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The Doctrine of Supra-Constitutionality and Lithuanian Constitutional Identity

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The aim of this article is to analyse the doctrine of supra-constitutionality, as developed by the Constitutional Court of the Republic of Lithuania, and its impact on the concept of the Lithuanian constitutional identity. The article deals with origins of the doctrine of supra-constitutionality, its content and consequences for the paradigm of constitutional law. This doctrine follows from the fundamental constitutional acts of the State of Lithuania, first and foremost, from the Act of Independence of 16 February 1918. From the standpoint of the current Constitution of 1992, these acts are considered to be pre-constitutional acts of constitutive (re-constitutive) nature, adopted by the supreme representative institutions of the People, which expressed the will to establish (re-establish) the independent democratic State of Lithuania. Therefore, the fundamental constitutional acts of the State of Lithuania are particular primary sources of the Lithuanian constitutional law. Their core provisions establish the unamendable fundamental constitutional principles – independence of the State, democracy, and the inherent nature of human rights. These principles have supra-constitutional force and cannot be denied by any constitution of Lithuania. On the contrary, it is the Constitution that derives from the fundamental constitutional acts and must unconditionally protect the irrevocable constitutional values. Thus, the element of supra-constitutionality present in the fundamental constitutional acts is not contrary to the concept of the Constitution, as supreme law. It is rather the cornerstone of the modern Lithuanian constitutionalism, which together with other constitutional traditions expressed by those acts allows us to define the constitutional identity of Lithuania.

Keywords: fundamental constitutional act, Constitution, supra-constitutionality, constitutional identity.

Contents

Introduction

This year both Latvia and Lithuania commemorate a centenary of their constitutions of 1922. This centenary demonstrates the significant historical achievement of Latvia. The uniqueness of the Constitution of the Republic of Latvia (*Satversme*)[1] starts with its original Latvian name that is recognisable in the legal world and is rightly associated with the continuity of the modern democratic state of Latvia, having survived the brutal Soviet and Nazi occupations. The *Satversme* is also a symbol of the longstanding European constitutional tradition, being the oldest valid constitution in Central and Eastern Europe, as well the sixth oldest valid republican constitution in the world.

In this regard, Lithuania's constitution building achievements are rather modest. The current Lithuanian Constitution will only mark its 30th anniversary at the end of this year, while the first democratic Constitution of the modern state of Lithuania – also adopted one hundred years ago – was only in force for four years. The democratic ideas and principles expressed in the Lithuanian Constitution of 1922 were revived years later: firstly, by the Resistance to the Soviet occupation in 1949, and, secondly, by the current Constitution of 1992.

Accordingly, the topic of this article is related with the common aspirations that all the constitutions serve. Such an aspiration is expressed in the preamble of the *Satversme* as the will to guarantee throughout the centuries the existence and development of the Latvian people, to ensure freedom of each individual. In other words, the focus is on both eternal and universal values, which are above any constitution and on which, therefore, any constitution should be built. Where can we find them? First and foremost, in the constituent acts that established the statehood.

On the other hand, according to the well-known traditional axiom, the Constitution is supreme law and the basis of the whole legal system, with which any other legal act should comply. It is stated both in the text of the Constitution of the Republic of Lithuania[2] and in the established case law of the Constitutional Court[3]. Therefore, it may be a rather provocative question to ask about what acts could be above the Constitution. However, then another question can be posed: what an assessment should be given to other primary sources of constitutional law, such as the declaration of independence, which also can be seen as stemming from the will of the People who organised itself into the state community, or a civic Nation. Whether those sources are of equal rank with the Constitution, or they should be regarded as subordinate to the Constitution, which lost its legal significance with the appearance of the latter? Or they should mean something more and above than the Constitution? These are essential questions to understand the meaning of the Constitution as well as

[1] Constitution of the Republic of Latvia (*Satversme*) (15.02.1922). Available: https://www.satv.tiesa.gov.lv/en/2016/02/04/the-constitution-of-the-republic-of-latvia/ [last viewed 15.06.2022].

[2] Constitution of the Republic of Lithuania (25.10.1992). Available: https://lrkt.lt/en/about-the-court/legal-information/the-constitution/192 [last viewed 15.06.2022]. According to its Art. 7(1), "any law or other act that contradicts the Constitution shall be invalid".

[3] E.g., Ruling of the Constitutional Court of the Republic of Lithuania of 25 May 2004 in case No. 24/04, para. II.1 of the argument. Available: https://lrkt.lt/en/court-acts/search/170/ta1269/content [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 24 January 2014 in case No. 22/2013, para. III.2 of the argument. Available: https://lrkt.lt/en/court-acts/search/170/ta850/content [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 11 July 2014 in case No. 16/2014-29/2014, para. I.2.2 of the argument. Available: https://lrkt.lt/en/court-acts/search/170/ta859/content [last viewed 15.06.2022]. In these rulings the Constitutional Court also noted that the source of the Constitution is the state community, the civic nation, itself.

the fundamentals of the statehood and constitutionalism. Moreover, they are not purely theoretical when we start to deal with the limits on the people, as a sovereign, and the state power to amend the Constitution or decide other important issues for the life of the state[4].

On 30 July 2020, the Constitutional Court of the Republic of Lithuania adopted a historical ruling, whereby it established a comprehensive official constitutional doctrine regarding the fundamental constitutional acts of the state of Lithuania[5] (though some elements of this doctrine can be traced to the Constitutional Court's rulings of 18 March 2014 and 11 July 2014[6]). This doctrine is an object of this article, as it contains a doctrinal element of supra-constitutionalism found within the Constitution, as supreme law.

The aim of this article is to reveal the content of the doctrine of supra-constitutionality, as developed by the Lithuanian Constitutional Court, and its relevance to the constitutional identity of Lithuania, by examining the concept of the fundamental constitutional acts of the State of Lithuania and their impact on the Constitution. The research is carried out by employing historical, logical, comparative and teleological methods of research. Although, taken individually, the fundamental constitutional acts of the state of Lithuania have been the object of research[7], their relationship with and impact on the Constitution has not been properly examined until the ruling of the Constitutional Court of 30 July 2020, with the exception of certain elements of supra-nationality dealt with in the collective monograph on constitutional disputes[8].

1. Concept of the fundamental constitutional acts of the state of Lithuania

One can rely on the aforementioned definition of the Constitution as supreme law, which is the basis of the whole legal system, and with which all other legal acts should comply. One can also describe the Constitution as a social contract, i.e., a commitment by all the citizens of the Republic of Lithuania to the current and future generations to live according to the fundamental rules provided by the Constitution, as well as

[4] See: *Sinkevičius, V*. Konstitucijos keitimo apribojimai? Jurisprudencija, Vol. 22, issue 2, 2015, pp. 206–230.

[5] Ruling of the Constitutional Court of the Republic of Lithuania of 30 July 2020 in case No. 5/2019, para. 6. Available: https://lrkt.lt/en/court-acts/search/170/ta2220/content [last viewed 15.06.2022].

[6] Ruling of the Constitutional Court of the Republic of Lithuania of 18 March 2014 in case No. 31/2011-40/2011-42/2011-46/2011-9/2012-25/2012, paras III.2, III.3, III.7 of the argument. Available: https://lrkt.lt/en/court-acts/search/170/ta853/content [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 11 July 2014 in case No. 16/2014-29/2014, para. I.5.3 of the argument. Available: https://lrkt.lt/en/court-acts/search/170/ta859/content [last viewed 15.06.2022].

[7] *Sinkevičius, V*. Kovo 11-oji: nepriklausomybės atkūrimo teisinė konstrukcija. Jurisprudencija, Vol. 121, issue 3, 2010, pp. 55–71; *Sinkevičius, V*. Lietuvos Laisvės Kovos Sąjūdžio Tarybos 1949 m. vasario 16 d. deklaracija Lietuvos teisės sistemoje. In: Regnum est: 1990 m. Kovo 11-osios Nepriklausomybės aktui – 20 (Liber Amicorum Vytautui Landsbergiui). Vilnius: Mykolo Romerio universiteto Leidybos centras, 2010, pp. 55–73; *Jakubčionis, A., Sinkevičius, V., Žalimas, D*. Aggression by the Soviet Union and the Occupation of Lithuania in 1940-1990. Resistance to the Soviet Occupation: the 16 February 1949 Declaration of the Council of the Lithuanian Freedom Fight Movement. In: Lithuanian Constitutionalism: The Past and the Present. Vilnius: Constitutional Court of the Republic of Lithuania, 2017, pp. 136–141; *Sinkevičius, V*. The Act of 11 March 1990 on the Re-Establishment of the Independent State of Lithuania. In: Lithuanian Constitutionalism: The Past and the Present. Vilnius: Constitutional Court of the Republic of Lithuania, 2017, pp. 159–165; *Žalimas, D*. Legal Status of Lithuania's Armed Resistance to the Soviet Occupation in the Context of State Continuity. In: International Law from a Baltic Perspective. Leiden/Boston: Brill Nijhoff, 2021, pp. 167–175.

[8] *Birmontienė, T., Danėlienė, I., Jarašiūnas, E., Sinkevičius, V., Žalimas, D*. Konstituciniai ginčai. Vilnius: Mykolo Romerio universitetas, 2019, pp. 20, 25–27, 34.

a normative basis for the common life of the people and guidelines for the whole national legal system[9].

Furthermore, if we look more carefully at the origins and the purpose of the Constitution, as a social contract and a normative basis for the common life of the people, we can observe that no Constitution is usually written on the basis of *tabula rasa* – the Constitution does not appear out of nowhere and overnight. On the contrary, before adopting the Constitution, the people have to establish and organise themselves into a state. This is usually achieved through the declaration of independence that is the "birth certificate" of the state, in which the foundation of the newly born state is laid down. That is why it can also be referred as a fundamental constitutional act of the state. It is an act that establishes the core of constitutionalism for an established state and remains "valid" throughout the lifespan of that state. Therefore, it is natural that the subsequent drafting and adoption of the Constitution should also inevitably rely on it. Together with the Constitution the declaration of independence forms a block of constitutionality of a certain state. Such a role of the declaration of independence has been similarly described by the constitutional courts of Moldova[10] and Slovenia[11].

Due to the five decades of foreign occupation in the 20th century, Lithuania, just as the other two Baltic states, has more than one fundamental constitutional act in which we find the foundation of the modern statehood. The Lithuanian Constitutional Court identified three of them:

1) **The Act of the Independence of 16 February 1918**, adopted by the Council of Lithuania[12] (hereinafter also – the Act of Independence), which established the "independent State of Lithuania, founded on democratic principles". It was later followed by the Resolution of 15 May 1920 of the Constituent *Seimas*, which decided on the republican form of government.

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[9] E.g., Ruling of the Constitutional Court of the Republic of Lithuania of 25 May 2004 in case No. 24/04, para. II.1 of the argument. Available: https://lrkt.lt/en/court-acts/search/170/ta1269/content [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 24 January 2014 in case No. 22/2013, para. III.2 of the argument. Available: https://lrkt.lt/en/court-acts/search/170/ta850/content [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 11 July 2014 in case No. 16/2014-29/2014, para. I.2.2 of the argument. Available: https://lrkt.lt/en/court-acts/search/170/ta859/content [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 30 July 2020 in case No. 5/2019, para. 8.1. Available: https://lrkt.lt/en/court-acts/search/170/ta2220/content [last viewed 15.06.2022].

[10] The Moldovan Constitutional Court referred to the Declaration of Independence as the "birth certificate" of the Republic of Moldova, which served as a constitutional basis for the development of the new state, including the key role in drafting of the text of the Constitution; whereas the concept of a block of constitutionality (bloc de constitutionnalité) was borrowed from the French Constitutional Council. See: Judgment of the Constitutional Court of the Republic of Moldova of 5 December 2013 in case No. 8b/2013, paras 47–51, 73–75, 87–91. Available: https://www.constcourt.md/public/ccdoc/hotariri/en-Judgment-No36-of-5122013-on-Romanian-Language-eng82ea4.pdf [last viewed 15.06.2022].

[11] The Slovenian Constitutional Court emphasised the significance of two independence documents – the Declaration of Independence and the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia – for the constitutional order of the country: both of them laid down the constitutional foundation of the Slovene statehood, including the principles that demonstrate the fundamental legal and constitutional quality of the new independent and sovereign state, upon which the value concept of the constitutional order is based. See: Decision of the Constitutional Court of the Republic of Slovenia of 26 September 2011 in case No. U-I-109/10, paras 7, 8. Available: http://www.us-rs.si/documents/4b/dc/u-i-109-102.pdf [last viewed 15.06.2022].

[12] Resolution of the Council of Lithuania (16.02.1918). Available: https://lrkt.lt/en/legal-information/lithuanias-independence-acts/act-of-16-february/365 [last viewed 15.06.2022].

2) **The Act of Restoration of the Independence of 11 March 1990**, adopted by the Supreme Council (Re-Constituent *Seimas*) of the Republic of Lithuania[13] (hereinafter also – the Act on Restoration of Independence), which restored the independence of the Republic of Lithuania on the basis of the continuity of state.
3) **The Declaration of 16 February of 1949 of the Council of the Lithuanian Freedom Fight Movement**, adopted by the then supreme authority of the Resistance to the Soviet occupation[14] (hereinafter also – the Declaration of the LFFM Council), which expressed the principles of the eventual restoration of the independence of the Republic of Lithuania based on state continuity.

From the standpoint of the current Constitution, the Lithuanian Constitutional Court described the fundamental constitutional acts of the State of Lithuania in the following manner: they "are pre-constitutional constituent (re-constituent) acts, adopted by the supreme representative institutions that expressed the will of the People to establish (re-establish) the independent democratic state of Lithuania. Therefore, these fundamental constitutional acts of the state of Lithuania, as the primary sources of Lithuanian constitutional law, may never be altered or repealed"[15].

This description allows us to distinguish three particular features of the fundamental constitutional acts of the state of Lithuania. First, they are pre-constitutional acts, as they were adopted before the current Constitution of 1992. Second, they are of constituent (re-constituent) nature, as they established the modern State of Lithuania or restored (sought to restore) its independence. The Act of Independence is a constituent act, while the rest two fundamental constitutional acts, based on the former, are of re-constituent character (the Act on Restoration of Independence restored the independence of the state of Lithuania, while the Declaration of the LFFM Council pursued this aim). The Constitutional Court referred to the Act of Independence as to the act that established the modern state of Lithuania as a subject of international law, regardless that the Act itself proclaimed "the restoration of the independent state of Lithuania", as from the legal point of view the previous state of Lithuania (the Grand Duchy of Lithuania that had been also a part of the Commonwealth of Two Nations) was irreversibly extinguished. Therefore, according to the Act of Independence, in pursuance of the right of peoples to self-determination, the new state of Lithuania, as a subject of international law, was established. Meanwhile, the proclamation of the "restoration of the independent state" has to be perceived as reflecting a historical and ideological rather than legal concept: the Act of Independence marks the legal beginning of a modern national state of Lithuania, the core and the name of which together with the creative and organisational potential was inherited from the former "empire"[16].

Third, all the three fundamental constitutional acts of the State of Lithuania were adopted by the unique supreme political representative institutions of the respective

[13] Act of the Supreme Council of the Republic of Lithuania on the Re-establishment of the Independent State of Lithuania (11.03.1990). Available: https://lrkt.lt/en/legal-information/lithuanias-independence-acts/act-of-11-march/366 [last viewed 15.06.2022].

[14] Declaration of the Council of the Lithuanian Freedom Fight Movement (16.02.1949). Available: https://lrkt.lt/en/legal-information/lithuanias-independence-acts/declaration-of-the-council-of-the-lithuanian-freedom-fight-movement/364 [last viewed 15.06.2022].

[15] Ruling of the Constitutional Court of the Republic of Lithuania of 30 July 2020 in case No. 5/2019, para. 6.4. Available: https://lrkt.lt/en/court-acts/search/170/ta2220/content [last viewed 15.06.2022].

[16] *Römeris, M*. Lietuvos konstitucinės teisės paskaitos, I dalis. Kaunas: „Spindulio" spaustuvė, 1937, pp. 37, 192.

time-period. First and foremost, their uniqueness lain in their particular mandate: regardless the differences in their formation[17], they expressed the will of the people to (re)establish the independent democratic State of Lithuania by adopting respective fundamental constitutional acts[18]. In other words, as particular representative institutions, they all had the most important constituent (re-constituent) powers that can be regarded as being primary with regard to the constituent power to adopt the Constitution. Since no other representative institution is mandated with such powers, the fundamental constitutional acts are not subject to amendments and cannot be abolished. At this point, we arrive at one of the premises for supra-constitutionality.

2. Doctrine of supra-constitutionality: Premises, essence and significance

Thus, the doctrine of supra-constitutionality attributable to the fundamental constitutional acts of the state of Lithuania is based on two premises. First, the assignment of those acts to the category of the primary sources of constitutional law adopted by the primary (re)constituent power. The division between the primary and secondary constituent power of the people was made by a pioneer of the Lithuanian doctrine of supra-constitutionality Konstantinas Račkauskas in his book "On the Issues of the Lithuanian Constitutional Law"[19] published in emigration already in 1967. In this context, the establishment or re-establishment of the state is an act of primary constituent power, while the Constitution is perceived as an act of secondary constituent power. Naturally, the secondary power is derived from the primary and is empowered by the latter to adopt the Constitution. As a consequence, the secondary constituent power cannot trespass the limits established by the primary constituent power. On the contrary, it is the Constitution that arises out of the fundamental constitutional

[17] The Council of Lithuania was elected at a special conference of representatives of the People; the Supreme Council was elected by universal elections at the end of the Soviet occupation; the LFFM Council was formed by the Resistance to the Soviet occupation.

[18] *Maksimaitis, M*. Lithuania's Act of Independence of 16 February 1918. In: Lithuanian Constitutionalism: the Past and the Present. Vilnius: Constitutional Court of the Republic of Lithuania, 2017, pp. 61, 64; *Jakubčionis, A., Sinkevičius, V., Žalimas, D*. Aggression by the Soviet Union and the Occupation of Lithuania in 1940-1990. Resistance to the Soviet Occupation: the 16 February 1949 Declaration of the Council of the Lithuanian Freedom Fight Movement. In: Lithuanian Constitutionalism: the Past and the Present. Vilnius: Constitutional Court of the Republic of Lithuania, 2017, pp. 135–137; *Sinkevičius, V*. The Act of 11 March 1990 on the Re-Establishment of the Independent State of Lithuania. In: Lithuanian Constitutionalism: the Past and the Present. Vilnius: Constitutional Court of the Republic of Lithuania, 2017, pp. 161–162.

[19] See: *Račkauskas, K*. Lietuvos konstitucinės teisės klausimais. New York: „Darbininko" leidykla, 1967, pp. 15–17, 19, 31. According to him, the Act of Independence is regarded as being the accomplishment of the primary constituent power of the people to create their state. As the Act of Independence provided for the Constituent *Seimas* the important duty to set the fundamentals of the state of Lithuania, the Constituent *Seimas* could not oppose to the Act. The legal ground and powers of the Constituent Seimas itself arose out of the Act of Independence. Therefore, the Constituent *Seimas* was not a sovereign body so as being able to change its title and competence; its powers were limited by the duty to set the fundamentals of statehood in addition and with full respect to those already established by the Act of Independence. Therefore, the constituent power of the people to establish the Constitution is not absolute and should be subjected to the primary constituent power expressed in the Act of Independence. Meanwhile, the power to change the Constitution should be placed in this hierarchy lower than the constituent power, as it is already qualified and limited by the Constitution.

acts adopted by the primary constituent power[20]. Furthermore, the constituted power is limited by the constituent power and should not change the entire Constitution.

Legal researchers Andras Sajo and Renata Uitz point out that in our times, constitutionalism presupposes the subordination of the established constituent power to its own rules and denies the possibility to revoke those rules at any time[21]. This excludes the possibility for the constituent power to operate on a permanent basis and without subjecting itself to any rules. Even more, the constituted power (even if it is a referendum held under the Constitution) has to be exercised in accordance with the rules established by the constituent power[22].

Second, the purpose of the Constitution, which is to safeguard the *raison d' être* of the state as the common good of the people[23], without which the Constitution would become meaningless. In other words, the Constitution cannot be perceived as "a suicide pact" (the maxim known already from time of the US President Lincoln)[24]. Following the tradition of American constitutionalism, this means that the Constitution cannot be employed against itself, including for the destruction of its foundation – the sovereignty of the people and their state. Similarly, the Moldovan Constitutional Court clearly stated that "the Constitution is not a suicide pact", therefore it cannot be interpreted against such "fundamental constitutional values, as national independence, the territorial integrity or the security of the State"[25].

Consequently, taking into account the origins and the purpose of the Constitution, one can make the conclusion that there are certain fundamental principles that have been established before the adoption of the Constitution and that are above the Constitution; the Constitution has to comply with and to develop those principles; they have to be found in the core provisions of the fundamental constitutional acts

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[20] That is why the Lithuanian Constitutional Court noted that the constitutions of the State of Lithuania, including the current Constitution of 1992, derive from the Act of Independence; the current Constitution also arises out of the Act on Restoration of Independence and the will of the People expressed in the Declaration of the LFFM Council. Ruling of the Constitutional Court of the Republic of Lithuania of 30 July 2020 in case No. 5/2019, paras. 6.1.1, 6.2.1, 6.3.3. Available: https://lrkt.lt/en/court-acts/search/170/ta2220/content [last viewed 15.06.2022].

[21] *Sajó, A., Uitz, R*. The Constitution of Freedom: An Introduction to Legal Constitutionalism. Oxford: Oxford University Press, 2019, p. 56.

[22] That is why the Lithuanian Constitutional Court emphasised that the Constitution equally binds the State community, the civic Nation, itself; therefore, the supreme sovereign power of the People may be executed, *inter alia*, directly (by referendum), only in compliance with the Constitution. Ruling of the Constitutional Court of the Republic of Lithuania of 11 July 2014 in case No. 16/2014-29/2014, para. I.2.2 of the argument. Available: https://lrkt.lt/en/court-acts/search/170/ta859/content [last viewed 15.06.2022].

[23] Ruling of the Constitutional Court of the Republic of Lithuania of 25 May 2004 in case No. 24/04, para. II.1 of the argument. Available: https://lrkt.lt/en/court-acts/search/170/ta1269/content [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 19 August 2006 in case No. 23/04, para. II.1 of the argument. Available: https://lrkt.lt/en/court-acts/search/170/ta1337/content [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 24 September 2009 in case No. 16/2009, para. III.3.2 of the argument. Available: https://lrkt.lt/en/court-acts/search/170/ta1287/content [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 24 January 2014 in case No. 22/2013, para. III.2 of the argument. Available: https://lrkt.lt/en/court-acts/search/170/ta850/content [last viewed 15.06.2022].

[24] *Posner, R. A*. Not a Suicide Pact: the Constitution in a Time of National Emergency. Oxford: Oxford University Press, 2006, pp. 153–154.

[25] Judgment of the Constitutional Court of the Republic of Moldova of 2 May 2017 in case No. 37b/2014, para. 188. Available: http://www.rulac.org/assets/downloads/Cst_Court_of_Moldova_Judgment_Neutrality.pdf [last viewed 15.06.2022].

of the State of Lithuania. This is exactly what the doctrine of supra-constitutionality is about.

It is not a surprise that the Act of Independence should be distinguished in this context. According to K. Račkauskas, this Act is "a supra-constitutional document, with which no constitution or law can be in conflict"[26]. The other two fundamental constitutional acts aimed at the implementation of the Act of Independence in the concrete historical situation. More precisely, the Lithuanian Constitutional Court clearly identified the core provision of the Act of Independence, which reflects the essence of the Act. It is the provision on the "independent State of Lithuania, founded on democratic principles". In its Ruling of 30 July 2020, the Constitutional Court stated about supra-constitutionality in the following way: "the provisions of the fundamental constitutional acts of the state of Lithuania that consolidated and implemented the unamendable fundamental constitutional principles – independence, democracy, and the innate nature of human rights and freedoms – have supra-constitutional force; they may not be denied by any constitution of the State of Lithuania. On the contrary, the Constitution, as supreme law, enshrines and unconditionally protects these constitutional values. If the Constitution were interpreted in a different way, as mentioned before, the preconditions would be created for abolishing the restored "independent State of Lithuania, founded on democratic principles", as proclaimed by the Act of Independence of 16 February 1918"[27].

Thus, first and foremost, the fundamental constitutional principles – the independence of the State, democracy and inherent nature of human rights – have been acknowledged as being supra-constitutional. They are also expressed and consolidated in Art. 1 of the current Constitution, which proclaims the State of Lithuania to be "an independent democratic republic". Due to their origins found in the core provision of the Act of Independence, the fundamental principles of Article 1 of the Constitution, such as the independence of the state, democracy and the inherent nature of human rights, have the status of unamendable, or eternal, clauses, which cannot be denied by any constitutional amendment; nor even by a referendum[28]. In such a way, the doctrine of supra-constitutionality substantiates the hierarchy of constitutional principles and the existence of absolute material criteria for the constitutionality of constitutional amendments, when express provisions regarding the unamendability or eternity of constitutional clauses are absent in the text of the Constitution. Thus, the doctrine of supra-constitutionality does not in any way deny the supremacy of the Constitution. On the contrary, it derives from the Constitution as well as it rather contributes to the safeguarding and strengthening of the pillars of modern constitutionalism. Among those pillars, the inherent nature of human rights is implied and follows from the core provision of the Act of Independence regarding the "independent State of Lithuania, founded on democratic principles", as it is perceived to be an immanent element of democracy. Already in 1978, another famous Lithuanian emigrant lawyer Jonas Varnas noted that "democracy is a life style based on social justice, acknowledgment of a human value in any human being, equality of all human beings

[26] *Račkauskas, K.* Lietuvos konstitucinės teisės klausimais. New York: „Darbininko" leidykla, 1967, p. 15.

[27] Ruling of the Constitutional Court of the Republic of Lithuania of 30 July 2020 in case No. 5/2019, para. 6.4. Available: https://lrkt.lt/en/court-acts/search/170/ta2220/content [last viewed 15.06.2022].

[28] Ruling of the Constitutional Court of the Republic of Lithuania of 11 July 2014 in case No. 16/2014-29/2014, para. I.5.3 of the argument. Available: https://lrkt.lt/en/court-acts/search/170/ta859/content [last viewed 15.06.2022]; Ruling of the Constitutional Court of the Republic of Lithuania of 30 July 2020 in case No. 5/2019, para. 8.2. Available: https://lrkt.lt/en/court-acts/search/170/ta2220/content [last viewed 15.06.2022].

and love to the close ones. It also supposes the moral duty to respect any human being and his or her personality"[29]. In addition, apart from that core provision of the Act of Independence, the core provisions of the Act on Restoration of Independence and the Declaration of the LFFM Council, which declare state continuity and identity as the legal ground for the restoration of independence, are also acknowledged as having supra-constitutional force; the concept of independence of the state of Lithuania inevitably includes the continuity of the State during the former foreign occupation and its identity with the State of Lithuania established by the Act of Independence[30].

In general, the Lithuanian doctrine of supra-constitutionality resembles to the doctrine of the unamendable core of the Constitution, as developed, among others, by the Latvian Constitutional Court. The latter proclaimed that the fundamental values, upon which the State of Latvia is based, including the fundamental rights and freedoms, democracy, sovereignty of the state and people, separation of powers, the rule of law, cannot be infringed by amendments to the *Satversme*[31]. Legal research (including that conducted by Ineta Ziemele)[32] further linked this substantial limitation on constitutional amendments to the doctrine of the Basic norm (*Grundnorm*) that is found in the 1918 Act on the Proclamation of the State. This Act itself provides for the constitutional core of the Republic of Latvia (an independent and democratic State established by the Latvian people on their land). The *Satversme* stems from that core. Therefore, this Basic norm can only be altered through a revolution or revolt rather than through the amendments to the *Satversme*. By developing the doctrine of supra-constitutionality, the Lithuanian Constitutional Court has advanced a similar constitutional doctrine at the official jurisprudential level.

3. Supra-constitutionality and constitutional identity

At this point we also encounter the concept of constitutional identity that is employed by a number of the European institutions of constitutional control. As such, constitutional identity encompasses the constitutional principles and provisions, which reflect the essence of the constitutional system and constitute the exceptionally safeguarded constitutional core[33].

Although it is not expressly mentioned by the Lithuanian Constitutional Court, constitutional identity follows, first and foremost, from the fundamental constitutional acts of the State of Lithuania. As it is clear from the Ruling of the Constitutional Court of 30 July 2020, the concept of constitutional identity is broader than that of supra-constitutionality: apart from the unchangeable constitutional core safeguarded by the doctrine of supra-nationality, it also includes the constitutional traditions that are established by the fundamental constitutional acts of the State of Lithuania, expressed in the text of the current Constitution and can in principle be subject to

[29] *Varnas, J.* Dėl demokratijos esmės. Tėvynės sargas, Vol. 40, issue 2, 1978, p. 47.

[30] Ruling of the Constitutional Court of the Republic of Lithuania of 30 July 2020 in case No. 5/2019, paras 6.2.1, 6.3.1. Available: https://lrkt.lt/en/court-acts/search/170/ta2220/content [last viewed 15.06.2022].

[31] Judgment of the Constitutional Court of the Republic of Latvia of 7 April 2009 in case No. 2008-35-01, para. 17. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2008/09/2008-35_01_ENG.pdf#search=lisbon [last viewed 15.06.2022].

[32] *Ziemele, I., Spale, A., Jurcena, L.* The Constitutional Court of the Republic of Latvia. In: The Max Planck Handbooks in European Public Law. Volume III: Constitutional Adjudication: Institutions, *Bogdandy, A., Huber, P., Grabenwarter, Ch.* (eds). Oxford: Oxford University Press, 2020, p. 505.

[33] *Jarašiūnas, E.* Valstybės suvereniteto kategorija tarpsisteminės sąveikos srityje: konstitucinio tapatumo alternatyva ar jo esminis elementas? In: Konstitucija ir teisinė sistema (Liber Amicorum Vytautui Sinkevičiui). Vilnius: Mykolo Romerio universitetas, 2021, pp. 43–44.

changes, once the opposite constitutional amendments are adopted (although some of those elements, such as the republican form of government and the restrictive aspect of geopolitical orientation, can be called *de facto* unamendable)[34].

Thus, the concept of constitutional identity of Lithuania following from its fundamental constitutional acts is a mixed one. In part, it resembles the German model of unamendable identity consisting of the eternity clauses[35], substantiated by the doctrine of supra-constitutionality. In other part, it follows the French pattern of the relative identity[36] so far as other constitutional traditions are involved.

The majority of those constitutional traditions that do not have the status of an eternity clause have been established by the Declaration of the LFFM Council[37]. They include a parliamentary republic (expressed by adherence to the spirit of the 1922 Constitution thereby rejecting the legacy of the authoritarian constitutions of 1928 and 1938). They also include the Western geopolitical orientation of the State (implying, on the one hand, non-alliance with the post-Soviet blocks and, on the other hand, membership in the European Union and the NATO), as well as the inconsistency with the Constitution of both the Nazi and the Soviet totalitarian regimes, including the prohibition of a communist party. In such a particular way, on the one hand, those constitutional traditions reflect national elements of the constitutional identity of Lithuania based on its specific historical experience and legal heritage; on the other hand, they are developing, safeguarding and strengthening the unamendable pillars of constitutionalism – the independence of the state, democracy and inherent nature of human rights as an inseparable element of a democratic constitutional order.

Summary

Traditionally the Constitution is perceived as supreme law, the source of which is the People organised in the state community (or a civic Nation). However, usually the Constitution is preceded by fundamental constitutional acts establishing or re-establishing a respective state.

The source of all the fundamental constitutional acts of the State of Lithuania (the Resolution of the Council of Lithuania of 16 February 1918, the Act of the Supreme Council of the Republic of Lithuania on the Re-establishment of the Independent State of Lithuania of 11 March 1990, and the Declaration of the Council of the Lithuanian Freedom Fight Movement of 16 February 1949) is the same – the will of the people (a civic nation). Thus, like the Constitution, all the fundamental constitutional acts of the state of Lithuania are primary sources of constitutional law. However, their particularity is predetermined by the purpose to organise the people into the state community. Only to a limited extent they pursue the aim that is typical for the Constitution – to lay down the more detailed normative basis for the life of the state community.

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[34] See: Ruling of the Constitutional Court of the Republic of Lithuania of 30 July 2020 in case No. 5/2019, paras. 6.1.2, 6.1.3, 6.2.2, 6.2.3, 6.3.2, 6.4, 8.2. Available: https://lrkt.lt/en/court-acts/search/170/ta2220/content [last viewed 15.06.2022].

[35] See: *Calliess, Ch*. Constitutional Identity in Germany. One for Three or Three in One? In: Constitutional Identity in a Europe of Multilevel Constitutionalism, *Calliess, Ch., Van der Schyff, G*. (eds). Cambridge: Cambridge University Press, 2019, pp. 153–181.

[36] See: *Jarašiūnas, E*. Valstybės suvereniteto kategorija tarpsisteminės sąveikos srityje: konstitucinio tapatumo alternatyva ar jo esminis elementas? In: Konstitucija ir teisinė sistema (Liber Amicorum Vytautui Sinkevičiui). Vilnius: Mykolo Romerio universitetas, 2021, pp. 64–65.

[37] See: Ruling of the Constitutional Court of the Republic of Lithuania of 30 July 2020 in case No. 5/2019, para. 6.3.2. Available: https://lrkt.lt/en/court-acts/search/170/ta2220/content [last viewed 15.06.2022].

Taking this into account, one can notice the following particular features of the fundamental constitutional acts of the state of Lithuania. First, they are pre-constitutional acts, as they were adopted before the current Constitution of 1992. Second, they are of constituent (re-constituent) nature, as they established the modern State of Lithuania or restored (sought to restore) its independence. Third, they were adopted by the supreme representative institutions of the People of the respective time-period, which were pursuing the primary constituent (re-constituent) power, i.e. the unique representative institutions that expressed the will of the people to (re)establish the independent democratic state of Lithuania.

This leads us to two main premises of supra-constitutionality inherent in the fundamental constitutional acts of the state of Lithuania. First, the constituent power that adopted the Constitution (even if it was done by a referendum) can be regarded only as secondary *vis-a-vis* the primary constituent power of the people that adopted the fundamental constitutional acts of the state of Lithuania. Therefore, the power that adopted the Constitution could not amount to the primary (re)constituent power. Even more this applies to the constituted power that is established and acts under the Constitution (the *Seimas*, as the representation of the people, or even a referendum held in accordance with the Constitution). Thus, neither the secondary constituent power, nor the constituted power can amend or abolish the fundamental constitutional acts adopted by the primary (re)constituent power of the people. That is why, the Constitution arises out of the will of the people, as expressed in the fundamental constitutional acts of the State of Lithuania, and those acts are the source of the respective constitutional provisions.

Second, the purpose of the Constitution is to safeguard the *raison d'etre* of the state as a common good of the people, without which the Constitution would become meaningless. In other words, the Constitution cannot be perceived as "a suicide pact", i.e. it cannot be employed against itself, including for the destruction of its foundation – the sovereignty of the people.

The conclusion following from these two premises is that the core provisions of the fundamental constitutional acts of the state of Lithuania must be acknowledged as having supra-constitutional force, even if they are incorporated into the text of the current Constitution of 1992. This is the essence the doctrine of supra-constitutionality, as developed by the Constitutional Court of the Republic of Lithuania in its ruling of 30 July 2020.

The supra-constitutional force is acknowledged to the unamendable fundamental constitutional principles – independence of the state, democracy, and the inherent nature of human rights, as namely these values constitute the *raison d' être* of the state of Lithuania in accordance with, first and foremost, the Act of the Independence of 16 February 1918. Thus, the Constitution cannot be interpreted contrary to these irrevocable constitutional values and must unconditionally protect them. By the same token, the unamendable fundamental constitutional principles serve as a substantial criterion for constitutionality of constitutional amendments.

Other provisions of the fundamental constitutional acts of the state of Lithuania, which are not so essential for the existence of the state and sovereignty of the people, nevertheless are expressing the constitutional traditions of Lithuania. Together with the unamendable fundamental constitutional principles they define the constitutional identity of Lithuania.

Thus, however paradoxical it may sound, the doctrine of supra-constitutionality does not in any way deny the supremacy of the Constitution. On the contrary, it

rather shares the purpose of various national doctrines dealing with the core of the Constitution, including that of the *Satversme*, which is to safeguard the foundation of our modern statehood as well as provide effective value-based responses to the challenges and at times even extraordinary threats to the European constitutionalism.

Sources

Bibliography

1. *Birmontienė, T., Danėlienė, I., Jarašiūnas, E., Sinkevičius, V., Žalimas, D*. Konstituciniai ginčai [Constitutional Disputes]. Vilnius: Mykolo Romerio universitetas, 2019.
2. *Calliess, Ch*. Constitutional Identity in Germany. One for Three or Three in One? In: Constitutional Identity in a Europe of Multilevel Constitutionalism, *Calliess, Ch., Van der Schyff, G.* (eds). Cambridge: Cambridge University Press, 2019, pp. 153–181.
3. *Jakubčionis, A., Sinkevičius, V., Žalimas, D*. Aggression by the Soviet Union and the Occupation of Lithuania in 1940-1990. Resistance to the Soviet Occupation: the 16 February 1949 Declaration of the Council of the Lithuanian Freedom Fight Movement. In: Lithuanian Constitutionalism: the Past and the Present. Vilnius: Constitutional Court of the Republic of Lithuania, 2017, pp. 105–141.
4. *Jarašiūnas, E*. Valstybės suvereniteto kategorija tarpsisteminės sąveikos srityje: konstitucinio tapatumo alternatyva ar jo esminis elementas? [Category of State Sovereignty in the Field of Inter-Systemic Interaction: Alternative to Constitutional Identity or the Essential Element thereof?]. In: Konstitucija ir teisinė sistema (Liber Amicorum Vytautui Sinkevičiui) [Constitution and the Legal System (Liber Amicorum Vytautas Sinkevičius)]. Vilnius: Mykolo Romerio universitetas, 2021, pp. 41–78.
5. *Maksimaitis, M*. Lithuania's Act of Independence of 16 February 1918. In: Lithuanian Constitutionalism: The Past and the Present. Vilnius: Constitutional Court of the Republic of Lithuania, 2017, pp. 60–68.
6. *Posner, R. A*. Not a Suicide Pact: The Constitution in a Time of National Emergency. Oxford: Oxford University Press, 2006.
7. *Račkauskas, K*. Lietuvos konstitucinės teisės klausimais [On the Issues of the Lithuanian Constitutional Law]. New York: „Darbininko" leidykla, 1967.
8. *Sajó, A., Uitz, R*. The Constitution of Freedom: An Introduction to Legal Constitutionalism. Oxford: Oxford University Press, 2019.
9. *Römeris, M*. Lietuvos konstitucinės teisės paskaitos, I dalis [Lectures on the Lithuanian Constitutional Law, part I]. Kaunas: „Spindulio" spaustuvė, 1937.
10. *Sinkevičius, V*. The Act of 11 March 1990 on the Re-Establishment of the Independent State of Lithuania. In: Lithuanian Constitutionalism: The Past and the Present. Vilnius: Constitutional Court of the Republic of Lithuania, 2017, pp. 159–165.
11. *Sinkevičius, V*. Konstitucijos keitimo apribojimai? [Are there Any Restrictions to Amend the Constitution?]. Jurisprudencija, Vol. 22, issue 2, 2015, pp. 206–230.
12. *Sinkevičius, V*. Kovo 11-oji: nepriklausomybės atkūrimo teisinė konstrukcija [11 of March: Legal Construction of the Restoration of Independence]. Jurisprudencija, Vol. 121, issue 3, 2010, pp. 55–71.
13. *Sinkevičius, V*. Lietuvos Laisvės Kovos Sąjūdžio Tarybos 1949 m. vasario 16 d. deklaracija Lietuvos teisės sistemoje [The 16 February 1949 Declaration of the Council of the Lithuanian Freedom Fight Movement in the Lithuanian Legal System]. In: Regnum est: 1990 m. Kovo 11-osios Nepriklausomybės aktui – 20 (Liber Amicorum Vytautui Landsbergiui) [Regnum Est: 20th Anniversary of the 11 March 1990 Act of Independence (Liber Amicorum Vytautas Landsbergis)]. Vilnius: Mykolo Romerio universiteto Leidybos centras, 2010, pp. 55–73.
14. *Varnas, J*. Dėl demokratijos esmės [On the Essence of Democracy]. Tėvynės sargas [Guardian of the Homeland], Vol. 40, issue 2, 1978, p. 47.
15. *Ziemele, I., Spale, A., Jurcena, L*. The Constitutional Court of the Republic of Latvia. In: The Max Planck Handbooks in European Public Law. Volume III: Constitutional Adjudication: Institutions, *Bogdandy, A., Huber, P., Grabenwarter, Ch*. (eds). Oxford: Oxford University Press, 2020, pp. 505–564.
16. *Žalimas, D*. Legal Status of Lithuania's Armed Resistance to the Soviet Occupation in the Context of State Continuity. In: International Law from a Baltic Perspective. Leiden/Boston: Brill Nijhoff, 2021, pp. 139–187.

Normative acts

1. Resolution of the Council of Lithuania (16.02.1918). Available: https://lrkt.lt/en/legal-information/lithuanias-independence-acts/act-of-16-february/365 [last viewed 15.06.2022].
2. Declaration of the Council of the Lithuanian Freedom Fight Movement (16.02.1949). Available: https://lrkt.lt/en/legal-information/lithuanias-independence-acts/declaration-of-the-council-of-the-lithuanian-freedom-fight-movement/364 [last viewed 15.06.2022].
3. Act of the Supreme Council of the Republic of Lithuania on the Re-establishment of the Independent State of Lithuania (11.03.1990). Available: https://lrkt.lt/en/legal-information/lithuanias-independence-acts/act-of-11-march/366 [last viewed 15.06.2022].
4. Constitution of the Republic of Lithuania (25.10.1992). Available: https://lrkt.lt/en/about-the-court/legal-information/the-constitution/192 [last viewed 15.06.2022].

Case law

1. Ruling of the Constitutional Court of the Republic of Lithuania of 25 May 2004 in case No. 24/04. Available: https://lrkt.lt/en/court-acts/search/170/ta1269/content [last viewed 15.06.2022].
2. Ruling of the Constitutional Court of the Republic of Lithuania of 19 August 2006 in case No. 23/04. Available: https://lrkt.lt/en/court-acts/search/170/ta1337/content [last viewed 15.06.2022].
3. Judgment of the Constitutional Court of the Republic of Latvia of 7 April 2009 in case No. 2008-35-01. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2008/09/2008-35_01_ENG.pdf#search=lisbon [last viewed 15.06.2022].
4. Ruling of the Constitutional Court of the Republic of Lithuania of 24 September 2009 in case No. 16/2009. Available: https://lrkt.lt/en/court-acts/search/170/ta1287/content [last viewed 15.06.2022].
5. Decision of the Constitutional Court of the Republic of Slovenia of 26 September 2011 in case No. U-I-109/10. Available: http://www.us-rs.si/documents/4b/dc/u-i-109-102.pdf [last viewed 15.06.2022].
6. Judgment of the Constitutional Court of the Republic of Moldova of 5 December 2013 in case No. 8b/2013. Available: https://www.constcourt.md/public/ccdoc/hotariri/en-Judgment-No36-of-5122013-on-Romanian-Language-eng82ea4.pdf [last viewed 15.06.2022].
7. Ruling of the Constitutional Court of the Republic of Lithuania of 24 January 2014 in case No. 22/2013. Available: https://lrkt.lt/en/court-acts/search/170/ta850/content [last viewed 15.06.2022].
8. Ruling of the Constitutional Court of the Republic of Lithuania of 18 March 2014 in case No. 31/2011-40/2011-42/2011-46/2011-9/2012-25/2012. Available: https://lrkt.lt/en/court-acts/search/170/ta853/content [last viewed 15.06.2022].
9. Ruling of the Constitutional Court of the Republic of Lithuania of 11 July 2014 in case No. 16/2014-29/2014. Available: https://lrkt.lt/en/court-acts/search/170/ta859/content [last viewed 15.06.2022].
10. Judgment of the Constitutional Court of the Republic of Moldova of 2 May 2017 in case No. 37b/2014. Available: http://www.rulac.org/assets/downloads/Cst_Court_of_Moldova_Judgment_Neutrality.pdf [last viewed 15.06.2022].
11. Ruling of the Constitutional Court of the Republic of Lithuania of 30 July 2020 in case No. 5/2019. Available: https://lrkt.lt/en/court-acts/search/170/ta2220/content [last viewed 15.06.2022].

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Corporate Prosecutions – on Some Relevant Issues Related to the Criminal Procedural Status of Legal Entities

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The article is dedicated to the issues related to corporate prosecution, which the authors see as relevant. The two main lines explored herein are the applicability of human rights to legal entities and the possibility of using procedural (preventive, security coercive measures during the proceedings. The outcomes of researching the currently valid regulatory enactments and those that have become void, examples of law application and theoretical sources are used to present the authors' perspective on the most important aspects of the respective issues, problems are foregrounded and proposals are advanced to facilitate further discussion.

Keywords: corporate criminal liability, corporate prosecutions, procedural coercive measures, legal entities and "human rights".

Contents

Introduction

Corporate criminal prosecution has become an inalienable part of modern criminal proceedings. It has been known for more than 17 years also in Latvia. However, the issues related to this topic that can be considered as being relevant, still remain problematic and unresolved. The institution of corporate criminal liability is sufficiently challenging from the perspective of both substantial and procedural law. This article focuses on the issues of procedural law nature pertaining to the corporate criminal liability. Admitting that such issues are numerous and diverse, general characteristics of them are provided at the beginning, further on paying greater attention to two of these – applicability of human rights to corporate entities and the possibility of applying procedural (preventive, security) coercive measures during the proceedings. To a large extent, these two aspects were chosen because the authors have explored them already in their previous publication some time ago and now see the need for deepening this discussion and/ or for assessing changes in the views on these issues since the previous publications and proposals were made. The article includes the authors' views on the most important aspects of these issues, developed on the basis of researching valid regulatory enactments and such that have become void, examples of law application and theoretical sources, relevant problems are updated and proposals made with the purpose of initiating further discussions.

1. Corporate prosecutions in Latvia – a brief insight into the legal regulation and practice of application

Corporate criminal prosecution, which has been known in Latvia already for more than 17 years, was introduced by amendments[1] to the Criminal Law[2] (hereafter – CL), and adoption of the Criminal Procedure Law[3] (hereafter – CPL), which included the institution of coercive measures (hereafter – CM), and regulated the procedure of their application[4]. CPL and amendments to CL entered into force on 1 October 2005, which should be considered the date as of which CM could be applied for committed criminal offences also to legal entities. It is important to note that CM applied to legal entities cannot be regarded as the corporate criminal liability because the opinion that legal entities, due to the impossibility of establishing guilt, cannot be made criminally liable is still prevailing in Latvia[5]. The authors, however, strictly adhere to the opinion

[1] Grozījumi Krimināllikumā [Amendments to the Criminal Law]. (05.05.2005.) Available: https://www.vestnesis.lv/ta/id/108851-grozijumi-kriminallikuma [last viewed 01.05.2022].

[2] Krimināllikums [Criminal Law]. (17.06.1998.). The version in force at present available: https://likumi.lv/ta/id/88966-kriminallikums [last viewed 01.05.2022].

[3] Kriminālprocesa likums [Criminal Procedure Law]. (21.04.2005). The currently valid version available: https://likumi.lv/ta/id/107820-kriminalprocesa-likums [last viewed 01.05.2022]

[4] See in greater detail – *Rozenbergs, J., Strada-Rozenberga, K.* Krimināltiesiskie piespiedu ietekmēšanas līdzekļi juridiskām personām, to piemērošanas process un tā aktuālās problēmas Latvijas kriminālprocesā [Criminal Procedural Coercive Measures for Legal Entities, the Procedure of Application thereof and Related Relevant Problems in Latvian Criminal Procedure]. In: Juridisko personu publiski tiesiskā atbildība. Rīga: Latvijas Vēstnesis, 2018., 169.–174. lpp. Available: https://www.apgads.lu.lv/fileadmin/user_upload/lu_portal/apgads/izdevumi/2018/Jurid.pers.publiski_tiesiska_atbild.pdf [last viewed 01.05.2022].

