content or a digital service as a *sui generis* contract. The Polish legislator did not decide to determine the nature of a contract for the supply of digital content, limiting itself in the statutory definition to determining the *essentialia negotii* of this contract.

Hence, both Latvian and Polish legislators ultimately did not take the opportunity to sufficiently clarify the key elements of the effects in the area of contract law (particularly interaction of consumer law and civil law), including arising from the impact of the General Data Protection Regulation, in particular the regulation on the granting and withdrawal of consent to the processing of personal data, as a counter-performance in relation to the performance of the trader.

The questions posed above at this point of the legislative procedure are left for the practice of law application to resolve based on interpretations of existing provisions.

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