[5] Professor U. Krastiņš can be considered as being the most visible and leading representative of this opinion, as the result of his insistent effort, the idea of introducing corporate criminal liability was dismissed by the Latvian parliament, replacing it by coercive measures for a legal entity (see in greater detail the course of reviewing draft law No. 699 of the 8th *Saeima*. Available: https://www.saeima.lv/L_Saeima8/index.htm). Also, *Krastiņš, U.* Konceptuāli par vainu administratīvajās tiesībās [Conceptually about Guilt in Administrative Law]. Jurista vārds, 2207, Nr.23(476). Available: https://juristavards.

that, although criminal liability of legal entities has not been introduced in Latvia, CM for legal entities should be regarded as their liability of criminal law nature. Moreover, taking into account the severity of CM (they may include even liquidation of a legal entity or confiscation of its entire property), it should be recognised that, with respect to criminal procedural safeguards, a legal entity should be ensured the same safeguards as when someone is made criminally liable.

The criminal procedural regulation on the process of applying CM is included in several norms of CP, e.g., CPL Chapter 39 "Special Features of Pre-trial Criminal Proceeding Applying Coercive Measures to a Legal Person" and Chapter 51 "Special Features of Court Proceedings in Proceedings regarding the Application of Coercive Measures on Legal Persons". The legal regulation on the process of applying CM cannot be deemed to be stable since it has undergone a series of amendments. Thus, amendments applicable to the corporate prosecutions had been introduced into CPL already eight times[6]. Currently, the parliament is examining one more draft law regarding possible amendments[7] with respect to the legal entity, involved in the process of applying CM, mainly pertaining to the application of preventive coercive measures, and it will be examined further in this article.

To characterise the prevalence of CM procedures in practice, we can rely only on perceptions and observations gained in practice, i.e., that initially there have been no such proceedings, this period was followed by a spur at the beginning of the last decade, whereas currently the number of such proceedings remains unchanged and they cannot be regarded as widespread. The lack of reliable statistics forces to use one's own observations as the basis, which is a significant obstacle to a quantitative data analysis. Information about the number of corporate prosecutions is not publicly available. Unfortunately, this issue has not been disclosed in the publicly accessible reports on the work of the prosecutor's office, either. Thus, for example, the issue of corporate prosecutions is examined only episodically in the report by

lv/doc/158182-konceptuali-par-vainu-administrativajas-tiesibas/; *Krastiņš, U.* Kriminālsods un citi kriminālie piespiedu ietekmēšanas līdzekļi [Criminal Punishment and Other Criminal Coercive Measures]. Jurista vārds, Nr.1194640, 2007. Available: https://juristavards.lv/doc/154290-kriminalsods-un-citi-kriminalie-piespiedu-ietekmesanas-lidzekli/; *Krastiņš, U.* Konceptuāli par juridisko personu kriminālatbildību [Conceptually about Corporate Criminal Liability]. Jurista vārds, Nr.33(338), 2004. Available: https://juristavards.lv/doc/92916-konceptuali-par-juridisko-personu-kriminalatbildibu/ [last viewed 01.05.2022].

[6] Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law]: (12.03.2009.). Available: https://likumi.lv/ta/id/190010-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022]; Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law] (14.03.2013.). Available: https://likumi.lv/ta/id/255728-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022]; Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law] (29.05.2014.) Available: https://likumi.lv/ta/id/266815-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022]; Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law] (18.02.2016.) Available: https://likumi.lv/ta/id/280784-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022]; Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law] (30.03.2017.). Available: https://likumi.lv/ta/id/290109-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022]; Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law] (20.06.2018.) Available: https://likumi.lv/ta/id/300107-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022]; Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law] (11.06.2020.) Available: https://likumi.lv/ta/id/315655-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022]; Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law] (19.11.2020.) Available: https://likumi.lv/ta/id/319095-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022].

[7] Draft law No. 1323/Lp13 "Grozījumi Kriminālprocesa likumā" [Amendments to the Criminal Procedure Law]. Available: https://titania.saeima.lv/LIVS13/SaeimaLIVS13.nsf/webAll?SearchView&Query=([Title]=*krimināl procesa*)&SearchMax=0&SearchOrder=4 [last viewed 01.05.2022].

Prosecutor General on the performance in 2021 and priorities for 2022, providing statistical data only with respect to some prosecution offices, without including them into the total statistics and without characterising trends.[8] This indirectly confirms the assessment expressed by one of the authors, creating a digest of case-law with respect to applying CM to legal entities in the Latvian courts in 2015–2020, in the framework of the European Social Fund (ESF) project "Justice for Development" (No.3.4.1.0/16/I/001)[9]. Namely, analysis of the available case law creates the impression that practitioners treat the process of applying CM as an addition to charges brought against a natural person, without paying due attention to it and without granting it appropriate meaning.

Furthermore, the assessment of the Latvian case law has led to the conclusion that, for the time being, it is rather simple and no complicated legal and factual issues are actually found therein[10]. However, this does not mean that there are no problems and outstanding issues. This means that the issues of procedural significance are not always, or, to be more precise – almost never, reflected in the final rulings in criminal proceedings, which are the only ones made publicly accessible and available for analysis. Likewise, it cannot be excluded that procedurally complex corporate prosecution cases do not reach the court at all, or do not reach it in the initially intended scope or form, exactly due to procedural problems.

Therefore, the fact that, currently, in Latvia no significant problems can be found in the case as reflected in the final rulings is not an obstacle for attempting to identify such problems theoretically, modelling possible problematic situations and proactively providing proposals for resolving them.

As noted above, there is no lack of relevant and problematic issues related to the topic of corporate prosecutions. We have focused on them in our previous publications and presentations at conference, and these will not be reiterated in this article.

Briefly characterising the current issues related both to the legal regulation on corporate prosecution and in the practice of its application, the following may be noted as being still relevant:

- application of the principle of mandatory nature of criminal proceedings (the legality principle) to procedures of CM;
- inaccurate legal regulation on the status of a legal entity and is representative; ambiguities in identification/ differentiation in practice;
- application of criminal law compensation to a legal entity and the division of the obligation to pay compensation between the guilty natural person and the legal entity, for whose benefit, in whose interests or due to whose insufficient supervision or control the criminal offence was committed;

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[8] Latvijas Republikas ģenerālprokurora ziņojums par 2021. gadā paveikto un 2022. gada darbības prioritātēm [Report by the Prosecutor General of the Republic of Latvia on the Performance in 2021 and Priority Actions in 2022]. Available: http://www.prokuratura.gov.lv/media/Normativie_akti/Zinojums.pdf [last viewed 01.05.2022].

[9] See in greater detail – *Strada-Rozenberga, K.* Piespiedu ietekmēšanas līdzekļu piemērošana juridiskajām personām. Tiesu prakses (2015–2020) apkopojums [Application of Coercive Measures to Legal Entities. Digest of Case-Law (2015–2020)]. Rīga, 2020, p. 44. Available: https://2a6c95cf-045b-40e7-840c-f4bd65b3ede4.usrfiles.com/ugd/2a6c95_bf620c60bf484b45a50c3f0dd444e6fd.pdf [last viewed 01.05.2022].

[10] See in greater detail – *Strada-Rozenberga, K.* Piespiedu ietekmēšanas līdzekļu piemērošana juridiskajām personām. Tiesu prakses (2015–2020) apkopojums [Application of Coercive Measures to Legal Entities. Digest of Case-Law (2015–2020)]. Rīga, 2020, p. 44. Available: https://2a6c95cf-045b-40e7-840c-f4bd65b3ede4.usrfiles.com/ugd/2a6c95_bf620c60bf484b45a50c3f0dd444e6fd.pdf [last viewed 01.05.2022]..

- establishing the grounds for applying CM in problematic situations when the guilty natural person has not been identified, *inter alia*, compatibility of this possibility with the regulation included in CL (i.e., alignment of the CL and CPL provisions);
- insufficient clarity regarding the rights, obligations and safeguards of legal entities and their representatives, in particular, during adjudication of the case, etc.

However, in this article, we would like to explore in greater depth two issues – namely, the possibilities for preventing counter-actions by a legal entity during criminal proceedings or the preventive procedural coercive measures and the application of human rights, characteristic of criminal proceedings, to a legal entity.

2. Application of procedural coercive measures to legal entities

Undeniably, just like natural persons, legal entities and their representatives, in the course of criminal proceedings, may engage in such actions (failure to act) that are contrary to statutory requirements and may hinder proper course of criminal proceedings. Thus, for example, anyone may fail to perform one's duties, organise or actively engage in prohibited counter-actions (destruction of evidence, influencing witnesses, etc.), or measures to make reaching of a fair resolution of criminal law relations, which is the aim of criminal proceedings, difficult or impossible. Likewise, the wish of those persons, who are targeted by the criminal proceedings, to avoid negative consequences that could set in as the result of criminal proceedings, can be clearly identified. CPL provides for sufficiently diverse types of response to such possible actions by natural persons and, from the perspective of legal regulation, they are comprehensive. The same cannot be said about legal entities. Undoubtedly, in the majority of cases there will be natural persons who, on behalf of a legal entity, in its interests, etc., will take actions that are incompatible with a fair resolution of criminal proceedings; however, not always these will be such persons who are involved in criminal proceedings with a status that would allow applying the preventive coercive measures to them. Moreover, even in cases where restrictions may be applicable to particular natural persons, often, these CM will not always provide sufficient security in proceedings against legal entities. Thus, for example, the application of such CM as the liquidation of a legal entity, intentional decrease of its property, etc. may cause significant obstacles to reaching and enforcing the outcomes of the proceedings. However, it should be recognised that, with respect to certain range of cases, the possibility to arrest a legal entity's property, already now envisaged by CPL, could be useful; however, it might not be sufficiently effective in all possible situations that require ensuring preventively proper "conduct" by a legal entity with the right to defence.

The fact that existing CPL regulation is not sufficiently effective was noted in the Latvian legal literature already 10 years ago. Thus, for example, J. Baumanis has pointed out that it could be possible to provide that security measures are applied also to representatives of legal entities. However, he does not support this idea himself, being of the opinion that it would not be sufficiently effective because there might not be a legal entity's representative in the proceedings at all[11]. Thus, to ensure effectiveness of the proceeding and prevent counter-actions by the legal entity, the author

[11] *Baumanis, J.* Prevencija piespiedu ietekmēšanas līdzekļu piemērošanas kontekstā [Prevention in the Context of Applying Coercive Measures]. Jurista vārds, Nr. 32(834), 19.08.2014. Available: https://juristavards.lv/doc/265004-prevencija-piespiedu-ietekmesanas-lidzeklu-piemerosanas-konteksta/ [last viewed 01.05.2022].

proposes envisaging in CPL the possibility of applying security measures to legal entities themselves.

One of the authors of this article has supported the idea regarding the possibility of applying security measures to legal persons already some years ago[12]. Today, it still can be recognised that, in principle, application of security measures to a legal entity (but not to its representatives) could be both necessary and possible.

After several years of waiting, the Latvian legislator has taken steps to align the unregulated situation. Currently, the next amendments to CPL[13] have been adopted in the first reading, which will introduce security measures applicable only to natural persons – suspects or accused persons, differentiating a group of procedural coercive measures – security measures for a legal entity. The following are envisaged as the grounds for applying a security measure – 1) counter-actions against reaching the aim of criminal proceedings, or 2) failure to perform procedural obligations, 3) grounds to consider that the course of proceedings will be hindered or that the natural person will commit a new criminal offence on the behalf of the legal person, in its interests or due to insufficient supervision or control over them. It is noted in the annotation to the draft law that "such actions by a legal entity or its representative as avoiding communication with the person directing the proceedings, intentional destruction of documents important for the criminal proceedings and other activities that hinder the course of criminal proceedings may be recognised as counter-actions against reaching the aim of criminal proceedings. Likewise, one of the grounds for applying one of the security measures is the fact that the procedural obligations, set out in law, are not discharged, e.g., the legal entity's representative does not arrive when summoned by the person directing the proceedings in accordance with Section 146 of CPL or intentionally delays issuing items, documents on information about facts, relevant for the criminal proceedings, upon the request made by the person directing criminal proceedings. [...] At the same time, it should be noted that, in accordance with Section 93 (5) CPL, the fact that a representative does not participate in the proceedings is not an obstacle to continuing the proceedings; hence, security measures would be applicable to a legal entity also in those cases, where the representative of the legal entity does not participate in the proceedings."[14]

It is envisaged that it will be possible to apply one of the following security measures to a legal entity: 1) prohibition of certain activities; 2) prohibition to change entries into the registers maintained by the Register of Enterprises of the Republic

[12] See in greater detail, e.g., *Meikališa, Ā.* Mantiskie preventīvie piespiedu līdzekļi kriminālprocesā – atsevišķi piemērošanas problēmjautājumi. Ārvalsts investīcijas: kad tiesības mijiedarbojas [Property-based preventive coercive means in criminal proceedings – certain problematic issues of application. Foreign investment: When laws interact]. Latvijas Universitātes 74. zinātniskās konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2016, 382.–401. lpp.; Preventīvo piespiedu līdzekļu piemērošana juridiskām personām kriminālprocesā [Application of preventive coercive measures to legal entities in criminal proceedings]. In: Autoru kolektīvs, Juridisko personu publiski tiesiskā atbildība: aktualitātes, problēmas un iespējamie risinājumi. Rīga: LU Akadēmiskais apgāds, 2018, 239.–245. lpp. Available: https://www.apgads.lu.lv/fileadmin/user_upload/lu_portal/apgads/izdevumi/2018/Jurid.pers.publiski_tiesiska_atbild.pdf [last viewed 01.05.2022].

[13] Likumprojekts: Grozījumi Kriminālprocesa likumā" (likumprojekta nr. 1323/Lp13) [Draft Law: Amendments to the Criminal Procedure Law" (Draft law No. 1323/Lp13)]. Available: https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/1493B4CCDCBD851EC22587DB0029DF4D?OpenDocument#B [last viewed 01.05.2022].

[14] Likumprojekta (1323/Lp13) "Grozījumi Kriminālprocesa likumā" sākotnējās ietekmes novērtējuma ziņojums (anotācija) [Initial Impact Assessment (Annotation) of the Draft Law (1323/Lp13) "Amendments to the Criminal Procedure Law]. Available: https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/1493B4CCDCBD851EC22587DB0029DF4D?OpenDocument#B [last viewed 01.05.2022].

of Latvia; and 3) prohibition of takeover of the company. It is underscored in the annotation to the draft law that "security measures cannot be graded according to their restrictive impact; hence, the person directing the proceedings will not have the possibility to select a more restrictive security measure in the case if a legal entity violates the provisions of the applied security measure or does not discharge its procedural duties [...]".

It is intended to make the regulation with respect to security measures for legal entities applicable from 1 January 2023.

In addition to the introduction of the intended amendments regarding coercive security measures, changes are envisaged also in provisions on procedural sanctions; i.e., a kind of punishment, set out in CPL, for the failure to discharge procedural obligations, showing disrespect forwards the court, etc. We have expressed our opinion also on this matter in our previous work[15], recognising that "neither prohibition nor admission of applying procedural sanctions to a legal entity is envisaged because they can be applied to any "person who does not fulfil the procedural duties provided for by law, interferes with the performance of a procedural action or does not show respect to the court" (Section 288 of CPL)." Notwithstanding such finding, the legislator has decided to amend CPL, providing directly that "A pecuniary sanction in the amount up to thousand minimum wages, defined in the Republic of Latvia, may be applied to a legal person who interferes with the procedure established in criminal proceedings or does not respect the security measure applied."

In general, the legislator's intentions are commendable. However, it must be recognised that they contain one dangerous aspect. It is related to the episodic nature of the amendments drafted. Namely, it has been noted previously that the main problem in the Latvian CPL is not the fact that the procedural-preventive coercive measures targeting a legal entity have not been directly enumerated but the fact that the status of a legal entity itself is not sufficiently clear, *inter alia*, its (or its legal representative's) obligations have not been defined[16]. It is this particular ambiguity with respect to the legal entity's status that could cause problems and suggests that without concerted amendments to other provisions of CPL and/or development of practical guidelines or doctrinal perspective effective implementation of the legislator's intentions in practice could be seriously jeopardised. To prevent this, primarily, the obligations, the possible consequences of the failure to discharge these obligations or other procedural violation committed by the legal entity itself and the natural persons, representing it in various statuses, should be clearly understood and differentiated between (*inter alia*, assessing the possibility of simultaneous onset of consequences for a natural person and a legal entity, etc.). In this context, it is important to remember that the legal entity itself is and remains a legal construct (fiction), irrespectively of the procedural status that it has been granted, it does not "act" or "fail to act" on its own accord. A legal entity is always represented by a natural person. Consequently, it must be understood, when to consider that actions by a natural person who is related to a legal entity that are

[15] See in greater detail, e.g., Preventīvo piespiedu līdzekļu piemērošana juridiskām personām kriminālprocesā In: Autoru kolektīvs, Juridisko personu publiski tiesiskā atbildība: aktualitātes, problēmas un iespējamie risinājumi. Rīga: LU Akadēmiskais apgāds, 2018, 239.-245.lpp. Available: https://www.apgads.lu.lv/fileadmin/user_upload/lu_portal/apgads/izdevumi/2018/Jurid.pers.publiski_tiesiska_atbild.pdf [last viewed 01.05.2022].

[16] *Strada-Rozenberga, K.* Piespiedu ietekmēšanas līdzekļu juridiskām personām piemērošanas process un tā aktuālās problēmas Latvijas kriminālprocesā [The process of applying means of coercive influence to legal entities and its current problems in Latvian criminal proceedings]. In: *Meikališa, Ā., Strada-Rozenberga, K.* Kriminālprocess. Raksti 2010–2015. Rīga: Latvijas Vēstnesis, 2015, 647. lpp.

incompatible with the legal proceedings could be identified as actions by the legal entity itself and when it can no longer be done. Thus, for example, whether not only the respective employee but also the legal entity itself could be accused of the failure of a legal entity's employee to come for interrogation or unauthorised actions by the guard of the legal entity – not letting police officers enter the territory, etc., in the process of applying CM. Presumably, this issue cannot be deemed to be simple, and both in doctrine and in the practice of applying law it might turn out to be as complicated as the identification of the grounds for corporate criminal liability (or in Latvia – for applying CM). Moreover, it should be kept in mind that legal entities and their representatives may be involved in criminal proceedings in different statuses. Consequently, the perspective should be aligned also with the legal entities and their representatives with other criminal procedural statuses, for example, legal regulation on a legal entity as the victim or the owner of property infringed during the criminal proceedings.

3. Legal entity and human rights

The previous section of the article focused on the ways of coercing a legal entity not to act contrary to the interests of fair resolution of proceedings. In this section, however, we shall address a fundamental issue –whether the legal entity in legal proceedings directed at it has also rights, procedural safeguards and, if so, whether these are "human rights". Even before embarking on elaborate examination of this issue, it has to be admitted that it and the previous one, which substantially are opposites (one examines obligations and coercion, the other – rights and protection), in the context of a legal entity, are united by one condition, the crux of the matter is, to our mind, the connection between particular natural persons and the legal entity and the obligation of a state governed by the rule of law to treat appropriately all subjects of law. In particular, a person who implements their aims, intentions, interests directly themselves or using the mediation of various legal tools, *inter alia*, by establishing legal entities.

Whether a legal entity has been endowed with human rights is not a new matter for discussions in legal literature. The opinions expressed are very diverse and sometimes diametrically opposite. In 2014, the publishing house "Springer" released a fundamental research "Regulating Corporate Criminal Liability"[17], where these issues were noted as being relevant, substantial, problematic and, currently, unresolved both in the article by D. Brodowski, an author representing the German school of law, on the minimum procedural rights that should be applied to legal persons[18] and in an article by A. N. Neira Pena, representing the Spanish academic community, dedicated to relevant aspects of corporate liability[19].

In the Latvian legal literature, in this context, we have focused on the attributability of the presumption of innocence to a legal entity[20]. It was noted already in 2016,

[17] *Brodowski, D. et al.* Regulating Corporate Criminal Liability. Springer International Publishing Switzerland, 2014.

[18] *Brodowski, D.* Minimum Procedural Rights for Corporations and Corporate Criminal Procedure. In: *Brodowski, D. et al.* Regulating Corporate Criminal Liability. Springer International Publishing Switzerland, 2014, pp. 211–226.

[19] *Neira Pena, A. M.* Corporate Criminal Liability: Tool or Obstacle to Prosecution? In: *Brodowski, D. et al.* Regulating Corporate Criminal Liability. Springer International Publishing Switzerland, 2014, pp. 197–210.

[20] See in greater detail – *Strada-Rozenberga, K.* Juridiskā persona un nevainīguma prezumpcija kriminālprocesā [Legal Person and Presumption of Innocence in Criminal Procedure]. In: Constitutional Values

that the aspect of the so-called typical human rights of a natural person had been taken into account on the level of the EU law creation. Thus, for example, the Meijers Committee in its comments on the draft EU Directive on the presumption of innocence and the right to be present at trial had noted, at the end of 2014, *inter alia*, that the safeguards included in this directive should be applicable also to a legal entity, to the extent possible in connection with its substance[21]. Notwithstanding the proposals made, the directive on the presumption of innocence and the right to be present at trial[22] was adopted in 2016, without applying it to a legal entity. Its Article 2 sets out that this directive is applicable to natural persons, whereas recitals 13-15 of the Preamble provide: "This Directive acknowledges the different needs and levels of protection of certain aspects of the presumption of innocence as regards natural and legal persons. As regards natural persons, such protection is reflected in well-established case-law of the European Court of Human Rights. The Court of Justice has, however, recognised that the rights flowing from the presumption of innocence do not accrue to legal persons in the same way as they do to natural persons. At the current stage of development of national law and of case-law at national and Union level, it is premature to legislate at Union level on the presumption of innocence with regard to legal persons. This Directive should not, therefore, apply to legal persons. This should be without prejudice to the application of the presumption of innocence as laid down, in particular, in the ECHR and as interpreted by the European Court of Human Rights and by the Court of Justice, to legal persons. The presumption of innocence with regard to legal persons should be ensured by the existing legislative safeguards and case-law, the evolution of which is to determine whether there is a need for Union action."

Evasion of attributing the presumption of innocence to a legal entity is one of the reprimands addressed at the directive. Thus, for example, it has been noted that the failure to apply the presumption of innocence to legal entities is a wasted opportunity for clarifying and improving the protection[23]. Likewise, it has been recognised that, unfortunately, the EU legislator chose not to apply the presumption of innocence to legal entities, gaining support for its position also in the case-law of the Court of Justice of the European Communities, wherein it has been recognised that, in the framework of this right, legal entities are less protected, which actually means that legal entities should rely on other legal tools, e.g., the Convention and the case law of the European Court of Human Rights.[24]

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in Contemporary Legal Space I: Collection of Research Papers in Conjunction with the 6th International Scientific Conference of the Faculty of Law of the University of Latvia. 2016. gada 16.–17. novembris. Rīga: LU Akadēmiskais apgāds, 2016, 606.–614. lpp. Available: https://www.apgads.lu.lv/fileadmin/user_upload/lu_portal/apgads/PDF/Jur-Konf-6_2016_Legal-Space-I.pdf [last viewed 01.05.2022].

[21] *Edecapitani.* Presumption of Innocence and the Right to be Present at Trial: The Meijers Committee's (*) position, 12.12.2014. Available: https://free-group.eu/2014/12/12/presumption-of-innocence-and-the-right-to-be-present-at-trial-the-meijers-committees-position/ [last viewed 01.05.2022].

[22] Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (09.03.2016). Available: http://data.europa.eu/eli/dir/2016/343/oj [last viewed 01.05.2022].

[23] *Sayers, D.* The new Directive on the presumption of innocence: protecting the 'golden thread'. 2015. Available: http://eulawanalysis.blogspot.com/2015/11/the-new-directive-on-presumption-of.html [last viewed 01.05.2022].

[24] *Lamberigts, S.* The presumption of innocence (and the right to be present at trial) directive. 03.05.2016. Available: http://europeanlawblog.eu/?p=3192 [last viewed 01.05.2022].

However, admittedly, the issue of rights that legal entities should be endowed with, is broader than solely the presumption of innocence, although numerous criminal procedural safeguards have "found shelter" in this principle.

As mentioned above, there is no unequivocal and uniform answer to the question whether human rights are applicable and should be applied to legal entities. It was noted in already in the 2005 edition of "Human Rights in Criminal Proceedings" that, currently, it is impossible to examine the issue of corporate criminal prosecution because international institutions had not encountered it. An assumption is made that the presumption of innocence will be applied to a legal entity *mutatis mutandis* as to a natural person[25]. In the commentaries on the European Convention of Human Rights, published in 2014, the applicability of the Convention's provisions to a legal entity is examined very briefly, merely noting that legal entities enjoy the human rights set out in the Convention. However, it is admitted that there are such human rights, which, due to the "Special circumstances in relation to corporate defendants – the opaqueness of the corporate veil, the specialized knowledge of corporations, their ready access to the resources for legal representation – all justify measures to ease the burden of proof on the state"; "Where corporations are defendants, legal innocence need not necessarily be an evidentiary blank sheet, and in fact is not. The imposition of a persuasive burden on corporations once the fact of the prohibited harm occurring has been proven in the way that background political morality says: for this class of defendants, legal innocence is over. The legal innocence criminal justice demands for corporations is that there is available to the corporate defendant a defence of due diligence even though the defendant has the burden of proving on the balance of probabilities that the defence lies". Shiners believes that not only the evidential burden, bet also the persuasive burden may be applied to a legal person, recognising that it is "not merely morally permissible in the case of corporate defendants, but morally justified"[26]

It seems that the essential differences between legal and natural persons serve as the basis for the denying attitude shown by the US representative Isiksel towards the legal entity as the subject of human rights. Analysing attribution of human rights within a sphere beyond criminal proceedings she notes that application of human rights to a legal entity would be "dehumanization of human rights ", stating, in continuation, that "It also has the potential to destabilize the moral and political force of human rights by diverting their focus from the protection of urgent human interests towards protecting the commercial interests of large firms. Although it is tempting to dismiss the attribution of human rights to corporations as preposterous, the settled practice of recognizing corporations as legal persons and bearers of rights in many domestic legal systems suggests that the issue is more complex." Isiksel points out: "I make the case for distinguishing the legal rights of business corporations from human rights on account, first, of the fundamental differences between natural persons and business corporations as moral agents, and second, on account of the kinds of interests these agents respectively hold. These are morally and legally salient differences that must be taken into account in determining the standards of

[25] *Treshel, S.* Human Rights in Criminal Proceedings. Oxford: Oxford University Press, 2005, p. 172.

[26] *Shiner, R. A.* Corporations and the Presumption of Innocence. Criminal Law, Philosophy, 8, 2014, pp. 487, 493. https://doi.org/10.1007/s11572-013-9287-9 [last viewed 01.05.2022].

treatment that business corporations are entitled to expect from states and other institutions that wield public power"[27].

German scholar Brodowski points to a very important nuance – namely, what exactly the consequences are that these procedures provide for the legal entity. He writes – "from a constitutional law perspective, the legislature has the choice: If it decides to limit the liability of legal persons for criminal behaviour to incapacitation and restitution – which is enough in order to achieve the goal that "crime must not pay" – no criminal proceedings and no criminal procedure guarantees are required. As these legal consequences may also be very severe, however, there is a strict constitutional and human rights requirement to legal review including a fair trial (Art. [...] Moreover, legislators are free – and, as we will see below, wise – to grant more procedural guarantees also in cases where there is no strict constitutional or human rights requirement to do so. If, instead, the legislature decides to introduce also a punishing element – as is the case in many modern criminal justice systems, including the German *lex lata* – criminal procedure guarantees are applicable, also when these legal consequences are targeted at legal persons."[28]

It can be noted, as a comment to this statement, that CM that have been introduced in Latvia, definitely, contain punishing elements. Issues of restitution, etc., including confiscation of criminally acquired property, cannot be considered as being application of CM. Also, the Latvian legislation had the possibility to decide, which model of response to involvement of legal entities in criminal offences to choose. It did not have to select the criminal law punitive form. However, in Latvia, without formally introducing the corporate criminal liability, CM were introduced, whose severity and punitive nature, undeniably, makes one subscribe to Brodowski's opinion that criminal procedural safeguards, definitely, should be applied to a legal entity.[29]

It seems that Neira Pena successfully brings certain clarity regarding differences in theoretical opinions. She sees as an important determinant of differences in views the states' affiliation with different circles or families of law, different legal traditions. She notes: "Most of the European and especially the Spanish doctrine understand that the broader—and even coextensive with the individuals—recognition of rights and guarantees to legal persons is the unavoidable counterpart of introducing corporate criminal liability in our law. They base this assertion on an *anthropomorphic conception* of the legal person. This also involves a conception of procedural rights and guarantees based on protecting the indicted from abuses of power, rather than on human dignity. Following this approach *strictu sensu*, legal persons could also enjoy other rights they lack in the U.S., such as free legal aid, the right to the presumption of innocence, the right to self-defence through a representative, the right not to incriminate themselves, or the right against unreasonable searches and seizures, including the inviolability of the domicile. All of them reinforce the entity's right of defence but the problem is that sometimes it overly hinders criminal investigations". Analysing the Spanish experience and opinions held by legal scholars, the author notes that with the introduction of criminal liability of legal persons and acquisition of defendant's status, the protection of legal entities themselves has been reinforced[30].

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[27] *Isiksel, T.* The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights. Human Rights Quarterly, Vol. 38, No. 2, 2016, pp. 297–298, 315. Project MUSE, doi:10.1353/hrq.2016.0031 [last viewed 01.05.2022].

[28] *Brodowski, D.* Minimum Procedural Rights, pp. 218–219.

[29] *Brodowski, D.* Minimum Procedural Rights, p. 221.

[30] *Neira Pena, A. M.* Corporate Criminal Liability, pp. 205–208.

It is worth noting that neither the Latvian CPLs provide for any differences with respect to the defendant status of a legal entity, thus, to a certain extent, equalling it to a natural person (it is stated in CPL *expressis verbis* that the representative of a legal person has the same rights as the accused).

Comparing the experience of the US and continental countries, the author recognises that "in the U.S. attempts have been made to adapt the procedural system of guarantees to the specialties of corporate criminal liability. By contrast, [...] in general in other continental countries, the option has been for a full alignment with individual, natural persons charged. The argument is simple and even simplistic: corporations can become charged as individuals, so they should have the same procedural rights." At the same time, she rejects equating legal entities with natural persons: "But full equality between natural and legal persons is not appropriate for several reasons. First of all, this equalization overly hinders investigation and prosecution. And above all, it should not be forgotten that corporations and individuals have an entirely different nature, among other things because corporations lack human dignity. Corporations and individuals are not the same at all!"[31] Without concealing that, possibly, corporate criminal liability is used too extensively in the U.S., Neira Pena, nevertheless, is inclined towards stricter proposals to continental countries, noting that "the equalization between firms and individuals overly hinders investigation and prosecution, and the strict principle of legality prevents negotiating with companies and makes it difficult to keep legal proceedings secret." The conclusion is harsh – "substantial differences between European and the U.S. procedural systems may cause corporate criminal liability to change from a useful tool in the U.S. into an obstacle to criminal investigations in Europe".[32]

Summing up this brief insight into the ongoing discussion, we shall try to find an answer to the question, whether, in our opinion, continental countries should revise their approach in granting comparatively extensive procedural safeguards to legal entities. An unequivocal answer cannot be provided also to this question. Our answer would be – both yes and no. In our opinion, it must be recognised that, in a state governed by the rule of law, legal entities as defendants in criminal procedures, which might lead to criminal sanctions or measures that, as to their severity, can be likened to them, should be granted effective rights to the protection of their interests. Whether these should be called human rights, in our opinion, is not a decisive issue. Legal persons, of course, are not human beings, they do not have human dignity and morality. However, this does not mean that they, as a separate legal construct, could be legally unprotected, *inter alia*, by international human rights provisions.

It is essential, in cases of corporate prosecutions, that actions linked and related to the legal entity highlight not only the issue of the protection of the legal entity itself but also the protection of particular natural persons related to it. Particular natural persons may be linked to the legal entity in various ways, as very successfully described by Brodowski in the article quoted above[33]. There are no grounds not to uphold Neira Pena's opinion that a corporation is not the same an individual at all, but wrongdoers acting within a corporation must enjoy the same rights as any other defendant[34], at the same time recognising that those linked to the particular

[31] Neira Pena, A. M. Corporate Criminal Liability, pp. 208–209.
[32] *Neira Pena, A. M.* Corporate Criminal Liability, pp. 209–210.
[33] *Brodowski, D.* Minimum Procedural Rights, p. 221.
[34] *Neira Pena, A. M.* Corporate Criminal Liability, p.198.

legal entity (employees, management, owners) must be ensured appropriate legal opportunities for protecting their infringed or potentially infringed interests[35].

At the same time, the legal entity itself also should enjoy certain protection. Brodowski's opinion can be upheld that these safeguards should not mandatorily be equalled to the safeguards for a natural persons, and whether and to which extent these guarantees apply in criminal proceedings against legal persons is primarily a question of criminal policy[36]. The Latvian legislator has chosen not to provide special regulation on this issue, which allows equalling the legal entity as the defendant to the suspect or the accused. In our opinion, a model that allows too much space for unclarity and non-uniform practice or, to put it differently, jeopardises legal certainty, should not be supported. It is more or less clear that there are rights, which, due to their nature, cannot be applied to a legal entity, e.g., the right to freedom. There are also such that, thanks to the case law of the ECHR and CJEU are already viewed as inalienable rights of legal entities, e.g., inviolability of offices or attorney-client privilege. However, still many issues remain that require a clearer vision, e.g., the right to not self-incriminate, the right to defence, etc. In our opinion, full equalising to a natural person (which, actually, has happened in Latvia), should not be supported because, firstly, may be incomprehensible (e.g., what does that mean that a legal person is not obliged to cooperate – who exactly from the legal entity is "privileged", and at the same time, which kind of commitment is not sufficient for refusal?) and, secondly, also an excessive burden upon the state, which may prohibit from ensuring effectiveness and reaching the aim of criminal proceedings. Hence, the issue – how to strike balance between protecting the interests of legal entities, to which they, undoubtedly, are entitled to, and effectiveness of the proceedings, ensuring of public interests – remains challenging.

Summary

1. The legal regulation on corporate prosecutions, although introduced in Latvia more than 15 years ago and amended several times, still cannot be considered as sufficiently clear or precise, and creates grounds for proposing changes to it.
2. The practice of corporate prosecutions, at least insofar as it can be judged by the publicly accessible court rulings, is rather simple, without many legally complex issues and problems. However, this does not allow assuming that there are no relevant issues or problems. Rather, it can be assumed that a large part of procedurally important issues does not appear in the final court rulings or that procedurally complex cases do not even reach courts.
3. One of the relevant issues of corporate prosecution is ensuring a proper conduct of legal entities during the criminal proceedings (or the so-called preventive coercive measures applied to legal entities), and attributing human rights to legal entities.
4. In the area of preventive coercive measures and procedural sanctions, the Latvian legislator intends to introduce the so-called security measures for legal persons and a pecuniary penalty as the possibility for applying a procedural sanction. This intention is commendable. However, it must be recognised that without aligned amendments to other CPL provisions and/ or developing guidelines on practice or doctrinal perspective, effective implementation of these intentions in practice could be seriously jeopardised. To prevent it, primarily, the obligations, possible

[35] See in greater detail also Strada-Rozenberga, K. Juridiskā persona, 606.–614. lpp.
[36] *Brodowski, D.* Minimum Procedural Rights, pp. 211, 221.

consequences of the failure to discharge one's duties and other procedural violations of the legal entity itself and of various natural persons, representing it in various statuses, should be clearly understood and differentiated between (including the possibility of simultaneous onset of consequences both for the natural person and the legal entity).

5. In corporate prosecution cases, it is important to respect the rights of both the involved, infringed or potentially infringed natural persons and of the legal entity. The protection of natural persons should be viewed, *inter alia*, in the light of huma rights, typical of them. The status of a legal entity should not be equalled to the status of a natural person; however, it should be ensured an effective possibility for protecting its rights, complying with the scope of the right to a fair trial. How exactly this should be achieved remains a challenge.

Sources

Bibliography

1. *Baumanis, J.* Prevencija piespiedu ietekmēšanas līdzekļu piemērošanas kontekstā [Prevention in the Context of Applying Coercive Measures]. Jurista vārds, Nr. 32 (834), 19.08.2014. Available: https://juristavards.lv/doc/265004-prevencija-piespiedu-ietekmesanas-lidzeklu-piemerosanas-konteksta/ [last viewed 01.05.2022].
2. *Brodowski, D. et al*. Regulating Corporate Criminal Liability. Springer International Publishing Switzerland, 2014.
3. *Edecapitani*. Presumption of Innocence and the Right to be Present at Trial: The Meijers Committee's (*) position, 12.12.2014. Available: https://free-group.eu/2014/12/12/presumption-of-innocence-and-the-right-to-be-present-at-trial-the-meijers-committees-position/ [last viewed 01.05.2022].
4. *Isiksel, T.* The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights. Human Rights Quarterly, Vol. 38, No. 2, 2016, pp. 297–298., 315. Project MUSE, doi:10.1353/hrq.2016.0031 [last viewed 01.05.2022].
5. *Lamberigts, S.* The presumption of innocence (and the right to be present at trial) directive. 03.05.2016. Available: http://europeanlawblog.eu/?p=3192 [last viewed 01.05.2022].
6. *Krastiņš, U.* Kriminālsods un citi kriminālie piespiedu ietekmēšanas līdzekļi [Criminal Punishment and Other Criminal Coercive Measures]. Jurista vārds, Nr.11(464), 2007. Available: https://juristavards.lv/doc/154290-kriminalsods-un-citi-kriminalie-piespiedu-ietekmesanas-lidzekli/ [last viewed 01.05.2022].
7. *Krastiņš, U.* Konceptuāli par vainu administratīvajās tiesībās [Conceptually about Guilt in Administrative Law]. Jurista vārds, Nr. 23(476), 2007. Available: https://juristavards.lv/doc/158182-konceptuali-par-vainu-administrativajas-tiesibas/ [last viewed 01.05.2022].
8. *Krastiņš, U.* Konceptuāli par juridisko personu kriminālatbildību [Conceptually about Corporate Criminal Liability]. Jurista vārds, Nr. 33(338), 2004. Available: https://juristavards.lv/doc/92916-konceptuali-par-juridisko-personu-kriminalatbildibu/ [last viewed 01.05.2022].
9. *Meikališa, Ā.* Mantiskie preventīvie piespiedu līdzekļi kriminālprocesā – atsevišķi piemērošanas problēmjautājumi. Ārvalsts investīcijas: kad tiesības mijiedarbojas [Property-based preventive coercive means in criminal proceedings – certain problematic issues of application. Foreign investment: When laws interact]. Latvijas Universitātes 74. zinātniskās konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2016.
10. *Meikališa, Ā.* Preventīvo piespiedu līdzekļu piemērošana juridiskām personām kriminālprocesā [Application of preventive coercive measures to legal entities in criminal proceedings]. In: Autoru kolektīvs, Juridisko personu publiski tiesiskā atbildība: aktualitātes, problēmas un iespējamie risinājumi. Rīga: LU Akadēmiskais apgāds, 2018. Available: https://www.apgads.lu.lv/fileadmin/user_upload/lu_portal/apgads/izdevumi/2018/Jurid.pers.publiski_tiesiska_atbild.pdf [last viewed 01.05.2022].
11. *Rozenbergs, J., Strada-Rozenberga, K.* Krimināltiesiskie piespiedu ietekmēšanas līdzekļi juridiskām personām, to piemērošanas process un tā aktuālās problēmas Latvijas kriminālprocesā [Criminal Procedural Coercive Measures for Legal Entities, the Procedure of Application thereof and Related Relevant Problems in Latvian Criminal Procedure]. In: Juridisko personu publiski tiesiskā

atbildība. Rīga: Latvijas Vēstnesis, 2018. Available: https://www.apgads.lu.lv/fileadmin/user_upload/lu_portal/apgads/izdevumi/2018/Jurid.pers.publiski_tiesiska_atbild.pdf [last viewed 01.05.2022].

12. *Sayers, D.* The new Directive on the presumption of innocence: protecting the 'golden thread'. 2015. Available: http://eulawanalysis.blogspot.com/2015/11/the-new-directive-on-presumption-of.html [last viewed 01.05.2022].
13. *Shiner, R. A.* Corporations and the Presumption of Innocence. Criminal Law, Philosophy, 8, 2014. Available: https://doi.org/10.1007/s11572-013-9287-9 [last viewed 01.05.2022].
14. *Strada-Rozenberga, K.* Piespiedu ietekmēšanas līdzekļu juridiskām personām piemērošanas process un tā aktuālās problēmas Latvijas kriminālprocesā. In: *Meikališa, Ā., Strada-Rozenberga, K.* Krimināprocess. Raksti 2010–2015. Rīga: Latvijas Vēstnesis, 2015.
15. *Strada-Rozenberga, K.* Juridiskā persona un nevainīguma prezumpcija kriminālprocesā [Legal Person and Presumption of Innocence in Criminal Procedure]. In: Constitutional Values in Contemporary Legal Space I**:** Collection of Research Papers in Conjunction with the 6th International Scientific Conference of the Faculty of Law of the University of Latvia. 2016. gada 16.–17. novembris. Rīga: LU Akadēmiskais apgāds, 2016.
16. *Strada-Rozenberga, K.* Piespiedu ietekmēšanas līdzekļu piemērošana juridiskajām personām. Tiesu prakses (2015–2020) apkopojums [Application of Coercive Measures to Legal Entities. Digest of Case-Law (2015–2020)]. Rīga, 2020. Available: https://2a6c95cf-045b-40e7-840c-f4bd65b3ede4.usrfiles.com/ugd/2a6c95_bf620c60bf484b45a50c3f0dd444e6fd.pdf [last viewed 01.05.2022].
17. Treshel, S. Human Rights in Criminal Proceedings. Oxford: Oxford University Press, 2005.

Normative acts

1. Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (09.03.2016). Available: http://data.europa.eu/eli/dir/2016/343/oj [last viewed 01.05.2022].
2. Krimināllikums [Criminal Law]. (17.06.1998.). The text of law currently in force available: https://likumi.lv/ta/id/88966-kriminallikums [last viewed 01.05.2022].
3. Grozījumi Krimināllikumā [Amendments to the Criminal Law]. (05.05.2005.) Available: https://www.vestnesis.lv/ta/id/108851-grozijumi-kriminallikuma [last viewed 01.05.2022].
4. Kriminālprocesa likums [Criminal Procedure Law]. (21.04.2005). The text of law currently in force: https://likumi.lv/ta/id/107820-kriminalprocesa-likums [last viewed 01.05.2022].
5. Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law]. (12.03.2009.). Available: https://likumi.lv/ta/id/190010-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022].
6. Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law]. (14.03.2013.). Available: https://likumi.lv/ta/id/255728-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022].
7. Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law]. (29.05.2014.) Available: https://likumi.lv/ta/id/266815-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022].
8. Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law]. (18.02.2016.) Available: https://likumi.lv/ta/id/280784-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022].
9. Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law]. (30.03.2017.). Available: https://likumi.lv/ta/id/290109-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022].
10. Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law]. (20.06.2018.) Available: https://likumi.lv/ta/id/300107-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022].
11. Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law]. (11.06.2020.) Available: https://likumi.lv/ta/id/315655-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022].
12. Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law]. (19.11.2020.) Available: https://likumi.lv/ta/id/319095-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022].

Other sources

1. Draft law No.1323/Lp13 Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law]. Available: https://titania.saeima.lv/LIVS13/SaeimaLIVS13.nsf/webAll?SearchView&Query=([Title]=*kriminālprocesa*)&SearchMax=0&SearchOrder=4 [last viewed 01.05.2022].
2. Latvijas Republikas ģenerālprokurora ziņojums par 2021. gadā paveikto un 2022. gada darbības prioritātēm [Report by the Prosecutor General of the Republic of Latvia on the Performance in 2021 and Priority Actions in 2022]. Available: http://www.prokuratura.gov.lv/media/Normativie_akti/Zinojums.pdf [last viewed 01.05.2022].

3. Likumprojekta (1323/Lp13) "Grozījumi Kriminālprocesa likumā" sākotnējās ietekmes novērtējuma ziņojums (anotācija) [Initial Impact Assessment (Annotation) of the Draft Law (1323/Lp13) "Amendments to the Criminal Procedure Law]. Available: https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/1493B4CCDCBD851EC22587DB0029DF4D?OpenDocument#B [last viewed 01.05.2022].
4. The course of reviewing draft law No. 699 of the 8th *Saeima*. Available: https://www.saeima.lv/L_Saeima8/index.htm [last viewed 01.05.2022].

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On the Occasion of the 100th Anniversary of the Latvian Constitution – a Brief Overview of the *Weimarer Reichsverfassung* as an "Elder Sister"

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In 2022, the Constitution of Latvia celebrates its 100th anniversary. With regard to the influence of the development of constitutions in other European states in the first decades of the 20th century, the contribution will provide an overview of the Weimar Imperial Constitution (hereinafter – *Weimarer Reichsverfassung*, WRV). Despite continuous criticism in the decades following the Second World War, it has had an immense impact and influence on the *German Grundgesetz* (Basic Law) and, on the occasion of its 100th anniversary in 2019 has gained increased attention.

Particularly in troubled times where constitutions are under constrain, a look at Weimar times may indicate risks and challenges of a constitution but also provide inspiration for potential safeguards.

Keywords: Constitution, Weimar Republic, Weimarer *Verfassung*, *Grundgesetz* / Basic Law

Contents

Introduction. 100 years and more: Inspiration from the birth of democratic constitutions in Europe

In 2022, the Constitution of Latvia celebrates its 100th anniversary. Three years earlier, in 2019 Germany celebrated the anniversaries of two constitutions: The Basic Law (*Grundgesetz*, GG), which entered into force on 23 May 1949, and the Weimar Imperial Constitution (*Weimarer Reichsverfassung*, WRV), which entered into force on 14 August 1919. These two German constitutions did not follow one another unrelatedly. Rather, the *Weimar Reichsverfassung* is referred to as a "journeyman's piece" and the GG as a "masterpiece".[1] According to Article 140 GG, some provisions of the WRV even became part of the GG. Other provisions, e.g., Article 33 (5) GG provide some continuity between the constitutions by requiring that "[…] the law governing the public service shall be regulated and developed with due regard to the traditional principles of the professional civil service […]". These principles are those that "were recognised and upheld as binding at least under the Weimar Constitution".[2] In other places, for instance, regarding the powers of the *Bundespräsident* (president) and the Constitutional Court, the addressees of the fundamental rights or the possibility of amending the constitution – the GG deliberately differs from the WRV. However, it is not only for these reasons that the GG can only be properly understood if one knows the WRV.[3] It has frequently been claimed that the GG had served as a model during the constitutionalisation of some Eastern European states after 1990, and has even been described as an "export hit".[4] Accordingly, given the WRVs considerable impact on the GG, it is also worth taking a look at the origins of democratic constitutionalism in Germany from an Eastern European perspective. Furthermore, the WRV finally failed because of a number of very different factors and problems internally, as well as externally. This also raises the question, how much pressure a democratic constitution may stand, and how far it may be secured against the variety of menaces.

Hence, this contribution will firstly provide an overview of the genesis of the WRV and its historical background (1.1). Hereafter, it will introduce its principles and institutions (1.2), before turning to a retrospective evaluation of the perceived deficiencies and the merits of the constitution (1.3), with a brief comment on the lessons that might be learned from the WRV, particularly regarding potentially difficult times. The final part will bring these aspects together in a conclusion.

1. The WRV – genesis, structure and impact on the Grundgesetz (GG)

To a considerable extent, the WRV may be seen as the result of German history, as it is marked by important events, as well as it reflects important philosophic and political ideas of the 19th and the early 20th century. Similarly, the historic setting may also be considered as the reason for the failure of the Weimar Republic. Accordingly,

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1 *Von Lewinski, K.* Weimarer Reichsverfassung und Grundgesetz als Gesellen- und Meisterstück. Juristische Schulung, Nr. 6, 2009, p. 505.

2 BVerfG, Beschluss des Zweiten Senats vom 14. Januar 2020 - 2 BvR 2055/16 -, Rn. 29. Available: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/01/rs20200114_2bvr205516.html [last viewed 10.05.2022].

3 *Waldhoff, C.* „Weimar" als Argument. Die Weimarer Reichsverfassung als Vorbild und als Gegenbild für das Grundgesetz. Juristische Schulung, Nr. 8, 2019, p. 737.

4 *Schwabe, J.* Verfassungsrecht und Verfassungspraxis. Eine Nachlese zu den Würdigungen des Grundgesetzes anläßlich seines 50jährigen Bestehens. Neue Juristische Wochenschrift, Nr. 49, 1999, p. 3616.

it is indispensable to provide an overview of the historic landmarks and highlight their impact on the constitutional process.

1.1. Historical background

Before founding the German national state in 1871, a constitution after the Revolution in 1848/1849 had been drafted but never came into force. Notwithstanding, this *Frankfurter Paulskirchenverfassung (FRV)*, which comprised a catalogue of fundamental rights, provided some inspiration to the drafting of later constitutions. The *Reichsverfassung* of 1871 (RV) only partially adopted the ideas of the failed revolution and provided for a constitutional monarchy without granting fundamental rights. However, constitutions of the *Länder* had catalogues of fundamental rights. This was of higher importance, because administrative powers lay with the *Länder*[5] and, according to the view at the time, fundamental rights should only bind the administration.[6]

The end of the RV became apparent when it became obvious that the German Reich would be defeated in the First World War and the German Kaiser (Emperor) Wilhelm II abdicated on 9 November 1918. In Berlin, the November Revolution was followed by civil war-like conditions over the question of how the German nation state should be oriented in the future.

On 19 January 1919, a National Assembly was elected, which met in the National Theatre in Weimar and elaborated a new constitution. According to some authors, this place had been chosen in order to symbolically foster the cohesion of north and south, and thus the unity of the Republic[7], while others state that this choice aimed at avoiding the risks of the street fighting in Berlin[8]. This fact, however, explains why "The Constitution of the German Reich" of 11 August 1919 (it came into force on 14 August 1919) is called the "Weimar Reich Constitution" (WRV). The State Secretary in the Reich Office of the Interior, Hugo Preuß, had already drafted a constitution for the *Reich* beforehand, which was submitted to the National Assembly on 3 February 1919 after modifications by experts, by the Reich government and by the governments of the Länder.[9] Later, the requirements of the Versailles Peace Treaty, which Germany ratified on 28 June 1919, had to be considered. Among other things, it was agreed in this treaty that Germany had to surrender and that it was solely responsible for all losses and damages of the war. Furthermore, it had to cede more than a tenth of its national territory, lost a tenth of its population[10] and, in addition, had to pay considerable reparations to the victorious powers and was only allowed to maintain weak armed forces.

1.2. The Weimar Imperial Constitution – an overview

The WRV consists of two main parts, ""Structure and Tasks of the Reich" and "Fundamental Rights and Duties of the Germans".

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[5] See below 1.2.1. aa) 1.

[6] *Stern, K.* Das Staatsrecht der Bundesrepublik Deutschland, Band V: Die geschichtlichen Grundlagen des Deutschen Staatsrechts, 2000, p. 362.

[7] *Austermann, P.* Der Weimarer Reichstag, 2020, p. 16 with further references.

[8] Ibid., providing references; *Grevelhörster, L.* Kleine Geschichte der Weimarer Republik, 2010, p. 34.

[9] *Gusy, C.* „Das Deutsche Reich ist eine Republik" – Die Weimarer Reichsverfassung nach 100 Jahren. Juristische Arbeitsblätter, Nr. 8, 2019, p. 562.

[10] *Stern, K.* Das Staatsrecht der Bundesrepublik Deutschland, p. 532.

1.2.1. Principles and institutions

The first main part of the WRV regulates the organisation of the state under the heading "Structure and Tasks of the Reich".

aa) Constitutional Principles

The Reich was founded on the Constitutional Principles of a Federal State, Democracy, Republic (see below, "President"), Rule of Law and a welfare state (see below, "Fundamental rights").

(1) Federal State

In the German tradition, Article 2 (1) and Article 5 WRV provided for a federal state (also in the RV and the GG). This federal state initially consisted of 24 *Länder*, which were later merged into 17 *Länder*.[11] Prussia accounted for about two thirds of the population and of the Reichs-territory. In this respect, there is talk of a "dualism between the Reich and Prussia"[12]. Article 17 WRV (similar to today's Article 28 GG) also required a liberal democratic constitution in the *Länder* (for which this passage is named "homogeneity clause"). The *Länder* could participate in the legislation and administration of the Reich through the *Reichsrat*.

(2) Democracy

The WRV decided against the proposal of the socialists, the installation of a "Räte-Republic" (a proposal similar to Soviet Socialist Republic)[13] and in favour of a representative parliamentary democracy, however, without using the word "democracy". Rather, as stipulated in Article 1 p. 2 WRV, all state power emanated from the people, which thus in principle corresponded to a parliamentary democracy. Thus, the members of parliament in the Reich (Article 22 WRV) and in the *Länder* (Article 17 WRV) were elected directly. According to Article 21 WRV, the deputies were representatives of the whole people. They were subject only to their conscience and were not bound by orders. Since the Reich President (Article 41 WRV) was also elected directly by the people and could thus invoke the same source of legitimacy, the people, as the Reichstag, existential tensions arose between these constitutional bodies, especially in times of crisis.[14] Elements of direct democracy were found in the legislative process: the people could vote on laws passed by the Reichstag (Article 73 (1), (2) and (3), Article 74 (3) WRV) or introduced there (Article 73 (3) WRV) if the majority of those entitled to vote took part in the vote (Article 75 WRV).

(3) Rule of Law

The WRV opted for the rule of law. It is true that the term "rule of law" is not explicitly used in the constitution. However, central elements were standardized, such as protection by independent courts (Article 102 WRV) or state liability (Article 131 WRV). Other central elements, such as the legality of administration and the separation of powers, were determined by jurisprudence through interpretation.[15] Admittedly, the WRV provided few formal safeguards for these elements.

bb) Institutions

The WRV provided for five institutions, the Reichstag (1), the Reichsrat (2) the Reich Government (3), the Reichspräsident (4) and finally, a State Court (5).

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[11] *Waldhoff, C.* „Weimar" als Argument, p. 742.

[12] *Stern, K.* Das Staatsrecht der Bundesrepublik Deutschland, p. 585.

[13] *Thiele, A.* Der konstituierte Staat, 2021 p. 303.

[14] *Stern, K.* Das Staatsrecht der Bundesrepublik Deutschland, p. 570.

[15] *Grzeszick, B.* Art. 20 Bundesstaatliche Verfassung; Widerstandsrecht, VII. Art. 20 und die allgemeine Rechtsstaatlichkeit. In: *Dürig, G., Herzog, R., Scholz, R.* Grundgesetz-Kommentar, p. 14.

(1) Reichstag

According to Article 22 WRV, the Reichstag as a parliament was elected by universal, equal, direct and secret suffrage by men and women over the age of twenty according to the principles of proportional representation. In contrast, England, the United States of America and France had a pure majority voting system. The Reichstag had the central task of legislating (Article 68 WRV). According to Article 76 para. 1, sentence 2 WRV, amendments to the Constitution required that two-thirds of the legal number of members be present and that at least two-thirds of those present vote in favour. Further tasks were, the participation in foreign affairs and supervision of the Reich Government (Article 54 WRV) and the Reich President (Article 43 para. 2, Article 48 para. 3 WRV).

(2) Reichsrat

The Reichsrat consisted of members of the governments of the *Länder*. The Reichsrat had the right to initiate legislation (Article 69 para. 2 WRV) and, according to Article 76 para. 2 WRV, could request a referendum on resolutions amending the Constitution. Furthermore, the Reichsrat could object to laws passed by the Reichstag (Article 74 WRV).

(3) Reich Government

According to Article 52 WRV, the Reich Government was composed of the Reich Chancellor and the Reich Ministers, who were appointed and discharged by the Reich President (Article 53 WRV). The Reichstag as the parliament was thus not involved in forming the government. Rather, the Reich President had considerable leeway in deciding whom to appoint as Reich Chancellor.[16] As stipulated in Article 54, 2nd sent. WRV, each of them had to resign if the Reichstag withdrew its confidence by express resolution. Therefore, the Reich Government was dependent on the confidence of the Reich President and the Reichstag. Within the Reich government, the Reich Chancellor determined the policy guidelines in accordance with Article 56 WRV. Within these guidelines, each Reich minister managed the area of responsibility entrusted to him independently and under his own responsibility to the Reichstag.

(4) *Reichspräsident* (Reich President)

After succeeding an over 1000-year period of monarchies on this territory, Germany became a republic (Article 1, 1st sent. WRV). Under the new system, the Reich President became the head of state. The Reich President was directly elected by the people (Article 41 WRV) for a term of seven years (Article 43 para. 1 WRV) and a second term was explicitly admitted by this norm (Article 43 para. 2 WRV). In terms of power politics, it is worth noticing that, apart some representative duties, the *Reichspräsident* held the supreme command over the entire armed forces of the Reich (Article 47 WRV) and the power to take measures in the event of disturbance of security and order (Article 48 WRV). In addition, the Reich President could dissolve the Reichstag (Article 25 (1) WRV), though not repetitively for the exact same reason. In total, the Reich President made eight times use of this option.

(5) State Court

The State Court (Article 108 WRV) only held the competence to decide in few areas: According to Article 19 WRV, it ruled on constitutional disputes within a *Land* where there was no court to settle them, as well as on disputes of a non-private law nature between different *Länder* or between the Reich and a *Land*. The Constitutional

[16] *Stern, K.* Das Staatsrecht der Bundesrepublik Deutschland, p. 573.

Court therefore did not have the competence to adjudicate on constitutional complaints (however, see § 126 lit. g) FRV), applications for the review of norms or on disputes between organs of the Reich.

1.2.2. Fundamental Rights and Duties of the Germans

The Second Principal Part of the WRV regulated fundamental rights and obligations of Germans (Article 109 ff. WRV).

(1) Fundamental rights

Article 109 ff. WRV introduced a structure of five fields, i.e. in "The Individual", "Community Life", "Religion and Religious Societies", "Education and School", and "Economic Life". With this "value-based character", the WRV went beyond a mere organizational constitution.[17]

Firstly, rights of equality were standardised, followed by liberal rights of freedom. However, from today's perspective, one notes the absence of the fundamental rights to life and health. Similarly, there was no provision that – comparably to Article 2 (1) GG – would generally safeguard freedom of action in matters other than those explicitly enumerated. However, the WRV even comprised social rights and some rather programmatic sentences, which were considered as quite progressive, such as Article 151 para. 1 sentence 1 WRV, which stipulated: "The order of economic life must conform to the principles of justice with the aim of guaranteeing an existence in dignity for al"".[18]

However, it remained controversial whether fundamental rights should be binding legal principles or non-binding programme sentences. State powers were not explicitly bound by the WRV, and it is particularly worth noticing that the legislative was not formally bound to fundamental rights (in contrast to § 130 FRV, which was never enacted).[19] However, there is one exception, as it is commonly agreed, that the executive was bound by fundamental rights. Moreover, in the case of freedom of opinion, for example, there is a direct third-party effect (Article 118 (1) sentence 2 WRV).

(2) Fundamental duties

The Second Principal Part of the WRV also regulated the fundamental duties of Germans. These included the duty of parents to bring up their offspring (Article 120 WRV), the duty to undertake voluntary work (Article 132 WRV), the duty to pay taxes (Article 134 WRV), the general duty to attend school (Article 145 WRV), the duty of landowners to cultivate and exploit the soil (Article 155 para. 3 WRV) and the moral duty to exert one's mental and physical powers as the welfare of the whole requires (Article 163 para. 1 WRV). Overall, however, it remained unclear whether these were legal duties or only moral duties.[20] The duty to perform personal service

[17] *Stern, K.* Das Staatsrecht der Bundesrepublik Deutschland, p. 562.

[18] Other examples: Article 155 para. 1 WRV: "The distribution and use of land shall be supervised by the state in such a way as to prevent abuse and to secure for every German a healthy dwelling and for all German families, especially those with many children, a dwelling and economic home suited to their needs" and Article 163 para. 2 WRV: "Every German shall be given the opportunity to earn his livelihood through economic work. Insofar as it cannot be proven that there is adequate employment available, his necessary maintenance shall be provided for.").

[19] *Stern, K.* Das Staatsrecht der Bundesrepublik Deutschland, p. 660 ff.

[20] Ibid., p. 653.

for the state and the community (Article 133 para. 1 WRV) and compulsory military service (Article 133 para. 2 WRV) were subject to specific laws[21].

1.3. The further development of WRV and its end

As noted above, the few procedures that attributed the State Court with the competence to adjudicate on constitutional matters, it was primarily left to the courts to apply and interpret the WRV.[22] Within jurisprudence, a dispute over method and direction soon arose between the so-called positivists and the so-called anti-positivists: According to the positivists, the origin, enforcement and effectiveness of legal norms was determined solely by the law established and recognised by the state.[23] In contrast, the so called antipositivists claimed, that the law also required extra-legal sources of knowledge to which the applicable law was subordinated or from which it was derived.[24]

Apart from these "internal" struggles among German scholars and lawyers,[25] the WRV was confronted with the various and massive external challenges. The political and societal setting and frame of the WRV was marked by political and economic crises, especially at the beginning and at the end of the Weimar period. In the early years, civil war-like conditions prevailed. Attempts to overthrow the government occurred in particular in 1920 ("Kapp-Lüttwitz Putsch") and 1923 ("Hitler Putsch"). In addition, there were political assassinations (among others against the communists Rosa Luxemburg, Karl Liebknecht and Leo Jogiches, the Bavarian Prime Minister Kurt Eisner, the USPD chairman Hugo Haase, the Reich Minister of Finance Matthias Erzberger and Reich Foreign Minister Walther Rathenau). The economic crisis culminated in the galloping inflation of 1923. In the parliamentary system of government, it had not been possible since 1920 to select Reich Chancellors who were backed by a parliamentary majority.[26] Thus the Reich President gained not only a purely formal but also a substantive right to appoint the Reich Chancellor. As a result, in 14 years there were 20 different governments.

The last years of the "Weimar Republic" began with the world economic crisis of 1929, which culminated in mass unemployment. Later, right-wing and left-wing extremists emerged strengthened from this economic hardship. Hence, democrats were unable to obtain parliamentary majorities. In this situation, Reich President Paul von Hindenburg issued emergency decrees under Article 48 WRV, by extensively interpreting the constituent elements ("disturbance of public safety and order"). All in all, for about nine years the Weimar Republic was almost exclusively governed under the regime of Article 48 WRV, since use was also made of it in the early years.[27] After the National Socialist German Workers' Party (NSDAP) received over 37% of the votes in the 1932 Reichstag elections, Hindenburg appointed Adolf Hitler as Reich Chancellor on 30 January 1933. The "Reichstag Fire Decree" of 28 February 1933

[21] Gesetz über die Abschaffung der allgemeinen Wehrpflicht of 21. August 1920 (RGBl. p.1041) and the Treaty of Versailles of 28. June 1919 (RGBl. p. 687).

[22] *Gusy, C.* „Das Deutsche Reich ist eine Republik", p. 563.

[23] *Kelsen, H.* Reine Rechtslehre, 1934.

[24] *Schmitt, C.* Verfassungslehre, 1928; *Smend, R.* Verfassung und Verfassungsrecht, 1928.

[25] Though in a modified guise, the same question is still relevant when it comes to the *rule of law*, see: *Schewe, C., Blome, T.* "The Rule of Law Mechanism" and the Hungarian and Polish Resistance: European Law Against National Identity? Juridiskā zinātne / Law, No. 14, 2021, pp. 49–67, https://doi.org/10.22364/jull.14.03.

[26] *Gusy, C.* „Das Deutsche Reich ist eine Republik", p. 565.

[27] *Stern, K.* Das Staatsrecht der Bundesrepublik Deutschland, p. 599.

suspended fundamental rights. On 23 March 1933, the Reichstag and the Reichsrat passed the "Law for the Rectification of the Distress of the People and the Reich" ("Enabling Act"), which allowed the Reich government to pass formal laws (including laws amending the constitution).[28] At this point at the latest, the WRV no longer had any effect, even if it was not formally repealed by the National Socialists.[29]

2. Retrospect on the WRV and its effect on the GG – anything to learn from German constitutional history?

The previous part has identified aspects of the constitution, which have been considered as progressive.[30] These are, in particular, the following elements: The WRV granted fundamental rights, it even addressed fair working conditions, minimum social standards, protection of common goods; it granted voting rights for women, elements of direct democracy, (initially) a relatively efficient parliament,[31] a president replacing the monarch and finally, it also foresaw means which may be described as measures of resilience. In fact, the WRV provided means to defend its principles, such as e.g. the possibility to ban political parties, which occurred 41 times. Apparently, as the short life-span of the constitution indicates, these instruments were not sufficient to defend it against the various attacks.

However, this contribution has pointed out that aspects of the constitution were criticised for having contributed to the failure of the WRV. This was, firstly, that the democracy *had been created from above* in the sense that it was a "democracy under democrats".[32] Furthermore, the strong position of the president is considered to have been one of the constitutions' flaws, as it enabled him by means of Article 48 WRV to govern the state without a meaningful parliamentary control or being limited by other review mechanisms. Thirdly, the liberal fundamental rights did not bind the legislator who, accordingly, could almost arbitrarily limit freedoms of citizens. Finally, there was no constitutional court entrusted with competences to protect the rights of citizens.

This leads to the question whether there were lessons to be learned. Some critics had linked the failure of the WRV to the constitution itself[33], and thus it was claimed that the GG had not only explicitly and consciously rejected the injustice of National Socialism, which historically was a central concern of all forces involved in the creation and enactment of the GG,[34] but also learned from the deficiencies of the WRV. This contrast to the WRV can for instance be observed in the position of

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[28] Zur Unvereinbarkeit des „Ermächtigungsgesetzes" mit der WRV *Bickenbach, C.* Vor 75 Jahren: Die Entmächtigung der Weimarer Reichsverfassung durch das Ermächtigungsgesetz. Juristische Schulung, Nr. 3, 2008, p. 199.

[29] On the development of the WRV during National Socialism: *Von Lewinski, K.* Weimarer Reichsverfassung und Grundgesetz als Gesellen- und Meisterstück. *Juristische Schulung*, Nr. 6, 2009, p. 510.

[30] *Gusy, C.* „Das Deutsche Reich ist eine Republik", p. 562 f.

[31] *Austermann, P.* Der Weimarer Reichstag, 2020, p. 267.

[32] *Eichenhofer, E.* (ed.). 80 Jahre Weimarer Reichsverfassung – Was ist geblieben?, Tübingen 1999, p. XIV.

[33] *Roellecke, G.* Konstruktionsfehler der Weimarer Verfassung, in: Der Staat 35/1996, pp. 599–613.

[34] BVerfG, Beschluss des Ersten Senats vom 04. November 2009 – 1 BvR 2150/08 –, Rn. 65. Available: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2009/11/rs20091104_1bvr215008.html; in English: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/11/rs20091104_1bvr215008en.html;jsessionid=9A4723C7F3907C3DDCA238055727BFD3.2_cid329 [last viewed 10.05.2022].

the president (*Bundespräsident*), which has been considerably weakened.[35] Secondly, the new Republic was organised in a federal system, which factually weakened the power of the government and made radical decisions less probable. Thirdly, in 1951 the *Bundesverfassungsgericht* (BVerfG) was created, i.e., a constitutional court, whose competencies were considerably enhanced compared to the Weimar State Court. Fourthly, Article 79 (3) GG guarantees the existence of the main principles of the constitution. Finally, Article 67 GG stipulates that "The Bundestag may express its lack of confidence in the Federal Chancellor only by electing a successor by the vote of a majority of its Members and requesting the Federal President to dismiss the Federal Chancellor." This means that it is less easy to abrogate the government as it had twice been the case in the Weimar Republic.[36] Finally, the elements of resilience have been strengthened.

Notwithstanding, it is questionable whether the GG would have coped better with the extraordinarily difficult internal and external conditions of the Weimar Republic.[37] While the GG has enjoyed a long period of "good weather", this was entirely different for the WRV, which was rather exposed to heavy storms.[38] Conversely, the WRV might presumably also have been successful under the much more favourable conditions of the Federal Republic's history.

Furthermore, it is worthwhile to note that the WRV failed along with 14 other liberal-democratic attempts in the interwar period in Europe,[39] for reasons that are subject of historical research and which have been discussed elsewhere.[40] Acknowledging these very different conditions, criticism of the WRV today is more moderate than before. Accordingly, regarding the essence of the WRV, there seems to be consensus that it was a milestone in German and European constitutional history of the 20th century, which pointed far beyond its time and even presaged the developments leading up to the EU Charter of Fundamental Rights. However, it is also commented that it had been an overstretched constitution of an overstretched republic – in sum, a hapless, not a failed constitution.[41] Hence, the decisive factor is that the political forces within society need to respect the conditions of the principles and the framework set by the constitution.[42] This can be impressively illustrated by Article 48 WRV, which regulated the state of emergency: while the same norm was applied in 1923/1924 to *protect* the state order, it was applied from 1930 onward to *destroy* it.[43] In many other areas, too, state practice and jurisprudence approved an application of the WRV that ran counter to the aims of the architects of the constitution.[44]

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[35] *Pauly, W.* Die Stellung der WRV in der deutschen Verfassungsgeschichte. In: *Eichenhofer, E.* (ed.). 80 Jahre Weimarer Reichsverfassung – Was ist geblieben?, Tübingen, 1999, p. 8.

[36] Extensively on this aspect, *Meyn, K. U.* Destruktives und konstruktives Mißtrauensvotum – von der schwachen Reichsregierung zum starken Bundeskanzler? In: *Eichenhofer, E.* (ed.). 80 Jahre Weimarer Reichsverfassung – Was ist geblieben?, Tübingen, 1999, p 8.

[37] Vgl. das Experiment von *Steinbeis, M.* Ein Volkskanzler. Available: https://verfassungsblog.de/ein-volkskanzler/ [last viewed 10.05.2022].

[38] Similarly, *Waldhoff, C.* „Weimar" als Argument, p. 737, who uses the term, while the GG shines in the light of its success.

[39] *Gusy, C.* „Das Deutsche Reich ist eine Republik", p. 561.

[40] Further references: *Stern, K.* Das Staatsrecht der Bundesrepublik Deutschland, p. 712.

[41] *Gusy, C.* „Das Deutsche Reich ist eine Republik", p. 561.

[42] *Friesenhahn, E.* in *Erdmann, K. D./Schulze, H.* Weimar. Selbstpreisgabe einer Demokratie, 1980, p. 81.

[43] *Gusy, C.* „Das Deutsche Reich ist eine Republik", p. 567.

[44] Ibid., p. 564.

Accordingly, the failure of the WRV seems to illustrate that the question of whether a constitution may be considered as successful also depends on whether citizens identify with its basic values, institutions and procedures and accept an active role as citizens. While German commentators marked the term "constitutional patriotism"[45] for describing the success of the GG also regarding the perception in the German population, this cannot be said about the WRV, which may rather be characterised as a "constitution that was acquiesced with"[46].

Summary

The WRV was the first valid liberal democratic constitution in Germany. It has been progressive insofar as it granted not only fundamental but even social rights, it gave the voting rights for women and demonstrated elements of direct democracy. Many ideas were also adopted by today's GG. Notwithstanding this positive assessment, it has also been criticised (among other things) because it could not prevent the national socialists from coming into power. However, whether the ascent of National Socialism could have been prevented by a different constitution is highly questionable. From today's perspective, there seems to be a consensus that the WRV was a good constitution in bad times. Furthermore, it is a good example of the so called *Böckenförde-dilemma* (*Böckenförde-Diktum*), that "the free, secular state lives on preconditions that it cannot guarantee itself"[47]. This is an insight, which, in the recent years, seems to have regained increased relevance for the liberal European democracies.

Sources

Bibliography

1. *Bickenbach, C.* Vor 75 Jahren: Die Entmächtigung der Weimarer Reichsverfassung durch das Ermächtigungsgesetz. Juristische Schulung, Nr. 3, 2008, pp. 199–203.
2. *Böckenförde, E.-W.* Säkularisation und Utopie. In: *Doehring, K.* (Hrsg.), Festgabe für Ernst Forsthoff zum 65. Geburtstag, Beck, München, 1967, pp. 75–99.
3. *Eichenhofer, E.* (ed.). 80 Jahre Weimarer Reichsverfassung – Was ist geblieben? Mohr Siebeck, Tübingen, 1999, p. 8.
4. *Friesenhahn, E.* In: *Erdmann, K. D., Schulze, H.* Weimar. Selbstpreisgabe einer Demokratie. Droste, Düsseldorf, 1980, pp. 81–102.
5. *Grzeszick, B.* Article 20. Bundesstaatliche Verfassung; Widerstandsrecht, VII. Art. 20 und die allgemeine Rechtsstaatlichkeit. In: *Dürig, G., Herzog, R., Scholz, R.* Grundgesetz-Kommentar, 2021.
6. *Gusy, C.* „Das Deutsche Reich ist eine Republik" – Die Weimarer Reichsverfassung nach 100 Jahren. Juristische Arbeitsblätter, Nr. 8, 2019, pp. 561–568.
7. *Kelsen, H.* Reine Rechtslehre, Franz Deuticke, Wien, 1934.
8. *Müller, J.-W.* Verfassungspatriotismus, Suhrkamp, Berlin, 2010.
9. *Von Lewinski, K.* Weimarer Reichsverfassung und Grundgesetz als Gesellen- und Meisterstück. *Juristische Schulung*, Nr. 6, 2009, pp. 505–511.
10. *Roellecke, G.* Konstruktionsfehler der Weimarer Verfassung. In: Der Staat 35/1996, pp. 599–613.

[45] *Sternberger, D.* Unvergleichlich lebensvoll, aber stets gefährdet: Ist unsere Verfassung nicht demokratisch genug? In: Frankfurter Allgemeine Zeitung Nr. 22 vom 27. Januar 1970, p. 11; extensively: *Müller, J.-W.* Verfassungspatriotismus.

[46] *Winkler, H.A.* Weimar, 1918–1933, 1993, p. 99.

[47] *Böckenförde, E.-W.* Säkularisation und Utopie. In: *Doehring, K.* (Hrsg.), Festgabe für Ernst Forsthoff zum 65. Geburtstag, 1967, p. 75 (93).

11. *Schewe, C., Blome, T.* "The Rule of Law Mechanism" and the Hungarian and Polish Resistance: European Law Against National Identity? Juridiskā zinātne / Law, No. 14, 2021, pp. 49–67, https://doi.org/10.22364/jull.14.03.
12. *Schmitt, C.* Verfassungslehre. Berlin, Duncker & Humblot, 1928.
13. *Schwabe, J.* Verfassungsrecht und Verfassungspraxis. Eine Nachlese zu den Würdigungen des Grundgesetzes anläßlich seines 50jährigen Bestehens. Neue Juristische Wochenschrift, Nr. 49, 1999, pp. 3614–3616.
14. *Smend, R.* Verfassung und Verfassungsrecht, Berlin, Duncker & Humblot, 1928.
15. Steinbeis, M. Ein Volkskanzler VerfBlog. 09.09.2019 Available: https://verfassungsblog.de/ein-volkskanzler/ [last viewed 10.05.2022].
16. *Stern, K.*, Das Staatsrecht der Bundesrepublik Deutschland, Band V: Die geschichtlichen Grundlagen des Deutschen Staatsrechts, C. H. Beck, München, 2000.
17. *Sternberger*, *D.* Unvergleichlich lebensvoll, aber stets gefährdet: Ist unsere Verfassung nicht demokratisch genug? In: Frankfurter Allgemeine Zeitung Nr. 22 vom 27. Januar 1970, p. 11.
18. *Thiele, A.* Der konstituierte Staat, Campus, Frankfurt/New York, 2021 p. 303.
19. *Waldhoff, C.* „Weimar" als Argument. Die Weimarer Reichsverfassung als Vorbild und als Gegenbild für das Grundgesetz. Juristische Schulung, Nr. 8, 2019, pp. 737–744.
20. *Winkler, H. A.* Weimar, 1918-1933, C. H. Beck, München, 1993.

https://doi.org/10.22364/jull.15.04

Changes in the Legal Status of a Woman-Mother in the Soviet Law After the Bolshevik Revolution and in the Stalin's Era (1917–1953)

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The Bolshevists' coming into power in Russia in 1917 changed the life of every woman significantly, since a new social status was immediately created. It was also defined in law, i.e., the Soviet woman. In the framework of this research, a detailed analysis is provided of one of the social statuses of a Soviet woman – a mother. The status of the mother is especially important, since every change in the social role of the mother in the upbringing of the child changes the entire society. The reforms of Stalin's era turned the mother into a public person in the Soviet state, fulfilling a mission important for the state in improving the demographic situation. At the same time, her rights to choose how to raise a child, how much time to devote to a child, what values to instil were continuously decreased. Mothers who did not conform to the ideology could be deprived of their mother's rights, subjected to repression and separation from their children.

Keywords: Soviet law, women's rights, legal status of the mother.

Contents

Introduction

The Bolshevists' coming into power in Russia in 1917 changed the life of every woman significantly, since a new social status was immediately created, which was also defined in law, – i.e., the Soviet woman. Latvia was affected by Bolshevism in

1940 when, following the Soviet occupation, the laws of the Soviet Russia entered into force and were accordingly translated into the national language of each republic.[1]

The Marxist-Leninist ideology advocated actual equality in society, including gender equality, which determined the Soviet state policy in marriage and family law. In the Manifesto of the Communist Party by Karl Marx and Friedrich Engels, marriage was clearly described as an institution allowing a man (husband) to exploit a woman (wife), and parents – to exploit children. Quoting the Manifesto: "On what foundation is the present family, the bourgeois family, based? On capital. On private gain [...] But you Communists would introduce a community of women, screams the bourgeoisie in chorus. The bourgeois sees his wife as a mere instrument of production. [2] He hears that the instruments of production are to be exploited in common and, naturally, can come to no other conclusion that the lot of being common to all will likewise fall to the women. He has not even a suspicion that the real point aimed at is to do away with the status of women as mere instruments of production."[3] Besides, Friedrich Engels had initially believed in the "utopia" of both the marriage and the family eventually disappearing in the Communist society of equals. Later, the Marxist classics revised this idea, saying that only the nature of the family would change. It would become a union of two free individuals with equal rights, based on love and mutual respect.[4] Thus, the essence and social role of marriage and family was revised in the Soviet state, and law conforming with the ideology was developed. Hence, the Soviet policy also changed the status of every woman in society.

In the framework of this research, a detailed analysis is provided of one of the social statuses of a Soviet woman, – that of a mother. The status of a mother is particularly important because it is the mother who, by bringing a child into the world, creates the succession of generations, ensures the natural reproduction of society; at the same time, the scope of this status is enormous, including a number of rights, obligations and responsibility within the family and society in raising a child. A mother performs a socially important work by socialising the child and passing on the cultural heritage created by the particular society, thus ensuring sustainability and continuity of society. The father's role is also important; this research, however, will focus on the status of a woman.

1. Changes in the family law and legal status of the mother after the Bolshevik revolution

The Bolsheviks set as their objective the creation of a new, equal society without exploitation. To transform the very foundations of a society, the institution of family should be changed first of all. Soon after the Bolshevik Revolution in Russia of 7 November 1917, the new government embarked upon introducing regulatory changes in marriage and family law. Before that, marriage in Russia was mainly

[1] *Blūzma, V*. Latvijas inkorporācija PSRS sastāvā un padomju tiesību uzspiešana Latvijai (1940–1941) [Latvia's incorporation into the USSR and the Imposition of Soviet Law on Latvia (1940–1941)]. In: Latvijas tiesību vēsture (1914–2000). A. Lēbers (ed.). Rīga: fonds "Latvijas Vēsture", pp. 288–295.

[2] *Markss, K., Engelss, Fr*. Komunistiskās partijas manifests [Manifesto of the Communist Party]. Rīga: Zvaigzne ABC, [without year], p. 3

[3] Ibid.

[4] Dekret Centralnogo Ispolnitelnogo Komiteta Sovetov rabochih, soldatskih I krestjanstih deputatov O rastorzheniji braka (16.12.1917) [Decree On divorce, adopted by the Central Executive Committee of the Soviets of Workers', Soldiers' and Peasants' Deputies at a meeting on 16 December 1917]. Available: http://www.1000dokumente.de/index.html/index.html?c=dokument_ru&dokument=0002_ehe&object=context&l=ru [last viewed 15.03.2022].

regulated by the church law, whereas family – by the local civil law and common law. The families of country landlords and townspeople lived by the church and civil laws, and those of peasants – by church law and common law. Furthermore, the vast empire itself, with different ethnic and religious groups, made it inevitable that civil law differed from one region to another. The Baltic province (*guberniya*) had its own civil law,[5] and Finland, Poland and other territories also had some legal autonomy.

After the left-wing forces came to power in the Soviet Russia, it was widely discussed whether marriage and family were at all necessary in the new society, which could develop as a society free from shackles. Ideas were expressed on free sexual relationships and on the community of women, which had been mentioned ironically in the Manifesto of the Communist Party... And still, the majority of the revolutionaries stood in favour of preserving, at least temporarily, the institution of marriage, although transforming it substantially in accordance with new ideals – namely, with the vision of a family as a union of equal spouses free from economic interest. The development of the Soviet family law starts with two decrees, signed by Lenin, of the All-Russian Central Executive Committee and the RSFSR Council of People's Commissars, proclaiming the new Soviet state's family law policy. This policy was focused on "putting an end to the enslaved position of women and clearing the state of inequality and the remnants of feudalism."[6]

Thus, the freedom of divorce was introduced in Soviet Russia, based on the principle of equality of both spouses.[7] The initial procedure for divorce established in the Soviet law was revolutionary in its liberalism. Later, it was substantially revised.

On 18 (31) December 1917, the decree "On Civil Marriage, Children, and Introduction of Civil Registry Books" was issued,[8] whereby the State abolished the church marriage as an official form of marriage and took over from the church the rights to keep civil records. The aforementioned decree envisaged a family as a monogamous, voluntarily formed union of absolutely equal partners, and provided for separate property of spouses to prevent the wife from becoming economically dependent on her husband, – previously, the husband became his wife's guardian and the holder of her property after marriage. The decree emphasised the equality of spouses in personal relationships and in property matters.[9] By the same decree, extramarital children were given equal rights with the children born in wedlock. Admittedly, this concept made the Soviet law revolutionary for Europe, whose most conservative part arrived at similar legal solutions only in the second half of the 20th century. With the recognition of the equality of a child born outside marriage, the social status of their mother also changed, namely, it was no longer shameful for a woman to bring a child into the world in the absence of a marriage. In connection with the protection of the rights of a woman-mother, it is important to note the decree of 22 December 1917 "On Insurance in the Case of Sickness", defining a physician's

[5] Svod grazhdanskih uzakonenij gubernij Pribaltijskih (Chastj III Svoda mestnih uzakonenij gubernij Ostzejskih) [The Code of Civil Laws of the Baltic Provinces (Part III of the Code of Local Laws of the Ostsee provinces)]. Petrograd: Pravo, 1915.

[6] *Vēbers, J.* Ģimenes tiesības [The Family Law]. Rīga: Pētera Stučkas Latvijas Valsts universitātes Juridiskā un filozofijas fakultāte, 1970, p. 14.

[7] Ibid., p. 13.

[8] Dekret Centralnogo Ispolnitelnogo Komiteta Sovetov rabochih, soldatskih I krestjanstih deputatov O grazhdanskom brake, o detiah i o vedenii knig aktov sostoianiia (14.11.1917) [Decree on civil marriage, on children and on keeping civil status record books adopted by the Central Executive Committee of the Soviets of Workers', Soldiers' and Peasants' Deputies at a meeting on 14 November, 1917]. Available: http://www.hist.msu.ru/ER/Etext/DEKRET/17-12-18.htm [last viewed 14.03.2022]

[9] *Vēbers, J.*, p. 13.

assistance and support to women in case of child-birth".[10] Even now in colloquial Latvian the phrase "leave of decree" is used to denote a pre-natal and post-natal leave.

Another step by the Soviet power to protect women's rights dating back to this period needs to be mentioned – the decree of 18 November 1920 "On the Protection of Women's Health", legalising, for the first time in the world, a woman's right to choose abortion, which, according to the decree, would be performed free of charge by a physician in a state hospital. [11] The Soviet power did not support abortions in principle; however, by this decree it fought against illegal abortions that threatened a woman's health and life.

It can be concluded that the Bolsheviks, since coming into power, normatively tried to ensure the equality of women and men and to expand women's rights, by, first of all, supporting a woman-mother and also by ensuring a woman's right to make decisions regarding her own body, i.e., the right to decide whether to bring the conceived child into the world or not. Before the Bolshevists came into power, Russia was a traditional society with high birth and mortality rates. Namely, at the turn of the 19th/20th centuries, one woman in her lifetime on average gave birth from 7 to 9 children.[12] In the Soviet state, freely available abortions changed this situation, and, with the number of abortions increasing, the number of newborns decreased year by year. Initially, this was explained as the consequences of the war and the ensuing poverty. The Bolshevist Party believed that, with growing prosperity in society, women would choose to give birth and to raise children.[13] However, in reality, with the decriminalisation of abortions, the high number of abortions remained unchanged. Moreover, with parents perishing or disappearing during the First World War and, later, the Civil War, as well as by the Soviet power "dismantling" the traditional patriarchal family, still fewer children were born.,[14] However, a multitude of orphans and abandoned children – homeless children – appeared, which presented a huge problem for the new Soviet state because, to survive, these children were begging, formed gangs and engaged in criminal activities.[15] At a conference in 1924, dedicated to this topic, it was concluded that addressing

[10] Dekret o strahovanii na sluchaj bolezni, prinjatij Centralnim Komitetom Soveta Rabochih, Soldatskih i Krestjanskih Deptatov v zasedaniji 22 dekabrja 1917 goda [Decree on health insurance adopted by the Central Executive Committee of the Soviets of Workers', Soldiers' and Peasants' Deputies at a meeting on December 22, 1917], in: Sobranije uzakonenij i rasporjazhenij pravitelstva za 1917-1918 gg. [Collection of legalizations and orders of the government for 1917-1918.]. Moskva: Upravlenije delami Sovnarkoma SSR, 1942, pp. 199–206.

[11] Postanovlenije Narkomnadzora RSFSR Ob ohrane zdorovja zhenshchin ot 18 nojabrja 1920 goda Decree of the People's Commissariat of Health of the RSFSR of 11/18/1920 "On the protection of women's health"] Available: http://lawru.info/dok/1920/11/18/n1205637.htm [last viewed 11.02.2022].

[12] *Denisov, B., Sakevich, V.* Ocherk istorii kontrolja rozhdajemosti v Rossii: bluzhdajushchaja demograficheskaja politika. [An Outline of the History of Birth Control in Russia: A Wandering Population Policy], in: Razvitije naselenija i demograficheskaja politika [Population development and demographic policy]. Moskva: Maks Press, 2014, p. 187.

[13] Ibid., p. 189.

[14] Sociologists of the Soviet time also subscribe to this, mentioning that decrease in the number of concluded marriages also contributes to decreasing birth rate. *Vishnevskij, A.* Demograficheskaja revolucija [The Demographic revolution]. In: Izbrannije demograficheskije trudi. Tom 1. Demograficheskaja teorija i demograficheskaja istorija [Selected Demographic Works. Volume 1. Demographic Theory and Demographic History]. Moskva: Nauka, 2005, p. 150

[15] The statistics of the time show that, in 1921/1922, the number of children suffering hunger and being vagrant was 7.5 million. *Epshtain, M.* Borjba s bezprizornostju [The fight against homelessness of children]. In: Trudi Pjatogo Vserossijskogo sjezda zavedujushchih otdelami narodnogo obrazovanija 27 maja – 2 ijunja 1926. goda [Proceedings of the Fifth All-Russian Congress of Heads of Departments of Public Education. May 27 – June 2, 1926]. Moskva: Directmedia, 2014, p. 305.

the issue of homeless children was not a matter of charity but a matter of public health.[16] "A life on the street leaves a harsh stamp on a child's personality," Nadezhda Krupskaya wrote, urging the state to establish structures that would assume care for homeless children, first of all, setting up a system for appointing a guardian for them, which would be a substitute for the parental care.[17] Seeking a solution, the Soviet state, first of all, developed a network of children's homes, in addition urging pioneers and komsomols to get involved in working with homeless children,[18] so that the children would be raised ideologically correctly, as proper Soviet people. However, of course, neither the state's care nor life in a children's home, nor activities of komsomols and pioneers could replace the care of the family and, in particular, of a mother, for a child.

2. Changes in the legal status of a woman-mother in the Stalin's era

The consolidation of Stalin's power, the formation of a totalitarian state, and the beginning of a regime of terror, marked a significant change in Soviet state policy; the rights and freedoms of the population were drastically reduced. The state assumed an increasingly extensive responsibility for people's lives, which meant strict regulation on social relationships and wider restrictions. Women's rights also changed, primarily, the legal status and the social prestige of a woman-mother.

The 1936 Constitution was of great legal importance; in it, the Soviet state undertook to guarantee its citizens broad fundamental rights, while simultaneously establishing the citizens' obligations to the State and, thus, also restrictions on freedoms. [19] This Constitution formed a totalitarian state, proclaiming the principle of the authority of the people, which consolidated the leading and directing role of the Communist party in Soviet society. In the Soviet doctrine, the period following the adoption of the 1936 Constitution was referred to as the stage of "Victorious Socialism". [20] At present, historians characterise this period (until Stalin's death in 1953) as a totalitarian State's terror against its own population. The decrees issued during the Stalin's era introduced radical changes into the rights of a woman-mother, *inter alia*, restricted the choice to become a mother, i.e., to give birth to a child. In 1937, the party activist Aaron Soltz wrote in the newspaper "Trud": "We need people. Abortions, which destroy life, are unacceptable for our state. The Soviet woman is equal to man in her rights, but that does not release her from the grand and honourable duty imposed by nature: she is a mother, the giver of life. This, definitely, is

[16] *Rozhkov, A.* Borjba s bezprizornostju v pervoje sovetskoje desjatiletije [The fight against homelessness of children in the first soviet decade]. Available: https://etargentuma.my1.ru/load/stati/istoricheskie/borba_s_besprizornostju_v_pervoe_sovetskoe_desjatiletie/35-1-0-231 [last viewed 04.11.2021].

[17] *Krupskaja, N.* Obshchije voprosi pedagogiki. Organizacija narodnogo obrazovanija v SSSR [General questions of pedagogy. Organization of public education in the USSR]. Moskva: Directmedia, 2014, p. 195.

[18] *Goldman, W. Z.* Women, the State and Revolution: Soviet Family Policy and Social Life: 1917–1936. Cambridge: Cambridge University Press, 1993, p. 314.

[19] Konstitucija (Osnovnoj zakon) SSSR (05.12.1936) [Constitution (Basic Law) of the USSR as amended on December 5, 1936]. Available: http://constitution.garant.ru/history/ussrrsfsr/1936/red_1936/3958676/ [last viewed 22.03.2022].

[20] *Kohanova, T., Aleksejeva, T.* Istorija Rossijskoj gosudarstvennosti [History of Russian statehood]. Moskva: MGIU, 2008, p. 310.

not a private matter but a matter of great social importance."[21] These words expressed the course chosen by the party in a nutshell. Instead of free sexual relations and unregistered co-habitation, the Soviet family was built by a strict hand, a husband and a wife were united in it, equal in the absence of their rights, but a special status was created for the mother because the Soviet state "needed people."[22]

As regards normative consolidation of these trends, the decree of the Presidium of the Supreme Council of the Union of the Soviet Socialist Republics of 27 July 1936 "Decree on the Prohibition of Abortions, the Improvement of Material Aid to Women in Childbirth, the Establishment of State Assistance to Parents of Large Families, and the Extension of the Network of Lying-in Homes, Nursery Schools and Kindergartens, the Tightening-up of Criminal Punishment for the Non-payment of Alimony, and on Certain Modifications in Divorce Legislation"[23] needs to be mentioned first of all. This decree marked the beginning of the state's comprehensive involvement in the family life, which, previously, traditionally had been the area of private law with minimal state's impact on the development of relationships between the family members. The preamble to the decree declared: "In no other country in the world a woman, as a mother and a citizen with great and important mission – giving birth to and raising citizens, is respected as much and protected by law as it is in the Union of the Soviet Socialist Republics."[24] Namely, in addressing the Soviet woman, the status of the mother was placed first and the status of a citizen came next, thus emphasizing that the woman as a citizen had the duty to become a mother. This decree included an extensive state support programme for women and families with children, for example, mothers with numerous children, who were in registered marriage and who at the moment when each subsequent child was born had six children, were disbursed a monetary grant in the amount of 2000 roubles annually for 5 years. If she had ten children, then a one-off grant was disbursed for the birth of each subsequent child in the amount of 5000 roubles and, starting from the second year in the life of a child, the family received 3000 roubles per year.[25] At the same time, a woman was deprived of the right to choose not to give birth to the conceived child. An exception, when abortions were allowed, were cases where pregnancy threatened a woman's life or significantly threatened her health (Article 1(1). Without engaging in more detailed analysis of this comprehensive regulatory enactment, we want to underscore that

[21] Ukaz Prezidiuma Verhovnogo Soveta SSSR ot 27 ijunja 1936 goda N. 65/1134 O zapreshchenii abortov, uvelicheniji materialjnoj pomoshchi rozhenicam, ustanovleniji gosudarstvennoj pomoshchi mnogosemejnim, rasshirenii seti rodilnih domov, detskih jaslej i detskih sadov, useliniji ugolovnogo nakazanija za neplatjozh alimentov i o nekotorih izmenenijah v zakonodatelstve o razvodah [Decree of the Presidium of the Supreme Soviet of the USSR of 27 June 1936 N 65/1134 On the prohibition of abortions, the increase in material assistance to women in childbirth, the establishment of state assistance to multifamilies, the expansion of the network of maternity hospitals, nurseries and kindergartens, the strengthening of criminal penalties for non-payment of alimony and on certain changes in divorce law], in: Sobranije zakonov i rasporjazhenij raboche-krestjanskogo pravitelstva Sojuza Sovetskih Socialisticheskih Respublik [Collection of laws and orders of the workers' and peasants' government of the Union of Soviet Socialist Republics], 1936, № 34, p. 309.

[22] *Vasiljeva, L.* Osobennosti ravzitija semejnogo prava SSSR v oblasti ohrani materinstva i detstva v 1930-40e godi [Peculiarities of the development of the family law of the USSR in the field of protection of maternitu and childhood in the 1930–40s.]. In: Izvestija Saratvovskogo universiteta [Izvestia of Saratov University], Vol. 7, issue 2, 2007, pp. 67–69.

[23] Ukaz Prezidiuma Verhovnogo Soveta SSSR ot 27 ijunja 1936 goda N. 65/1134.

[24] *Sakevich, V.* Chto bilo posle zapreta abortov v 1936 godu? [What happened after the abortion ban in 1936?]. In: Demoskop, 2005, № 221/222, p. 7. Available: http://www.demoscope.ru/weekly/2005/0221/reprod01.php [last viewed 10.11.2021].

[25] Ukaz Prezidiuma Verhovnogo Soveta SSSR ot 27 ijunja 1936 goda N. 65/1134.

it comprised the idea that a woman, a full-fledged Soviet citizen, had to give birth to children. The period following the coming into force of this decree is marked by a very high number of women who died at birth or as the result of an illegal or a self-performed abortion.[26]

At the same time, raising children was not a sole concern of a Soviet woman-mother. She would give birth to a child (the decree enshrined guaranteed medical assistance and material support), breast-feed the child, provide an upkeep for the child (also in this respect the decree provides for additional guarantees in the form of a state support and more effective collection of alimony payments), however, it was also envisaged that she should return to work while the child was still an infant. The leave related to child-birth, in accordance with this decree, was 35 days before the child-birth and 28 days following it. Breast-feeding of a child for a working woman was regulated by labour law, establishing breaks for breast-feeding. Raising of a child was the task of the entire society, the implementation of which was facilitated by expanding the network of nurseries and kindergartens for older children and increasing number of boarding schools. Kindergartens were established in any locations, among others, at factories, collective and soviet farms, cooperatives and other institutions, where mothers worked. Namely, mid-1930s in the USSR saw significant changes in the understanding of child-rearing. Raising of children and their re-education was institutionalised, i.e., entrusted to special state institutions.[27]

Moreover, the Decree clearly outlined that, following dissolution of the parents' marriage, children lived with their mother because the norms that regulated collection of alimony payments provided that these amounts were to be transferred to female workers and collective farm workers, i.e., women-mothers. Namely, by formalising the procedure of divorce, providing that an entry regarding divorce had to be made in a person's passport, the state presumed that following a divorce the children would remain with their mother.

The current research will not delve deeper into Stalin's policy of subjecting to repressions the wives and children of "the enemies of people" or "traitors of the homeland", defined by the Order of 15 August 1937 by the Minister for the Interior N. Yezhov No. 00486 "On the Operation for Repressing Wives and Children of Traitors of the Homeland"."[28] Both the wedded wives and those living in actual co-habitation, as well as divorced wives of the traitors of the homeland were subjected to repressions, i.e., serving the sentence from 5 to 8 years in camps. They were separated from their children who, in turn, ended up in children's homes that were specially set up for children of the traitors of the homeland. The term "a socially dangerous child above the age of 15" appears in this order, which legally allows subjecting this child to repressions as an adult.[29] This matter deserves to be studied in its own right.

Returning to the regulation on supporting a woman-mother, the decree of 21 November 1941 needs to be mentioned. It introduced the childlessness tax to be

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[26] *Goldman, W.*, p. 267.

[27] *Kelli, K.* Deti gosudarstva, 1935–1953 [Children of the state, 1935–1953], in: Neprikosnovennij zapas, 2008, № 2. Available: http://www.intelros.ru/readroom/nz/nz_58/2390-deti-gosudarstva-1935-1953.html [last viewed 04.04.2022]. *Goldman, W.*, p. 314.

[28] Operativnij prikaz Narodnogo komissara vnutrennih del N. Jezhova Nr. 00486 Ob operacii po repressirovaniju zhon i detej izmennikov rodini SSSR (15.08.1937) [Operational Order of the People's Commissar of Internal Affairs of the USSR N. Ezhov No. 00486 "On the operation to repress the wives and children of traitors to the homeland USSR" 08/15/1937]. Available: https://www.alexanderyakovlev.org/fond/issues-doc/1009101 [last viewed 04.04.2022].

[29] Ibid.

paid by single citizens and childless couples. The tax had to be paid by men between the age of 20 and 50, and by women aged between 20 and 45. An individual had to pay the tax until the birth of his/her child. [30] The funds collected were intended to be used for the state care of war orphans and as state support to large families.[31] The childlessness tax, under various conditions, remained in place in the Soviet tax system until the very collapse of the state in 1990/1991.[32] Namely, an additional financial burden was imposed upon women who were not mothers to reallocate the collected money as benefits to those women who were mothers, as well as for the child care in state institutions.

The decree of 8 July 1944 "On the increase in state aid to expectant mothers, mothers of large families and unmarried mothers, on the strengthening of protection of motherhood and childhood, on the institution of the honorary title of Mother-Heroine, and on the establishment of the Order of the Glory of Motherhood and Motherhood Medal" expanded the childlessness tax to include those parents who had one or two children. However, the rate payable was differentiated. People without children paid 6% of their income, parents with one child paid 1%, and parents with two children paid 0.5%. In turn, mothers of at least 3 children were receiving substantial state aid. Simultaneously, this decree ended the legality of actual cohabitation as a form of marriage, its Section 19 providing that only a registered marriage gave rise to those rights and responsibilities of the spouses which were guaranteed by laws. The decree encouraged the couples living in actual cohabitation to register their marriage, indicating the actual time of their life together. Section 20 of the decree revoked the right of a mother to apply to court to establish paternity and to recover child support funds from a person she was not married to. The new term "lone mother" was introduced to denote a mother who has given birth to a child while being unmarried. If a child's mother was not married, the child, being registered in accordance with the decree, received his or her mother's surname.[33] The state established special support for a mother who performed the task, important for the state, of rising a child alone "by organically aligning the raising of a child with social upbringing, to instil loyalty to one's homeland, communistic attitude towards work to prepare the child for building communism", which was later enshrined in the foundations of the marriage and family law of the USSR in 1968.[34]

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[30] Ukaz Prezidiuma Verhovnogo Soveta SSSR O naloge na kholostiakov, odinokikh i molosemeinykh grazhdan SSSR (21.11.1941) [On the tax on bachelors, single and young-family citizens of the USSR, Decree of the Presidium of the Supreme Council from 11/21/1941]. In: Vedomostji Verhovnogo Soveta SSSR, 1941, № 42, p. 1.

[31] *Djachenko, V.* Istorija finansov SSSR (1917–1950) [History of Finance of the USSR 1917–1950]. Moskva: Ripol Klassik, 1978, pp. 408, 409.

[32] Really the tax existed until 01.01.1992. *Parigina, V., Tadeev, A.* Nalogovoje pravo Rossii [Russian tax law]. Moskva: Litres, 2022, pp. 56, 57.

[33] Ukaz Prezidiuma Verhovnogo Soveta SSSR "Ob uvelichenii gosudarstvennoi pomoshchi beremennym zhanshchinam, mnogodetnym i odinokim materiam,, usilenii okhrany materinstva i detsva, ob ustanovlenii pochetnogo zvaniia "Matj – geroinja" i uchrezhdenii ordena "Materinskaia slava" i medli "Medal materinstva"" ot 08 ijulja 1944 goda [Decree of the Presidium of the Supreme Soviet of the USSR of July 8, 1944 "On increasing state assistance to pregnant women, mothers of many children and single mothers, strengthening the protection of motherhood and childhood, establishing the highest degree of distinction – the title of "Mother Heroine" and establishing "the Order of Mother's Glory" and medals "Medal of motherhood""]. In: Vedomostji Verhovnogo Soveta SSSR, N. 37, 1944, pp. 1, 2.

[34] Zakon SSSR N 1968 N 2834-VII "Ob utverzhdenii Osnov zakonodatelstva Sojuza SSR i sojuznih respublik o brake i semje" ot 27 ijunja 1968. [Law of the USSR of 27 June 1968 No. 2834-VII "On approval of the fundamentals of the legislation of the USSR and the Union republics on marriage and family"] Available: http://museumreforms.ru/node/13898#ref-3 [last viewed 04.04.2022].

Since the reforms of Stalin's era, the mother, in a way, turned into a public person in the Soviet state, fulfilling a mission important for the state in improving the demographic situation. At the same time, her rights to choose how exactly to raise the child, how much time to dedicate to the child, which values to instil were constantly decreased. The mothers who did not conform to the ideology, were influenced by social means, for example, comrades' court, but those who openly held other opinions lost their rights of a mother, were repressed and separated from their children. Although this façade of a mother as value of state importance was created, it devalued a mother's role in the private life of a family and significance in the upbringing of children. The Russian researcher Anzhela Vavilenko, assessing the role of the Soviet woman, concludes that the Soviet state perceived the woman not as "an unreasonable childbearing machine" but rather as "an effective labour resource that gives birth conscientiously."[35]

Summary

1. The Marxist-Leninist ideology advocated actual equality in society, especially – gender equality. The Bolshevists' coming into power in Russia in 1917 changed the life of every woman significantly, since a new social status was immediately created, which was also defined in law. The essence and social role of marriage and family was revised in the Soviet state, and a legislation conforming with the ideology was developed. Hence, the Soviet policy altered the status of every woman in the society.
2. The status of the mother is especially important in every society, since every change in the social role of the mother in the upbringing of the child changes the whole society. From the very first days of its existence, the Soviet state changed the role of the mother in raising a child. The patriarchal family, in which both the wife and the children were under the control of the pater familias, was dismantled. The upbringing of a child was transformed from a private family relationship into a duty of the whole society. After the revolution, the woman was given the free choice to have sexual intercourse, terminate her pregnancy, and give up raising a child. The effects of the war and new Bolshevik policy after the war led to a sharp decline in the birth rate in the country and a huge number of homeless children.
3. By creating totalitarian control over the nation, Stalin radically revised the Soviet state policy, including imposing restrictions on women's freedom to have abortions, because "state needed people". The decree of 27 July 1936 marked the beginning of the state's comprehensive involvement in the family life, which, previously, traditionally had been the area of private law with a minimal state's impact on the development of relationships between the family members. A Soviet woman, as a citizen, was obliged to become a mother, give birth to a child, and the state was ready to bring this child up as a new Soviet citizen.
4. Since the reforms of Stalin's time, "the mother" turned into a public person in the Soviet state, responsible for the future of the nation. At the same time, her rights to choose how exactly to raise the child, how much time to dedicate to the child, which values to instil were consistently decreased. The mothers who

[35] *Vavilenko, A.* Aborti v SSSR, osobennaja neobhodimostj ili politicheskij proschot? [Abortion in the USSR, perceived necessity or political miscalculation?]. In: Materinstvo i otcovstvo skvozj prizmu vremeni i kultir. Tom 2 [Motherhood and fatherhood through the prism of time and culture. Volume 2], Smolensk-Moskva: Smol-GU, 2016, p. 20.

did not conform to the ideology, where influenced by social means, whereas those who openly were of other opinions or "the enemies of the soviet people" lost their rights of a mother, were repressed, and separated from their children.

5. Increasing support for the mother, raising her social status, honouring mothers with many children, including the support to mothers raising a child in absence of the child's father, dismantled the traditional family model in which the father and mother were equally responsible and respected. A side effect of the Soviet "Mother Heroine" cult was the diminishing role of the man as a father in the family and society. This has had consequences for post-Soviet society, which will be explored in the next study.

Sources

Bibliography

1. *Blūzma, V*. Latvijas inkorporācija PSRS sastāvā un padomju tiesību uzspiešana Latvijai (1940–1941) [Latvia's incorporation into the USSR and the Imposition of Soviet Law on Latvia (1940–1941)], in: Latvijas tiesību vēsture (1914–2000). A. Lēbers (ed.). Rīga: fonds "Latvijas Vēsture", pp. 288–295.
2. *Denisov, B., Sakevich, V.* Ocherk istorii kontrolja rozhdajemosti v Rossii: bluzhdajushchaja demograficheskaja politika [An Outline of the History of Birth Control in Russia: A Wandering Population Policy]. In: Razvitije naselenija i demograficheskaja politika [Population development and demographic policy]. Moskva: Makss Press, 2014.
3. *Djachenko, V*. Istorija finansov SSSR (1917–1950) [History of Finance of the USSR 1917–1950]. Moskva: Ripol Klassik, 1978.
4. *Goldman, W. Z.* Women, the State and Revolution: Soviet Family Policy and Social Life: 1917–1936. Cambridge: Cambridge University Press, 1993.
5. *Kelli, K.* Deti gosudarstva, 1935–1953 [Children of the state, 1935–1953]. In: Neprikosnovennij zapas, 2008, № 2. Available: http://www.intelros.ru/readroom/nz/nz_58/2390-deti-gosudarstva-1935-1953.html [last viewed 04.04.2022].
6. *Kohanova, T., Aleksejeva, T*. Istorija Rossijskoj gosudarstvennosti [History of Russian statehood]. Moskva: MGIU, 2008.
7. *Krupskaja, N*. Obshchije voprosi pedagogiki. Organizacija narodnogo obrazovanija v SSSR [General questions of pedagogy. Organization of public education in the USSR]. Moskva: Directmedia, 2014.
8. *Markss, K., Engelss, Fr.* Komunistiskās partijas manifests [Manifesto of the Communist Party]. Rīga: Zvaigzne ABC, [without year].
9. *Parigina, V., Tadeev, A*. Nalogovoje pravo Rossii [Russian tax law]. Moskva: Litres, 2022.
10. *Rozhkov, A*. Borjba s bezprizornostju v pervoje sovetskoje desjatiletije [The fight against homelessness of children in the first soviet decade]. Available: https://etargentuma.my1.ru/load/stati/istoricheskie/borba_s_besprizornostju_v_pervoe_sovetskoe_desjatiletie/35-1-0-231 [last viewed 04.11.2021].
11. *Sakevich, V.* Chto bilo posle zapreta abortov v 1936 godu? [What happened after the abortion ban in 1936?]. In: Demoskop, No. 221/222, 2005, p. 7. Available: http://www.demoscope.ru/weekly/2005/0221/reprod01.php [last viewed 10.11.2021].
12. *Vishnevskij, A*. Demograficheskaja revolucija [The Demographic Revolution]. In: Izbrannije demograficheskije trudi. Tom. 1. Demograficheskaja teorija i demograficheskaja istorija [Selected Demographic Works. Volume 1. Demographic Theory and Demographic History]. Moskva: Nauka, 2005.
13. *Epshtain, M*. Borjba s bezprizornostju [The fight against homelessness of children]. In: Trudi Pjatogo Vserossijskogo sjezda zavedujushchih otdelami narodnogo obrazovanija 27 maja – 2 ijunja 1926. goda [Proceedings of the Fifth All-Russian Congress of Heads of Departments of Public Education. May 27 – June 2, 1926]. Moskva: Directmedia, 2014.
14. *Vasiljeva, L.* Osobennosti ravzitija semejnogo prava SSSR v oblasti ohrani materinstva i detstva v 1930-40e godi [Peculiarities of the development of the family law of the USSR in the field of protection of maternitu and childhood in the 1930–40s]. In: Izvestija Saratvovskogo universiteta. [Izvestia of Saratov University], 2007, Vol. 7, issue 2.
15. *Vavilenko, A*. Aborti v SSSR, osobennaja neobhodimostj ili politicheskij proschot? [Abortion in the USSR, perceived necessity or political miscalculation?]. In: Materinstvo i otcovstvo skvozj prizmu

vremeni i kultur. Tom 2 [Motherhood and fatherhood through the prism of time and cultures. Volume 2]. Smolensk-Moskva: Smol-GU, 2016.

16. *Vēbers, J.* Ģimenes tiesības [The Family Law]. Rīga: Pētera Stučkas Latvijas Valsts universitātes Juridiskā un filozofijas fakultāte, 1970.

Normative acts

1. Konstitucija (Osnovnoj zakon) SSSR (05.12.1936) [Constitution (Basic Law) of the USSR as amended on 5 December 1936]. Available: http://constitution.garant.ru/history/ussrrsfsr/1936/red_1936/3958676/ [last viewed 22.03.2022].
2. Svod grazhdanskih uzakonenij gubernij Pribaltijskih (Chastj III Svoda mestnih uzakonenij gubernij Ostzejskih) [The Code of Civil Laws of the Baltic Provinces (Part III of the Code of Local Laws of the Ostsee provinces)]. Petrograd: Pravo, 1915.
3. Dekret Centralnogo Ispolnitelnogo Komiteta Sovetov rabochih, soldatskih I krestjanstih deputatov O grazhdanskom brake, o detiah i o vedenii knig aktov sostoianiia (14.11.1917) [Decree on civil marriage, on children and on keeping civil status record books adopted by the Central Executive Committee of the Soviets of Workers', Soldiers' and Peasants' Deputies at a meeting on 14.11.1917]. Available: http://www.hist.msu.ru/ER/Etext/DEKRET/17-12-18.htm [last viewed 14.03.2022].
4. Dekret Centralnogo Ispolnitelnogo Komiteta Sovetov rabochih, soldatskih I krestjanstih deputatov O rastorzheniji braka (16.12.1917) [Decree On divorce, adopted by the Central Executive Committee of the Soviets of Workers', Soldiers' and Peasants' Deputies at a meeting on 16.12.1917]. Available: http://www.1000dokumente.de/index.html/index.html?c=dokument_ru&dokument=0002_ehe&object=context&l=ru [last viewed 15.03.2022].
5. Dekret Centralnogo Ispolnitelnogo Komiteta Sovetov rabochih, soldatskih I krestjanstih deputatov O strahovanii na sluchaj bolezni, prinjatij Centralnim Komitetom Soveta Rabochih, Soldatskih i Krestjanskih Deptatov v zasedaniji (22.12.1917) [Decree on health insurance adopted by the Central Executive Committee of the Soviets of Workers', Soldiers' and Peasants' Deputies at a meeting on 22.12.1917]. In: Sobranije uzakonenij i rasporjazhenij pravitelstva za 1917–1918 gg. [Collection of legalizations and orders of the government for 1917–1918]. Moskva: Upravlenije delami Sovnarkoma SSR, 1942.
6. Postanovlenije Narkomnadzora RSFSR Ob ohrane zdorovja zhenshchin (18.11.1920) [Decree of the People's Commissariat of Health of the RSFSR of 18.11.1920 "On the protection of women's health"]. Available: http://lawru.info/dok/1920/11/18/n1205637.htm [last viewed 11.03.2022].
7. Operativnij prikaz Narodnogo komissara vnutrennih del N. Jezhova Nr. 00486 Ob operacii po repressirovaniju zhon i detej izmennikov rodini SSSR (15.08.1937) [Operational Order of the People's Commissar of Internal Affairs of the USSR N. Ezhov No. 00486 "On the operation to repress the wives and children of traitors to the homeland USSR" 15.08.1937]. Available: https://www.alexanderyakovlev.org/fond/issues-doc/1009101 [last viewed 04.04.2022].
8. Ukaz Prezidiuma Verhovnogo Soveta SSSR O naloge na kholostiakov, odinokikh i molosemeinykh grazhdan SSSR (21.11.1941) [On the tax on bachelors, single and young-family citizens of the USSR, Decree of the Presidium of the Supreme Council from 21.11.1941]. In: Vedomostji Verhovnogo Soveta SSSR, No. 42, 1941, p. 1.
9. Ukaz Prezidiuma Verhovnogo Soveta SSSR N. 65/1134 O zapreshchenii abortov, uvelicheniji materialjnoj pomoshchi rozhenicam, ustanovleniji gosudarstvennoj pomoshchi mnogosemejnim, rasshirenii seti rodilnih domov, detskih jaslej i detskih sadov, useliniji ugolovnogo nakazanija za neplatjozh alimentov i o nekotorih izmenenijah v zakonodatelstve o razvodah (27.06.1936) [Decree of the Presidium of the Supreme Soviet of the USSR of June 27, 1936 N 65/1134 On the prohibition of abortions, the increase in material assistance to women in childbirth, the establishment of state assistance to big families, the expansion of the network of maternity hospitals, nurseries and kindergartens, the strengthening of criminal penalties for non-payment of alimony and on certain changes in divorce law]. In: Sobranije zakonov i rasporjazhenij raboche-krestjanskogo pravitelstva Sojuza Sovetskih Socialisticheskih Respublik [Collection of laws and orders of the workers' and peasants' government of the Union of Soviet Socialist Republics], No. 34, 1936, p. 309.
10. Decree of the Presidium of the Supreme Soviet O naloge na kholostiakov, odinokikh i molosemeinykh grazhdan SSSR (21.11.1941) [On the tax on bachelors, single and young-family citizens of the USSR, Decree of the Presidium of the Supreme Council from 11/21/1941]. In: Vedomostji Verhovnogo Soveta SSSR, No. 42, 1941, p. 1.
11. Ukaz Prezidiuma Verhovnogo Soveta SSSR Ob uvelichenii gosudarstvennoi pomoshchi beremennym zhanshchinam, mnogodetnym i odinokim materiam,, usilenii okhrany materinstva i detsva, ob

ustanovlenii pochetnogo zvaniia "Matj – geroinja" i uchrezhdenii ordena "Materinskaia slava" i medli "Medal materinstva" ot (08.07.1944) [Decree of the Presidium of the Supreme Soviet of the USSR of 8 July 1944 "On increasing state assistance to pregnant women, mothers of many children and single mothers, strengthening the protection of motherhood and childhood, establishing the highest degree of distinction – the title of "Mother Heroine" and establishing "the Order of Mother's Glory" and medals "Medal of Motherhood""], in: Vedomostji Verhovnogo Soveta SSSR, No.37, 1944, pp. 1, 2.

12. Zakon SSSR N 1968 N 2834-VII Ob utverzhdenii Osnov zakonodatelstva Sojuza SSR i sojuznih respublik o brake i semje (27.06.1968) [Law of the USSR N 2834-VII "On approval of the fundamentals of the legislation of the USSR and the Union republics on marriage and family" (27.06.1968)]. Available: http://museumreforms.ru/node/13898#ref-3 [last viewed 04.04.2022].

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Recommendations for Overcoming Challenges of Whistleblowing in Public Procurement Procedures

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Public procurement is an area very vulnerable to corruption, which was especially evident during the Covid-19 virus pandemic. Pandemic called for prompt state response, including urgent public procurement procedures that resulted in numerous irregularities (e.g., "Silver Raspberry" case). The possibility of discretionary decision-making contributed to irregularities, and the absence of financial controls, which due to the urgency of the procedure could not be implemented in a timely manner. Therefore, if financial control systems are not able to function smoothly, the question of modalities of strengthening transparency and control in public procurement procedures arises. One possibility to inform the public about irregularities is through whistleblowers. However, this also depends on the level of whistleblower protection in respective national legislation. Whistleblowers in public procurement can face a variety of challenges. Starting from the assumption that the protection of whistleblowers and the whistleblowing process itself needs to be further improved, authors offer recommendations for improving the position of whistleblowers in public procurement procedures at the national level of European countries based on the application of dogmatic-legal method and content analysis.

Keywords: importance of whistleblowers, public procurement, prevention, irregularities.

Contents

Introduction

Public procurement as purchase by governments and state-owned enterprises of goods, services and works represents a significant amount of total public expenditure. At the level of the European Union, public authorities spend about two billion annually on public procurement, which represents about 14% of gross domestic product.[1] In OECD countries, the existing statistics show 12% of gross domestic product and 29% of government spending. [2]

Due to the fact that public spending is financed partially from taxes paid by citizens, hence, the citizens have a considerable interest to be informed regarding expenditure of public funds. To ensure spending of funds in a legal and efficient manner, it is necessary to have adequate control mechanisms. External control in the public sector is mostly performed in accordance with the annual plan, while internal audit mostly informs the top management of a certain institution about irregularities. The question is how to act in a situation when the top management has participated in these illegal activities. Furthermore, some facts that indicate illegal conduct can be established only by performing a certain job within the contracting authority or bidder. The whistleblowers are not necessary the persons whose job description requires to determine the illegalities in business activities at the institution, nor are they tasked with collecting relevant evidence, but they can perform any job and get knowledge on irregularities. The institute of whistleblowers was established to motivate persons to report irregularities and to guarantee a certain degree of protection from retaliation by the employer and other persons, as well as to protect them from criminal and civil liability if they have reported irregularities in accordance with the standards that guarantee the protection of whistleblowers.[3]

Whistleblowers protection is now part of international and regional standards. The general principles in the field of public procurement are incorporated in

[1] European Commission. Public Procurement. 2021. Available: https://ec.europa.eu/growth/single-market/public-procurement_en [last viewed 13.04.2022].

[2] OECD. Public Procurement, 2019. Available: https://www.oecd.org/governance/ethics/public-procurement.htm [last viewed 13.04.2022]; *Matić Bošković, M. Kostić, J.* The Legislation of the Republic of Serbia in the Field of Prevention of Corruption on Public Procurement, Bratislava Law Review, Vol. 5, No. 1, 2021, p. 146. Available: https://doi.org/10.46282/blr.2021.5.1.234 [last viewed 13.04.2022].

[3] European standards in the field of whistleblower protection are contained in: Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protetion of persons who report breaches of Union law, *Official Journal of the European Union,* L 305/17, 26.11.2019.

the Treaty on the Establishment and Functioning of the European Union, as well as the practices of the European Union institutions. These principles are: transparency, equal treatment, competition and non-discrimination. However, the aforementioned principles are often violated in public procurement procedures. Having in mind the challenges in public procurement and especially irregularities during the Covid-19 pandemic, in the paper authors try to highlight the important role of whistleblowers in public procurement procedures and the need to improve their protection. In addition, the authors assessed incentives for whistleblowers within the public sector institutions, bearing in mind challenges they are in both the public and private sector.

Given the fact that during the pandemic of the Covid-19 virus it was not possible to conduct both external and internal control procedures in a timely manner, in the first part of the paper we point out the importance of role of whistleblowers in conducting urgent public procurement procedures. Then, having in mind that abuses are possible in each stage of public procurement procedures, in a separate chapter we analyse irregularities in each of them and, based on the example from practice, we have highlighted that inadequate protection of whistleblowers is the most common reason for non-reporting of irregularities in public procurement procedures by employees. In the third and fourth chapters, we consider the mechanisms of prevention of irregularities in public procurement procedures, and we especially emphasize the importance of whistleblowers in combating irregularities. Then, in the fifth chapter of the paper, we gauge the content of the public interest in public procurement, having in mind its complexity, as well as the fact that its protection must be the only motive for whistleblowers in the public and in the economy sector. To emphasise the need for special training in the field of handling classified information when informing the public, in the sixth chapter we analysed the data protection, which is highly important for public procurement in the defence and security sector. In the last section, we offer recommendations for improving the system of whistleblower protection not only at the national, but also at the institutional level to encourage whistleblowing in public procurement procedures, which seems to us to be underrepresented in practice due to inadequate protection of whistleblowers.

1. Public procurement in urgent procedures

During the Covid-19 pandemic, numerous irregularities in public procurement procedures were noticed. This has affected the quality of products delivered and services rendered, which are important in saving lives and providing assistance to those at risk.

The absence of financial control, as well as discretion in procedures and decision-making, contributed to growing irregularities during the pandemic.[4] That is why citizens should be encouraged to report irregularities that indicate corruption.[5] Thus, during the pandemic in Bosnia and Herzegovina, an affair was recorded regarding corruption in public procurement procedures. For the needs of treating patients with the virus, 100 ventilators were procured from China from the company "Silver Raspberry", which is engaged in the production of raspberries with no previous experience or a license to trade in medical products.[6] In addition, ventilators other than

[4] *Teichmann, F., Falker, M. C.* Public procurement and courruption during Covid-19; self monitoring and whistleblowing incentives after Srebrena Malina. SEER Journal for Labour and Social Affairs in Eastern Europe, Vol. 24, issue 2, 2021, p. 185, doi: org/10.5771/1435-2869-2021-2-181.

[5] Ibid., p. 187.

[6] Ibid., p. 181.

those specified in the contract were delivered. If this type of irregularities is observed, the whistleblowers should inform the public to prevent such actions.

The lack of timely control and discretionary decision-making procedures contributes to irregularities, even in countries with a very long tradition of controlling public spending, such as Great Britain. Although the Supreme Audit Institution played a significant role in improving the transparency of Great Britain, it could not exercise its powers during the pandemic. The audit of the expediency of public procurement was performed somewhat later. However, in its Report from 2020, the Supreme Audit Institution pointed out a number of irregularities in public procurement procedures conducted under an urgent procedure.[7] According to the Report, contracts were awarded without publishing or invitations to submit bids in some cases. In most situations, there was a lack of explanation of how the supplier was selected and how the risk of corruption was reduced, as well as the possibility of conflicts of interest.

Apart from the above, according to the findings of the Supreme Audit Institution, there was no clear trace of internal audit that would support public procurement decisions. During August 2020, the Cabinet of Ministers asked the Government Agency for Internal Audit to audit six contracts. On that occasion, the Agency determined that there was no evidence that control procedures had been applied and there were shortcomings in the documentation, so it was unclear how some suppliers were awarded contracts.[8]

These irregularities may be the result of not only gross negligence, but also corruption in public procurement procedures. To prevent potential illegalities in public procurement procedures, it would be of great importance to gather evidence against their perpetrators in such situations. Bearing in mind that in the specific case, the public procurements referred to the procurement of equipment for the protection of health and treatment of patients with Covid-19, there is a multiple public interest in finding out such information.

Procurement of equipment and materials of inadequate quality endangers human health, giving unfounded advantages to certain bidders violates the principle of free competition, simultaneously causing damage to public funds. Abuses in public procurement can be present in all phases of its implementation, from planning to the implementation of contracts, not only in public procurement that is carried out under urgent procedures, but also in other procedures.

2. Types of abuse in public procurement

Abuses in public procurement procedures can be detected at every stage of their implementation. The planning phase remains the weakest link in the public procurement chain, since it is still impossible to ascertain whether the technical specifications and quantities correspond to the real needs of the contracting authority; whether the estimated value of the particular public procurement corresponds to a view to

[7] Investigation into government procurement during the Covid-19 pandemic. Report by the Comptroller and Auditor General, Cabinet Office, 26. November 2020, p. 10. Available: //www.nao.org.uk/wp-content/uploads/2020/11/investigation-into-government-procurement-during-the-COVID-19-pandemic.pdf. [last viewed 13.04.2022]; See: *Kostić, J., Matić Bošković, M.* Public Procurements during the Covid-19 Pandemic Time – Lessons for the Republic of Serbia, In: International organizations and State's response to Covid-19 *Jelisavac Trošić, S. Gordanić, J.* (eds). Belgrade: Institute of International Politics and Economics, 2021, p. 341.

[8] Investigation into government procurement during the Covid-19 pandemic, Report by the Comptroller and Auditor General, Cabinet Office, Op. cit., p. 10.

the objectives of the procurement, the technical specifications and the quantities; and whether the contracting authorities have the goods being procured on stock. During the planning process, it is possible that the public procurement is conducted for the procurement of goods, services or works for which there is no need, or for goods that contracting authority already has in a certain quantity and quality. Although it might be expected that such abuses will be detected by internal or external control mechanisms, it is sometimes possible that another person whose control is not stipulated by the job description will come across certain information while performing his/her job duties. Sometimes these people notice the presence of illegal activities much sooner than the control mechanisms. Sensitive matter is also the procurement of intellectual services, e.g., consulting services by persons for whose engagement there is no need.[9]

Furthermore, abuses can occur during the public procurement process, when certain public procurements are treated as confidential. This could be public procurement in the security and defence sector when it comes to the purchase of goods that should not be treated as confidential (i.e., office furniture or fuel). It is also possible for the procuring entity to consciously choose the subject of procurement that can be performed only by one bidder, and he does not have proof that only he can do that, as well as if the evidence possessed by the procuring entity does not indicate that only a certain bidder can realize the procurement.

At the phase of performance of awarded contract abuses are possible through the permission for the contract to be performed in way that differs from what was offered and stipulated. This usually happens in the form of prohibited annexes to the contract: change of stipulated price even though the tender documents do not provide for an objective reason for which the contracting authority could allow that; change in payment terms and conditions, so that, for instance, the stipulated price is paid in advance – entirely or partially, even though the public procurement contract specified that the payment would be made only once the work was performed, that is, only when all the obligations were performed by the bidder; change of the stipulated time limit for performance, where the contracting authority allows the bidder to provide the service or perform works within time limits longer than those offered, that is, allow the bidder to delay performance; change in subject of the tender, where the contracting authority allows the bidder to deliver something that is of a lower quality and of inferior technical characteristics compared to what was offered (this also relates to provision of services and works); change of subject of procurement where the contracting authority allows the supplier to deliver something that was not envisaged in the procurement contract; change of the stipulated amount of goods to be delivered, that is, change off stipulated scope of works or services, where the contracting authority demands or allows a performance below or exceeding what was stipulated, etc. In addition, abuses are possible through agreements between bidders and purchasers, as well as between the bidders themselves.[10] It is possible to find out about the existence of such agreement from the whistleblower who is employed by the purchaser or the bidder. However, inadequate protection against retaliation seems

[9] On the procurement of intellectual services see also: *Varinac, S., Ninić, I.* Korupcijska mapa sistema javnih nabavki u Republici Srbiji [Corruption map of the public procurement system in the Republic of Serbia]. Belgrade: OEBS, 2014, pp. 5 and 48.

[10] *Matic Boskovic, M.* Krivično delo zloupotreba u javnim nabavkama – izazovi u primeni [Criminal offense of abuse in public procurement – challenges in implementation]. In:(Privredna krivična dela [Economic crimes], *Stevanović, I., Čolović, V.* (eds). Belgrade:Institute of Criminological and Sociological Research and Institute of Comparative Law, 2017, pp. 215–229.

dissuasive to them, so the practice of whistleblowing is not sufficiently present in public procurements. This is confirmed by examples from practice.

During 2010, Ľubica Lapinová, employed in the public sector in the Slovak Republic (National Forestry Centre), reported the misuse of public funds during a tender for a project worth 700 000 euros. The employee worked on controlling the spending of funds. After discovering the violation, she refused to sign the document approving the financing of the project. This resulted in her dismissal during 2012, which was justified by reducing the redundancy. In addition, the employer filed two criminal charges against Lapinova, which were rejected as unfounded. In 2016, a regional court upheld a municipal court ruling that firing whistleblowers was illegal. However, the consequences of retaliation by the employer were long-lasting. The whistleblower could not get a job for many years after she was fired, and Ms Lapinova waited for three years for the Supreme Court to decide that employer was obliged to pay her lost earnings. However, her endeavour was rewarded by non-governmental organizations in Slovakia, when she was awarded the Civic Courage Award in 2014.[11]

This shows that the whistleblowers who report illegalities to protect the public interest face serious consequences, such as long-term unemployment. Due to such examples, many employees who would otherwise report an irregularity, decided not to react in such situations. Therefore, it seems necessary not only to prescribe measures concerning the protection of whistleblowers by national legislation, but also to establish internal procedures and procedures at the level of institutions and to apply an effective system of protection of whistleblowers in practice. In addition, it indicates the need to prescribe and apply sanctions against employers who take retaliatory measures against employees sons who report irregularities in the public interest.[12] Although the monetary compensation for whistleblowers is a questionable measure due to risk of abuse, it seems that a some kind of compensation for the whistleblower would be acceptable.[13] Moreover, the establishment of cash funds could be considered to help whistleblowers to overcome the material problems they may face due to the retaliatory measures until they find a new job. In addition, it is necessary to keep in mind the mandatory application of sanctions against employers who take retaliatory measures against whistleblowers.

3. Prevention mechanisms

To date, various mechanisms for preventing illegality in public procurement procedures have been established in the practice of many countries. Among them, the most common are external audit and internal financial controls. However, both control mechanisms have their limitations, thus, in some situations it is more realistic to expect that irregularities in public procurement procedures will be found out thanks to the activities of whistleblowers. The State Audit Institution across the world

[11] Whistleblower gets justice after 7 years, 26.06.2019. Available: https://spectator.sme.sk/c/22154429/it.took.lubica-lapinova-7-years-to-get-justice-done-white-crow. html [last viewed 13.04.2022]; Estimating the Economic Benefits of Whistleblower Protection in Public Procurement, Final Report, Luxembourg: European Commission, 2017, p 87. Available: https://op.europa.eu/en/publication-detail/-/publication/8d5955bd-9378-11e7-b92d-01aa75ed71a1/language-en [last viewed 13.04.2022].

[12] Article 23 of the Directive (EU) 2019/1937 stipulates that Member States should take all measures to protect a person who reports irregularities from retaliation, including the imposition of effective, proportionate and dissuasive penalties for natural or legal persons who prevent, attempt to obstruct or retaliate against a whistleblower.

[13] Article 20, paragraph 2 of the Directive provides for the possibility for Member States to prescribe financial support for persons who report irregularities.

operates in accordance with the annual plan of activities and never performs audits in all public sector institutions during the year. During the audit procedure, it can be determined that there are irregularities in the public procurements that were conducted in the previous period, and due to the obsolescence of criminal prosecution, it may be too late to sanction the perpetrators. Internal audit reports irregularities to the top management of the institution in which it is established. In such situations, a problem arises if the top management has participated in public procurement procedures in which irregularities have been identified.

In some countries significant role has civil sector since it acts during public procurement procedure. The institute of civic supervisor was established in the Republic of Serbia in 2012 by the Law on Public Procurement for procurements whose estimated value exceeded one billion dinars (about 10 million euros).[14] All documents in the public procurement procedure were available to him and he was able to publicly present opinion and make recommendations to the contracting authority. Based on the 2012 Law, the Institute of civic supervisor had two important roles: overseeing and analysing the procedure and pointing out the relevance, which could consist of submitting requests for protection of rights in public procurement procedures or reporting on corruption.[15]

Bearing in mind that civic supervisor's role also included informing on irregularities in public procurement procedures, it could be said that he in some way had the role of an authorized whistleblower, who acted on the basis of an employment contract. One of the differences in relation to the classic role of whistleblower was that the civic supervisor could be a legal entity (non-governmental organization), in whose name its members acted. However, the institute of civic supervisor itself has not, in practice, been fully set in motion. The reason for that is the lack of adequate reaction from the competent institutions to which the reports on irregularities were submitted. In addition, high oversight costs were present. The lack of monetary compensation discouraged civic supervisors.[16] Although the aforementioned institute was an important mechanism in the prevention of corruption in high-level public procurement procedures, it was repealed by the new Law on Public Procurement, which was passed in 2019.[17]

4. Concept of whistleblowing and relevance for public procurement

Employees in either the public or private sectors are often afraid to inform the authorities about the illegal activities of their superiors. The main reason for such an attitude is to avoid revenge for undertaking such activities.[18] To prevent retaliation,

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[14] The Law on Public Procurement, Official Gazette of the Republic of Serbia, No. 124/12.

[15] *Matić Bošković, M., Kostić, J.* The Legislation of the Republic of Serbia in the Field of Prevention of Corruption on Public Procurement. Op. cit., p. 151.

[16] *Šarić, M., Stojanović, M.* Nadzornici odustaju od kontrole najskupljih javnih nabavki [Supervisors give up control of the most expensive public procurement]. Centar za istraživačko novinarstvo Srbije [Center for Investigative Journalism of Serbia], 2018, Available: https://www.cins.rs/nadzornici-odustaju-od-kontrole-najskupljih-javnih-nabavki/. [last viewed 14.04.2022].

[17] The Law on Public Procurement, Official Gazette of the Republic of Serbia, No. 91/2019.

[18] *Šuput, J.* Državna revizorska institucija i prevencija kriminaliteta belog okovratnika u javnom sektoru [State Audit Institution and White Collar Crime Prevention in the Public Sector]., Zbornik radova Pravnog fakulteta u Nišu [Proceedings of the Faculty of Law in Nis], No. 67, 2014, p. 322; *Martić, M.* Uporednopravni aspekti pojma uzbunjivača [Comparative legal aspects of the notion of whistleblowers]. Strani pravni život [Foreign Legal Life], 60(1), 2016, p. 210; *Višekruna, A.* Modeli podsticanja aktivnosti uzbunjivanja na finansijskom tršištu [Models for encouraging whistleblowing activities in the financial market]. Pravo i privreda [Law and economics], No. 4–6, 2016, p. 370.

a whistleblower protection system has been established at the international level in both the public and private sectors.

At the EU level, the important instrument for protection of whistleblowers is Directive (EU) 2019/1937 on the protection of persons who report breaches of Union Law (hereinafter Directive (EU) 2019/1937).[19] According to the aforementioned Directive, EU member states should establish adequate protection for persons who inform the public about irregularities they uncover while doing their job. The target groups to which Directive applies is broadly defined. The Directive applies to persons who have the status of employees in a particular institution, including civil servants, persons who have the status of self-employed persons, persons who perform administrative, managerial and supervisory activities, including volunteers and trainees, as well as persons who are under the supervision or in a contractual relationship with the person in whose business irregularities were noticed. According to the provisions of the Directive, the protection of whistleblowers must also be established for persons who report irregularities observed in the work of the legal entity with which they were engaged as suppliers or subcontractors. Its provisions also apply to persons who report irregularities which they have come upon during their terminated employment, as well as persons who report irregularities that they have learned about during the employment procedure (Article 4). The Directive specifically offers several types of protection in situation when a whistleblower suffered retaliation for reporting a breach. Public procurement is mentioned as one of the areas in which the Directive provides support in case of disclosure.

An important basis for providing protection to the whistleblower is the existence of a motive to provide information by the whistleblower in the public interest. Given that both legal entities from the public sector and those from the economic sector participate in the public procurement procedure, the question could be asked which information in the public interest could be provided by public employees and which by private sector employees. In the case of the contracting authority, this could be information concerning the appropriateness of public procurement or possibly negotiating with a particular tenderer or tenderers to favour a particular person over others. When it comes to the economic sector, it could be the information concerning the agreement between the bidders on the amount of the offered price, as well as the agreement of the bidder with the procuring entity itself.

Whistleblowers can report illegal orders from superiors in public procurement procedures, although their role may be linked to wider activities. The work environment must have an incentive for whistleblowers to report irregularities to contribute to both strengthening integrity and reducing budget losses. Employees in the public sector can detect fraud and corruption in their institutions, and to act as whistleblowers, they must be familiar with the protection of whistleblowers. Whistleblowing has multiple meanings, as it contributes to strengthening accountability, fighting corruption and encouraging transparency. To prevent harassment, discrimination, or any other form of retaliation against the whistleblower, it is necessary to ensure that their protection is implemented in the internal legal acts of the institutions and legal entities in which they are employed.[20]

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[19] Directive (EU) 2019/1937.

[20] *Rabrenović, A., Kostić, J., Matić, M.* Open Dilema: How to react to illegal orders from a superior. In: Integrity and Good Governance in the Western Balkans. RESPA, Regional School of Public Administration, *Rabrenović, A.* and *Knežević Bojović, A.* (eds). 2018, p. 313. Available: http://iup.rs/wp-content/uploads/2020/10/Integrity-and-Good-Governance-in-the-WB.pdf [last viewed 13.04.2022].

5. Whistleblowing regarding public procurement and public interest

According to international standards, whistleblowing must be done in the public interest. Even if its definition is not determined by law, it does have its constitutive elements and forms. These forms include external and internal security, public order and peace, continuous supply of energy and food, uninterrupted functioning of public services, orderly and uninterrupted traffic, public communications, communications, protection of the environment from pollution, functioning of the market, protection of competition, provision information of public importance, protection of personal data[21] Authors considering the theory of administrative law have similar views. According to Tomić, the constitutive elements of the public interest are the exercise and protection of human rights and freedoms, development of social life and orderly work of state bodies and public services.[22] Some authors consider the interests of all individuals who together make up the public to be in the public interest. Therefore, it should be assessed whether the interests related to the rule of law, i.e., the division of power and the protection of human rights, have been realized.[23] According to some authors, the protection of the public interest should overcome the employee's sense of loyalty to the organization, because whistleblowing is an effective tool for investigating and sanctioning corruption. However, in that case it is necessary to take into account whether the protection of the public interest has been the main motive of the whistleblower.[24]

Some authors consider that if one wants to assess the ethics of whistleblower behaviour, one should take into account loyalty to the community rather than to the employer himself.[25] Therefore, the whistleblower in such cases should enjoy an adequate level of protection in accordance with the standards that guarantee effective protection of the whistleblower.[26]

One of the first European standards in the field of whistleblower protection is the 2014 Council of Europe Recommendation on the Protection of whistleblowers. According to this document, when it comes to the public interest in the public sector, the disclosure of information can be undertaken to enable increased democratic participation, the formulation of sound policies and public oversight of state action. In the private sector, the public interest is consumer protection, fair market competition

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[21] *Đurić, V., Vranješ, N*. Pravni okvir uloge lokalne samouprave u ostvarivanju javnog interesa – Primeri Republike Srbije i Republike Srpske [Legal framework of the role of local self-government in the realization of public interest – examples of the Republic of Serbia and the Republic of Srpska]. Godišnjak fakulteta Pravnih nauka [Yearbook of the Faculty of Law], No. 10, 2020, pp. 49–50.

[22] *Tomić, Z.* Javni poredak: Pojam i struktura [Public order: Concept and structure]. Anali Pravnog fakulteta u Beogradu [Annals of the Faculty of Law in Belgrade], Vol. 67, No. 2, 2019, p. 36.

[23] *Boot, R. E.* The Feasibility of a Public Interest Defense for Whistleblowing. Law and Philosophy, Vol. 39, No. 1, 2020, p. 34.

[24] *Scaturro, R.* Deffining Whistleblowing. Laxenburg: International Anti Corruption Academy, 2018.

[25] *Bowden, P.* In the public interest: Protecting whistleblowers and those who speak out. Prahran: Tilde University Press, 2014, p. 11 cited in *Dussuyer, I., Armstrong, A*. and *Smith, R.* Research into Whistleblowing, Protection Against Victimisation. Journal of Law and Governance, Vol. 10, No. 3, 2015, p. 37. Available: https://doi.org/10.15209/jbsge.v10i3.860 [last viewed 13.04.2022].

[26] "The Biela Vrana Award" is a positive example of the community's gratitude to conscientious citizens. That award is established in the Slovak Republic by non-governmental organizations to thank the courageous citizens who have acted in the public interest. More information about the aforementioned award is available at: https://bielavrana.sk/ocenenie/ [last viewed 13.04.2022].

and an adequate way of regulating financial and other business activities (item 15).[27] Bearing in mind the above, it can be concluded that publishing information on illegal actions in public procurement procedures would enable public oversight of the state and thus protect the public interest in relation to the functioning of the public sector. The benefit for economic sector would be, e.g., ensuring free competition, which is a very important principle of public procurement.

6. Whistleblowing and protection of data confidentiality

A particular problem with whistleblowing may be the fear of liability for leaking classified information. This applies, in particular, to classified information in the field of public procurement in the defence and security sector. Therefore, only the definition of data secrecy and the termination of their secrecy should be clearly defined by national regulations. The Directive (EU) 2019/1937 does not apply to the responsibility of Member States to ensure national security or the protection of essential security interests. This means that it will not apply to reports of breaches of procurement rules that include aspects of defence or security unless covered by relevant Union acts.[28] However, in such situations, there should be some rules at the level of institutions in which public procurement is conducted regarding the manner of internal information about irregularities, if they are noticed at work. Information that is secret cannot be made public, nevertheless, there should be internal rules for effective control of the legality of actions.

If a secret is declared a business secret, the measures, procedures and legal remedies for the protection of a legal entity that has provided certain information as a business secret shall not be applied, if the exercise of the right to freedom of expression prescribed by Article 10 of the Convention on Human Rights and Fundamental Freedoms of the Council of Europe, as well as in the case of detecting illegal activities in order to protect the public interest.[29] However, in some situations, it may happen that the security sector revokes the confidentiality of data concerning the information that is declared secret only to cover up illegality. Hence, it is crucial that whistleblowers are aware of the national regulations governing the confidentiality of data and the conditions under which certain data may be declared business secrets. If these regulations are not known, whistleblowers may be discouraged from reporting irregularities. Therefore, training of security and defence staff in dealing with confidentiality data is of particular importance. When it comes to informing employees in the economic sector about irregularities in public procurement, the question can be asked whether they are sufficiently encouraged to report irregularities. As the Directive provides equal protection for both public and private employees, it can be concluded that they enjoy equal protection in this regard.

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[27] Recommendation CM/Rec(2014)7 adopted by the Committee of Ministers of the Council of Europe on 30 April 2014 and explanatory memorandum. Available: https://rm.coe.int/16807096c7 [last viewed 14.04.2022].

[28] Article 3 of the Directive (EU) 2019/1937.

[29] Article 5 of the Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, Official Gazette of the European Union, L 157/1. Available: https://wipolex.wipo.int/en/text/423032 [last viewed 13.04.2022].

Summary

1. The importance of whistleblowers in detecting irregularities in public procurement is of great importance for the legality and transparency of the procedure, as well as for the protection of bidders' rights. Although there are various mechanisms in the public sector that can identify irregularities such as external audit and internal control, it seems likely that most irregularities in public procurement procedures will be identified exclusively by employees, not only in the public procurement sector, but also in other sectors such as e.g., finance or human resources sector. In addition to the employees of the contracting authority, the role of employees in the economic sector is also very important, for disclosure of irregularities. However, whistleblowers should solely act to protect the public interest. The actions of whistleblowers are of particular importance in the procedures of undertaking urgent public procurements, because then discretionary decision-making is possible, and therefore there is a greater possibility of abuse. In these situations, the timely performance of control activities by external and internal audit is disabled, hence, certain evidence that indicates illegal conduct may be hidden or illegalities may be covered up. With a higher probability that the perpetrators will be discovered, and their actions will be punished, the number of illegalities in public procurement procedures will be reduced.
2. Employees in the security and defence sector may face a particular challenge in reporting irregularities in public procurement procedures. The question arose as to how they should handle classified information. According to the Directive (EU) 2019/1937, classified information cannot be disclosed. This is possible only if the information is presented as secret to cover up illegalities in public procurement procedures. Therefore, it is essential that employees are educated properly to know if some information can be declared as secret information in accordance with European standards and national legislation.
3. However, the fear of losing the job and economic insecurity due to retaliation by the employer can affect the whistleblower's decision to report irregularities noticed in public procurement procedures. Therefore, a certain fund should be established at the national level to provide assistance to a whistleblower who has acted in the public interest. The support should last during the court proceedings pursuant to illegal dismissal. In addition, it is necessary to take adequate sanctions against employers for revenge against the whistleblower. This is the only way to encourage whistleblowers to report irregularities in public procurement procedures. This is important for both the public and private sectors, where there seems to be a greater possibility of being fired by the employer. Furthermore, the criteria that apply to public, must also be applied in the economic sector when it comes to the protection of whistleblowers. It can be concluded that it is not enough to have whistleblower protection standards at the national level. It is necessary to specify the manner and procedure of whistleblowing in the internal rules, while prescribing in detail the manner of handling classified information. Whistleblowing in public procurement procedures should not only include the persons conducting public procurement, but also whistleblowing by other persons employed in the financial sector and who are in charge of planning funds and monitoring financial realization, as well as persons from the human resources sector and other persons participating in any of the phases in public procurement procedures.

Sources

Bibliography

1. *Boot, R. E.* The Feasibility of a Public Interest Defense for Whistleblowing. Law and Philosophy, Vol. 39, No. 1, 2020, pp. 1–34.
2. *Dussuyer, I., Armstrong, A. and Smith, R.* Research into Whistleblowing, Protection Against Victimisation. Journal of Law and Governance, Vol. 10, No. 3, 2015, pp. 34–42.
3. *Đurić, V., Vranješ, N.* Pravni okvir uloge lokalne samouprave u ostvarivanju javnog interesa – Primeri Republike Srbije i Republike Srpske [Legal framework of the role of local self-government in the realization of public interest – Examples of the Republic of Serbia and the Republic of Srpska]. Godišnjak fakulteta Pravnih nauka [Yearbook of the Faculty of Law], No. 10, 2020, pp. 48–69.
4. *Kostić, J., Matić Bošković, M.* Public Procurements during the Covid-19 Pandemic Time-Lessons for the Republic of Serbia. In: International organizations and State's response to Covid-19, *Jelisavac Trošić, S., Gordanić, J.* (eds). Belgrade: Institute of International Politics and Economics, 2021, pp. 339–359.
5. *Martić, M.* Uporednopravni aspekti pojma uzbunjivača [Comparative legal aspects of the notion of whistleblowers]. Strani pravni život [Foreign Legal Life], 60(1), 2016, pp. 201–214.
6. *Matic Boskovic, M.* Krivično delo zloupotreba u javnim nabavkama – izazovi u primeni [Criminal offense of abuse in public procurement – challenges in implementation]. In: Privredna krivična dela [Economic crimes], *Stevanović, I., Čolović, V.* (eds). Belgrade:Institute of Criminological and Sociological Research and Institute of Comparative Law, 2017, pp. 215–229.
7. *Matić Bošković, M., Kostić, J.* The Legislation of the Republic of Serbia in the Field of Prevention of Corruption on Public Procurement. Bratislava Law Review, Vol. 5, No. 1, 2021, pp. 145–158. Available: https://doi.org/10.46282/blr.2021.5.1.234 [last viewed 13.4.2022].
8. *Rabrenović, A. Kostić, J. and Matić, M.* Open Dilemma: How to react to illegal orders from a superior. In: Integrity and Good Governance in the Western Balkans, Respa, Regional School of Public Administration. In: *Rabrenović A.* and *Knežević Bojović A.* (eds). 2018, pp. 303–314. Available: http://iup.rs/wp-content/uploads/2020/10/Integrity-and-Good-Governance-in-the-WB.pdf [last viewed 13.04.2022].
9. *Scaturro, R.* Deffining Whistleblowing, Laxenburg: International Anti-Corruption Academy. 2018.
10. *Teichmann, F., Falker, M. C.* Public procurement and corruption during Covid-19; self-monitoring and whistleblowing incentives after Srebrena Malina. SEER Journal for Labour and Social Affairs in Eastern Europe, Vol. 24. Issue 2, 2021, pp. 181–206. Available: https://doi: org/10.5771/1435-2869-2021-2-181 [last viewed 13.04.2022].
11. *Tomić, Z.* Javni poredak: Pojam i struktura [Public order: Concept and structure]. Anali Pravnog fakulteta u Beogradu [Annals of the Faculty of Law in Belgrade], Vol. 67, No. 2, 2019, pp. 34–48.
12. *Varinac, S., Ninić, I.* Korupcijska mapa sistema javnih nabavki u Republici Srbiji [Corruption map of the public procurement system in the Republic of Serbia]. Belgrade: OEBS, 2014.
13. *Višekruna, A.* Modeli podsticanja aktivnosti uzbunjivanja na finansijskom tršištu [Models for encouraging whistleblowing activities in the financial market]. Pravo i privreda [Law and economics], No. 4–6, 2016, pp. 368–385.
14. *Šarić, M., Stojanović, M.* Nadzornici odustaju od kontrole najskupljih javnih nabavki [Civic supervisors give up control of the most expensive public procurements], Centar za istraživačko novinarstvo Srbije. 2018. Available: https://www.cins.rs/nadzornici-odustaju-od-kontrole-najskupljih-javnih-nabavki/ [last viewed 14.04.2022].
15. *Šuput, J.* Državna revizorska institucija i prevencija kriminaliteta belog okovratnika u javnom sektoru [State Audit Institution and White-Collar Crime Prevention in the Public Sector]. Zbornik radova Pravnog fakulteta u Nišu, broj 67/2914, pp. 321–346.

Normative acts

1. Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and 14, Rome, 4.XI.1950. Available: https://www.echr.coe.int/documents/convention_eng.pdf [last viewed 13.04.2022].
2. Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, L 157/1. Available: https://wipolex.wipo.int/en/text/423032 [last viewed 14.04.2022].

3. Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. Available: https://www.legislation.gov.uk/eudr/2019/1937 [last viewed 14.04.2022].
4. Recommendation CM/Rec(2014)7 adopted by the Committee of Ministers of the Council of Europe on 30 April 2014 and explanatory memorandum. Available: https://rm.coe.int/16807096c7 [last viewed 14.04.2022].
5. The Law on Public Procurement, Official Gazette of the Republic of Serbia, No. 124/12.
6. The Law on Public Procurement, Official Gazette of the Republic of Serbia, No. 91/2019.

Other sources

1. Estimating the Economic Benefits of Whistleblower Protection in Public Procurement. Final Report, Luxembourg: European Commission, 2017. Available: https://op.europa.eu/en/publication-detail/-/publication/8d5955bd-9378-11e7-b92d-01aa75ed71a1/language-en [last viewed 13.04.2022].
2. European Commission. Public Procurement. 2021. Available: https://ec.europa.eu/growth/single-market/public-procurement_en [last viewed 13.04.2022].
3. Investigation into government procurement during the Covid-19 pandemic. Report by the Comptroller and Auditor General, Cabinet Office, 26. November 2020. Available: //www.nao.org.uk/wp-content/uploads/2020/11/investigation-into-government-procurement-during-the-COVID-19-pandemic.pdf [last viewed 13.04.2022].
4. OECD. Public Procurement. 2019. Available: https://www.oecd.org/governance/ethics/public-procurement.htm [last viewed 13.04.2022].
5. Whistleblower gets justice after 7 years, 26.06.2019. Available: https://spectator.sme.sk/c/22154429/it.took.lubica-lapinova-7-years-to-get-justice-done-white-crow. html [last viewed 13.4.2022].

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Sexual Harassment and Its Differentiation from Other Criminal Offences

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The publication focuses on the concept of sexual harassment. Its aim is to clarify the understanding of this concept and its place within the system of criminal law. To achieve this aim, the authors have analysed international and national regulation, regulation of other countries, as well as the legal doctrine of the branch, case law and statistical data.

Keywords: sexual harassment, sexual violence, discrimination, criminal offence, criminal law.

Contents

Introduction

The *#MeToo* movement resounded in 2017 when many victims of sexual harassment or violence – both women and men – shared publicly their negative experience in workplaces when a colleague or an employer had made sexual comments or acted in a way that made the victim feel uncomfortable or humiliated.

Already in 2001, Members of the European Parliament warned that the precariousness of adult employment might cause sexual harassment and urged the Member States of the European Union to adjust their legal acts to solve this problem, as well

as to introduce measures for ensuring gender equality and increasing economic possibilities for women, which would facilitate elimination of the problem. Members of the European Parliament continued debating this issue also in the coming years, adopting several resolutions condemning such behaviour and calling for introduction of a mechanism that would help to prevent it.[1]

The issue of sexual harassment has been foregrounded in the UN Convention on the Elimination of All Forms of Discrimination against Women, the Council of Europe Convention on preventing and combating violence against women and domestic violence, in several Directives of the European Parliament and the Council, defining the States' obligation to envisage liability for sexual harassment.

In view of the relevance of this problem also in Latvia, the aim of the article is to elucidate the understanding of sexual harassment and review the valid legal regulation to establish whether it ensures liability of perpetrators of sexual harassment and, if necessary, to outline possible improvements to the legal regulation.

1. The concept of sexual harassment

As noted by the Council of Europe Steering Committee for Equality between Women and Men, European States began tackling the problem of sexual harassment at work only in the 1980s, whereas in the North America it was for several years already considered to be discrimination among labour force and circles of governance.

In one of the first European studies of sexual harassment, conducted by two Belgium teams, sexual harassment was defined as "'unpleasant behaviour or propositions which the person concerned knows or should know are not welcome. Sexual harassment includes unsolicited sexual advances, the request for sexual favours and other verbal or physical behaviour of a sexual nature"'.[2]

It was also noted that the definition of sexual harassment usually comprises three components: 1) description of several examples of actions, gestures, treatment or verbal behaviour; 2) description of the victim's feelings: confusion, irritation, sense of humiliation, which may turn into a sense of being blackmailed; 3) principles, on the basis of which this conduct is condemned, e.g., the principle of prohibition of discrimination, a person's right to dignity, possibilities of equal employment, etc.[3]

The relevance of the issue of sexual harassment was foregrounded in the Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.[4] It is noted in para. 8 of the Preamble to the Directive: "Harassment related to the sex of a person and sexual harassment are contrary to the principle of equal treatment between women and men; it is therefore

[1] EP plenārsesijā tiek apspriesta seksuāla uzmākšanās Eiropas Savienībā [Sexual harassment: MEPs debate situation in the EU in plenary]. Available: https://www.europa.eu/news/lv/headlines/society/20171023STO86603/ep-plenarsesija-tiek -apspriesta-seksuala-uzmaksanas [last viewed 08.04.2022].

[2] Sexual violence against women – Contribution to a strategy for countering the various forms of such violence in the Council of Europe member states. European Committee for Equality between Women and Men. EG (91) 1. Strasbourg, 1991, p. 21.

[3] Ibid.

[4] Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. Official Journal, 5.10.2002 L 269/15.

appropriate to define such concepts and to prohibit such forms of discrimination. To this end it must be emphasised that these forms of discrimination occur not only in the workplace, but also in the context of access to employment and vocational training, during employment and occupation".

The concept of sexual harassment is provided also in the Directive 2006/54/EC of the European Parliament and the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation[5]. In the context of this Directive, actions are qualified as sexual harassment "where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment"'.

In the meaning of Section 29 (7) of the Labour Law[6], the harassment of a person is the subjection of a person to such action which is unwanted from the point of view of the person, associated with his or her belonging to a specific gender, including action of sexual nature, if the purpose or result of such action is violation of the person's dignity and creation of an intimidating hostile, humiliating, degrading or offensive environment.

Sexual harassment is a variety of sexual violence; moreover, it is characterised by taking physical or/and verbal actions of sexual nature against the victim in work or study environment, where, most often, certain subordination between the perpetrator and the victim exists. Sexual harassing need not be motivated by gratification of sexual desire.[7] Often, the perpetrator's motivation is creating humiliating and unpleasant conditions for the victim, most often – due to gender, to emphasize their role as an authority in the work or study environment, creating such conditions that would hinder the victim's possibilities of growth in the case of refusal, etc. Namely, sexual harassment may also be a type of discrimination.

Division of sexual harassment into physical and verbal manifestations usually serves to emphasize the greater harmfulness of physical sexual harassment; however, verbal sexual harassment may be as harmful as physical one. I.e., as the result of verbal sexual harassment a person may experience the same feelings as following a physical offence, e.g., feelings of shame and humiliation.[8]

The examples referred to above are not exhaustive. The institution of sexual harassment is interdisciplinary and experts representing various fields express their opinions regarding it. The psychological, sociological and legal interaction of this concept is undeniable, therefore, sexual harassment can be divided into several sub-types. For example, *quid-pro-quo*, the literal translation of which is "something for something", characterises a situation where a person, who holds hierarchic power over the victim, either provides respective benefits (e.g., concludes legal labour relations) or deprives of them (e.g., discontinues legal labour relations) for favours of sexual nature. Notably,

[5] Directive 2006/54/EC of the European Parliament and the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). Official Journal, 26.7.2006 L 204/23.

[6] Darba likums: LV likums [Labour Law: Law of the Republic of Latvia]. Latvijas Vēstnesis, No. 105, 06.07.2001.

[7] Supreme Court of the United States of America, Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 1998. Available: https://supreme.justia.com/cases/federal/us/523/75/#tab-opinion-1960325 [last viewed 12.03.2022].

[8] *Luzon, G.* Criminalising Sexual Harassment. In: The Journal of Criminal Law, 81 (5), p. 360. Available: https://heinonline.org.datubazes.lanet.lv/HOL/Page?collection=journals&handle=hein.journals/jcriml2017&id=351&men_tab=srchresults [last viewed 09.03.2022].

in the sub-type of creating hostile environment, the relationship of subordination is not mandatory, and a person who makes comments or actions of sexual nature may not be an authority in work environment. For example, sexual harassment may be perpetrated by a colleague. Likewise, there is such a sub-type of sexual harassment as the contrapower harassment, where a person, who is in a hierarchically lower position, harasses a person occupying a higher position in work or study environment.[9] Whatever sub-type pf sexual harassment would be present in the specific case, regularity is not a pre-condition of sexual harassment, and the perpetrator and the victim need not belong to opposite genders.[10]

The aforementioned statements are confirmed by the comments made by the Committee on the Elimination of Discrimination against Women (hereafter – CEDW) on the UN Convention on the Elimination of All Forms of Discrimination against Women New York[11], explaining that sexual harassment includes such unwelcome behaviour as physical contact and advances, sexually coloured remarks, showing pornography, and sexual demands, whether by words or actions. Manifestation of sexual harassment may be humiliating and cause health and safety concerns. A case where the woman has reasonable ground to believe that her objection to sexual harassment would cause inconvenience in working environment, including, with respect to entering into legal labour relations or promotion, or when it creates a hostile working environment, is to be considered as being discriminatory.[12]

2. Legal regulation and differentiation of the concept

It was noted in the Directive of the European Parliament and the Council of 5 July 2006 2006/54/EC, reconfirming the statements made in the Directive of 23 September 2002, that sexual harassment is contrary to the principle of equal treatment of men and women, and that it is discrimination on the grounds of gender, that this type of discrimination "should be prohibited and should be subject to effective, proportionate and dissuasive penalties".

On 18 May 2016, Latvia signed the Council of Europe Convention on preventing and combating violence against women and domestic violence or, as generally better known, the Istanbul Convention (hereafter – the Istanbul Convention)[13]. The Istanbul Convention was drafted with the aim of setting united standards for protecting women against violence and domestic violence, and the minimum measures that the State has to introduce to ensure this protection. In addition to protection against stalking, sexual violence, forced marriages, the Istanbul Convention defines the State's

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[9] *Maass, A., Cadinu, M., Galdi, S.* Sexual Harassment: Motivations and Consequences. In: The SAGE Handbook of Gender and Psychology, 1st edition. Editors: M.K. Ryan and, N.R. Branscombe. [B.v.]: Sage publications, 2013, p. 342.

[10] *Luzon, G.* Criminalising Sexual Harassment, p. 362.

[11] Convention on the Elimination of All Forms of Discrimination against Women New York. Signed in New York, 18.12.1979. Available: https://www.refworld.org/docid/3ae6b3970.html [last viewed 06.04.2022].

[12] Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence against women (Eleventh session, 1992), U.N. Doc. A/47/38 at 1 (1993), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 243 (2003). Available: http://hrlibrary.umn.edu/gencomm/generl19.htm [last viewed 09.03.2022].

[13] Council of Europe Convention on preventing and combating violence against women and domestic violence. Signed in Istanbul, 11.05.2011. Available: https://rm.coe.int/168008482t [last viewed 06.04.2022].

obligation to envisage liability for sexual harassment.[14] The Istanbul Convention has caused widespread response not only within the international community but also in Latvia; moreover, at the time when this article was written, Latvia had not ratified the Istanbul Convention yet.

In view of the high level of prevalence of violence against women, at the beginning of 2020, CEDW, which has been established in accordance with the UN Convention on the Elimination of All Forms of Discrimination against Women, called upon Latvia to ratify the Istanbul Convention as soon as possible. By responding to the concerns expressed by CEDW, the Latvian delegation pointed out that, within recent years, Latvia had achieved significant progress in combatting violence against women and that Latvia had planned to criminalise harassment.[15]

Namely, Latvia already at present should ensure to a person protection against sexual harassment; however, certain problems can be discerned in both legal regulation and practice.

Section 161 of the Labour Law defines liability for violation of prohibition of differential treatment in the field of employment relationship. Pursuant to Section 161 of the Labour Law, liability sets in if the violation has been committed in the context of legal labour relationship but not within study environment, as well as only in the case where the respective situation is not regulated by the Criminal Law, in accordance with the principle of the priority of criminal proceedings, enshrined in Section 5 (2) of the Administrative Liability Law[16].

In view of the explanation of sexual harassment and the regulation of Criminal Law, liability for such criminal offence should be set out in Section 149[1] of the Criminal Law, which defines liability for violation of the prohibition of discrimination, which jeopardises persons' equality in various areas of public life.[17]

Egils Levits explains that "prohibition of discrimination means that, with respect to exercise of an individual's rights, it is prohibited to legally differentiate between people, i.e., to define certain groups of people on the basis of a criterion included in the prohibition of discrimination, thus – a prohibited criterion." Further, it is concluded that a person's biological gender is one of the prohibited criteria, which are defined in the catalogue of the Charter's prohibited criteria, included in Article 21 of the European Charter of Fundamental Rights.[18]

Thus, analysis of the content of Section 149[1] of the Criminal Law allows concluding that sexual harassment is such violation of prohibition of discrimination due to gender, which is committed by a general subject or a public official [in this

[14] See Council of Europe Convention on preventing and combating violence against women and domestic violence, Article 40.

[15] Committee on Elimination of Discrimination against Women. In dialogue with Latvia, Committee on the Elimination of Discrimination against Women calls for specific gender equality legislation. Available: https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25546&LangID=E [last viewed 10.03.2022].

[16] Administratīvās atbildības likums: LV likums [Administrative Liability Law: Law of the Republic of Latvia]. Latvijas Vēstnesis, No. 225, 14.11.2018.

[17] *Krastiņš, U., Liholaja, V.* Krimināllikuma komentāri. Otrā daļa (IX–XVII nodaļa). Trešais papildinātais izdevums [Commentaries on the Criminal Law. Part Two (Chapter IX-XVII). 3rd supplemented edition]. Rīga: Tiesu namu aģentūra, 2022, 442. lpp.

[18] *Levits, E.* 91. Visi cilvēki ir vienlīdzīgi likuma un tiesas priekšā. Cilvēka tiesības tiek īstenotas bez jebkādas diskriminācijas [91. All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind]. Grām.: Latvijas Republikas Satversmes komentāri VIII nodaļa Cilvēka pamattiesības. Sagatavojis autoru kolektīvs prof. R. Baloža zin. red. Rīga: Latvijas Vēstnesis, 2011., 99., 102., 111. lpp.

context – with whom the victim is in relationship of subordination – the authors' note] or a responsible employee of an undertaking (company) or an organisation.

If this criminal offence is committed by a general subject liability sets in only if substantial harm has been caused. In this case harm that can be measured in monetary terms is not caused, but other lawful interests are significantly jeopardised.[19]

The Supreme Court has recognised that "[...] not every infringement upon the rights, guaranteed in the *Satversme* of the Republic Latvia, *per se*, without assessment of the infringement, can be recognised as substantial harm in the meaning of Section 23 of the law "On the Procedures for the Coming into Force and Application of the Criminal Law". Substantial harm is to be determined on the basis of evidence, verified in the court, assessment of the type on threat to interests, [...] traits of the person, against whom threats had been directed."[20] Namely, the assessment of substantial harm in cases where the harm cannot be measured in monetary terms can be subjective. In view of the nature of the criminal offence, in the case of sexual harassment it is not necessary to establish that substantial harm had been caused to the person, *inter alia*, but not only because sexual harassment may infringe upon several interests, which *per se* points to the harmfulness of the criminal offence.

Although sexual harassment is a sub-type of discrimination, the fact that sexual harassment is also a sub-type of sexual violence. In view of the above, in a case of sexual harassment, several interests are infringed upon, Section 149[1] of the Criminal Law, however, sets out liability only for violation of prohibition of discrimination.

Thus, currently, even if in practice Section 149[1] (2) of the Criminal Law could be applicable also to cases of sexual harassment, this regulation could not ensure punishment for all manifestations of sexual harassment.

Section 161 of the Labour Law defines liability for violation of prohibition of differential treatment in the area of legal labour relations, whereas Section 149[1] of the Criminal Law – for violation of prohibition of discrimination, protection of persons against sexual harassment is not ensured in practice. Namely, in accordance with the data provided by the Information Centre of the Ministry of the Interior, at the time when this article was written, no person had been made liable in accordance with Section 161 of the Labour Law, whereas, since 1 October 2005, one criminal proceeding had been initiated in accordance with Section 149[1] of the Criminal Law, which later was terminated pursuant to para. 2 of Section 377 of the Criminal Procedure Law; moreover, the description of the situation allows concluding that, in this case, another violation of prohibition of discrimination and not sexual harassment had been examined.[21] Neither can such data be found in judicature.

It has been argued that persons could be made liable for sexual harassment in accordance with Section 11 of the Law on Administrative Penalties for Offences in

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[19] *Luzon, G.* Criminalising Sexual Harassment, pp. 359–366.

[20] See Article 23 of "Par Krimināllikuma spēkā stāšanās un piemērošanas kārtību": LV likums [On the Procedures for the Coming into Force and Application of the Criminal Law: Law of the Republic of Latvia]. Latvijas Vēstnesis, No. 331/332, 04.11.1998.

[20] Latvijas Republikas Augstākās tiesas Krimināllietu departamenta 2016. gada 29. septembra lēmums lietā Nr. SKK-190/2016, krimināllieta Nr. 11816003310 [Supreme Court of the Republic of Latvia decision in the case No. 11816003310, SKK-190/2016]. Available: https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/kriminallietu-departaments/hronologiska-seciba?year=2016 [last viewed 03.04.2022].

[21] Data from the Information Centre of the Ministry of the Interior. Unpublished.

the Field of Administration, Public Order, and Use of the Official Language[22], which defines liability for petty hooliganism, Section 231 of the Criminal Law, which sets out liability for hooliganism, as well as Section 160 of the Criminal Law, which defines liability for sexual violence, as well as Section 132[1] of the Criminal Law, which sets out liability for stalking.[23]

Although sexual harassment is characterised by violation of generally accepted rules of conduct, in order to classify it as hooliganism or petty hooliganism, it must be established that, as the result of these actions, person's peace, operations of institutions or undertakings (companies) had been hindered. Thus, sexual harassment should be such that not only injures the victim but had affected also other persons. A situation like this could occur in public spaces; however, this comprises only a small number of potential cases, in view of the fact that the basic trait of sexual harassment does not have to be public character of actions or the fact that it affects also other persons, repeatedly underscoring that, most often, sexual harassment occurs in working or study environment, where relationships of subordination between the perpetrator and the victim are typical. The direct object of hooliganism as a criminal offence is public interests; however, in the case of sexual harassment, the victim's interests will always be the direct object. Hence, even if hooliganism could comprise sexual harassment, Section 231 of the Criminal Law does not cover cases where sexual harassment has occurred privately or publicly but did not affect other persons.

Likewise, Section 160 of the Criminal Law that envisages liability for sexual violence will not be appropriate grounds for making a person criminally liable for sexual harassment. Firstly, although sexual harassment may be also physical, significant feature of Section 160 of the Criminal Law is the perpetrator's motivation, i.e., gratification of sexual desire. There might be another motivation in a sexual harassment case. Namely, the aim of sexual harassment might be to humiliate or have negative impact on the victim by actions of sexual nature or comments due to gender, therefore, in the case of sexual harassment, it is of no importance whether this has been the motivation for its perpetration.[24]

Secondly, basic feature of the criminal offence, defined in Section 160 of the Criminal Law, is physical contact with the victim's body. As noted above, sexual harassment may be also verbal, and, in such a case, Section 160of the Criminal Law cannot ensure the respective protection.

Likewise, although in the case of sexual harassment unwelcome communication can be identified, the pre-condition of sexual harassment is not regularity of such actions, as it is in cases of stalking. Thus, the assertion that a person could be made criminally liable for sexual harassment in accordance with Article 132[1] of the Criminal Law does not withstand criticism.

Foreign criminal laws reveal diverse understandings of the definition of sexual harassment. For example, in France, sexual harassment is an injury to a person

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[22] Administratīvo sodu likums par pārkāpumiem pārvaldes, sabiedriskās kārtības un valsts valodas lietošanas jomā: LV likums [Law of the Republic of Latvia Law on Administrative Penalties for Offences in the Field of Administration, Public Order, and Use of the Official Language]. Latvijas Vēstnesis, No. 96, 20.05.2020.

[23] Bez miesas bojājumiem neskaitās? Atbildība par seksuālo uzmākšanos – robs Latvijas likumos [Does not count without bodily injuries? Liability on sexual harassment – a gap in legislation of Latvia]. Available: https://www.lsm.lv/raksts/zinas/latvija/bez-miesas-bojajumiem-neskaitas-atbildiba-par-seksualo-uzmaksanos-robs-latvijas-likumos.a346358/ [last viewed 10.03.2022].

[24] *Maass, A., Cadinu, M., Galdi, S.* Sexual Harassment, p. 342.

with the aim of obtaining favours of sexual nature.[25] Such criminal offence entails a sentence of deprivation of liberty up to two years, as well as monetary fine in the amount of EUR 30 000. In some cases (for example, if the victim is below the age of 15 or sexual harassment had been committed in a group), a sentence of deprivation of liberty up to even three years and monetary fine in the amount of EUR 45 000 are envisaged.[26] Evidently, the French legislator qualifies sexual harassment as a concept that is separate from discrimination; moreover, the type and scope of the uncompromising penalty, i.e., both the sentence of deprivation of liberty and the monetary fine, point to the understanding of the concept and harmfulness of this criminal offence in France.

In Germany, in turn, only the physical aspect of sexual harassment has been criminalised; i.e., a person is to be made criminally liable, if they have touched another person in a sexual manner and, thus, caused infringement.[27] The definition of sexual harassment is provided by the General Act on Equal Treatment[28], which states that, in the context of this Act, sexual harassment is deemed to be discrimination when an unwanted conduct of sexual nature takes place, including unwanted sexual acts and requests to carry out sexual acts, physical contact of sexual nature, comments of a sexual nature, as well as the unwanted showing or public exhibition of pornographic images, takes place with the purpose or effect of violating the dignity of the person concerned, in particular, where it creates intimidating, hostile, degrading, humiliating or offensive environment. Thus, the General Act on Equal Treatment provides that, in order to consider sexual harassment discrimination, the respective actions of sexual nature should be taken with the purpose of leaving negative impact upon a person in the particular environment.

The perpetrator's obligation to compensate for damages sets in only if the employee has complained about this type of discrimination to the respective department of the company or to the public authority. Compensation for sexual harassment at workplace does not exceed the amount of 3 monthly salaries. If sexual harassment is repeated but the employer has not ensured the protection of the person concerned against the colleagues or third persons in work environment, then the employee has the right to demand compensation for damages from the employer.

The above shows that the German legislator distinguishes the physical manifestation of sexual harassment as an action entailing criminal punishment, whereas civil law liability for other manifestations of sexual harassment, if it has happened within the framework of legal labour relations, is set out in the Federal Act on Equal Treatment, which defines the legal framework for discrimination. At the same time, the Federal Act on Equal Treatment contains the phrase "sexual action", the content of which should be clarified. In view of the restriction on the length of this article, the authors will not elaborate on it, returning to this discussion at another time.

In Lithuania, a person is to be punished for sexual harassment if, in searching for sexual contact or gratification, the perpetrator harasses a person who is in relationship

[25] Code pénal [Penal Code of the Republic of France]. Available: https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006070719/ [last viewed 03.04.2022].

[26] Sciences Po, Guidelines on Dealing with Sexual Harassment. Available: https://eige.europa.eu/sites/default/files/sciencespo_guidelines_on_dealing_with_sexual_harassment_2.pdf [last viewed 07.04.2022].

[27] Strafgesetzbuch [Criminal code of the Federal Republic of Germany]. Available: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [last viewed 03.04.2022].

[28] General Act on Equal Treatment. Available: https://www.gesetze-im-internet.de/englisch_agg/englisch_agg.html#p0101 [last viewed 03.04.2022].

of subordination with the perpetrator, in office environment or otherwise, or in other vulgar or similar manner, or by propositioning or making insinuations. In Lithuania, the respective criminal proceedings are initiated on the basis of an application by the victim or their representative, or request made by the prosecutor's office.[29] Sexual discrimination as a form of discrimination is regulated by "Law on Equal Opportunities for Women and Men"[30], which provides that sexual harassment is a form of discrimination, characterised by unwanted and insulting verbal, written or physical conduct of a sexual nature with a person, with the purpose of effect of violating the dignity of a person, in particular, when creating an intimidating, hostile, humiliating or offensive environment. As can be seen, this definition is similar to the one set out in the German Federal Act on Equal Treatment; however, the Lithuanian legislator has chosen to criminalise both verbal and physical manifestations of sexual harassment in the respective environment of subordination. If sexual harassment has occurred, for example, in working environment but without existing relationship of subordination, criminal liability does not set it. In such a case, the Labor Code of Lithuania[31] provides that sexual harassment in working environment is a gross breach of work duties, for which unilateral termination of legal labour relation is possible.

Examination of regulation of foreign countries allows to conclude that cases of sexual harassment are criminalised on the basis of different criteria. I.e., in Germany, criminal liability is envisaged only for physical manifestations of sexual harassment, whereas France and Lithuania envisage criminal liability for sexual harassment also without a physical contact. Although legal regulation on sexual harassment differs in various Member States of the European Union, the majority of States have consolidated the concept of sexual harassment as a form of discrimination, which entails certain legal consequences, even if the respective manifestation has not been criminalised. In the majority of States, at least some manifestations of sexual harassment have been criminalised.

Presumably, the Latvian legislator should develop such criminal law regulation that would comprise all possible types of sexual harassment, irrespective of their objective manifestations and purpose that the perpetrator wanted to achieve by their actions, thus ensuring protection to a person both in a situation where sexual harassment occurred with the aim of gratifying one's sexual desires, as well as in situations where it is linked to violation of the prohibition of discrimination and manifests itself as an infringement upon equality and self-respect.

Summary

1. In view of the considerations presented in the article, the authors hold the opinion that the Latvian legislator should decide on both defining sexual harassment as a separate criminal offence in the Criminal Law and on specifying Section 1491 of the Criminal Law, providing that sexual harassment in environment where raising objections to respective comments or actions could influence the victim's legal labour or any other relations (e.g., the study process) or in any other way worsen the victim's role in the respective environment should be deemed discrimination.

[29] Criminal Code of the Republic of Lithuania. Available: https://www.legislationline.org/download/id/8272/file/Lithuania_CC_2000_am2017_en.pdf [last viewed 04.04.2022].

[30] Republic of Lithuania Law on Equal Opportunities for Women and Men. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/488fe061a7c611e59010bea026bdb259 [last viewed 04.04.2022].

[31] Labour Code of the Republic of Lithuania. Available: https://e-seimas.lrs.lt/rs/legalact/TAD/TAIS.391384/ [last viewed 07.04.2022].

If subordination in relations between the perpetrator and the victim is established, in view of the perpetrator's more privileged position, a more severe liability should be envisaged.

2. In such a case, the purpose of the criminal offence should be worsening the position of the other person in the respective environment. If the criminal offence has been committed with the aim of gratifying one's sexual desires, then there are no grounds for discussing sexual harassment as violation of prohibition of discrimination, in view of the fact that the purpose is one of the most significant line of demarcation between sexual harassment as a sub-type of discrimination and sexual harassment as a separate criminal offence. Moreover, such unwelcome verbal and physical manifestations should be penalised as sexual harassment also in the cases, when there is no relationship of subordination between the persons.
3. This would ensure that any form of sexual harassment is targeted, whether assessed as manifestation of discrimination or unlawful action aimed at gratifying sexual desire.

Sources

Bibliography

1. Bez miesas bojājumiem neskaitās? Atbildība par seksuālo uzmākšanos – robs Latvijas likumos [Does it not count without bodily injuries? Liability for sexual harassment – gap in legislation of Latvia]. Available: https://www.lsm.lv/raksts/zinas/latvija/bez-miesas-bojajumiem-neskaitas-atbildiba-par-seksualo-uzmaksanos-robs-latvijas-likumos.a346358/ [last viewed 10.03.2022].
2. EP plenārsesijā tiek apspriesta seksuāla uzmākšanās Eiropas Savienībā [Sexual harassment: MEPs debate situation in the EU in plenary]. Available: https://www.europa.eu/news/lv/headlines/society/20171023STO86603/ep-plenarsesija-tiek -apspriesta-seksuala-uzmaksanas [last viewed 08.04.2022].
3. *Krastiņš, U., Liholaja, V.* Krimināllikuma komentāri. Otrā daļa (IX–XVII nodaļa). Trešais papildinātais izdevums [Commentaries on the Criminal Law. Part Two (Chapter IX–XVII). 3rd Supplemented Edition]. Rīga: Tiesu namu aģentūra, 2022.
4. *Levits, E.* 91. Visi cilvēki ir vienlīdzīgi likuma un tiesas priekšā. Cilvēka tiesības tiek īstenotas bez jebkādas diskriminācijas [91. All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind]. Grām.: Latvijas Republikas Satversmes komentāri VIII nodaļa Cilvēka pamattiesības. Sagatavojis autoru kolektīvs prof. R. Baloža zin. red. Rīga: Latvijas Vēstnesis, 2011.
5. *Luzon, G.* Criminalising Sexual Harassment. In: The Journal of Criminal Law, 81(5). Available:https://heinonline-org.datubazes.lanet.lv/HOL/Page?collection=journals&handle=hein.journals/jcriml2017&id=351&men_tab=srchresults [last viewed 09.03.2022].
6. *Maass, A., Cadinu, M., Galdi, S.* Sexual Harassment: Motivations and Consequences. In: The SAGE Handbook of Gender and Psychology, 1st edition. Editors: M.K. Ryan and, N.R. Branscombe. [B.v.]: Sage Publications, 2013.

Normative acts

1. Convention on the Elimination of All Forms of Discrimination against Women New York. Signed in New York, 18.12.1979. Available: https://www.refworld.org/docid/3ae6b3970.html [last viewed 06.04.2022].
2. Council of Europe Convention on preventing and combating violence against women and domestic violence. Istanbul 11.05.2011. Available: https://rm.coe.int/168008482e [last viewed 06.04.2022].
3. Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. Official Journal, 5.10.2002 L 269/15.
4. Directive 2006/54/EC of the European Parliament and the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). Official Journal, 26.7.2006 L 204/23.

5. Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence against women (Eleventh session, 1992), U.N. Doc. A/47/38 at 1 (1993), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 243 (2003). Available: http://hrlibrary.umn.edu/gencomm/generl19.htm [last viewed 09.03.2022].
6. Sexual violence against women – Contribution to a strategy for countering the various forms of such violence in the Council of Europe member states. European Committee for Equality between Women and Men. EG (91) 1. Strasbourg, 1991, p. 12.
7. Sciences Po, Guidelines on Dealing with Sexual harassment. Available: https://eige.europa.eu/sites/default/files/sciencespo_guidelines_on_dealing_with_sexual_harassment_2.pdf [last viewed 07.04.2022].
8. Administratīvās atbildības likums: LV likums [Administrative Liability Law: Law of the Republic of Latvia]. Latvijas Vēstnesis, No. 225, 14.11.2018.
9. Administratīvo sodu likums par pārkāpumiem pārvaldes, sabiedriskās kārtības un valsts valodas lietošanas jomā: LV likums [Law of the Republic of Latvia Law on Administrative Penalties for Offences in the Field of Administration, Public Order, and Use of the Official Language]. Latvijas Vēstnesis, No. 96, 20.05.2020.
10. Darba likums: LV likums [Labour Law: Law of the Republic of Latvia]. Latvijas Vēstnesis, No. 105, 06.07.2001.
11. Par Krimināllikuma spēkā stāšanās un piemērošanas kārtību: LV likums [On the Procedures for the Coming into Force and Application of the Criminal Law: Law of the Republic of Latvia]. Latvijas Vēstnesis, No. 331/332, 04.11.1998.
12. Code pénal [Penal Code of the Republic of France]. Available: https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006070719/ [last viewed 03.04.2022].
13. Criminal Code of the Republic of Lithuania. Available: https://www.legislationline.org/download/id/8272/file/Lithuania_CC_2000_am2017_en.pdf [last viewed 04.04.2022].
14. General Act on Equal Treatment. Available: https://www.gesetze-im-internet.de/englisch_agg/englisch_agg.html#p0101 [last viewed 03.04.2022].
15. Labor Code of the Republic of Lithuania. Available: https://e-seimas.lrs.lt/rs/legalact/TAD/TAIS.391384/ [last viewed 07.04.2022].
16. Republic of Lithuania Law on Equal Opportunities for Women and Men. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/488fe061a7c611e59010bea026bdb259 [last viewed 04.04.2022].
17. Strafgesetzbuch [Criminal code of the Federal Republic of Germany]. Available: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [last viewed 03.04.2022].

Case law

1. Latvijas Republikas Augstākās tiesas Krimināllietu departamenta 2016. gada 29. septembra lēmuma lietā Nr. SKK-190/2016, krimināllieta Nr.11816003310 [Supreme Court of the Republic of Latvia decision in the case No. 11816003310, SKK-190/2016]. Available: https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/kriminallietu-departaments/hronologiska-seciba?year=2016 [last viewed 03.04.2022].
2. Supreme Court of the United States of America, Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 1998. Available: https://supreme.justia.com/cases/federal/us/523/75/#tab-opinion-1960325 [last viewed 12.03.2022].

Other sources

1. Committee on Elimination of Discrimination against Women. In dialogue with Latvia, Committee on the Elimination of Discrimination against Women calls for specific gender equality legislation. Available: https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25546&LangID=E [last viewed 10.03.2022].
2. Data from the Information Centre of the Ministry of the Interior. Unpublished.

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"Not Permanent, Nor Static": Perspectives on "Humanisation" of International Immunities in International Law

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"Humanisation" has had a variable impact on international law. Nevertheless, it has failed to significantly affect the state-centric paradigm underpinning state and state officials' jurisdictional immunities. The present contribution is intended to provide some remarks on the challenges and perspectives on the humanisation of international immunities in international law.

Keywords: humanisation of international law, exceptions to international immunities, *jus cogens*, *controlimiti*.

Contents

Introduction: Shapeshifting content and nature of international immunities

The term "humanisation of international law" refers to "the radiation, or the reforming effect that human rights and humanitarian law has had, and is having, on other fields of public international law"[1]. This phenomenon has had a variable

[1] *Meron, Th.* The Humanization of International Law. Leiden: Martinus Nijhoff, 2006, p. xv.

impact, but failed to significantly affect the state-centric paradigm underpinning jurisdictional immunities ("international immunities") of state and its officials[2].

It is true that, over the last century, state immunity has passed from "absolute" to "restricted", and is today applicable only in relation to *jure imperii* acts[3]. Yet, humanisation played little role in the process. For instance, the *jure gestionis* exception stemmed primarily from the need to better safeguard the economic interests of individuals conducting business with foreign states[4], while the territorial tort exception prioritises a strong jurisdictional connection between the domestic forum and the torts attributable to foreign states[5]. In contrast, as the rise and fall of the *jus cogens* exception shows, state immunity "has been assailed from a human rights perspective, but without much success"[6].

On the other hand, after the Second World War, the inception of the principle of individual international responsibility as independent from state responsibility paved the way to the elaboration of exceptions to state officials' immunities from both criminal and civil domestic jurisdiction for the commission of international crimes[7]. The actual scope of these exceptions, as well as their rationale, are still a matter of debate[8].

One may wonder why humanisation has struggled so much to effectively "reform" international immunities. This issue has been addressed mainly with reference to the *jus cogens* exception[9]. The most prominent theory revolves around the "procedural" nature of state immunity, as opposed to the "substantial" one of human rights. According to this dichotomy, there is no genuine conflict between these areas of law, since they operate on separate levels: state immunity bars the jurisdiction of domestic judges, it does not, *per se*, prohibits the settlement of disputes involving *jus cogens* violations. This "impossible antinomy" *a fortiori* applies to any violation of human rights obligations (including that of access to justice), as well as to the commission of international crimes by state officials, at least in relation to personal immunity[10].

This argument displays two possible flaws: first, it *a priori* characterises international immunities as procedural in nature. While this is not the appropriate place to elaborate on this issue, it is at least worth noting that the "true" nature of international immunities should not be taken for granted[11].

The second problem is that, in any case, the formalistic distinction between procedural and substantial rights only sidesteps the contradiction between international

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[2] Among others, *Pavoni, R*. Human Rights and the Immunities of Foreign States and International Organizations. In: Hierarchy in International Law: The Place of Human Rights, *De Wet, E., Vidmar, J.* (eds). Oxford: OUP, 2012, p. 71.

[3] *Higgins, R*. Equality of States and Immunity from Suit: A Complex Relationship. The Netherlands Yearbook of International Law, Vol. 43, 2012, p. 137.

[4] *Yang, X*. State Immunity in International Law. Cambridge: CUP, 2012, p. 19.

[5] *Fox, H., Webb., Ph.* Law of State Immunity. Oxford: OUP, 3rd ed., 2013, p. 466.

[6] *Sheeran, S.* The Relationship of International Human Rights and General International Law: Hermeneutic Constraint, or Pushing the Boundaries? In: Routledge Handbook of International Human Rights, *Sheeran, S., Rodely, N.* (eds). London: Routledge, 2013, p. 91.

[7] *Webb, Ph*. Human Rights and the Immunities of State Officials. In: Hierarchy in International Law: The Place of Human Rights, *De Wet, E., Vidmar, J.* (eds). Oxford: OUP, 2012, p. 157.

[8] The International Law Commission (ILC) is currently undertaking studies on the immunity of state officials from foreign criminal jurisdiction. Available: https://legal.un.org/ilc/guide/4_2.shtml [last viewed 24.03.2022].

[9] *Pavoni, R*. Human Rights, p. 74.

[10] Judgment of 14 February 2002 of the ICJ in Case Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), para. 60.

[11] *Orakhelashvili, A*. Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening). American Journal of International Law, Vol. 106, 2012, p. 609.

immunities and humanisation instances, and overshadows the crux of the matter, i.e., the fact that international practice does not clearly support the existence of any "human rights exception" yet.

At the same time, the possibility that this trend of "humanising" could still lead to some development of international immunities is not a naïve "human-rightism"[12]. Some hints in states' practice do appear to suggest the possibility of a gradual shift to a more "humanised" regime.

1. Cross-fertilisation of domestic judges' decisions

"Cross-fertilisation" encapsulates domestic judges' proneness to support the interpretation and application of international law by recalling one or more decisions of foreign domestic judges, both as manifestation of practice and *opinio juris* and as subsidiary means for the determination of the applicable rules[13]. Cross-fertilisation takes on particular importance when it comes to the regime of international immunities. In fact, this area "is at the point of intersection of international law and national procedural law"[14], placing *direct* obligations on domestic judges.

This is epitomised by the shift from an "absolute" to a "restricted" state immunity triggered at the turn of the 20th century by Belgian and Italian courts[15]. Indeed, the distinction between *jure imperii* and *jure gestionis* acts did not remain a Belgian and Italian anomaly, but soon spilt over into Austrian, Egyptian and Swiss case law, promoting a gradually homogeneous practice worldwide[16]. The formation of the territorial tort exception followed a similar trajectory[17].

It is important to note that cross-fertilisation spread mainly among judges belonging to the same type of legal system. In fact, these two exceptions had been elaborated upon almost exclusively by civil law judges, while common law judges tenaciously enforced state immunity as almost absolute[18].

The reason behind this different approach is hard to explain. The different perception of their role by domestic judges themselves could have had some influence[19]. Civil law judges, when faced with a friction between international and domestic law, appear more willing to bend the former to the legal and political logic of the latter by devising original solutions. They act as state organs producing (new) practice[20]. Common law judges, on the other hand, are more cautious and favour a position which is more consistent with the dictates of international law. The assumption holds that it is not the task of domestic judges to unilaterally hammer out a rule that, although desirable, does not conform to international practice. Domestic decisions are, first and foremost, subsidiary means for the determination of international law.

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[12] That is, "the 'posture' that consists in being absolutely determined to confer a form of autonomy […] on a "discipline" […]: the protection of human rights", *Pellet, A*. "Human Rightism" and International Law. Italian Yearbook of International Law, Vol. 10, 2000, p. 3.

[13] *Yang, X*. State Immunity, p. 28.

[14] *Hess, B*. The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property. European Journal of International Law, Vol. 4, 1993, p. 271.

[15] *Fox, H., Webb, Ph.* Law of State Immunity, p. 150.

[16] Ibid., p. 153.

[17] Ibid., p. 464.

[18] Ibid., p. 137.

[19] *Roberts, A*. Comparative International Law? The Role of National Courts in Creating and Enforcing International Law. International and Comparative Law Quarterly, Vol. 60, 2011, p. 61.

[20] *Sciso, E*. Italian Judges' Point of View on Foreign State's Immunity. Vanderbilt Journal of Transnational Law, Vol. 44, 2011, p. 1202.

This different approach has profoundly influenced the humanisation of international immunities. Thus, the poor dialogue between the Cassazione[21] and the House of Lords[22] was one of the reasons that contributed to curbing the development of a *jus cogens* exception. Conversely, the *Pinochet (3)* decision[23], issued by the House of Lords, quickly cross-fertilised Belgian, German and US case law, eventually establishing an exception to former Heads of state personal immunity from criminal domestic jurisdiction for the commission of international crimes[24]. Similarly, cross-fertilisation has corroborated "the contours" of a customary exception to state officials' functional immunity from criminal domestic jurisdiction for the commission of international crimes[25].

It is difficult to predict whether and to what extent cross-fertilisation will channel further humanisation to the international immunity regime. International scholarship did suggest that cross-fertilisation would have boosted human rights and accountability[26]. However, the activity of domestic judges may be determined by *ad hoc* pieces of legislation or conditioned by a certain legal or political background. Domestic judges may also lack the necessary knowledge or tools to address such a specialised field[27].

Still, it would seem myopic to underestimate the transformative potential of the cross-fertilisation of domestic judges' decisions. After all, when it comes to international immunities, international practice "illustrates how a single domestic court decision which rests on a dubious interpretation of precedent and principle may gain ground rapidly"[28].

2. Executives' stance

Executives' practice has substantially contributed to the development of the international regime of immunities[29].

Executives' acquiescence was pivotal to catalyse the distinction between *jure imperii* and *jure gestionis* acts in customary law by Belgian and Italian judges. The lack of reaction by the forum state might be attributed to the desire to safeguard domestic businesses from contractual breaches by foreign states, also with a view to attracting investments from abroad. As for defendant states, they refrained from invoking the violation of their immunity, probably because they tacitly agreed on the desirability of such an exception, also in terms of reciprocity, or because anyway

[21] Judgment of the Italian Court of Cassation of 11 March 2004 in Case No. 5044.

[22] Judgment of the House of Lords of 14 June 2006 in Case Jones and Others v. The Kingdom of Saudi Arabia.

[23] Judgment of the House of Lords of 24 March 1999 in Case Regina v. Bow Street Stipendiary Magistrate, *Ex parte* Pinochet Ugarte (No. 3), p. 17.

[24] *Webb, Ph*. Human Rights and the Immunities, p. 119.

[25] Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur. Yearbook of the International Law Commission, Vol. II, Part Two, 2016, para. 180.

[26] *Wuerth, I*. International Law in Domestic Courts and the Jurisdictional Immunities of the State Case. Melbourne Journal of International Law, Vol. 13, 2012, p. 829.

[27] *Van Alebeek, R., Pavoni, R.* Immunities of States and their Officials. In: International Law in Domestic Courts: A Casebook, *Nollkaemper, A., et al.* (eds). Oxford: OUP, 2018, p. 158.

[28] *Van Alebeek, R., Pavoni, R.* Immunities of States, p. 169.

[29] Executives' practice refers to "any form of executive act, including executive orders, decrees and other measures; official statements on the international plane or before a legislature; and claims before national or international courts and tribunals", Draft Conclusions on Identification of Customary International Law, with Commentaries. Yearbook of the International Law Commission, Vol. II, Part Two, 2018, Conclusion 6, para. 5.

equipped with immunity from execution[30]. Be that as it may, the absence of protests avoided the formation of an international dispute and, consequently, the possible intervention of an international court or tribunal, a circumstance which could have ended up curbing the *in fieri* exception.

In common law systems, the contribution of the executive is even more evident. Here, faced with domestic judges' intransigence in interpreting and applying state immunity as (almost) absolute[31], executives took the lead and, starting from the late 1970s, promoted the adoption of *ad hoc* pieces of legislation providing for the *jure gestionis*, the territorial tort, and other exceptions, forcibly "getting in line" domestic judges' decisions and indirectly corroborating the customary nature of the codified exceptions[32].

Against this backdrop, the executives' reluctance to recognise a "human rights exception" may *prima facie* stand out. Executives have usually submitted their opinions to domestic judges, supporting the application of foreign state or state officials' immunities before "human rights exception" pleas[33]. This is understandable, considering that the executive is normally in charge of managing international relations and that the affected state will almost certainly protest against the violation of its rights. True, executives may weaponize the enforcement of human rights through domestic judges as a means of advancing their foreign policy, but these are rather exceptional cases[34]. In addition, and tellingly, no legal act or international instrument on state immunities provides for a *jus cogens* exception.

All in all, executives do not appear particularly prone to personally stand up for advocating the existence of *new* exceptions to international immunities. Yet, some elements also suggest a more nuanced view on the issue. Executives have sometimes shied away from stigmatizing the judiciary's "humanising" ventures[35]. Moreover, while ratifying the 2004 United Nations Convention on Jurisdictional Immunities of States, some executives appended a declaration specifying that the ratification was without prejudice to any further development on the protection of human rights[36]; others have introduced new statutory exceptions to state immunity[37] and to state officials' immunity from civil domestic jurisdiction[38], or have enacted pieces of legislation excluding state officials' immunity, *both personal and functional*, from criminal domestic jurisdiction for the commission of the international crimes listed under the Rome Statute[39]. Finally, several states did comment favourably on the desirability of an exception to state officials' functional immunity from criminal domestic jurisdiction for the commission of international crimes in the context of the ILC works[40].

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30 *Fox, H., Webb, Ph.* Law of State Immunity, p. 15.
31 *Ibid.,* p. 137.
32 Ibid., p. 139.
33 See the case law in *Wuerth, I.* International Law, p. 829.
34 Ibid., p. 837.
35 Ibid., p. 831.
36 *Van Alebeek, R., Pavoni, R.* Immunities of States, p. 162.
37 Like the "sponsor of terrorism" exception, see Sections 1605A of the US Foreign Sovereign Immunities Act and 6.1 of Canada's State Immunity Act.
38 Like the "torture victim protection" exception, see 28 USC 1350.
39 Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur. Yearbook of the International Law Commission, Vol. II, Part Two, 2016, para. 58.
40 *Barkholdt, J., Kulaga, J.* Analytical Presentation of the Comments and Observations by States on Draft Article 7. KFG Working Paper Series, Vol. 4, 2018, p. 8.

3. Conservative approach of international courts and tribunals

International courts and tribunals have consistently resisted "humanising" temptations when ruling on international immunities.

For instance, in *Al-Adsani* the European Court of Human Rights (ECtHR) made clear that the recognition of state immunity does not entail a violation of the right of access to justice under Article 6 of the European Convention on Human Rights, even if the state allegedly violated *jus cogens* obligations[41]. It further ruled out the existence of a customary *jus cogens* exception to state immunity[42], even before a *forum necessitatis* pledge[43]. In *Jones*, the ECtHR also favoured a "pragmatic understanding" in putting on the same footing the states' immunity and the state officials' functional immunity from *civil domestic jurisdiction* for the commission of international crimes, including acts of torture, arguing that, "if it were otherwise, State immunity could always be circumvented by suing named officials"[44].

In *Arrest Warrant*, the International Court of Justice (ICJ) stated that incumbent heads of state, heads of government and ministers of foreign affairs enjoy personal immunity from both criminal and civil domestic jurisdiction, even for the alleged commission of war crimes and crimes against humanity[45]. Moreover, in an ambiguous *obiter dictum*, the ICJ seemed to argue that former state officials lose their personal immunity before domestic courts *only* "as in respect of acts committed during th[e] period in office *in a private capacity*"[46]. Again, in *Jurisdictional Immunities* the ICJ specified that the territorial tort exception does not cover unlawful acts committed by armed forces in the context of an armed conflict and that there is no *jus cogens* exception applicable to state immunity, even if obtaining compensation before the competent judge has become unfeasible[47].

Criminal international courts and tribunals, such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court, have denied state officials' immunity for the commission of international crimes[48]. However, they did so mainly with respect to *their* statutory jurisdiction, paradoxically reinforcing the *a contrario* argument that, under customary law – i.e., lacking any *ad hoc* provision to the contrary –, state officials do enjoy (personal) immunity from

[41] Judgment of 21 November 2001 of the ECtHR in Case Al-Adsani v. United Kingdom (application No. 35763/97), para. 61.

[42] Ibid.

[43] Judgment of 15 March 2018 of the ECtHR in Case Naït-Liman v. Switzerland (application No. 51357/07), para. 188.

[44] Judgment of 14 January 2014 of the ECtHR in Case Jones and Others v. United Kingdom (applications Nos. 34356/06 and 40528/06), para. 202.

[45] Judgment of 14 February 2002 of the ICJ in Case Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), paras 51, 54 and 58.

[46] Judgment of 14 February 2002 of the ICJ in Case Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), para. 61, emphasis added. And see Judgment of the ICJ of 4 June 2008 in Case Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), paras 170 and 194.

[47] Judgment of 3 February 2012 of the ICJ in Case Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), para. 101. On this ruling see, among others, *Conforti, B.* The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity. Italian Yearbook of International of International Law, Vol. 21, 2011, p. 138, and *Pisillo Mazzeschi, R.* Il rapporto tra norme di *ius cogens* e la regola sull'immunità degli Stati: alcune osservazioni critiche sulla sentenza della Corte internazionale di giustizia del 3 febbraio 2012. Diritti umani e diritto internazionale, Vol. 6, 2012, p. 310.

[48] Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur. Yearbook of the International Law Commission, Vol. II, Part Two, 2016, para. 96.

criminal jurisdiction both before international and domestic courts and tribunals for the commission of such crimes[49].

This "conservative approach" might be explained on the basis of the fact that international immunities represent one of the oldest branches of international law and corollary of the fundamental principles of reciprocity and sovereign equality of states. Therefore, it is understandable that international courts and tribunals tend to use a pinch of caution in departing from customary law or in recognising the existence of an exception that has not fully consolidated into practice in this matter.

Still, the role of international courts and tribunals in the development of international immunities can be problematic. One has just to think of the above recalled *jure gestionis* exception: if, in the early decades of the 20th century, an international court or tribunal had ruled on the validity of the so-called "Italian-Belgian theory", it would have likely declared it at variance with international law[50]. It is impossible to know whether such a stance would have irreversibly stopped the shift from an absolute to a restricted immunity. In any case, as observed by Dame Rosalyn Higgins, the growing protagonism of international courts and tribunals is unfortunate, as domestic judges are the natural repository for findings on this area of international law[51].

4. The "*controlimiti* doctrine"

The *controlimiti* doctrine works as an "emergency brake" in the case of irreconcilable conflict between the application of international (or supranational) law and compliance with the fundamental principles of the constitutional order of states. The (dualistic) solution is to uphold the latter to the detriment of the former[52].

Domestic judges may feel inclined to resort to it to pursue their quest for a more "humanised" regime by questioning the constitutionality of the application of international immunities before (gross) violations of human rights[53]. This is exactly what happened in the Italian Constitutional Court's (ICCt) *sentenza* No. 238 of 2014. The legal background of this ruling is well known: in 2004, the Cassazione recognized the existence of a *jus cogens* exception in international law and denied the applicability of Germany's immunity for the commission of war crimes in Italy by Nazi armed forces from 1943 to 1944[54]. *Ferrini* set a problematic precedent and eventually led to the *Jurisdictional Immunities* case. As a result, the Italian executive enacted an *ad hoc* piece of legislation to force Italian judges to comply with the ICJ judgment[55], but the Tribunal of Florence raised "issue of constitutionality" with respect to the compatibility between this and other pieces of legislation and Articles 2 and 24 of the Italian

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49 *Webb, Ph.* Human Rights, p. 126.

50 *Conforti, B.* The Judgment, p. 142.

51 *Higgins, R.* Equality of States, p. 144 (referring to state immunity).

52 *Peters, A., Volpe, V.* Reconciling State Immunity with Remedies for War Victims in a Legal Pluriverse. In: Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court *Sentenza* 238/2014, *Volpe, V., et al.* (eds). E-book: Springer, 2021, p. 23.

53 *Conforti, B.* The Judgment, p. 133.

54 Judgment of the Italian Court of Cassation of 11 March 2004 in the case No. 5044, para. 9.1. See, among others, *Iovane, M.* The *Ferrini* Judgment of the Italian Supreme Court: Opening Up Domestic Courts to Claim of Reparation for Victims of Serious Violations of Fundamental Rights. Italian Yearbook of International Law, Vol. 14, 2004, p. 165, *Gianelli, A.* Crimini internazionali ed immunità degli Stati alla giurisdizione nella sentenza Ferrini. Rivista di diritto internazionale, Vol. 87, 2004, p. 643 and *De Sena, P., De Vittor, F.* State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case. European Journal of International Law, Vol. 16, 2005, p. 89.

55 Law of 14 January 2013, No. 5, Article 3.

Constitution[56]. In an unexpected turn of events, the ICCt upheld the issue of constitutionality, noting that:

> *[T]he fundamental principles of the constitutional order and inalienable human rights constitute a limit to the introduction [within the Italian legal system] of generally recognized norms of international law […]. [I]nsofar as the law of immunity from jurisdiction of States conflicts with the[se] fundamental principles, it has not entered the Italian legal order and, therefore, does not have any effect therein*[57].

The change of strategy is evident: unlike the Cassazione in *Ferrini*, the ICCt acknowledged the lack of a *jus cogens* exception in international law; it is for this reason that it triggered the *controlimiti* to reassert the right of access to justice "especially when the right at issue is invoked to protect fundamental human rights"[58]. Strictly speaking, this judgment is not an element of humanisation, although, in a broader sense, it is a highly qualified element of practice expressing an *opinio juris* and, therefore, it "may also contribute to a desirable – and desired by many – [*sic*] evolution of international law itself"[59].

Sentenza No. 238 has sparked "extensive and heated scholarly commentary"[60]. As of today, however, its actual impact has been minimal, if not irrelevant. At the domestic level, Italian judges re-embraced the *Ferrini* jurisprudence and, in splendid isolation, keep condemning Germany to pay reparation to Italian victims of Nazi massacres and deportation[61].

On the contrary, outside Italy, *sentenza* No. 238 has hardly inspired imitation attempts. There is no clear reason as to why it is so. One may argue that the lack of cross-fertilisation is due to both the unique set of circumstances characterising the whole legal ordeal and the peculiarity of the Italian institutional framework that ultimately allowed Constitutional Court to rule against the enforcement of an international judgment upon request of a domestic judge, indirectly validating the Supreme Court's previous case law. However, the *controlimiti* doctrine virtually applies in any legal system equipped with a constitutional review mechanism. This is also true when international immunities have been codified in a domestic act, although the question will likely narrow down to the constitutionality of the that act, without involving the applicability of international law.

In addition, the more frequent establishment of *ad hoc* judicial bodies tasked with adjudicating disputes arising from the violations of human rights by states in conflict scenarios may have contributed to reducing the filing of claims for compensation

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[56] Orders of the Tribunal of Florence of 21 January 2014 in Cases Nos 84, 85 and 113.

[57] Judgment of the Italian Constitutional Court of 22 October 2014 in the case No. 234, paras 3.2. and 3.5. The translation is in *Volpe, V., others* 2021, p. 415.

[58] Judgment of the Italian Constitutional Court of 22 October 2014 in Case No. 234, para. 3.4.

[59] Ibid., para. 3.3.

[60] See, among others, *Tanzi, A. M.* Un difficile dialogo tra Corte internazionale di giustizia e Corte costituzionale. La Comunità internazionale, Vol. 70, 2015, p. 13, *Cataldi, G.* A Historic Decision of the Italian Constitutional Court on the Balance between the Italian Legal Order's Fundamental Values and Customary International Law. Italian Yearbook of International Law, Vol. 24, 2015, p. 37 and *Cannizzaro, E.* Jurisdictional Immunities and Judicial Protection: The Decision of the Italian Constitutional Court No. 238 of 2014. Rivista di diritto internazionale, Vol. 98, 2015, p. 126.

[61] Recently, Italy has established a public fund for the liquidation of these damages. Once the payment is made, all the rights related to the claim shall cease to exist, see Decree-Law of 30 April 2022, No. 36, Article 43.

before domestic courts[62]. Again, this explanation is not particularly satisfying, since it applies to a limited number of potential cases.

Of course, it may well be that domestic judges regard the application of international immunities consistent with their respective constitutional order, thereby withholding *ab initio* the formation of a "constitutional exception". After all, whether to invoke the *controlimiti* is, first and foremost, a question of domestic law, not of international law. Still, it seems just a matter of time (and chance) before other domestic judges find themselves in a situation akin to that of the ICCt and justify the lifting of state or state officials' immunities by recourse to the *controlimiti* doctrine.

Recently, the Seoul Central District Court did apply the *controlimiti* doctrine to condemn Japan to compensate twelve South Korean women who had been victims of sexual slavery perpetrated by members of the Imperial Japanese Army during Japan's 1910 to 1945 colonial rule of Korea. The South Korean judges remarked that "the doctrine of State immunity is not permanent nor static" and, referring to *Ferrini* and *sentenza* No. 238, ruled that the application of state immunity would deprive "victims of their right of access to courts guaranteed by the Constitution"[63].

Summary

Humanisation constantly strives for pushing the state-centric boundaries of international immunities forward. This area of law has proved remarkably steady, but it is dubious whether some elements of the international immunity regime will stand the test of time.

For instance, it may seem "inherently anomalous […] that the exercise of territorial jurisdiction prevails over immunity where torts are concerned, but not where criminal acts of foreign military are concerned"[64]. In the same vein, the "impossible antinomy" theory translates into an over-formalistic avoidance technique and appears ill-suited to convincingly settle the "value conflict" between the fundamental right of access to justice and state immunity before a *forum necessitatis* pledge for gross violations of human rights. In addition, this theory falls short of explaining why, when it comes to gross violations of human rights, state officials' functional immunity does not appear to benefit from its "procedural" nature as state officials' personal immunity and state immunity do[65].

The recent ILC works also support a more "humanised" law of state officials' immunities and could be instrumental in reigniting the debate on the admissibility of a *jus cogens* exception to state immunity. In particular, a customary exception to state officials' functional immunity from criminal domestic jurisdiction for

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[62] *Fontanelli, F.* Sketches for a Reparation Scheme: How Could a German-Italian Fund for the IMIs Work? In: Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court *Sentenza* 238/2014, *Volpe, V., et al.* (eds). E-book: Springer, 2021, p. 168.

[63] Judgment of the Seoul Central District Court of 8 January 2021 in Case No. 2016 Ga-Hap 505092, paras. C(3)(3) and C(3)(6)(i). Recently, however, another South Korean court has upheld Japan's immunity in an almost identical case, see Amnesty International. South Korea: Disappointing Japan Ruling Fails to Deliver Justice to "Comfort Women". Available: https://www.amnesty.org/en/latest/news/2021/04/south-korea-disappointing-japan-ruling-fails-to-deliver-justice-to-comfort-women/ [last viewed 24.03.2022].

[64] *Higgins, R.* Equality of States, p. 138.

[65] Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur. Yearbook of the International Law Commission, Vol. II, Part Two, 2018, para. 130. The major counter-argument obviously being that any theoretical contradiction is only of secondary importance in the face of how international practice has developed.

the commission of international crimes could represent a dialectical argument for challenging the theoretical consistency of the applicability of state immunity from civil domestic jurisdiction for the commission of corresponding acts.

Finally, a more frequent recourse to the *controlimiti* doctrine may contribute to the establishment of new exceptions.

On the other hand, it is crucial to stress that international immunities play an essential role in ensuring an orderly allocation and exercise of jurisdiction and in respecting the sovereign equality of states. Therefore, any exception should (and, most likely, will) progressively emerge in international practice as the result of a careful composition between these and equally valuable, but diverging interests. For instance, a strong territorial connection with the forum state justifies the lifting of state immunity even with respect to *jure imperii* acts. Similarly, the lack of exceptions to incumbent state officials' personal immunity finds a reasonable counterweight in its temporary nature.

In conclusion, guessing whether and to what extent international immunities will actually develop entails the risk of conflating the "ought" and the "is" of international law[66]. In the light of international practice, it looks likely that the conundrum of the conflict between international immunities and human rights will be solved halfway, hopefully leaning towards a more comprehensive protection of the latter, at least before the most heinous violations of international law.

Sources

Bibliography

1. *Barkholdt, J., Kulaga, J.* Analytical Presentation of the Comments and Observations by States on Draft Article 7. KFG Working Paper Series, Vol. 4, 2018.
2. *Cannizzaro, E.* Jurisdictional Immunities and Judicial Protection: The Decision of the Italian Constitutional Court No. 238 of 2014. Rivista di diritto internazionale, Vol. 98, 2015.
3. *Cataldi, G.* A Historic Decision of the Italian Constitutional Court on the Balance between the Italian Legal Order's Fundamental Values and Customary International Law. Italian Yearbook of International Law, Vol. 24, 2015.
4. *Conforti, B.* The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity. Italian Yearbook of International of International Law, Vol. 21, 2011.
5. *De Sena, P., De Vittor, F.* State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case. European Journal of International Law, Vol. 16, 2005.
6. *Fontanelli, F.* Sketches for a Reparation Scheme: How Could a German-Italian Fund for the IMIs Work? In: Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court *Sentenza* 238/2014, *Volpe, V., et al.* (eds). E-book: Springer, 2021.
7. *Fox, H., Webb, Ph.* Law of State Immunity. Oxford: OUP, 3rd ed., 2013.
8. *Gianelli, A.* Crimini internazionali ed immunità degli Stati alla giurisdizione nella sentenza Ferrini. Rivista di diritto internazionale, Vol. 87, 2004.
9. *Hess, B.* The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property. European Journal of International Law, Vol. 4, 1993.
10. *Higgins, R.* Equality of States and Immunity from Suit: A Complex Relationship. The Netherlands Yearbook of International Law, Vol. 43, 2012.
11. *Iovane, M.* The *Ferrini* Judgment of the Italian Supreme Court: Opening Up Domestic Courts to Claim of Reparation for Victims of Serious Violations of Fundamental Rights. Italian Yearbook of International Law, Vol. 14, 2004.
12. *Meron, Th.* The Humanization of International Law. Leiden: Martinus Nijhoff, 2006.

[66] *Tzevelekos, V. P.* Revisiting the Humanisation of International Law: Limits and Potentials. Obligations Erga Omnes, Hierarchy of Rules and the Principle of Due Diligence as the Basis for Further Humanisation. Erasmus Law Review, Vol. 6, 2013, p. 75.

13. *Orakhelashvili, A*. Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening). American Journal of International Law, Vol. 106, 2012.
14. *Pavoni, R*. Human Rights and the Immunities of Foreign States and International Organizations. In: Hierarchy in International Law: The Place of Human Rights, *De Wet, E., Vidmar, J.* (eds). Oxford: OUP, 2012.
15. *Pellet, A*. "Human Rightism" and International Law. Italian Yearbook of International Law, Vol. 10, 2000.
16. *Peters, A., Volpe, V*. Reconciling State Immunity with Remedies for War Victims in a Legal Pluriverse. In: Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court *Sentenza* 238/2014, *Volpe, V., et al.* (eds). E-book: Springer, 2021.
17. *Pisillo Mazzeschi, R.* Il rapporto tra norme di *ius cogens* e la regola sull'immunità degli Stati: alcune osservazioni critiche sulla sentenza della Corte internazionale di giustizia del 3 febbraio 2012. Diritti umani e diritto internazionale, Vol. 6, 2012.
18. *Roberts, A*. Comparative International Law? The Role of National Courts in Creating and Enforcing International Law. International and Comparative Law Quarterly, Vol. 60, 2011;
19. *Sciso, E*. Italian Judges' Point of View on Foreign State's Immunity. Vanderbilt Journal of Transnational Law, Vol. 44, 2011.
20. *Sheeran, S.* The Relationship of International Human Rights and General International Law: Hermeneutic Constraint, or Pushing the Boundaries? In: Routledge Handbook of International Human Rights, *Sheeran, S., Rodely, N.* (eds). London: Routledge, 2013.
21. *Tanzi, A. M.* Un difficile dialogo tra Corte internazionale di giustizia e Corte costituzionale. La Comunità internazionale, Vol. 70, 2015.
22. *Tzevelekos, V. P.* Revisiting the Humanisation of International Law: Limits and Potentials. Obligations Erga Omnes, Hierarchy of Rules and the Principle of Due Diligence as the Basis for Further Humanisation. Erasmus Law Review, Vol. 6, 2013.
23. *Van Alebeek, R., Pavoni, R.* Immunities of States and their Officials. In: International Law in Domestic Courts: A Casebook, *Nollkaemper, A., et al.* (eds). Oxford: OUP, 2018.
24. *Webb, Ph*. Human Rights and the Immunities of State Officials. In: Hierarchy in International Law: The Place of Human Rights, *De Wet, E., Vidmar, J.* (eds). Oxford: OUP, 2012.
25. *Wuerth, I*. International Law in Domestic Courts and the Jurisdictional Immunities of the State Case. Melbourne Journal of International Law, Vol. 13, 2012.
26. *Yang, X*. State Immunity in International Law. Cambridge: CUP, 2012.

Normative acts

1. Law of 14 January 2013, No. 5.
2. Decree-Law of 30 April 2022, No. 36.

Case law

1. Judgment of the House of Lords of 24 March 1999 in Case Regina v. Bow Street Stipendiary Magistrate, *Ex parte* Pinochet Ugarte (No. 3).
2. Judgment of 21 November 2001 of the ECtHR in Case Al-Adsani v. United Kingdom (application No. 35763/97).
3. Judgment of 14 February 2002 of the ICJ in Case Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium).
4. Judgment of the Italian Court of Cassation of 11 March 2004 in Case No. 5044.
5. Judgment of the House of Lords of 14 June 2006 in Case Jones and Others v. The Kingdom of Saudi Arabia.
6. Judgment of the ICJ of 4 June 2008 in Case Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France).
7. Judgment of 3 February 2012 of the ICJ in Case Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening).
8. Judgment of 14 January 2014 of the ECtHR in Case Jones and Others v. United Kingdom (applications No. 34356/06 and 40528/06).
9. Judgment of the Italian Constitutional Court of 22 October 2014 in Case No. 234.
10. Judgment of the Seoul Central District Court of 8 January 2021 in Case No. 2016 Ga-Hap 505092.

Other sources

1. Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur. Yearbook of the International Law Commission, Vol. II, Part Two, 2016.
2. Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur. Yearbook of the International Law Commission, Vol. II, Part Two, 2018.
3. Draft Conclusions on Identification of Customary International Law, with Commentaries. Yearbook of the International Law Commission, Vol. II, Part Two, 2018.

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Development of the Normative Regulation on the Official Latvian State Language During the First Period of Independence

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At the moment when a person no longer counts himself as part of the Latvian community and stops speaking Latvian, he is lost to the Latvian nation.[1]

(President of the Republic of Latvia Vaira Vīķe-Freiberga)

The current article views the history of establishment and legal foundations of Latvian as the official language of the state, beginning from the position of Latvian among other languages in the newly established independent state of Latvia. The article includes not only analysis of works by other authors and publications in the area of research but also examination of transcripts of various joint sittings of legislators in different periods (the People's Council, the Constitutional Assembly, the *Saeima* of the first and the second period of independence, and the Supreme Council), as well as unpublished minutes of committees. Within the article, certain part of the research focuses also on normative acts related to the use and protection of the official language. The author provides a detailed review of normative acts concerning the official language, concluding the study with the review of the period before the Soviet occupation – the situation after establishment of Kārlis Ulmanis' authoritatian regime after the *coup d'état* on 15 May 1934.

Keywords: *Satversme* (Constitution of the Republic of Latvia), the Latvian language, official language, the Latgalian language, language policy, ethnic minorities.

[1] *Vīķe-Freiberga V.* Runa konferences "Trimda, kultūra, nacionāla identitāte" atklāšanā. Rīgas Latviešu biedrības namā, 2004. gada 30. septembrī [The speech at the opening of conference "Exile, Culture, National Identity" at Riga Latvian Society House, 30 September 2004]. *Vīķe-Freiberga, V.* V.V.-F. 4 plus 4. Runas 1999 – 2007 [*Vīķe-Freiberga, V.* V.V.-F. 4 plus 4. Speeches 1999–2007]. Rīga: Pētergailis, 2007, p. 380.

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Introduction

Today, it is taken as self-evident that we live in a free state and Latvian is the official language in Latvia, and it is one of the official languages of the European Union, interpretation into which is provided at the meetings of European institutions and the binding documents are translated into it. The story about the destiny of the Latvian language is inseparably linked to the complex course taken by the Latvian nation and the State founded by it. In a nation-state, which Latvia is, language, just like the anthem, flag and coat-of-arms, is both the proof of the nation's vitality and a symbol of the State.[2] This is exactly why the newly elected Members of the Parliament, upon assuming their office, in their oath solemnly promise to strengthen and defend the values of the State, which also include the Latvian language.[3]

The Latvian language is an important element of Latvia's constitutional identity, without which the constitutional order of Latvia and the system of *Satversme* (the Constitution) as such are inconceivable. Measures for protecting the Latvian language, including its constitutional level, have been and remain closely connected to the genesis of the State and its sovereignty.[4] Latvians acquired the right to use their

[2] Short film by Legal Science Research Institute "Latvijas valsts simboli" ["Symbols of the Latvian State"]. Available: https://www.youtube.com/watch?v=brB8TrGpkVM&ab_channel=J%C5%ABrmalaspils%C4%93ta [last viewed 09.08.2021].

[3] *Rodiņa, A., Kļaviņa, I., Plepa, I.* Satversmes 18. panta komentārs [Commentary on Article 18 of the *Satversme*]. Latvijas Republikas Satversmes komentāri. II nodaļa. Saeima [[Commentaries on the *Satversme* of the Republic of Latvia. Chapter II. The *Saeima*]. Collective of authors under scientific editorship by Prof. R. Balodis. Rīga: Latvijas Vēstnesis, 2020, p. 283.

[4] *Jundzis, T.* Tiesību reformu loma neatkarības atjaunošanā [The Role of Legal Reforms in the Restoration of Independence]. *Blūzma, V., Celle, O., Jundzis, T., Lēbers, D. A., Levits, E. Zīle, Ļ.* Latvijas valsts atjaunošana 1986. – 1993 [Restoration of the State of Latvia 1986–1993]. Rīga: LU žurnāla "Latvijas Vēsture" fonds, 1998, p. 156.

own language with the proclamation of their State; however, its status had to be won in parliamentary struggles and had to be safeguarded at a referendum on language. As soon as Latvia's statehood was lost, the language also lost its official status, giving in to the official language of the occupying state (German or Russian). However, language as the means of interpersonal communication, differs from other symbols of the State, which can be physically destroyed, prohibited or the use of which can be severely penalised. Invaders may attempt to impose maximum restrictions on the use of the language in public space, forcing inhabitants of the occupied state to speak, as much as possible, in the language of victors; however, it is practically impossible to eradicate it from private use even in a totalitarian order.

In Latvia, similarly with the other Baltic states, and in contrast to other provinces of the Union of Soviet Socialist Republics (hereafter – the USSR), e.g., Ukraine, Kazakhstan or Belarus, the situation regarding the language use was considerably better. Books in Latvian were published in Latvia, and the alphabet was not rewritten in Cyrillic. Despite occupation of the country, schools and higher education institutions operated in Latvian. At the same time, the state's policy aimed at Russification existed, and that was closely linked to the process of industrialisation. In the period from 1940 to 1990, in the territory of Latvia the number of Russian inhabitants increased four times. The Latvian language, as a minority language of the USSR, was entirely excluded from the sectors of industry, transport, railway, and construction.[5] During the period of Soviet occupation, every Latvian person had to take into account that they would have to speak Russian on the street, in a shop, at the house-manager's office, at the police (militia) and, of course, at state institutions or, at the first request, switch over to Russian, otherwise risking to fail settling one's affairs. During the time of Soviet occupation, Russian, as the language of communication in the USSR, took the dominant role of the official language of communication also in the LSSR. For the Soviet people, Latvians being counted as one of them, the use of their native language was the area of their private life and even then not invariably. As a rule, Latvian was not the first language spoken in mixed families.

Five years before promulgation of the Declaration of Independence[6], the song "Dzimtā valoda" ("Native Language") of rock group "Līvi" won "Mikrofons" song contest in 1986. This happened despite the desperate attempts of the Soviet censors to prevent the triumph of the ambiguous song at the popular TV show. The seemingly innocent lyrics of the song, rendered unforgettable by Jānis Grodums' raspy vocal[7], brought tears to the eyes of many and made many clench their fists. Although at the time nobody suspected the global events that Latvia would be dragged into, ultimately regaining its independence, the song by "Līvi" clearly marked the approaching Awakening. The national self-confidence, for a long period suppressed by the Soviet regime, started rising in Latvians and, as the result, the song turned into one of the protest symbols of the Awakening period. A couple of years later, Latvia was

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[5] *Druviete, I.* Latviešu valoda pēc neatkarības atgūšanas: valodas situācija un valodas politika [The Latvian Language after Regaining Independence: Linguistic Situation and Linguistic Policy]. Latvieši un Latvija. Akadēmiski raksti. III sējums. Atjaunotā Latvijas valsts [Latvians and Latvia. Academic Articles. Vol. III. The Restored State of Latvia]. *Stradiņš, J.* (ed.-in-chief). Rīga: Latvijas Zinātņu akadēmija, 2013, p. 257.

[6] Par Latvijas Republikas neatkarības atjaunošanu: Augstākās padomes deklarācija [On the Restoration of Independence of the Republic of Latvia: Declaration of the Supreme Council], 04.05.1990. Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs, No. 20, 15.05.1990.

[7] "The native language is mother, mother. Everything is sweeter in your native tongue. Laugh at yourself silently in your native tongue."

visited by the band "Čikāgas piecīši", the recordings of their songs for years had been in semi-secret circulation among people, and Mežaparks Grand Bandstand gathered thousands to listen to nostalgic songs of emigrants about the lost statehood and freedom. During the Singing Revolution, Latvians restored the statehood and the right to their language.

With the constitutionalism of Latvia entering the second centenary[8], the current article is dedicated to the development of the normative regulation concerning the Latvian language as the official language during the first independence period. It is planned to conduct research of the same scale of the second period of independence, which, hopefully, will be published in the next issue of the journal.

The article includes not only analysis of works by other authors and publications in the area of research but also examination of transcripts of various joint sittings of legislators in different periods (the People's Council, the Constitutional Assembly, the *Saeima* of the first and the second period of independence, and the Supreme Council), as well as unpublished minutes of committees. Within the article, certain part of the research focuses also on normative acts related to the use and protection of the official language. The author attempts to examine consecutively the development of the official language, starting from its genesis, at the founding of the State, until the Soviet occupation.

1. Regulation on languages in Latvia prior to adopting the normative regulation on Latvian as the official language in 1932

A valid opinion, expressed by several experts in an interdisciplinary study (Ina Druviete, Annija Kārkliņa, Jānis Pleps, Gunārs Kusiņš and Edgars Pastars), has taken root in the Latvian legal doctrine that the drafting, adoption and promulgation of the *Satversme*[9] in Latvian proves that the Latvian language had performed the role of the official language from the very moment when the State was founded. The Latvian language has been the official language of the Republic of Latvia, which is proven also by the fact[10] that all documents, *inter alia*, the Act of Proclamation,[11] the first,[12] the second[13] provisional *Satversme* were adopted only in the literary Latvian language. Procedures of the People's Council (hereafter – PC TP), the Constitutional Assembly

[8] 15 February 2022 will mark the centenary since the adoption of the Latvian *Satversme*.

[9] Latvijas Republikas Satversme [*Satversme* [Constitution] of the Republic of Latvia]. 15.02.1922. Likumu un Valdības Rīkojumu Krājums, 12. burtnīca, No. 113, 1922; Latvijas Vēstnesis, No. 43, 01.07.1993.

[10] *Druviete, I., Kārkliņa, A., Kusiņš, G., Pastars, E., Pleps, J.* Satversmes 4. panta komentārs [Commentary on Article 4 of the *Satversme*]. Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi [Commentaries on the Satversme of the Republic of Latvia. Introduction. Chapter I. General Provisions]. Collective of authors under scientific editorship by Prof. R. Balodis. Rīga: Latvijas Vēstnesis, 2014, p. 299.

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

[12] See 2nd part of Art. 3, Art. 4 and also the 1st part of Art. 6. Tautas padomes politiskā platforma [Political Platform of the People's Council]. Pieņemta Latvijas Tautas Padomes sēdē]. 17.11.1918. Valdības Vēstnesis, No. 14, 14.01.1918; Latvijas Pagaidu Valdības Likumu un Rīkojumu Krājums, No. 1, 15.07.1919.

[13] Deklarācija par Latvijas valsti: Latvijas Satversmes Sapulces deklarācija [Declaration on the State of Latvia, Declaration by the Constitutional Assembly of Latvia], 27.05.1920. Likumu un Valdības Rīkojumu Krājums, No. 4, 31.08.1920; Latvijas valsts pagaidu iekārtas noteikumi [Regulation on the Provisional Order of the State of Latvia]. Approved at the plenary session of Republic of Latvia *Satversme* on 01.06.1920. Likumu un Valdības Rīkojumu Krājums, No. 4, 31.08.1920.

and the *Saeima* point to this, although they allowed trilingualism (the Latvian, German and Russian languages) without providing interpretation into Latvian, the legislators' transcripts were made only in Latvian.

The Latvian language is the language of communication in the state, and during the first period of independence the State itself always perceived it as the official language. Several normative acts testify to this by comprising the legal concept "official language" both in the period when the *Satversme* was adopted and later. The first documents of the kind are the Provisional Regulation of 16 December on the Courts and Procedure of Litigation (Art. 10),[14] the PC Rules of Procedure of 23 August 1919 (Art. 38), the law of 8 December 1919 "On Latvia's Institutions of Education" (Art. 8), which is followed by the Cabinet Regulation of 22 November 1921 "On Testing Civil Servants' Proficiency in the Official Language", the regulation with the law of force, issued in the procedure set out in Art. 81 of the *Satversme* on 4 October 1923, "Regulation on Reinstating the Activities by the Senior Notary of the Latgale Regional Court with Respect to Certification of Acts"[15], as well as the law of 17 November 1924 "On Testing the Proficiency in the Official Language of Officers and Military Officials." Admittedly, though, the usage of the term lacked consistency, which, in turn, is proven by other normative acts where the legislator does not use "the official language" as a legal term. Thus, in the Law on Assemblies of 18 July 1923[16] "assemblies organised by foreigners" and "the freedom of speech and language" appear, whereas the term "official language" is avoided. Likewise, the law of 23 April 1923, which approves of the Constitution of the University of Latvia, in its para. 3, makes no mention of the official language but the Latvian language.[17] Bearing in mind that sometimes lectures at the University of Latvia, even in basic subjects, were delivered in German, this was not a matter of legal technique. A similar situation is revealed by looking into the laws of 8 December 1919 "On Latvia's Institutions of Education" and "On the System of Minority Schools in Latvia". Both laws were adopted on the same day, both are interconnected, and the first one comprised the concept of the official language,[18] whereas, for reasons incomprehensible, it does not appear in the second one.[19] Other examples of such lack of consistent policy could be found; however, the most important conclusion that follows from this is clear – the Latvian legal system lacked the status of an official language, defined in the hierarchy of legal norms. Due to this, consistent policy of the official language was also absent. The situation

[14] See Art. 10. Par Latvijas tiesām un tiesāšanās kārtību: Tautas padomes pagaidu nolikums [Regulation on the Courts and Procedure of Litigation in Latvia]. Latvijas Pagaidu Valdības Likumu un Rīkojumu Krājums, No. 1, 15.07.1919.

[15] Noteikumi par Latgales apgabaltiesas vecākā notara darbības atjaunošanu attiecībā uz aktu apstiprināšanu [Regulation on Reinstating the Activities by the Senior Notary of the Latgale Regional Court with Respect to Certification of Acts], 04.10.1923. Issued pursuant to the Republic of Latvia Satversme, Art. 81. Valdības Vēstnesis, No. 222, 08.10.1923.

[16] Likums par sapulcēm [Law on Assemblies], 18.07.1923. Valdības Vēstnesis, No. 152, 18.08.1923.

[17] "The language of instruction at the University of Latvia is Latvian. Lessons can be taught in other languages only in certain cases with the special permission of the University Council". See Art. 3 in Latvijas Universitātes Satversmē [Law on the Constitution of the University of Latvia], 27.04. 1923. Valdības Vēstnesis, No. 66, 28.03.1923.

[18] Art. 9 of the law "On Latvia's Institutions of Education" provided that "In schools and classes, where the language of instruction is not the official language, the latter shall be introduced starting with the second year of the elementary school".

[19] Art. 4 of the law "On the System of Ethnic Minority Schools in Latvia" provided that "The requirements of the curriculum in schools of ethnic minorities may not be lower than the respective requirements in Latvian schools. Note: The scope of mandatory requirements for the Latvian language in ethnic minority schools shall be defined by the Ministry of Education".

changed only after "Regulation on the Official Language" was adopted in 1932 in the procedure set out in Art. 81 of the *Satversme*, the Regulation had the force of law and finally defined the status of the Latvian language. Only thereafter, the attitude towards language use not only within the public administration but also outside it started to change. Up to 1932, the Russian and German languages, compared to other foreign languages, had a more privileged status *vis-à-vis* the Latvian language, whose legal basis had not been defined yet.

Admittedly, the *Saeima* was a model in this respect on the level of constitutional traditions, allowing its members to speak in the *Saeima* in Russian and in German.[20] Similarly to state and municipal institutions, also in the *Saeima* records were kept, of course, only in Latvian.[21] It is interesting to note that during adoption of the state budget it was obligatory for the rapporteurs to speak in Latvian.[22] The Rules of Procedure of the *Saeima* only stipulated that the members themselves had to submit translations of their speeches. Transcripts show that some members ignored this procedure and we no longer have the possibility to study their speeches.[23] The Rules of Procedure of the *Saeima* (of 1923 and 1929), which regulated the parliamentary work during the first period of independence, instead or *permitting* trilingualism, *allowed it*[24], and even "Regulation on Language" of 1932 does not dare to change this tradition, which had existed since the establishment of the State, even including a note to Article 2, stating that the language use in the *Saeima* is determined by the Rules of Procedure of the *Saeima*.

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[20] Research of the *Saeima's* transcripts leads to a rather convincing assumption that part of the deputies representing minorities instead of not knowing the Latvian language, for political reasons, did not want to speak in Latvian, and the political will was lacking to ensure that only Latvian was used in the parliament and local governments. The *Saeima*, was quite fragmented at the time, just as it is today. Coalitions were weak, and nobody was sufficiently strong.

[21] "Each application to be presented to the *Saeima* shall be worded in Latvian and signed by the submitter" (see Art. 45, "Saeimas kārtības rullis" [Rules of Procedure of the *Saeima*], law, 26.03.1923. Valdības Vēstnesis, No. 65, 27.03.1923.

[22] Thus, at the sitting of 8 February 1929, the member of parliament V. Piguļevskis, who had to report on the tax exemption in the budget of 1928/29 in connection with floods, hail and crop failure, began his speech in Russian but following interjections from the audience, as well as a respective reprimand by the chairman of the sitting, changed to Latvian, in which he, judging by the transcript, was perfectly proficient (see Latvijas Republikas III Saeimas II sesijas 6. sēdes stenogramma [Transcript of the 6th sitting of II Session of III *Saeima* of the Republic of Latvia], 08.02.1929.

[23] For example, reading a transcript of II *Saeima*, the speech by the member of parliament Leonīds Jeršovs (Workers' and Peasants' Faction) cannot be found, as instead of his speech there is a note that the deputy had spoken in Russian, and "an abstract of the speech was not submitted". See Latvijas Republikas III Saeimas VIII sesijas 1. sēdes stenogramma [Transcript of the 1st sitting of VIII Session of III *Saeima* of the Republic of Latvia], 20.01.1931.

[24] The Rules of Procedure of the *Saeima* of 1923, as well as the substitute thereof, i.e., the Rules of Procedure of the *Saeima* of 1929, provide that if deputies speak German or Russian during sittings, the people's representative must himself ensure that the translation of the speech is submitted to the Transcripts Bureau of the *Saeima*. Whether the statements made would appear in the transcripts depended on the deputy who chose to speak in these languages. See Art. 146 of Saeimas kārtības rullis [The Rules of Procedure of the *Saeima*], law, 26.03.1923. Valdības Vēstnesis, No. 65, 27.03.1923 and Art. 148, Saeimas kārtības rullis [The Rules of Procedure of the *Saeima*], law, 20.03.1929. Valdības Vēstnesis, No. 79, 10.03.1929. Examination of transcripts allows to verify how the regulation operated. Thus, for example, there is a stenographer's note in the transcripts of the sitting of I *Saeima* regarding deputy Marcus Nurock (member of the faction "Agudat Yisrael") that he had spoken in German and the footnote informs that the text is an abstract of the speech in Latvian. The same can be found when examining the speech by deputy Max Lazerson (faction "Ceire Cion"). It is noted, however, that he spoke in Russian. See Latvijas Republikas 1. Saeimas 1. sesijas 7. sēdes stenogramma [Transcript of the 7th sitting of Session 1 of the first *Saeima* of the Republic of Latvia], 13.12.1922.

Insight into two attempts made by ethnic minorities to attain laws that would regulate the use of minority languages follows below. One of these occurred at the time when PC functioned, the second one – at the time of the Constitutional Assembly. Since the debates on these prospective laws, their content and the true reasons for not adopting them are closely linked to the regulation on the Latvian language as the official language or, actually, the absence of it, these legislative battles must certainly be explored in this article.

1.1. Draft laws on minority languages during the periods of the People's Council and the Constitutional Assembly (1919, 1922)

The Political Platform of PC of 17 November 1918, which, as the first provisional *Satversme*, defined both the form of the State to be established, as well as the role of the institution itself, particularly accentuated the representation of ethnic minorities and also Latvia's regions in PC.[25] Latvian politicians understood quite well that peace in civil society and flourishing of the state directly depended on how productive their cooperation with politicians representing ethnic minorities would be. Founders of the State made all possible effort to gain ethnic minorities' support or, at least, their neutrality towards the prospective new State. Despite the Platform's wishes regarding proportions, the pre-Parliament of the State was established by representatives of eight Latvian parties. Latgalian Staņislavs Kambala was to be regarded as a regional representative, as he was not a member of parties but a member of the Land Council of Latgale, as at that time Latgale was occupied by Bolsheviks.

Examination of the PC Rules of Procedure, adopted on 23 August 1919, which is the primary source of pre-parliamentary internal procedures, does not reveal an algorithm that would ensure representation of ethnic minorities and Latvia's regions on PC. Ādolfs Klīve, an active participant in these past events, reveals in his memoirs that PC had been created by Kārlis Ulmanis, who had invested a particular effort into ensuring a certain proportion for representatives of national minorities and social democrats. The politician is of the opinion that PC "reserved for national minorities representation proportionally to the number of Latvians, without more particular rules"; moreover "leaving in the unlimited discretion of minorities the sending of their deputies to PC" had been a significant "inconsistence". To quote Klīve, "some conservative Latvian parties were not admitted to PC but Germans and other minorities could send conservative politicians to PC without restrictions."[26] This suggests that, despite the PC Rules of Procedure, the initial intention of the PC's Political Platform had a certain effect, at least, on ethnic minorities. One has to assume that representatives of ethnic minorities got into the pre-Parliament just like other Members of PC, by obtaining their mandate through party representation. Respectively, by the party submitting a request to the Presidium of PC to grant a mandate, which later would be confirmed at the general meeting of PC in general procedure.[27] Considering that the initial number of PC Members, representatives delegated by parties (17.11.1918), was 40, but when PC discontinued its activities(01.05.1920) – 245 (other sources mention 297), which is six times more than on the day when PC was

[25] The second part of Art. 3 of the Political Platform of the People's Council states: "The following participate in Latvian People's Council with their deputies: a) political parties, b) national minorities, c) those regions of Latvia, i.e., Kurzeme and Latgale, where there are no political parties at the moment."

[26] *Klīve, Ā.* Brīvā Latvija: Latvijas tapšana: atmiņas, vērojumi un atzinumi [Free Latvia: Creation of Latvia: Recollections, Observations and Insights]. Bruklina: Grāmatu Draugs, 1969, pp. 234, 242.

[27] See Art. 1 and Art. 2. Latvijas Republikas Tautas Padomes kārtības rullis [The Rules of Procedure of the Latvian People's Council], law, 23.08.1919. Likumu un Valdības Rīkojumu Krājums, No. 11, 1919.

established[28], it is clear that the Presidium of PC, headed by Jānis Čakste, had to think hard on who should be admitted to PC and who, perhaps, not. Ā. Klīve notes in his memoirs,[29] that the allies Americans even had called PC "a select group of parties". Increasing number of PC Members was welcome as a rational proof that the unelected pre-Parliament represented various strata of society; however, on the other hand, the main role of the institution was also to perform the legislative function. PC was perfectly able to make all the preparatory work for establishing a democratically elected institution of people's representation in Latvia[30], and many laws were in force until the Soviet occupation. Since laws were adopted in compliance with generally accepted parliamentary procedure, it is the evidence of professionally organised work and high intellectual level of PC Members. It would have been impossible without meticulous control over mandates by the PC Presidium and well-considered political agreements.

Thanks to Kārlis Ulmanis' outstanding organisational skills and sound policy towards ethnic minorities during the first years in the life of the state, it was possible to attain civic concord. This policy can be discerned already in the second (!) month of PC's activities, when it adopted the Provisional Regulation on the Courts and Procedures of Litigation in Latvia,[31] which defines Latvian as "the language of transactions in courts and judicial institutions", at the same time allowing also free use of Russian and German. It was striking evidence of the emerging state's tolerance towards ethnic minorities and, how could it be otherwise, if, in accordance with the statistical data of 1920, from among 1 596 131 inhabitants of Latvia, 72.8% were Latvians. Great Russians and Belarussians (12.6%), Jews (5%), Germans (3.6%) and Poles (3.4%) are indicated as the largest minorities.[32] It is important to note that, in rural areas, the number of Latvians in some places amounted to 90% and more, whereas in cities this proportion was different. In Riga, the capital city of Latvia, Latvians constituted slightly over half of the population, i.e., 55.12%, the situation was similar in Liepāja – 52.29%, but in the cities of Latgale it was slightly above 1/4 (19.26 % in Rēzekne) or even less (5.15% in Daugavpils).[33] The concentration of minorities in regions was not homogenous, which determined greater prevalence of German in Kurzeme region and of Russian in the southeast of Latvia. In Latvia, where the impact of the cultures and politics of major nations intersected, a large part of population was proficient in several languages, this, in particular, applies to the city dwellers "many of whom spoke two, three and even four languages".[34]

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[28] 1918.–1920. gads Latvijas Republikas Pagaidu valdības sēžu protokolos, notikumos, atmiņās [The years of 1918–1920 in the Minutes of the Sittings of the Provisional Government of the Republic of Latvia, Events, Recollections]. Rīga: Latvijas Vēstnesis, 2013, p. 72; Likumdevēju vēsture [History of Legislators]. Available: http://www.saeima.lv/lv/par-saeimu/likumdeveju-vesture [last viewed 09.08.2021].

[29] *Klīve, Ā.* Brīvā Latvija: Latvijas tapšana: atmiņas, vērojumi un atzinumi [Free Latvia: Creation of Latvia: Recollections, Observations and Insights]. Bruklina: Grāmatu Draugs, 1969, p. 234.

[30] *Kusiņš, G.* Latvijas parlamentārisma apskats [Overview of the Latvian Parliamentarism]. Rīga: Saeimas kancelejas izdevums, 2016, p. 17.

[31] See. Art. 10. Par Latvijas tiesām un tiesāšanās kārtību: Tautas padomes pagaidu nolikums. [On Courts of Latvia and Procedure of Litigation: Provisional regulations of the People's Council]. Latvijas Pagaidu Valdības Likumu un Rīkojumu Krājums, No. 1, 15.07.1919.

[32] *Skujenieks, M.* Otrā tautas skaitīšana Latvijā [The Second Population Census in Latvia]. Rīga, 1925, p. 52. Quoted from: *Sosāre, M.* Valodu likumdošanas jautājumi Latvijas Republikas pastāvēšanas sākuma posmā [Issues of language legislation at the initial stage of the Republic of Latvia]. Latvijas Zinātņu Akadēmijas Vēstis, part A, No. 4, 01.04.1992.

[33] Ibid., p. 58.

[34] *Sosāre, M.* Valodu likumdošanas jautājumi Latvijas Republikas pastāvēšanas sākuma posmā [Issues of language legislation at the initial stage of the Republic of Latvia]. Latvijas Zinātņu Akadēmijas Vēstis, part A, No. 4, 01.04.1992.

Participation of ethnic minorities in the work of PC and, later, in the Constitutional Assembly proved the support by the entire society for the formation of the new Latvian State. PC's transcripts include information about the agreement between the Farmers' Union and PC minority factions on Latvian as the official language.[35] Kārlis Ulmanis himself was the Prime Minister throughout the period of PC, and in all four provisional governments that he headed he allocated the office of the State Controller either to the Baltic German, representative of *Deutsch-baltische Fortschrittliche Partei*, Baron Eduard von Rosenberg (in the first provisional government) or the representative of the Jewish National-Democratic Party of Jewish extraction Paul Mintz (in the second, third and fourth provisional government).[36] It must be noted that the State Controllers were full-fledged voting members of the Provisional Governments[37] and that is why P. Mintz also in the last Provisional Government lead by Ulmanis performed the duties of the State Controller and the Minister for Labour at the same time. In the final period of PC, this delicate treatment of minorities, introduced by Ulmanis, changes. This happens with the approval of the Cabinet, led by Zigfrīds Anna Meierovics (17.06.1921), without a single representative of ethnic minorities, which is the reason for immediate expressions of indignation, stating that formation of the government had been guided by the principle "Get rid of minorities!".[38] An opinion can be found in historical overviews that the political representation of national minorities had had rather narrow interests, which accordingly influenced the formation of a stable government,[39] although, on the other hand, Ulmanis' policy of reconciliation with minorities contributed to the formation of the Latvian State – in PC Latvians, Germans, Russians had sat at the same table, jointly deciding the fate of the Latvian State. Both the rightist and leftist political forces had to take the minorities' block seriously. [40] Historian Ādolfs Šilde writes in his book "History of Latvia, 1914–1940" that in the pre-Parliament national minorities "always felt forced to remind of their requirements".[41] This Šilde's statement can be certainly attributed also to the period of the Constitutional Assembly and the primary object of interest for minority politicians, quite logically, was protection of their national identity and language. PC's Committee for National Affairs was headed by Baltic German Paul Schiemann, who was an outstanding publicist, organiser, and lawyer. He initiated a legislative

[35] See the speech by Kārlis Vilhelms Pauļuks at the sitting of PC on 27 August 1919, discussing such an agreement. Notably, Pauļuks clearly states that the draft Language Law, elaborated by minorities, is a proof of an unwritten agreement between PC's factions on rocking the status of the Latvian as the official language (Tautas padomes IV sesijas 8. sēdes 1919. gada 27. augusta stenogramma [Transcript of the 8th sitting of IV session of the People's Council].

[36] *Bebers, K.* Statistika par Latvijas Republikas valdībām [Statistics on the governments of the Republic of Latvia]. Latvijas Republikas Satversmes komentāri. III nodaļa. Valsts prezidents. IV nodaļa. Ministru kabinets. [[Commentaries on the *Satversme* of the Republic of Latvia. Chapter III. The President. Chapter IV. The Cabinet]. Collective of authors under scientific editorship by Prof. R. Balodis. Rīga: Latvijas Vēstnesis, 2017, pp. 658–662.

[37] *Balodis, R., Danovskis, E.* Satversmes 87. un 88. panta komentārs [Commentary on Art. 87 and Art. 88 of the *Satversme* of the Republic of Latvia]. Latvijas Republikas Satversmes komentāri. VI nodaļa. Tiesa. VII nodaļa. Valsts kontrole [Chapter VI. Court. Chapter VII. The State Audit Office.] Collective of authors under scientific editorship by Prof. R. Balodis. Rīga: Latvijas Vēstnesis, 2013, p. 179.

[38] *Šilde, Ā.* Latvijas vēsture, 1914 – 1940. Valsts tapšana un suverēna valsts [History of Latvia, 1914–1940. The Making of the State and the Sovereign State]. Stokholma: Daugava, 1976, pp. 351–352.

[39] *Spekke, A.* History of Latvia. Rīga: Jumava, 2006, p. 341.

[40] *Bleiere, D., Butulis, I., Feldmanis, I., Stranga, A., Zunda, A.* History of Latvia the 20th Century. Rīga: Jumava, 2006, p. 212.

[41] *Šilde Ā.* Latvijas vēsture, 1914 – 1940. Valsts tapšana un suverēna valsts [History of Latvia, 1914–1940. The Making of the State and the Sovereign State]. Stokholma: Daugava, 1976, p.332.

fight not only for the right to the language of his nation but also involved other ethnic minorities in his activities. He prepared a draft law on the linguistic rights of ethnic minorities (hereafter – MLL), achieving support for it at the Committee for National Affairs, where it was supported by representatives of the Latvian parties. On 27 August 1919, the general meeting of PC was held, were MLL caused intense debate. The Latvian civic parties, led by the Farmer's Union, actively resisted MLL, because they perceived it as an attempt by ethnic minorities to sidestep the official language.[42] Latgalians characterised MLL as unacceptable for Latgale, referring to it as "building the Tower of Babel". The sitting caused a considerable political uproar. Procedural obstacles were desperately sought to stop further proceeding with MLL. When the national minorities reproached the Farmer's Union, since its own members had supported the draft law, the faction immediately recalled its representatives from the Committee for National Affairs, delegating other representatives to it. One of these representatives was Kārlis Skalbe, who, although having very strong national sentiments, had approved of the draft law directed against Latvian language.[43]

The greatest critic of MLL at the sitting was Kārlis Vilhelms Pauļuks (Farmers' Union), who invited all those present to study the draft law carefully, because, actually, through the draft law under review the minorities were demanding the status of the official language for their languages. He called MLL "foreigners' programme" and spred alarm that this document was a blatant derogation "from our [Political] Platform [of the People's Council] […] By the adoption of this law, the previous general conditions fall away because this draft comprises a special provision, on linguistic rights […] But it cannot be fulfilled. Minorities demand from us what we cannot fulfil. […]".

Pauļuks underscored that MLL, strangely enough, dis not speak about the official language. The politician was concerned, how could a law on language use in the State of Latvia be adopted if it did not comprise the main principle – Latvian as the official language. Pauļuks was of the opinion that such a draft law should be categorically dismissed or fundamentally revised, placing in its centre regulation on the Latvian language. Schiemann categorically rejected this proposal, declaring that he had no intention of revising or recalling the draft law voluntarily. It seemed that the Baltic German's indignation has no limits.

> *[…] Cold water has been poured over the minorities. […] The state must guarantee rights to all inhabitants, among others, also to national minorities. […] At the very beginning of building a new state, we are deprived of our elementary civic and national rights. […] We demand nothing more but that civil servants would know other languages, so that no citizen would be restricted in his rights due to not being proficient in Latvian. […] Dismissal of this draft law will have devastating consequences for that new body of the State, building of which is currently our task. […]*"[44]

To formally resolve the open confrontation with ethnic minorities and close the parliamentary discussion, Pauļuks expressed the opinion that the issue of languages

[42] See Tautas padomes IV sesijas 8 sēdes 1919. gada 27. augusta stenogramma [Transcript of the 8th sitting of IV session of the People's Council of 27.08.2019].

[43] As is well known, later the poet was one of the most active defenders of Latvian as the official language in 1922 in the debates at the Constitutional Assembly on Art. 115 of the *Satversme*, as well as in discussing the provisions of the special Official Language Law of 1932 at the 4th *Saeima*.

[44] See Tautas padomes IV sesijas 8. sēdes 1919. gada 27. augusta stenogramma [Transcript of the 8th sitting of IV session of the People's Council of 27.08.2019].

should be decided on by the Constitutional Assembly, because PC was said to be there "for establishing order" and it had neither the time, nor the competence to delve into this issue of official language policy. The draft was removed from examination and did not appear in later discussion in PC. It is interesting to note that in contemporary legal literature this is deemed to be significant,[45] in connection with Schiemann's answer why the principle of the official language had not been incorporated in MLL. Schiemann had retorted that the official language was not the problem of ethnic minorities, it was for the Latvians themselves to sort it out. Undeniably, his statement was saturated with irony, because, although MLL has not been preserved, the transcript shows that the basic principle of the draft law was "various rights to various languages in various places of Latvia". The algorithm included in the draft law was closely linked to the density of minority population in the respective administrative region of the state. Thus, if 20 % in a city or in the respective rural parish 50% of minority inhabitants lived, then the minority language would enjoy the status of the official language there. The special rights of German in the cities in the central part of the state followed from the draft law, whereas the Russian language had a special status in Latgale and in four cities of the state.

Several months after the event described above, the Rules of Procedure of PC are adopted, where Art. 38 designated the Latvian language as the official language and, apparently, as revenge to P. Schiemann, it was written that any translations were possible only into the Russian but not into the German language.[46] This is an assumption; however, there is no rational explanation for ignoring the German language in the pre-Parliament's procedural law because, in the further parliamentary life, at the Constitutional Assembly and all four pre-war convocations of the *Saeima,* German and Russian were used to an equal extent.

The second attempt to achieve adoption of MLL took place at the Constitutional Assembly and, again, under P. Schiemann's leadership. Before exploring this case, it is worth to examine the available statistics on the ethnic composition of the Constitutional Assembly. Four ethnic (German, Jewish, Russian and Polish) or, more precisely, ethnic minority parties were represented in the Constitutional Assembly, which reflects the distribution of power objectively. Germans (the Committee of the German Baltic Parties) had six mandates, Jews (*Ceire Cion* and Jewish block) – five, Russians (Group of Russian Citizens) – four, but the United Polish Party – one, although its representative was a Latvian. Ādolfs Šilde, who collected these data, also wrote that from among 150 members of the Constitutional Assembly 132 persons or 88% were Latvians. Russian members of the Assembly

[45] See *Druviete, I., Kārkliņa, A., Kusiņš, G., Pastars, E., Pleps, J.* Satversmes 4. panta komentārs [Commentary on Article 4 of the *Sartversme*]. Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi [Commentaries on the *Satversme* of the Republic of Latvia. Introduction. Chapter I. General Provisions]. Collective of authors under scientific editorship by Prof. R. Balodis. Rīga: Latvijas Vēstnesis, 2014, p. 298; *Pleps, J.* Vienīgā valsts valoda: latviešu valoda un Satversme [The Only Official Language: the Latvian Language and the *Satversme*]. Valsts Valodas Komisija. Raksti 10. sējumos. Valoda un valsts [Collected Articles of the Commission of the Official Language in 10 Volumes. Language and State]. Dr. habil. Philol. *Veisbergs, A.* (ed.). Zinātne, 2019, p. 11.

[46] "Amendments and issues raised during the siting and to be put to the vote upon the request of a Member of the People's Council who is not proficient in the official language, shall be translated into the Russian language. The President may entrust the translation to a special translator." See the second part in Art. 38, Latvijas Tautas Padomes kārtības rullis [The Rules of Procedure of the Latvian People's Council], law, 23.08.1919. Likumu un Valdības Rīkojumu Krājums, No. 11, 1919.

constituted 2.6 7%, Jews – 5.33 % while Germans – 4 %.[47] During the parliamentary period, the politicians of national minorities had great impact on politics,[48] although, predominantly, they were in the opposition. As regards the national representation of Latvians amounting to 88%, it has to be noted, however, that part of Latvians were Latgalians. The Latgale People's Party, the Latgale Union of Christian Farmers and the Latgale Famers' Union jointly had twenty-four mandates. Although only 18 members took part in voting on matters of protection the region and the interests of Latgalian dialect of the Latvian language used there, it is a united, organised block, which later[49] would decide the fate of the draft Constitution of Latvia – *Satversme*.

The Rules of Procedure of the Constitutional Assembly [50], in contrast to the Rules of Procedure of PC, no longer comprised a reference to languages, but that was understandable because intensive work continued to draft the *Satversme*, in the second part of which, namely, Art. 115 was intended to include a clause on the official language. The representation of national minorities in the Constitutional Assembly was strong, and in order to reach the major aim, an effort was made not to annoy ethnic minorities. Politicians belonging to ethnic minorities were mainly preoccupied with drafting MLL, intending for each minority to have their own: – one for Russians, their own – for Germans, and their own – for Jews. This approach was supported, and the Committee of the *Satversme*[51] planned to include in Art. 115 a further reference to the need of a special law in the area of languages. Draft MLL were examined in the Committee in three readings. Draft MLL have not been preserved, however, the fragments recorded in the minutes of the Committee of the *Satversme*, suggest that P. Schiemann is the main author and guardian of these laws. This indicated that he continued the work that he had done already in PC in this respect. The Committee's minutes recorded that, finally, the Committee, on the basis of Schiemann's proposal, decided to combine various ethnic minorities' laws into one (to combine "German and Great Russian laws on languages" in one draft law and to do it in the third reading), the Committee did not object to it. Truth be told, at the sitting of 14 July 1922[52], Chairman of the Committee Marģers Skujenieks concluded the work of the Committee for Drafting the *Satversme* at the Constitutional Assembly, explaining, in particular, the situation connected to MLL. Skujenieks informed his colleagues that the sub-committee, which had been tasked with finalising MLL, had

[47] *Šilde, Ā.* Latvijas vēsture, 1914 – 1940. Valsts tapšana un suverēna valsts [History of Latvia, 1914–1940. The Making of the State and the Sovereign State]. Stokholma: Daugava, 1976, p. 348.

[48] "The Baltic Germans, due to their great internal organisation as a national minority, succeeded in achieving surprisingly good results during Latvia's parliamentary period. In each *Saeima*, Germans had 5 to 6 mandates out of 100. Considering their small proportion in the total number of population, only 3.9% in 1929, this is excellent." *Feldmanis, I.* The Political Activities of Baltic Germans in Latvia 1918–1940: Discussions in the Historical Literature. The Baltic States at Historical Crossroads. Political, economic, and legal problems and opportunities in the context of international co-operation at the beginning of the 21st century. *Jundzis, T.* (ed.). 2nd revised and expanded edition. Rīga: Latvian Academy of Sciences, 2001, p. 611.

[49] See Section 3 of the article "The issue of Latgalians at the Constitutional Assembly: Language, Autonomy and Church".

[50] Satversmes Sapulces kārtības rullis [The Rules of Procedure of the Constitutional Assembly]. Valdības Vēstnesis, No. 251, 02.11.1920.

[51] See Satversmes komisijas 1921. gada 3. novembra sēdes protokols Nr. 58 [Minutes No. 58 of the sitting of the Committee for Drafting the *Satversme* on 03.11.1921.] Satversmes komisijas 1922. gada 8. jūlija sēdes protokols Nr. 70 [Minutes No. 70 of the sitting of the Committee for Drafting the *Satversme* on 08.07.1922]and Satversmes komisijas 1922. gada 14. jūlija sēdes protokols Nr. 77 [Minutes No. 77 of the sitting of the Committee for Drafting the *Satversme* on 14.07.1922].

[52] Satversmes komisijas 1922. gada 14. jūlija sēdes protokols Nr. 77 [Minutes No. 77 of the sitting of the Committee for Drafting the *Satversme* of 14.07.1922]. Unpublished.

been unable to convene a sitting because MLL had not been prepared for the third reading. This, in turn, meant that the Constitutional Assembly completed its work and, in the area of languages, had been unable to move further than PC. The Latvian language did not have the status of an official language, and neither did ethnic minorities have a separate regulation on the use of their languages. After the second part of the *Satversme* was not adopted at the Constitutional Assembly and Latvian was not defined as the official language in the *Satversme*, the Committee for Drafting the *Satversme* did not proceed with the draft law on minority languages. It should be noted that the matter of languages turned into an unresolvable *Gordian Knot* for the Constitutional Assembly, where, as strange as it might be, the main problem was not ethnic minorities but the concept of the official language, which did not permit constitutional derogations from the literary Latvian language.

Regretfully, draft MLL has not been preserved to the present, however, some minutes[53] permit to form an opinion about the main directions of the regulation. This regulation, apparently, even surpassed the previously drafted Language Law regulation for PC, because 10% algorithm was being discussed instead of 20% or 50%. Some records in the minutes regarding the wording of some Articles of the Russians Law (*Lielkrievu likuma*), approved by the Committee, were found, and it is worth quoting them in full: [54]

> *Article 45. In all those units of Latvia's local government where Great Russians constitute no less than 10% of the total number of population, inhabitants shall have the right to turn to all judicial, state and local government institutions both orally and in writing in the Great Russian Language.*
>
> *Article 46. All orders by state and local government institutions shall be published, for general knowledge, also in the Russian Language.*
>
> *Article 49. In judicial institutions, litigants shall be allowed to use the Great Russian Language in writing and orally.*

Most likely, articles in the German Language Law were similar. Only two wordings of articles approved in the second reading can be found in the minutes:

> *Article 37. Using the German language shall be permitted in postal, telegraph and telephone communication, public performances, social gatherings, as well as in written and oral communications.* [A. Bergs' wording, which was approved].[55]
>
> *Article 38. The use of spoken German in the sittings of the* Saeima *and local governments shall be allowed.*
>
> *Article 40. In judicial institutions, except in Latgale, litigants shall be allowed to use the German Language in writing and orally.*

Comparing the situation in Latvia to the one in Lithuania, where the development of statehood and parliamentarism was similar to that of Latvia, the state language policy evolved quite differently. Initially, when the State of Lithuania was established, the use of other languages in public administration, parliament and local governments was allowed there, as well. Just like in Latvia, in Lithuania the deputies representing ethnic minorities were allowed to speak from the podium in their own

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[53] Satversmes komisijas 1922. gada 8. jūlija sēdes protokols Nr. 70 [Minutes No. 70 of the sitting of the Committee for Drafting the *Satversme* on 08.07.1922]. Unpublished.

[54] Ibid.

[55] The initial wording was, as follows: "Article 73. Everyone shall have the right to use the German language freely in writing and orally, in private life, as well as openly."

language (in the case of Lithuania, – in Polish, Yiddish and Belorussian), but they were requested to annex to their speeches a translation into Lithuanian. However, in contrast to the Latvian *Satversme* of 15 February 1922, the Lithuanian Constitution of 10 June 1920 included a norm on the Lithuanian language as the official language (Art. 6).[56] Despite the fact that a law was not adopted, starting with 1922, the Parliament discontinued transcribing speeches that were not in Lithuanian. If somebody started to speak in an un-official language, for example, Member of the *Seimas* Simon Rozenbaum attempted to deliver his speech in Yiddish (1923), the chairman of the siting interrupted him, reminding of Art. 6 of the Constitution.[57] The constitutional basis in combination with a strong political will is a powerful argument.[58] In this regard, the practice in Latvia differs from that of the neighbouring state. On the one hand, Latvian was the official language of public administration in the State of Latvia; however, on the other hand, actual trilingualism (Latvian, German and Russian) prevailed in the *Saeima* and local governments, as well as the possibility to use the Latgalian dialect in Latgale region. An official language, defined in a law, and provisions regarding the use of minority languages can be spoken of only starting with 18 February 1932, when the Cabinet adopted "Regulation on the Official Language" with the force of law pursuant to Art. 81 of the *Satversme*. At the same time, respecting the status of Latvian as the official language, the use of German and Russian in the procedure set out in the law continued also after the Regulation with a force of law was adopted. Penalties were added to this Regulation with the force of law (1934), and the Regulation was revised (1935) as the Official Language Law of Kārlis Ulmanis' authoritarian government.

1.2. Normative regulation on languages during the first period of independence

The following normative acts relating to the language issue can be listed that regulated the language issues during the first period of independence:

- Area of education and science: PC law "On Latvia's Institutions of Education" of 8 December 1919[59] and its amendment of 1932[60], and PC law "On the System of Ethnic Minority Schools" in Latvia of 8 December 1919.[61]
- System of courts: Provisional Regulation of PC adopted on 6 December 1918 "On the Courts and Procedure of Litigation in Latvia."[62].

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[56] Art. 6 of the Lithuanian Constitution provided that the use of the Lithuanian language is defined by a special law. See Lietuvas Satversme. Tautas Tiesības [Constitution of Lithuania. People's Rights]. No. 11,12, 16.06.1927.

[57] *Vaišniene, D.* Valodas politikas sākumi Lietuvā [The Beginnings of Language Policy in Lithuania]. Valsts Valodas Komisija. Raksti 10. sējumos. Valoda un valsts [Collected Articles of the Commission of the Official Language in 10 Volumes. Language and State]. Dr. habil. philol. *Veisbergs, A.* (ed.). Zinātne, 2019, pp. 43–45.

[58] Ibid.

[59] Likums "Par Latvijas izglītības iestādēm" [Law "On Latvia's Institutions of Education"]. 08.12.1919. Likumu un valdības rīkojumu krājums, No.13, 31.12.1919. Available: http://periodika.lv/periodika2-viewer/?lang=fr#panel:pa|issue:354805|article:DIVL50|query:Latvijas%20Likums%20par%20izglitibas%20iest%C4%81des%20 [last viewed 01.03.2022].

[60] Pārgrozījums likumā "Par Latvijas izglītības iestādēm" [Amendments to the law "On Latvia's Institutions of Education"]. 20.04.1932. Issued pursuant to Art. 81 of the *Satversme*. Valdības Vēstnesis, No. 89, 22.03.1932.

[61] Likums "Par mazākuma tautību skolu iekārtu Latvijā" [Law "On the System of Ethnic Minority Schools in Latvia"]. 08.12.1919. Likumu un valdības rīkojumu krājums, No.13, 31.12.1919.

[62] Par Latvijas tiesām un tiesāšanās kārtību: Tautas padomes pagaidu nolikums [Regulation the Courts and Procedure of Litigation in Latvia]. Pagaidu Valdības Vēstnesis, 14.(1.)12.1918; Latvijas Pagaidu Valdības Likumu un Rīkojumu Krājums, No. 1, 15.07.1919.

- Civil service: "Cabinet Regulation on Testing Civil Servants' Proficiency in the Official Language" of 22 November 1921".[63]
- Area of national security: The *Saeima's* law of 17 November 1924 "On Testing the Proficiency in the Official Language of Officers and Military Officials"[64];
- Latgale region: Cabinet Regulation on the Overseeing of Latgale's Affairs of 30 June 1921;[65] Cabinet Regulation of 26 July 1921 on Appointing Civil Servants in Latgale;[66] Cabinet Regulation of 11 August 1921 on Using the Latgalian Dialect.[67]

Normative regulation on the official language: Regulation with the force of law "On the Official Language" was adopted on 18 February 1932 in the procedure set out in Article 81 of the *Satversme*.[68] On 5 January 1935, this legal act is replaced by the Official Language Law.[69] Here an explanation is needed regarding the authoritarian period, which came into power in Latvia on 15 May 1934. Firstly, Kārlis Ulmanis' regime based its activities on the regulation that had been adopted during the parliamentarian period, without shying from introducing corrections to it, if needed. The area of languages was not an exception. From the legal perspective, the Official Language Law did not change much, and the Regulation on the Official Language of 1932 with Amendments of 1934 would have perfectly sufficed.[70] It had the force of law, therefore consolidation of it with only one minor amendment and renaming it a law changed nothing. The regime needed the Official Language Law of 5 January 1935, adopted by Ulmanis' government, to build public relations with the Latvian part of society. Such documents as, for example, the Instruction of 27 June 1934 on the Use of the Latvian Language on Railway,[71] were of marginal nature.[72]

As shown by the legal acts arranged chronologically and listed above, a large part of them was adopted during the period when PC and the Constitutional Assembly functioned, from 1919 to 1921. Notably, the first years following the foundation of the Latvian State might have seemed unusual and peculiar for the two largest minorities (Germans and Russians)[73] because, in their view, Latvians had suddenly

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63 Noteikumi par ierēdņu pārbaudīšanu valsts valodas prašanā [Cabinet Regulation on Testing Civil Servants' Proficiency in the Official Language]. 22.11.1921. Valdības Vēstnesis, No. 269, 28.11.1921.

64 Likums par virsnieku un kara ierēdņu pārbaudīšanu valsts valodas prašanā [Law on Testing the Proficiency in the Official Language of Officers and Military Officials]. 17.11.1924. Valdības Vēstnesis, No. 262, 22.11.1924.

65 Noteikumi par Latgales lietu pārzināšanu [Cabinet Regulation on the Overseeing of Latgale's Affairs]. 30.06.1921. Valdības Vēstnesis, No.177, 10.08.1921.

66 Noteikumi par ierēdņu iecelšanu Latgalē [Cabinet Regulation on Appointing Civil Servants in Latgale]. 26.07.1921. Valdības Vēstnesis, No.174, 06.08.1921.

67 Noteikumi par latgaliešu izloksnes lietošanu [Cabinet Regulation on Using the Latgalian Dialect]. 11.08.1921. Valdības Vēstnesis, No.183, 17.08.1921.

68 Noteikumi par valsts valodu [Cabinet Regulation on the Official Language]. 18.02.1932. Issued pursuant to Art. 81 of the *Satversme*. Valdības Vēstnesis, No.39, 18.02.1932.

69 Likums par valsts valodu [The Official Language Law]. Law, 05.01.1935. Valdības Vēstnesis, No. 7, 1935. 09.01.1935.

70 Pārgrozījumi un papildinājumi noteikumos par valsts valodu [Amendments and Additions to the Regulation on the Official Language]. Valdības Vēstnesis, No. 132, 16.06.1934.

71 Instrukcija Nr. 94 par valsts valodas lietošanu dzelzceļu virsvaldē un tai padotās administratīvās vienībās [Instruction No. 94 on the Use of the Official Language in the Executive Board of Railways and Administrative Units Subordinated to it]. 27.06.1934. Valdības Vēstnesis, No. 166, 28.07.1934.

72 of the Official Language Law, 1935.

73 *Feldmanis, I.* The Political Activities of Baltic Germans in Latvia 1918–1940: Discussions in the Historical Literature. The Baltic States at Historical Crossroads. Poltical, economical, and legal problems and opportunities in the context of international co-operation at the beginning of the 21st century. *Jundzis, T.* (ed.). 2nd revised and expanded edition. Rīga: Latvian Academy of Sciences, 2001, p. 610.

come to the very top of the vertical hierarchy of power. The former elite of the Russian Empire now had to respect the irrevocable will of the Latvian nation to establish its own state (*povoir constituant*), accepting that Latvians had become the titular nation, which would now create a state on its historical land and would define its national cultural identity.[74] For both ethnic minorities, imperial and colonial memories were too recent a past to be easily abandoned within a couple of years. It is worth recalling that, during this period, as the result of agrarian reform, huge land areas, belonging to barons and German clergy, were redistributed in favour of Latvian-speaking peasants. Adding to it the loss of titles, political influence, it would be naïve to wish that the majority of these former masters would start speaking the language of their coachmen and servants within a short time. With the roles being reversed, they observed the efforts made by Latvians with arrogant curiosity, pronounced doubts regarding the potential of the Latvian as the language of culture,[75] which alternated with fear about their own further existence in the new circumstances. [76] As regards the language, the groups of both ethnic minorities were sufficiently large to be linguistically self-sufficient. Eduard von Rosenberg, the first State Controller of the Republic of Latvia, spoke about the use of the Latvian language very emotionally, which is humanely understandable, (speaking in German):

> *[…] If you, gentlemen, demand from us proficiency in the Latvian language, then you are demanding from us the impossible, because we, regretfully, have never learnt this language in our schools. But all of you know our languages, either German or Russian, therefore we are not demanding anything impossible from you! […]*

This period is fundamental in terms of changing the worldviews also for the Latvian intelligentsia, part of whom in the pre-state period, to enter the high society, were forced to join either the German or the Russian cultural environment.[77] The Latvian language started to assume the role of the main (official) language naturally, becoming the lifeblood for of the public administration.

In PC, ethnic minorities achieved the governance and autonomy of schools that was acceptable to them,[78] which is proven by the laws of 8 December 1919 "On the System of Ethnic Minority Schools in Latvia" and "On Latvia's Institutions of Education", which guaranteed autonomy to minority schools. Art. 41 of the law "On Latvia's Institutions of Education" defined the obligation of state and communal institutions to maintain "… for each nationality so many obligatory schools as are needed for educating their children, pursuant to the rules of this law." Here, it should be noted that, in 1925–1935, the number of pupils in Russian schools increased 1.5 times, ensuring to all children basic education. for the first time in the history of Latvia's Russians the State of Latvia achieved this, which the Russian Empire was incapable of doing. The law "On Latvia's Institutions of Education" (Art. 7) stipulated that, in all schools in Latvia, "the following shall be included in the list of compulsory

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[74] *Levits, E.* Valstsgriba. Idejas un domas Latvijai 1985–2018. [A Will for Statehood. Ideas and Thoughts for Latvia 1985–2018]. Rīga: Latvijas Vēstnesis, 2019, pp. 637, 688.

[75] *Osipova, S.* Valsts valoda kā konstitucionāla vērtība [Official Language as a Constitutional Value]. Jurista Vārds, No. 42 (689), 08.10.2011.

[76] Tautas padomes IV sesijas 8. sēdes 1919. gada 27. augusta stenogramma [Transcript of the 8th sitting of IV session of the People's Council of 27.08.1919].

[77] *Osipova, S.* Latviešu juridiskās valodas attīstība pēc Pirmā pasaules kara [Development of Legal Latvian after the First World War]. Juridiskā zinātne, No. 1, 2010, pp. 82–83.

[78] *Šilde, Ā.* Latvijas vēsture, 1914 – 1940. Valsts tapšana un suverēna valsts [History of Latvia, 1914–1940. The Making of the State and the Sovereign State]. Stokholma: Daugava, 1976, p. 332.

subjects": the Latvian language, the history and geography of Latvia. These subjects had to be taught "in all schools starting from the third year of elementary school, giving general introduction of these subjects to children. Later, these subjects shall be taught systematically in the official language". Truth be told, these provisions did not make a considerable difference in promoting mastery of the official language among non-Latvians. Statistics show that, in the period between 1920 and 1930, the share of those proficient in Latvian in the Russian community increased very little (from 14 to 18%)[79], which does not speak well of the official language policy at the time. At the University of Latvia and the Riga Polytechnical Institute, faculty members lectured not only in Latvian but also in German and Russian.[80]

The government also did a lot in creating normative regulation on language. At the time of the Constitutional Assembly, the Cabinet, headed by Zigfrīds Anna Meierovics, adopted several regulations in the area of language in 1921. Understandably, the government was concerned with the civil service, therefore on 22 November 1921 the Cabinet Regulation on Testing Civil Servants' Proficiency in the Official Language was issued. This Regulation provided that, in the future, "only such persons who are sufficiently proficient in the official language" would be employed as civil servants, whereas those "who do not have sufficient proficiency in the official language but want to remain in the service of a state institution" would be given an opportunity to learn to speak fluent Latvian within one year. Proficiency in the official language had to be demonstrated in front of a commission. As regards Latgale, the term was extended for two more years. Undeniably, Meierovics' government, indeed, tried to deal with the problems of Latgale region by special treatment of Latgale. Thus, for example, the Cabinet Regulation adopted on 11 June 1921 on using the Latgalian dialect provided that "all state institutions and officials" in the future had to accept applications, written in the Latgalian dialect, and allowed derogation from using the literary Latvian language in Latgale region. The Regulation was laconic and consisted of two paragraphs, and yet it had a considerable positive impact. The Regulation provided that, henceforth, officials, state and local government institutions had "the right to use the Latgalian dialect in clerical work and correspondence, as well as in advertisements, on signboards, etc." On 30 June 1921, the Cabinet Regulation on the Overseeing of Latgale's Affairs [81] was issued, abolishing the Department of Latgale Affairs of the Ministry of the Interior (MoI), which had compromised itself, establishing instead the position of the highest-level civil servant – Deputy Minister for the Interior in Latgale Affairs with broad competence in the matters of Latgale. This official was given the right to request from any ministry or institution information about the work of these institutions in Latgale. The Regulation granted to the Deputy Minister for the Interior in Latgale Affairs the right to provide references in matters relating to appointments of civil servants. On 26 July 1921, the Cabinet adopted one more Regulation – on appointing civil servants in Latgale, which set out the obligation of central state institutions to coordinate with the Deputy Minister for the Interior in Latgale Affairs appointment of all civil servants who were

[79] *Dribins, L., Goldmanis, J.* Mazākumtautību devums Latvijas Republikas kultūrā [Contribution of Ethnic Minorities to the Culture of the Republic of Latvia]. Latvieši un Latvija. Akadēmiski raksti. IV sējums. Latvijas kultūra, izglītība, zinātne [Latvians and Latvia. Academic Articles. Vol. IV. Culture, Education and Science of Latvia]. *Stradiņš, J.* (ed.-in-chief). Rīga: Latvijas Zinātņu akadēmija, 2013, p. 234.

[80] *Osipova, S.* Latviešu juridiskās valodas attīstība pēc Pirmā pasaules kara [Development of Legal Latvian after the First World War]. Juridiskā zinātne, No. 1, 2010, p. 84.

[81] Noteikumi par Latgales lietu pārzināšanu [Regulation on the Overseeing of Latgale's Affairs]. 30.06.1921. Valdības Vēstnesis, No. 177, 10.08.1921.

appointed "for the needs of Latgale". The Regulation provided that, in appointing civil servants in Latgale, "preference should be given to those candidates, with other traits being similar, who know the Latgalian dialect and are familiar with the local conditions".

This work continued also after the Constitutional Assembly ceased its operations. The first convocation of the *Saeima* adopted the Law of 17 November 1924 "On Testing the Proficiency in the Official Language of Officers and Military Officials". The titles of these legal acts themselves testify to a degree of legal certainty in normative acts which regulate the level of proficiency in the official language in public administration and armed forces. Latvian is called the official language. The Cabinet and the *Saeima* make great effort to ensure sufficient proficiency in the Latvian language in public administration, armed forces. Admittedly, part of the civil service did not fare well in mastering Latvian, which was proven by the fact that, in 1923, a note was added to this Regulation[82], stating that "the head of department" had the right to postpone this test until 31 December 1923 for some civil servants. The reason for such postponement was "justified grounds why [civil servants] had not been able to learn the official langue". This liberal approach was praised even by the contemporary defenders of the Russian language, noting that the Latvian State had been lenient towards those who had not passed the examination. This was a reference to the information that, in 1923, those heads of institutions who had not passed the exam were given the right to extend the term until 1924.[83] The timeframe of 2 years for mastering the language (similarly as for civil servants) was set also for those belonging to the armed forces.

In general, interethnic relations that developed during PC period, to a large extent due to the policy implemented by Kārlis Ulmanis, can be seen as stable and consistent. In pre-war Latvia and also Estonia, the minorities were ensured incomparably better conditions than in many other countries, which was proven by the State's official position towards education in minority languages in schools.[84] The principles established in the PC period continued to function as guidelines and, to a large extent, served as the basis for culture and education of ethnic minorities. Thus, for example, during the first period of independence, the Jewish Theatre, the Riga Russian Theatre, the Riga German Theatre, the German Herder Institute, the Riga Association of German Theatre, the Latvian Polish Theatre operated in Riga, and there were other institutions, of which the greatest part was supported by the state.[85]

Notably, with the Regulation on the Official Language of 18 February 1932, adopted pursuant to Art. 81 of the *Satversme*, the State launched new policy relating

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[82] Papildinājums noteikumos par ierēdņu pārbaudīšanu valsts valodas prašanā [Addition to the Regulation on Testing Civil Servants' Proficiency in the Official Language]. 06.02.1923. Likumu un Ministru kabineta noteikumu krājums, 19.03.1923.

[83] Mazākumtautību tiesiskais un faktiskais stāvoklis Latvijā. Pēc viņu aizstāvju datiem. Demogrāfija, valoda, izglītība, vēsturiskā atmiņa, pilsonība, sociālā nevienlīdzība [The Legal and Actual State of Ethnic Minorities in Latvia. According to the Data of their Advocates. Demography, Language, Education, Historical Memory, Citizenship, Social Inequality]. Collected articles, *Buzajevs, V.* (ed.). Rīga: Latvijas Cilvēktiesību komiteja, 2015, 16.lpp.

[84] *Bleiere, D., Butulis, I., Feldmanis, I., Stranga, A., Zunda, A.* History of Latvia the 20th Century. Rīga: Jumava, 2006, p. 212.

[85] *Dribins, L., Goldmanis, J.* Mazākumtautību devums Latvijas Republikas kultūrā [Contribution of Ethnic Minorities to the Culture of the Republic of Latvia]. Latvieši un Latvija. Akadēmiski raksti. IV sējums. Latvijas kultūra, izglītība, zinātne [Latvians and Latvia. Academic Articles. Vol. IV. Culture, Education and Science of Latvia]. *Stradiņš, J.* (ed.-in-chief). Rīga: Latvijas Zinātņu akadēmija, 2013, pp. 231–260.

to the official language, which was continued and developed at the time of Kārlis Ulmanis' regime. This period saw flourishing of the Latvian language and culture. During Ulmanis' time, Latvia ranked second in Europe as regards the number of published books,[86] during this period, the Latvian Language Archive (1935), the Orthography Commission were established, which, in turn, made the publication of "Latvian Dictionary of Orthography" possible (1942, 1944). Yes, of course, Ulmanis promoted exaggerated and naïve ideologization of history in the spirit of national perspective, however, as stated by Professor Maija Kūle, Ulmanis' aim was much broader[87] and it was linked to the preservation of the Latvian nation. Propaganda of the regime and the misleading title of the Regulation of 1932, adopted pursuant to Art. 81 of the *Satversme*, i.e., "regulation", most probably was the reason why even at present Ulmanis' Official Language Law of 1935 is discussed[88], which unfoundedly overshadows achievements of the parliamentary period. Of course, an authoritarian regime with minimised legislative process, police methods and drastic penalties has greater chances to enforce compliance with the provisions on the official language; however, it is a part of a long-term process, which has been implemented step by step during the parliamentary period.

2. The failed attempts to define in the *Satversme* the status of the official language for Latvian of the first period of independence

As is well known, Latvian as the official language was enshrined in the *Satversme* only in 1998. This happened in the already restored Republic of Latvia, when the issue of the constitutionality of the Latvian language emerged with new relevance. Until 1998, during the first period of independence, there had been two failed attempts to do it:

1) in the spring of 1922, when the majority support was not gained at the third reading at the Constitutional Assembly to adopt the second part of the *Satversme* (the status of the official language for Latvian was introduced in Art. 115 of the draft law).
2) in the spring of 1934, when the third reading in the 4th *Saeima* did not take place because the *Saeima* was abolished (the status of the official language for Latvian was introduced in Art. 4 of sizeable amendments to the *Satversme*, submitted by the Farmers' Union).

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[86] *Zanders, V.* Nacionālā grāmatniecība gadsimta ritumā *[National Book Publishing Throughout Centuries]*. Akadēmiskie raksti 4 sējumos "Latvieši un Latvija", IV sējums "Latvijas kultūra, izglītība, zinātne". [Latvians and Latvia, Academic Articles in 4 Volumes. Vol. IV "Culture, Education and Science of Latvia"]. Rīga: Latvijas Zinātņu akadēmija, 2013, p. 337.

[87] *Kūle, M.* Jābūtības vārdi. Etīdes par zināšanām un vērtībām mūsdienu Latvijā [Words of Moral Obligation. Sketches on Knowledge and Values in Contemporary Latvia]. Rīga: Apgāds Zinātne, 2016, p. 235.

[88] "…the law on Latvian as the official language was adopted only in 1935.". See Latviešu valodas aģentūra. Vēsture. Available: https://valoda.lv/valsts-valoda/vesture/ [last viewed 09.08.2021]. Similar statements are found also in analytical articles: "The law [the Official Language Law of 1935] was significantly shorter and simpler compared to the contemporary regulation, and this was a new impetus for the development of the Latvian language, which significantly reinforced its position. See *Ruks, M.* Latviskās enerģijas nesējs. Kārlim Ulmanim – 135 [The Bearer of Latvian Energy. Kārlis Ulmanis Turns 135]. Latvijas Avīze, 04.09.2012.

Analysis of the historical regulation on the constitutional symbols of one's State is important because, by exploring the successes and failures in our past, we are able to make our statehood stronger and more capable. As noted by the Supreme Court, by analysing the past, we can gain important arguments to clarify the content of the concept "Latvian language".[89] When reading about debates with respect to Art. 115, one the one hand, the position should be supported that the majority of the Constitutional Assembly did not attempt to exclude the Latgalians from the Latvian nation, which would follow logically, if their dialect had been recognised as being a foreign language, but, quite on the contrary, to ensure as close as possible integration of the Latvian nation.[90] On the other hand, it is also clear that it would have sufficed with the Latgalians' votes to adopt the second part of the *Satversme* in the third reading and, together with the first part, it would have created a modern constitution for those times. There are grounds to consider that the language issue turned into an unresolvable problem, regarding which the authors of the constitution could not reach an agreement.

2.1. Article 115 of the unadopted II part of the draft *Satversme* (1922)

The draft *Satversme* was elaborated by the Latvian Constitutional Assembly (1920–1922), its special Committee for Drafting the *Satversme*, which organised its work in two sub-committees: Sub-committee No. 1 and Sub-committee No. 2. Each of them worked on its own, special part of the *Satversme*. Sub-committee No. 1 was responsible for the basic rules on organising the state, which was called the First Part of the *Satversme* (Preamble. Articles 1-88), whereas Sub-committee No. 2 was preparing the Second Part of the *Satversme* or the part on fundamental rights (Articles 87–117). In contrast to many other constitutions on the world, the Latvian *Satversme* was not approved as a united project but instead as two separate draft laws. Initially, each part of the draft was approved by the respective sub-committee in three readings, afterwards it was approved by the Committee for Drafting the *Satversme*, and only then the respective part was submitted to the Constitutional Assembly, where it had to be approved in three readings by the Constitutional Assembly. Readings of the *Satversme's* parts were held consecutively. At the beginning, the readings of the first part were held, then – those of the second part. Consequently, on 15 February 1922, the first part of the *Satversme* had its third reading, following this, on 4–5 April, the second part of the *Satversme* was examined, which was unable to gain the support of majority.

The Committee for Drafting the *Satversme*, which laid the foundations for the architecture of the *Satversme*, already in 1921 largely had a clear picture what the *Satversme* would look like. The sitting on 29 April 1921 of the Sub-committee No. 2, which worked on the Second Part of the *Satversme* "Basic Rules in the Citizens' Rights and Obligations", was attended by four members of the sub-committee – Fricis Jansons, Andrejs Kuršinsis, Pauls Kalniņš and Jakovs Helmanis, the minorities' representative, who without any discussions accepted and entered into the minutes a new norm of the draft *Satversme*:

[89] Decision by the Department of Administrative Cases of the Supreme Court Senate on 18 August 2009 in Case No. SKA596/2009, para. 6.

[90] *Pleps, J.* Latgaliešu valoda un Satversme [The Latgalian Language and the *Satversme*]. Jurista Vārds 25.10.2011. Nr. 43 (690).

> *The Latvian language shall be the official language. Those having the rights of minorities shall be guaranteed free use of their language both in speech and in writing.*[91]

The initial author of the norm can no longer be identified; however, it is possible to trace its movement through the general meeting of the Constitutional Assembly, where it arrived already as Art. 115 with some improvements in the second sentence concerning the issue of minorities.

> *115. The Latvian language shall be the official language. Those having the rights of minorities shall be guaranteed free use of their language both in speech and in writing. Which minority languages and to what extent are admissible in state, local government and judicial institutions shall be defined by a special law.*[92]

From the perspective of science of the time and the architecture of the *Satversme*, placement of Art. 115 within the circle of recognised citizens' rights[93] had a certain logic. At the time, as noted above, ethnic minorities actively worked on their own special laws, focusing on the work of the Committee for Drafting the *Satversme*. Therefore, the members of the Constitutional Assembly, representing ethnic minorities, had no valid reason to discuss Art. 115. It would not have been right either from the perspective of tactical or strategic considerations because the procedure for using their language would not be set out in the constitution. Likewise, the second sentence of Art. 115, which referred to ethnic minorities, was neutral. Even Paul Schiemann, who, in the Committee for Drafting the *Satversme* had unsuccessfully tried to replace the concept of "ethnic minorities" in the second sentence of Art. 115 by enumeration of particular ethnicities (Jews, Germans and Russians), instead of a legal concept subject to abstract interpretation,[94] and did not ask for the floor.

The representatives of Latgale, however, were in an entirely different situation at the Constitutional Assembly because, in their opinion, the national minorities were considerably ahead of them. The rights of ethnic minorities are included on the constitutional level, whereas the issue of Latgalians was taken off the agenda of the *Satversme*, because the next article, Article 116, turns to the organisational status of ethnic minorities and Article 117 – to the conditions for restricting fundamental rights in a state of emergency. At the general meeting of the Constitutional Assembly on 7 February 1922, when Art. 115 is discussed, F. Kemps submits a proposal to add to the first sentence of Art. 115 "The Latvian language shall be the official language", the words:

> *moreover, in Latgale region, the Latgalian dialect shall be recognised as being the official language.*

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[91] Satversmes II apakškomisijas1921. gada 29. aprīļa sēdes protokols Nr. 60. [Minutes No.60 of the sitting of Constitutional Assembly's 2nd Sub-committee of the Committee for drafting the *Satversme* on 29.04.1921]. Unpublished.

[92] Satversmes II daļas lasīšana pa pantiem V. sesijas 10.sēdes 1922. gada 7. februāra stenogramma [Transcript of the 10th sitting of V Session of the Latvian Constitutional Assembly, of 07.02.1922]. Latvijas Satversmes sapulces stenogrammu izvilkums 1920–1922. Latvijas Republikas Satversmes projekta apspriešana un apstiprināšana [Extract of transcripts of the meeting of the Latvian Constitution 1920–1922. Discussion and approval of the draft Constitution of the Republic of Latvia], (digital publication). Rīga: Tiesu namu aģentūra, 2006, p. 737.

[93] *Lēbers, A.* Lekcijas par Ievadu tiesību zinātnē. II daļa [Lectures on Introduction to Law. Part II]. Rīga: LU stud. pad. grāmatnīca, 1922, p. 12.

[94] Satversmes izstrādes komisijas 1921. gada 3. novembra sēdes protokols Nr. 58 [Minutes No. 58 of the sitting of the Committee for Drafting the *Satversme* on 03.11.1921]. Unpublished.

When the proposal by the deputies representing Latgale regarding the right of the dialect[95], the Latgalians and' "the Balts"[96] engage in intense debate. The Latgalians are, obviously, offended and, therefore, are not sparing of words and in the discussions express concern regarding the policy for assimilating Latgalians. Kemps holds that "the Latgalian dialect" is beautiful and rich[97], therefore ridiculing it is said to be chauvinism [of other Latvians]. It is alleged that it is not "patriotism and serious building of the State but it is chauvinism within the nation itself." It is clear that the Latgalians now would be in a worse situation than the national minorities, which will have a special provision in the *Satversme* and a special law will be adopted later:

> *[…] Our dialect is not comprehensible and loved as we would think because we often observe that when the Latgalians come to take the floor, large part of the meeting leave the hall. […] we hear and feel from all sides how it is ridiculed, distorted, made fun of, even denied […] In some other matters, like those of schools and local governments, we [Latgalians] have been placed lower compared to the minorities, and we should demand the minority's rights already now.* ***Also in this matter we do not want to be below the minorities.*** [98]

K. Skalbe, the Latvian poet, journalist, the classic of the Latvian literature, is not satisfied with such positioning of the matter, he is calling out already during Kemp's speech "Where are the Latgalians "minorities"!?!", and, having asked for the floor, explains his opinion from the podium of the Constitutional Assembly:

> *…do not trouble us with this nonsense and do not try to make us believe that there is another Latvian language apart from the one Latvian language. It is a dialect, like many other dialects that exist in our nation. We do not deprive them of this right to a dialect, and do not trouble Latgalians when they speak in their dialect in courts and other institutions, but we cannot demand civil servants of this state to respond in their dialect, because the written language rules in all institutions […] Official language is our literary language […]*[99]

F. Trasūns said a reconciliatory speech at this meeting, stating

> *there is one language and it is the official language",* indicating, however, that: *"[…] now the question arises which dialect should be given preference. If we look*

[95] Latgale (*Latgola*) is one of Latvia's historical lands, which had its own course of development prior to the establishment of the Latvian State. Since mid-16th c., Latvia was part of the State of Lithuania, then the Polish-Lithuanian State, and it becomes part of the Russian Empire at the end of 18th century. Up to 1917, Latgale was administratively separated from the rest of Latvia, being included in the Pskov and later – Vitebsk Governorate. In Latgale, serfdom in abolished fifty years later, as the serfdom in Kurzeme was abolished in 1817 and in Vidzeme – in 1819, whereas in Latgale – only in 1861, which affected considerably education and the standard of living. In difference to the rest of Latvia, which is Protestant due to the influence of Swedes and Germans, the Roman Catholic Church dominates in Latgale. The impact on the Latgalian language by Polish, Lithuanian, as well as by being in another administrative region during the period of Russian Empire, was considerable. Although many words are understandable, part are incomprehensible to an average Latvian-speaker. The dialect and the written form of Latgalian differ quite considerably from the Latvian language.

[96] At the sitting, several speakers, F. Kemps and F. Trasūns among them, called Latvian the Baltic Language.

[97] Latvijas Satversmes sapulces IV sesijas 8. sēdes 1921. gada 5. oktobra stenogramma [Transcript of the 8th sitting of IV Session of the Latvian Constitutional Assembly on 05.10.1921].

[98] Latvijas Satversmes sapulces IV sesijas 7. sēdes 1921. gada 4. oktobra stenogramma [Transcript of the 7th sitting of IV Session of the Latvian Constitutional Assembly on 04.10.1921].

[99] Ibid.

> *at this matter historically, then it turns out that both dialects are parallel in their standing. […] One is richer, the other – less so, but, nevertheless, recently has started to develop fast. Collapse of the State is inconceivable only because the Latgalian dialect would be used in Latgale. […] Our position is that each Latgalian should now the Baltic dialect, as all citizens of Latvia. […]. The Balts should know the Latgalian dialect.*

Debates ended with voting, where, again, only the Latgalians had voted for the Latgalians' proposal. There were only 18 votes in favour of it. This time, four members of the Constitutional Assembly abstained from voting.

Despite the government's attempt to reach a compromise in the Latgalian matter[100], there were grounds to consider that the dismissingly arrogant attitude of the Constitutional Assembly towards the Latgalians' proposals regarding Art. 99 and Art. 11 was "the last drop", making the patience of Latgalian deputies run out, which simultaneously decided the fate of the Second Part of the *Satversme*. As it is well known, at the sitting of the Constitutional Assembly on 5 April 1922, 62 members voted for the Second Part of the *Satversme*, whereas 62 abstained, thus, taking into account that the votes of those abstaining were counted as votes against passing of the motion, in the end there were 62 votes "for" and 68 votes "against" it.[101] Even half of the Latgalians' votes had been enough to adopt the Second Part of the *Satversme*. Since in the third reading on the final wording at the sitting of the Constitutional Assembly on 5 April 1922 there were not enough votes for the Second Part of the *Satversme*, its first part, approved on 15 February 1922 became the text of the *Satversme*. Both parts were closely interconnected,[102] and the failure to adopt the second part was a great loss not only for the matters pertaining to human rights,[103] but also for matters of local governments and the official language. All these matters [104] had to be regulated on a lower level by legal acts of lower legal force. Consequently, the Latvian language acquired the status of the official language only after ten years.

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[100] It cannot be said that the Latgalians' demands fell on entirely deaf ears. Whether the solutions were acceptable for Latgalians is another matter. It is difficult to judge without additional information. Before the proposals made by Latgalians regarding autonomy and language that were dismissed at the general meetings of the Constitutional Assembly, several regulations, laconic as to their scope, were issued. One of the government regulations aligned the matter of the Latgalian dialect, two others adjusted the supervision of Latgale affairs. Regulations also provided that, in appointing civil servants in Latgale "preference shall be given to candidates who, with other traits being equal, know the Latgalian dialect and are familiar with the local conditions" See Noteikumi par latgaliešu izloksnes lietošanu [Regulations on Use of Latgalian Dialect]. 11.08.1921, Valdības Vēstnesis, No. 183, 17.08.1921; Noteikumi par Latgales lietu pārzināšanu [Regulations on Overseeing of Latgale's Affairs]. 30.06.1921. Valdības Vēstnesis, No. 177, 10.08.1921; Noteikumi par ierēdņu iecelšanu Latgalē [Regulations on Appointing Officials in Latgale]. 26.07.1921. Valdības Vēstnesis, No. 174, 06.08.1921.

[101] Latvijas Satversmes sapulces V sesijas 34. sēdes 1922. gada 5. aprīļa stenogramma [Transcript of the 34th sitting of V Session of the Latvian Constitutional Assembly on 05.04.1922].

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

[103] *Balodis, R.* Ievads Latvijas Republikas Satversmes VIII nodaļas komentāriem [Introduction to the Commentaries on Chapter VIII of the *Satversme* of the Republic of Latvia]. Latvijas Republikas satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības [Commentaries on the Satversme of the Republic of Latvia. Chapter VIII. Fundamental Human Rights]. Collective of authors under scientific editorship by Prof. R. Balodis. Rīga: Latvijas Vēstnesis, 2011, pp. 8–9.

[104] Piezīmes par Satversmes 8. nodaļu – Cilvēka pamattiesības. Satversme un cilvēktiesības [Notes on Chapter 8 of the *Satversme* – Fundamental Human Rights. The *Satversme* and Human Rights]. Gadagrāmata, 1999. Cilvēktiesību žurnāls, No. 9–12. Rīga: Latvijas Universitāte, 1999, p. 13.

Non-Latvian lawyers (Balduin von Düsterlohe,[105] Max Lazerson) smirked about this failure. Lazerson even called the *Satversme* "*Rumpf-Verffassung*" or a constitution with a trunk lacking a head.[106]

2.2. Attempt to amend the Satversme at the 4th Saeima (1934)

The second attempt to include into the *Satversme* the norm on the official language took place in the beginning of May 1934, a couple of weeks before Kārlis Ulmanis' coup. This initiative is shown by the Public Law Committee of the *Saeima*, which at one point (1932) had revised the Regulation on the Official Language. The Farmers' Union had submitted sizeable amendments to *Satversme*, which were predominantly related to changing the model for electing the President of the State and the scope of the President's mandate. These amendments did not include the norm on the official language. The *Saeima*, at its sittings on 3 and 4 May 1934,[107] examining these amendments to the *Satversme*, in the second reading approved the proposal by the Public Law Committee to grant the status of the official language to the Latvian language in Art. 4 of the *Satversme*.

Actions of the Public Law Committee are understandable, as the committee continued the set course towards enshrining the Latvian language in the legal system. During the *Saeima's* sitting, the rapporteur of the Public Law Committee Jēkabs Alfrēds Bērziņš explained the committee's actions by the legal technique, pointing to the need to enshrine in the *Satversme* the provisions regarding the official language that had been defined in the regulation with the force of law.[108] The sitting of the *Saeima* was extremely emotional, and its Mmmbers, when debating the language, from the podium shared also gossip regarding the imminent *coup d'état*. They constantly digressed from the main topic. Member of the *Saeima*, the leader of "Aizsargi" [Defenders] organisation A. Bērziņš and Prime Minister K. Ulmanis, who were both present, are often mentioned. During the sitting, repeated interjections from the floor were addressed to the two main organisers of the *coup d'état*. The new wording of Art. 4 of the *Satversme* was unanimously approved in the second reading, without particular discussions,[109] however, also this time around the official language was not defined in the *Satversme* because, on 15 May, Ulmanis together with his allies staged a successful *coup d'état* and, on 18 May, the new government announced the change of the state order until the *Satversme* would be reformed.[110] The status of the Latvian language, however, benefitted from it.

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105 *Pleps, J.* Pamattiesību katalogs starpkaru periodā [Catalogue of Fundamental Rights in the Inter-war Period]. Jurista Vārds, No. 48, 23.12.2008.

106 *Lazdiņš, J.* Rechtspolitische Besonderheiten bei der Entstehung des lettischen Staates und seiner Verfassung. Juridiskā zinātne / *Law*, No. 7, 2014, s. 17.

107 Latvijas Republikas IV Saeimas IX sesijas 5. sēdes 1934. gada 4. maijā stenogramma [Transcript of the 5th sitting of IX Session of IV *Saeima* of the Republic of Latvia on 04.05.1934]; Latvijas Republikas IV Saeimas IX sesijas 3. sēdes 1934. gada 3. maija stenogramma [Transcript of the 3rd sitting of IX Session of IV *Saeima* of the Republic of Latvia on 03.05.1934].

108 Meaning Regulation on the Official Language, issued in the procedure set out in Art. 81 of the *Satversme* in 1932.

109 Latvijas Republikas IV Saeimas IX sesijas 5. sēdes 1934. gada 4. maijā stenogramma [Transcript of the 5th sitting of IX Session of IV *Saeima* of the Republic of Latvia on 04.05.1934].

110 "Until reforms of the *Satversme* are implemented, the functions of the *Saeima* shall be performed by the Cabinet of Ministers, from 15 May 1934, 23:00". The Government's Declaration on Suspending the Work of the *Saeima*, Cabinet of Ministers, 18.05.1934: Valdības Vēstnesis, No. 110, 19 May 1934.

3. The issue of Latgalians at the Constitutional Assembly: Language, autonomy and church

The literary Latvian language was basically heard at the sittings of PC, the Constitutional Assembly and, later, the first four convocations of the *Saeima*; however, now and then also Russian and German languages were heard, as was the Latgalian dialect. Latgalians resorted to the Latvian language only when wanted "to be better understood".[111] It was not noticeable when reading the transcripts, because employees of the Transcripts Bureau transformed the Latgalian language into the literary Latvian language. As it is at present, not everyone fully understood the Latgalian dialect,[112] although it is worth noting here that not all members of the parliament understood the speeches that were made in German.

At the time of creating the *Satversme* (1920–1922), the Latgalians elected to the Constitutional Assembly, together with other members of Assembly, were active in the area of legislation, step by the step creating the foundations for the State of Latvia, at the same time tirelessly trying to remind of the interests of their native Latgale. The most visible advocates of the Latgalian language,[113] culture, autonomy and church were the priest of the Roman Catholic Church (professor of philosophy and theology), deputy from the Christian Union of Latgale Peasants Francis Trasūns and the Latgalian author, deputy of the Latgale People Party (also, Democratic Latgalian Workers' Party; Socialist Workers' Party of Latgale) Francis Kemps.[114] The latter, *inter alia*, created the word "Latgale" (1900).

Their greatest opponents of Latgalians were social democrats, with whom they had already had squabbles in PC regarding faith education in schools. Both groups of deputies fought each other ardently: one fought for religious education in schools, the other – for excluding faith-related education from the curriculum entirely.[115] At the Constitutional Assembly, when the Second Part of the *Satversme* was drafted, clashes between the Latgalians and social democrats were very obvious in the debates regarding the bizarre wording of Art. 112, initiated by the social democrats.

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[111] Latvijas Satversmes sapulces IV sesijas 8.sēdes 1921. gada 5. oktobra stenogramma [Transcript of the 8th sitting of IV Session of the Latvian Constitutional Assembly on 05.10.1921].

[112] For example, Member of the Constitutional Assembly (Latgale People's Party), after analysing publications, arrives at the conclusion that journalists could not understand some speeches in the Latgalian language by the Latgalian deputies (newspapers wrote about "incomprehensible Latgalian dialect"), and this is why the press did not report on these speeches. See Satversmes sapulces IV sesijas 8.sēdes sēdes 1921. gada 5. oktobrī stenogramma [Transcript of the 8th sitting of IV Session of the Latvian Constitutional Assembly on 05.10.1921].

[113] The author encountered similar problems regarding the definition as the ones mentioned by scholar of law Jānis Pleps, whose disclaimer in the article "Latgalian Language and the *Satversme*" the author upholds entirely "…within his article, for simplicity's sake, the author sues the formulation "the Latgalian language"; however, this does not mean that he has expressed an opinion on whether the Latgalian language should be regarded as being an independent language or a dialect. Occasionally, the formulation "the Latvian language of Latgale" is used in the same meaning." In analysing the transcripts of the Latvian Constitutional Assembly the formulation of the time has been retained, i.e., "the Latgalian dialect"" (see *Pleps, J.* Latgaliešu valoda un Satversme [The Latgalian Language and the *Satversme*]. Jurista Vārds, No. 43(690), 25.10.2011).

[114] It is interesting that Ādolfs Klīve, a Member of PC, the Constitutional Assembly and the first three convocations of the *Saeima*, one of the top leaders of the Farmers' Union, in his memoirs describes Kemp as the lobbyist of Polish nobility in Latgale (*see Klīve, Ā.* Brīvā Latvija: Latvijas tapšana: atmiņas, vērojumi un atzinumi. [Free Latvia: Creation of Latvia: Recollections, Observations and Insights]. Bruklina: Grāmatu Draugs, 1969, pp. 234, 118).

[115] *Šilde, Ā.* Latvijas vēsture, 1914 – 1940. Valsts tapšana un suverēna valsts [History of Latvia, 1914–1940. The Making of the State and the Sovereign State]. Stokholma: Daugava, 1976, p. 332.

The Latgalians proved the great importance of the Roman Catholic Church in the life of Latgale. More about it – at the conclusion of the current section.

In creating the *Satversme*, the matter of Latgalians was discussed most in connection with four Articles of the *Satversme*. The Latgalians tried to include the germs of the idea of Latgale's autonomy in Art. 4 and Art. 99 of the *Satversme*, but in Art. 115 – to enshrine, in addition to the Latvian language, also the rights of the Latgalian dialect within the territory of Latgale.[116]

As regards the idea of Latgale's autonomy, it must be noted that the majority of the Constitutional Assembly was against it. Trends of separatism were seen in the idea; therefore, attempts were made to dismiss it as undesirable for the unity of Latvia.[117] Latgalians themselves did not have a united view on the practical aspects of autonomy.[118] Whenever even the slightest chance presented itself, Francis Trasūns' nephew Jezups Trasūns (Workers' Party), tried to get involved in debate regarding the autonomy of Latgale, which was considered to be an idea of a narrow circle of politicians. Both the rightist forces (e.g., the Farmer's Union) and the leftist forces (e.g., social democrats) of the Constitutional Assembly took a united stand against the idea of Latgale's autonomy.[119] Social democrat Fēlikss Cielēns used the Latgalians' internal contradictions, hastening to note that was not clear for the Latgalians themselves what they wanted – "These discussions, these fights among themselves, the Latgalians, are quite interesting, and interesting in the sense that we see that something is out of order in Latgale (mirth in the audience) […]". Due respect should be paid to Cielēns' agility in skilfully diverting the embarrassing question into talks about elections, making the Latgalians, instead of speaking about the idea of autonomy, justify themselves. All this bewildered the other members of the Constitutional Assembly who, in such circumstances, saw no grounds for supporting the autonomy of Latgale.[120]

Two almost identical proposals by the Latgalians to add to the draft *Satversme* special disclaimers regarding Latgale's autonomy are found in the transcripts of the Constitutional Assembly:

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[116] More on this in Section 2.1. of this article "Article 115 of the unadopted Second Part of the draft *Satversme*".

[117] *Balodis, R., Lazdiņš, J.* Satversmes vēsturiskā attīstība. Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi. [Historical Development of the *Satversme* in Latvia. Commentaries on the *Satversme* of the Republic of Latvia. Introduction. Chapter I. General Provisions.] Collective of authors under scientific editorship by Prof. R. Balodis. Rīga: Latvijas Vēstnesis, 2014, p. 61.

[118] See Latvijas Satversmes sapulces IV sesijas 7. sēdes 1921. gada 4. oktobra stenogramma [Transcript of the 7th sitting of IV Session of the Latvian Constitutional Assembly on 04.10.1921], kā arī Latvijas Satversmes sapulces V sesijas 33. sēdes 1922. gada 4. aprīlī stenogramma [Transcript of the 33rd sitting of V Session of the Latvian Constitutional Assembly on 04.04.1922].

[119] It has to be admitted that Latvia of the time might have had concerns regarding the ambitions of Piłsudski's Poland to restore its borders of 1722, which, then, would comprise not only Latgale but also Kurzeme See Parlamentārā izmeklēšana Latvijas Republikā 2. Saeimas izmeklēšanas komisiju galaziņojumi, viedokļi, liecības. [Parliamentary Investigation in the Republic of Latvia. Final Reports, Opinions, Testimonies of the Inquiry Committees of the 2nd *Saeima*]. Prof. *Balodis, R.* (sc. ed.). Rīga: Latvijas Vēstnesis, 2016, pp. 158, 199; *Balodis, J.* Atmiņu burtnīcas 1918.-1939. gads [Notebooks of Reminiscence 1918–1939]. *Caune, A.* (comp.), Rīga: Latvijas Vēstures institūta apgāds, 2015, pp. 205–208; *Cielēns, F.* Laikmetu maiņā. Atmiņas un atziņas. Otrais sējums: Latvijas neatkarīgās demokrātiskās republikas lielais laiks [In the Change of Eras. Recollections and Insights. Volume II. The Grand Time of the Independent Democratic Republic of Latvia]. Stokholma: Apgāds Memento, 1963, p. 159.

[120] Latvijas Satversmes sapulces V sesijas 33. sēdes 1922. gada 4. aprīļa stenogramma [Transcript of the 33rd sitting of V Session of the Latvian Constitutional Assembly on 04.04.1922].

- The first proposal – to express Art. 4 of the Satversme in the following wording – "Latgale shall enjoy the rights of regional self-government, which shall be defined by a separate law". The Latgalians advance this proposal on 5 October 1921, when at the general meeting of the Constitutional Assembly the First Part of the *Satversme* was reviewed in the second reading. [121]
- The second proposal included suggestion to express Article 99 of the *Satversme* in the following wording: – "Latgale shall enjoy broad rights of regional self-government, the limits of which shall be defined by a separate law".[122] The proposal was advanced on 4 April 1922, when the Second Part of the *Satversme* was reviewed in the second reading at the general meeting of the Constitutional Assembly.

Comparison of both proposals reveals that they are practically identical, except that the word "broad" appears in the second proposal. Both proposals share the fact that they had not been discussed at the Committee for Drafting the *Satversme* but were proposed at the general meeting. The first proposal was dismissed, using the pretext that it should be examined at the time of reviewing the draft of the Second Part of the *Satversme*, since local governments and also language would be discussed there.[123] When the second proposal was examined, the Latgalians themselves tried to prevent suspicions of separatism as much as possible, stating that these accusations were spread by those who "…would want to melt all together in one pot, not only one part of a nation. But also everyone's personal views" and called upon the Constitutional Assembly to take into account Latgale's particularity, asking to put an end to "assimilation of the Latgalian dialect and melting it together with the great Baltic dialect."[124] Quite unsuccessful, seemingly, attempts at rejecting accusations of separatism are made by J. Pabērzs.[125] A fragment from his speech provides an insight:

> *…I do not wish to say that there are no such groups in Latgale that cultivate the ideas of separatism. Of course, there are inclinations towards separatism in Latgale, of course. […] However, the fact that such inclination towards separatism exists in a certain group does not mean that a regional self-government should be inadmissible in Latgale. For example, here, in Latvia, horses are being stolen. However, this does not lead to the conclusion that horses could no longer be kept in Latvia. The fact that there is disposition towards separatism in a certain*

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121 Latvijas Satversmes sapulces IV sesijas 8. sēdes 1921. gada 5. oktobra stenogramma [Transcript of the 8th sitting of IV Session of the Latvian Constitutional Assembly on 05.10.1921].

122 Latvijas Satversmes sapulces V sesijas 33. sēdes 1922. gada 4. aprīļa stenogramma [Transcript of the 33rd sitting of V Session of the Latvian Constitutional Assembly on 04.04.1922].

123 Marģers Skujenieks, who was the rapporteur on the First Part of the draft *Satversme* at the Constitutional Assembly, responding to Trasūns' statement that the First Part "does not take into consideration the issue of Latgale, Latgale's particularities, Latgale's autonomy of self-governance has not been defined", states: "the issue of self-governance does not fall within the first part of the *Satversme*, it is an issue that the Second Part deals with". See Latvijas Satversmes sapulces IV sesijas 5. sēdes 1921. gada 28. septembra stenogramma [Transcript of the 5th sitting of IV Session of the Latvian Constitutional Assembly on 28.09.1921], as well as Latvijas Satversmes sapulces IV sesijas 7. sēdes 1921. gada 4. oktobrī stenogramma [Transcript of the 7th sitting of IV Session of the Latvian Constitutional Assembly on 04.10.1921].

124 See Latvijas Satversmes sapulces IV sesijas 2. sēdes 1921. gada 21. septembra stenogramma [Transcript of the 2nd sitting of IV Session of the Latvian Constitutional Assembly on 21.09.1921] and Latvijas Satversmes sapulces V sesijas 10. sēdes 1922. gada 7. februārī stenogramma [Transcript of the 10th sitting of V Session of the Latvian Constitutional Assembly on 07.02.1922].

125 Latvijas Satversmes sapulces V sesijas 33. sēdes 1922. gada 4. aprīlī stenogramma [Transcript of the 33rd sitting of V Session of the Latvian Constitutional Assembly on 04.04.1922].

> *part of Latgalian society does not mean at all that Latgale could not be granted the right of regional self-government. […] To sum it all up, I am of the opinion that, actually, there is not a single valid reason for dismissing this submission. Therefore, I ask you to vote for it.*[126]

All the efforts by the Latgalians were in vain. A dialogue with other Members of the Constitutional Assembly did not evolve. They had to put up with the retorts that making excuses regarding non-existence of separatism as such was suspicious.[127] At the Constitutional Assembly, Latgalians made up only 15.35%, they had no allies. Francis Trasūns, in desperation, at the sitting tried to achieve that the entire draft *Satversme* would be returned to the Committee for Drafting the *Satversme*, and a separate section on the self-government of Latgale region would be included in it.[128] Similarly to voting on the proposal of autonomy, this proposal also ran into the majority vote. Only eighteen votes of their own were given in favour of the proposal.

The debate on the articles of the Second Part of the *Satversme* in the second reading took place from 17 January to 7 February 1922, and that was the time when the concordat (agreement) between the Holy See, as the main spiritual centre of Catholics, and the Republic of Latvia was being prepared for signing.[129] The Latgalian deputies, as opposed to the majority of the Constitutional Assembly's members, belonged to the Roman Catholic Church. Social democrats, wishing to demonstrate their attitude towards the signing of the concordat[130] and to tease the Latgalian deputies at the same time, proposed expressing Art. 112 of the *Satversme* (according to the numbering recorded in the minutes – Art. 115[9]) in the following wording "Activities of the Jesuit Order shall be prohibited in Latvia". The proposal was submitted to the Committee of the *Satversme* by Fēlikss Cielēns[131] in person. There was no voting and no objections against it at the Committee of the *Satversme*… There is no credible information as to why social democrats wanted to include into the *Satversme* such constitutional prohibition from activities in Latvia with regard to only one institution. In view of the fact that this institution is the Jesuit Order of Roman Catholics ("Society of Jesus", abbreviation *SJ, from Latin*, "*Societas Jesu*") with the motto: "For the Greater Glory of God", this cannot be called otherwise than an anti-Catholic prank.[132] The bizarre article proposed by Cielēns was deleted from the draft already in the second reading, however, the debate about the article at the general meeting of

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126 At this point, it is worth reminding that the third reading of the Second Part of the *Satversme* occurred in a rather complicated political situation, in the pre-election atmosphere of the 1st *Saeima*, and this could not but influence the Constitutional Assembly's debates.

127 Latvijas Satversmes sapulces IV sesijas 8. sēdes 1921. gada 5. oktobra stenogramma [Transcript of the 8th sitting of IV Session of the Latvian Constitutional Assembly on 05.10.1921].

128 Latvijas Satversmes sapulces IV sesijas 2. sēdes 1921. gada 21. septembra stenogramma [Transcript of the 2nd sitting of IV Session of the Latvian Constitutional Assembly on 21.09.1921].

129 The agreement with the Holy See was signed on 30 May 1922, but the Constitutional Assembly rartified it on 19 July. Zigfrīds Meierovics, the Prime Minister at the time, who signed the agreement on the behalf of Latvia, at the Constitutional Assembly spoke about the sacrifice that Latvia had to make. The concordat had been promised to Latgalians as a pre-condition for joining Latgale to Latvia before Latvia was established.

130 A deputy from Latgale, J. Pabērzs, also speaks of this version at the Constitutional Assembly's sitting (see Latvijas Satversmes sapulces V sesijas 10. sēdes 1922. gada 7. februāri stenogramma [Transcript of the 10th sitting of V Session of the Latvian Constitutional Assembly on 07.02.1922].

131 Satversmes komisijas 1922. gada 19 . janvāra sēdes protokols Nr. 61 [Minutes No. 61 of the sitting of the *Satversme* Committee on 19.01.1922]. Unpublished.

132 The Roman Catholic Church established the Jesuit Order in 1521 and had been active in the territory of Latvia.

the Constitutional Assembly caused great merriment.[133] The Roman Catholic priest F. Trasūns was frequently interrupted by interjections (for example, sent that Trasūns "to pulpit!", etc. and rather rude comments), and patiently explained the significance of the Jesuit Order, i.e., that literacy had come to Latgale only as a consequence of the Order's efforts, etc.[134] Apart from Latgalians, the representative of the Farmers' Union J. Goldmanis also asked for the floor and announced, on behalf of his faction, that fearing from "some kind of Jesuit Order" would be totally misplaced for the State of Latvia, as would be immortalising this fear in the constitution. He pointed out that if one would wish to list all organisations unwelcome in the State, then, of the current 117 articles of the *Satversme*, should be doubled. Finally, the Latvian constitutional legislator supported Trasūns' proposal to delete the article on Jesuits. Nevertheless, there were forty-five votes against this proposal, and when the outcome of the vote was announced in the hall, somebody called out "Long live the Jesuits!" A norm of this content no longer appeared for the third reading.

This article setting out prohibition of the Jesuits should be considered as a cunning ideological provocation, targeting the Roman Catholic Church and F. Trasūns personally.[135]

4. Normative consolidation of the status of official language

Constitutional law is most closely linked to politics[136], and the constitution, being the supreme law in the state is simultaneously a legal and a political document that reflects the political agreement of those who adopt it, which becomes binding at

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[133] It is obvious that, from the moment when the chairman of the sitting J. Čakste puts this article for debate in the second reading, untypical mirth is seen in the hall. F. Trasūns is the first to ask for the floor, and his colleagues start cheering (*Ah, ooh).* In his speech, F. Trasūns, speaking, as usual, in the Latgalian dialect, criticises social democrats at length, and they call out interjections (for example, let Trasūns *"go to pulpit"*, that he is a communist, that a monument to Jesuits should be built, that Poland would bring autonomy to Latgalians, etc.). Meanwhile, Trasūns keeps explaining patiently that books had appeared among Latgalians thanks to Jesuits and that Jesuits had brought literacy to Latgale. Trasūns also says that many social democrats should be deported to Kamchatka and should not be admitted into Latvia. Mirth overtakes the hall during Trasūns' speech, to quote the transcript – "General laughter, mirth and interjections". Even the usually self-possessed Secretary of the Constitutional Assembly, social democrat Roberts Ivanovs joins in teasing Trasūns, by calling, during Trasūns' speech, from his place the word "autonomy", to which the speaker immediately responds. "Yes, autonomy, and we are going to get that autonomy. Perhaps we would not need that autonomy if we could live in Latvia like free citizens, but, gentlemen, you, social democrats, want to meet us with despotism, you want to oppress our cultural life, want to oppress […]". To this Ivanovs responds, enraged, by calling from his place "Stop destroying the state!", finally, J. Čakste has to reprimand the speaker: "I, the speaker, cannot allow you to deal with such matters!" This small episode, which at the Constitutional Assembly lasted for half an hour, reveals the general position (see Latvijas Satversmes sapulces V sesijas 10. sēdes 1922. gada 7. februāra stenogramma [Transcript of the 10th sitting of V Session of the Latvian Constitutional Assembly on 07.02.1922].

[134] Latvijas Satversmes sapulces V sesijas 10. sēdes 1922. gada 7. februāra stenogramma [Transcript of the 10th sitting of V Session of the Latvian Constitutional Assembly].

[135] The answer as to why such a peculiar proposal was initiated should be sought in Francis Trasūns' personality and his personal attitude towards the social democrats. F. Trasūns was one of the most active spokesmen of Latgale. Most probably, Trasūns' long, moralizing speeches, which often turned into sermons, could have irritated the social democrats (and not only them), therefore Cielēns, who had listened to them for more than a year, had intended small revenge upon his opponent by the proposal to prohibit Jesuits.

[136] Judgment of 3 February 2012 by the Constitutional Court in case No. 2011-11-01, para. 11.2; Dissenting Opinion of Justice of the Constitutional Court of the Republic of Latvia Aldis Laviņš in case No. 2019-33-01 "On Compliance of Section 155 (1) of the Labour Law with the First Sentence of Article 110 of the *Satversme* of the Republic of Latvia", para. 3.

the moment of its adoption. Within the hierarchy of the national normative legal acts, the constitution ranks supreme. The norms of the *Satversme,* in their abstract wording, become the beacon and a definite, inviolable legal framework for the *Saeima* and the Cabinet. Establishing the status of the official language for Latvian in the *Satversme* is of great ideological and practical significance. There is no doubt that the law on the official language, as well as the law on the languages of ethnic minorities, to which the second sentence of Art. 115 of the draft *Satversme* of 1922 referred to, would have been adopted. The State cannot refuse to exercise a right if has been set out in the *Satversme*. It would no longer be a right recognised by society and some politicians, which, with great effort, was included in a regulation with the force of law (not in a law adopted by the *Saeima* or even the *Satversme*), but its protection would be a Latvian constitutional value,[137] which is superbly shown in the example of the neighbouring state – Lithuania,[138] where the constitutional legislator of Lithuania succeeded in including in its legislation the clause of the official language. Moreover, the *Satversme* is a united whole, and the legal norms included in it are closely interconnected. Each norm of the *Satversme* has its definite role within the constitutional system[139], and if the Latvian as the official language had been included in it already during the first period of independence, the foundations of the Latvian State would have been significantly reinforced.

4.1. Regulation on the Official Language with the force of law (1932)

Fundamental improvements were obviously needed in the education system because outside public administration large communities of inhabitants formed, which were internally self-sufficient and who were not interested in learning the official language. In this respect, something had to be done urgently. Procedures in the *Saeima* were long and cumbersome, therefore it was quite logical that when Marģers Skujenieks, the chairman of the Committee for Drafting the *Satversme*, became the Prime Minister at the end of 1931, within a couple of months Regulation on the Official Language was ready, which was not an ordinary government regulation but instead had a force of law. On 18 February 1932, the Cabinet issued in the procedure set out in Art. 81 of the *Satversme* "Regulation on the Official Language", which for the first time in the Latvian legal systems normatively regulated the issues of language. The regulation had the force of law,[140] consequently, within the legal system, it did not

[137] Judgment of 2 May 2012 by the Constitutional Court in case No. 2011-17-03; Judgment of 13 March 2001 by the Constitutional Court in case No. 2000-08-0109; Judgment of 31 March by the Constitutional Court in case No. 2009-76-01, para. 5.5.

[138] *Vaišniene, D.* Valodas politikas sākumi Lietuvā [Beginnings of language policy in Lithuania]. Valsts Valodas Komisija. Raksti 10. sējumos. Valoda un valsts [Collected Articles of the Commission of the Official Language in 10 Volumes. Language and State]. Dr. habil. philol. *Veisbergs, A.* (ed.). Zinātne 2019, pp. 43–45.

[139] Judgment of 16 December 2005 by the Constitutional Court in case No. 2005-12-0103, para. 13.

[140] Formulation "with the force of law" is no longer relevant for the Latvian legal system. Since 2007, Art. 81 has been deleted from the *Satversme*. During the first period of independence, the government regulations, issued in the procedure set out in Art. 81 of the *Satversme*, entered into force at the moment of their publication and were submitted to the *Saeima* not for approval but for expressing objections. The regulation that is being examined was in force from the moment it was adopted by the government, but at the *Saeima's* sitting of 23 February 1932, the transfer of the regulation to the responsible Public Law Committee was debated. If the *Saeima's* Committee did not express any objections to the norms of the regulation, it functioned, actually, as a special law on linguistic matters. Transcript of the *Saeima's* sitting of 23 February 1932 also shows that the legislator of the time clearly understood such regulations as special laws, as P. Schiemann called this a law in the procedure of Art. 81. Likewise, the transcript of 3 May 1934 shows that the rapporteur from the Public Law Committee does not use the word "regulation", using the term "law" instead, which characterises the genuine legal nature of the legal act.

differ from a law as to its legal force, it only pointed to the procedure of adoption and authorship. It was stated in the first article of the legal act that the official language of the state was the Latvian language, and subsequent articles provided for mandatory use of the official language in the Latvian armed forces, state and local government institutions and enterprises, as well as in "in all private institutions of public law nature". Regulation in the private sector allowed ethnic minorities to maintain internal office work, including ("trade communication", engaging in religious activities, in the press, "book publishing and trade", institutions of education and training institutions) in the language of minorities, whereas communication with state institutions (accounts, etc.) was permitted only in the official language. Translation had to be mandatorily annexed to any document in non-official language that was submitted to state institutions. The new regulation stipulated that legal persons could not use the excuse of not knowing the official language and ignore "applications in the official language applicable to their activities.[141] Signboards, stamps and seals had to be made in the official language, the names of firms being the only exception. It should be noted that the new Regulation on the Official Language with the force of law provided that, in official communication, Latvian place names were to be designated only in the official language. Regulation allowed using Russian and German in local governments, providing in Art. 1 an algorithm that allowed using Russian and German in local governments upon the condition that they had at least ½ of inhabitants speaking in one of these languages. This serves as a good illustration of the actual scope of using German and Russian in some local governments of Latvia of that time. Regulation also revealed the quite liberal linguistic policy of the first period of independence with respect to the two foreign languages referred to above. The note included in Art. 2 is notable, as it provided that in the local governments' sittings, until re-election of 1935, with the chairman's permission or upon the request of at least 1/3 members of this body, German and Russian could be used. The law also provided that if a sitting of a local government was held in a foreign language and any participant of the sitting did not understand this foreign language, then the respective local government had to ensure translation into the official language.

The *Saeima* discussed the aforementioned regulation at the sitting of 23 February 1932. Politicians belonging to the ethnic minorities took a united stand against the new regulation, regarding it as being restrictive upon their rights. Concerning the reasoning, the debate reminded the one on the language law at PC's sitting on 27 August 1919,[142] however, in political terms, there was a significant difference – the faction of social democrats joined ethnic minorities in the fight against Latvian as the official language. Truth be said, social democrats, as the opposition party, it seemed, rather fought against the ruling coalition than the language, and protested against the procedure of the regulation and not the issue of language on its merits. During the debate, the social democrats concurred with P. Schiemann, who contested the constitutionality of the adoption of the regulation in the procedure set out in Art. 81 of the *Satversme*. It was validly reminded that the role of this norm of

[141] In renewing the law, the authoritarian law did not amend this norm substantially, although a note was added that foreign languages could be spoken at closed meetings, whereas if another language was used at open meetings or public performances, such practice would require a special permit by the Minister for the Interior and, if necessary, interpretation could be demanded.

[142] See Section 1.1. of the article "Draft laws on the languages of ethnic minorities of the period of the People's Council and the Constitutional Assembly (1919, 1922)".

the *Satversme* was "urgent need in the period between the *Saeima's* sessions"[143], and in this case it was difficult to justify it. Social democrat Fēlikss Cielēns during the debate contested compliance of the draft law with the *Satversme* because the legal act was drafted by the Cabinet, whereas, pursuant to the *Satversme*, the right to legislate was vested in the *Saeima*. What kind of urgency could there be if on the following day after the adoption the regulation was submitted to the *Saeima*?![144] Member of Cielēns' faction Fricis Menderis, in turn, declared that minority rights were closer to social democrats than was the Latvian bourgeoisie with "its interests".[145] Paul Schiemann, as usual, spoke from the *Saeima's* podium in German, stating that he would be speaking in the name of all minority factions of the *Saeima*. He protested against "these regulations that cause ethnic hatred". The Baltic German called for dismissal of the new regulation on language because "…in fact, by this regulation the State declares to the minorities that they are alien to the State […]", etc. Schiemann believed that the state should be founded on the slogan "The State above all, all for the State", but the legal act under review was said to be "smart move by the government" intended to hush up the crisis politics in the area of customs and taxes to be introduced by the government. Schiemann, who had headed the newspaper "Rigasche Rundschau" for a long time, as a publicist completed his speech by brilliantly describing the "tragic" situation of non-Latvians in Riga at the beginning of the 1930s:

> *Contrary to the other Baltic states, Latvia has become renown abroad because anyone, who does not know the official language, is ill-treated here, and he encounters all kinds of difficulties. […] Materials written in a foreign language must be translated first before a civil servant may use them, irrespectively of whether he knows or does not know this language. Anyone wishing to use the street railway [tram], but does not know Latvian, should take an interpreter along on the trip.*

Neither the speaker himself nor his audience suspected that within seven years mighty changes regarding the language use in Latvia would occur, turning everything upside down.

Transcripts show that several other deputies from workers' factions took the floor, they, however, spoke in Russian, and their speeches are not available for study because it was indicated that the deputies did not submit abstracts of their speeches. Member of the Workers' and Peasants' faction Linards Laicāns took the floor during the debate, stating, almost as a prophet, that the *Saeima* should take a look at the Soviet Union and learn to deal with the linguistic issues by using the Soviet methodology. Laicāns also turned to the topic of Latgalians, pointing out that the Latgalian language had not been mentioned in the regulation at all.

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[143] The wording of Art. 81 of the *Satversme*, which was in force at the time when the regulation on the official language that is being examined was adopted, was, as follows: "In the period between the *Saeima's* sessions, the Cabinet shall have the right, if it is urgently needed, to issue regulations with the force of law. Such regulations may not amend the *Saeima* Election Law, laws on the system of courts and procedure, the budget and the budget law, as well as laws adopted by the incumbent *Saeima*, they may not pertain to amnesty, state taxes, customs and loans, and they become invalid if they are not submitted to the *Saeima*, at the latest, within three days after the subsequent session of the *Saeima* is opened."

[144] Latvijas Republikas IV Saeimas II sesijas 3. sēdes 1932. gada 1. marta stenogramma [Transcript of the 3rd sitting of II Session of IV *Saeima* of the Republic of Latvia on 01.03.1932].

[145] Latvijas Republikas IV Saeimas II sesijas 2. sēdes 1932. gada 23. februāra stenogramma [Transcript of the 2nd sitting of II Session of IV *Saeima* of the Republic of Latvia on 23.02.1932].

The regulation on language, which was drafted in the procedure set out in Art. 81, was such an important project for the government that Prime Minister Marģers Skujenieks in person arrived to defend it. He categorically rejected the accusations made by some deputies that the regulation forced people in ripe old age to learn Latvian. He spoke about the new generation, which had grown up in free Latvia and could talk in no other language but Latvian. It was alleged that this new generation was expecting this regulation. The State wanted to open up the path in life to this generation, that is why the *Saeima* was asked to support the regulation. The Prime Minister mentioned particular cases when Latvian young people were discriminated against and were not employed for the sole reason that they did not know Russian or German. Poet Kārlis Skalbe threw himself emotionally into defending Latvian as the official language, pointing out

> *…this law should be issued due to simple respect for our State. If we respect this State, we respect the official language. Where there is a State, there is an official language. In Latvia, it can be no other language but Latvian because the Latvian nation is the majority here.*

The member of the *Saeima* explained that the normative regulation in no way infringed the minorities' right to use their own language because, basically, the legal act regulated communication of individuals with state and local government institutions.

> *…Latvia cannot be at the same time Russian, German or Polish, just like a man cannot have three souls in his breast, or, at one and the same time, three totally different political orientations!* […] *each state has a certain backbone, and this backbone is the majority nation, its language and culture.*"[146]

Finally, as always, the debate in the *Saeima* was resolved by voting, whereby the majority supported transferring the regulation with the force of law to the Public Law Committee. In this particular case, this also meant that the validity of the act was recognised. Representatives of national minorities, collaborating with social democrats[147], also tried to achieve that the coming into force of the regulation would be postponed.[148] The debate briefly continued at the *Saeima's* sitting on

[146] Latvijas Republikas IV Saeimas II sesijas 2. sēdes 1932. gada 23. februāra stenogramma [Transcript of the 2nd sitting of II Session of IV *Saeima* of the Republic of Latvia on 23.02.1932].

[147] The matter of social democrats taking a stance against the official language is interesting because Fēlikss Cielēns does not mention in it his memoirs, writing about his activities in the last pre-war *Saeima* (see *Cielēns, F.* Laikmetu maiņā. Atmiņas un atziņas. II sējums. Latvijas neatkarīgās demokrātiskās republikas lielais laiks [In the change of eras. Memories and insights. Volume II. The grand time of the independent democratic republic of Latvia]. Stokholma: Apgāds Memento, 1963, pp. 446–448.), although he provided long and elaborate description of his contribution in writing the *Satversme* and doing great work elsewhere for the Latvian nation. Most probably, Cielēns was not proud of having taken this step either in 1932 or in exile, which is proven also by the fact that, at the *Saeima's* sitting, he got involved in legal discussion only regarding the suitability of Article 81 of the *Satversme.* Paul Schiemann and other representatives of minorities is a different story, they actually supported the possible co-existence of several official languages. Schiemann disliked the notion of a nation- state as such and held that separation of the concepts of the state and the nation would pave the way to united Europe. Of course, Schiemann's opposition to the Latvian language was caring for the cultural autonomy of Germans. Being one of the leading politicians of the German minority, he, undoubtedly, reflected the general views of the German minority (see *Hidens, Dž.* Pauls Šīmanis minoritāšu aizstāvis [Paul Schiemann – defender of minorities]. Rīga: Avots, 2016, pp. 134, 136, 141, 148, 195).

[148] See Latvijas Republikas IV Saeimas II sesijas 3. un 4. sēdes, resp. 1932. gada 1. marta un 4. marta stenogrammas [Transcripts of the 3rd and 4th sittings of II session of IV *Saeima* of the Republic of Latvia, resp. on 01.03.1932 and 04.03.1932].

1 March, however, these efforts were futile, the regulation remained in force. After having successfully dealt with the Regulation on Language in the *Saeima*, Marģers Skujenieks' government set about improving mastering of the official language in schools of national minorities. On 20 April 1932, amendments were adopted in the procedure set out in Art. 81 of the *Satversme* to the law of 1919 "On Latvia's Institutions of Education", providing that "in schools and classes, where instruction is not conducted in the Latvian language, this language shall be introduced and taught" already in the first grade of elementary school".

Furthermore, "Regulation on the Official Language", issued on 18 February 1932 in the procedure set out in Art. 81 of the *Satversme*, significantly improved the situation relating to the use of official language in Latvia. An example[149] serves as a good illustration on the impact that the regulation had on the life at the University of Latvia. In the academic year 1932/1933, at the Faculty of Law of the University of Latvia (at the time – Faculty of Economics and Legal Science), two national-level outstanding scholars of law and the founders of their areas, representatives of ethnic minorities, Professor Paul Mintz and Professor Vasilijs Sinaiskis immediately transited to Latvian as the language of instruction. Previously, they had lectured to the students in German and Russian, respectively.

4.2. The Official Language Law (1935)

The Official Language Law of 5 January 1935, which Ulmanis' authoritarian government issued a little more than six months after seizing the power in Latvia fits perfectly into the regime's ideological message of "policy of national unity". Ulmanis' "Leadership" is authoritarianism, where the father of the nation, deep in paternal concerns, who knows what should be done and how, can be considered as being the cornerstone of ideology. He is constantly thinking about the Latvian nation, its unity and Latvianness.[150] Kārlis Ulmanis' ideology is founded on Latvianness and flourishing of the Latvian nation is the deepest meaning for the state's existence.

> *Let's make Latvia Latvian again, let's make into a land of Latvians, where the Latvian qualities is expressed everywhere, impacts everything and can be felt everywhere […] Let a Latvian, first of all, become Latvian internally, spiritually, in his consciousness, power, then Latvia will truly be for Latvians.*

These were the words of the leader to his nation.[151] The law on Latvian as the official language better than any propaganda measure demonstrates that the Latvian nation is becoming stronger "in all strata"[152] and, of course, the new government's special interest in everything Latvian. The Official Language Law of 5 January 1935 was not turning against ethnic minorities. Assertions that Ulmanis had "turned against democratic minority rights", which had been one of the factors influencing the role

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[149] See more in *Osipova, S.* Latviešu juridiskās valodas attīstība pēc Pirmā pasaules kara [Development of Legal Latvian after the First World War]. Juridiskā zinātne, No. 1, 2010, p. 84.

[150] *Stranga, A.* K. Ulmaņa autoritārais režīms (1934–1940): politika, ideoloģija, saimniecība [Authoritarian regime of K. Ulmanis (1934–1940): politics, ideology, economy]. Akadēmiskie raksti 4 sējumos Latvieši un Latvija, II sējums "Valstiskums Latvijā un Latvijas valsts – izcīnītā un zaudētā" [Academic Articles in 4 Volumes. Vol. II. Latvians and Latvia. "Statehood in Latvia and the State of Latvia – the Destroyed and the Lost"]. Rīga: Latvijas Zinātņu akadēmija, 2013, p. 353.

[151] Degsme. Dr. Kārļa Ulmaņa atziņas, norādījumi, aicinājumi un vēlējumi [Fervour. insights, instructions, appeals and wishes of Dr. Kārlis Ulmanis]. *Līgotnis* (ed.). 2nd release. Rīgā: A. Gulbja izdevniecība, 1938, p. 240.

[152] Ibid., pp. 225, 234, 268.

of Nazi ideas in the consciousness of the Baltic German community[153], were very far from the truth. Indeed, Ulmanis was preoccupied with creating the state monopoly, which could be done only by way of nationalisation. Clearly, nationalisation of major companies, agricultural land and processing companies, credit societies and banks significantly affected also ethnic minorities (Germans, Jews and Russians). Their properties and financial instruments were expropriated. Nationalisation was conducted with the intention of increasing the State's importance in economy, however, it was done by paying compensation. Nationalised companies were merged in state joint stock companies, which turned into the major market operators in industrial and financial sectors.[154] It was quite conditionally linked to the State's language policy, which, actually, only continued the former efforts and achievements in this area in the previous parliamentary years. The Official Language Law of 5 January 1935 is an excellent teamwork of Ulmanis' public relations specialists and lawyers, who were able to turn the work done during the parliamentary period into a success of the authoritarian power. Deeper analysis of the Official Language Law of 5 January 1935 shows that it is an altered Regulation with the force of law of 18 February 1932.[155]

The regime was thinking about regulation on the Latvian language since the first month of its existence because, on 14 June 1934, Ulmanis' government introduced amendments to the Marģers Skujenieks' regulation with the force of law of 18 February 1932. The amendments deleted from the regulation the note regarding language use in the *Saeima* (after all, the parliament was abolished), and finally envisaged sanctions for failure to comply with the language law, which were absent before. The established penalties were quite strict. For violations of the regulation on language, the Ministry of the Interior could impose monetary fines in the amount up to thousand lats,[156] and the possible perpetrator could be placed in custody for up to six months. Both penalties could be imposed for particularly grave violations. The Minister for the Interior was personally responsible for the functioning of the law.[157] In a situation when martial law had been declared in the state, a regulation like this inspired awe in everyone. A couple of weeks after adoption of these amendments, Instruction of the Ministry of Transport No. 94 was issued, which determined the use of the official language in railway structures.[158] The instruction was adopted on the basis of regulation on the official language of 1932. Henceforth, railway employees at the executive board, precincts, workshops, stations, etc. "shall use in speech and in writing, as well as

[153] *Grudule, M.* Vācbaltieši Latvijas un latviešu kultūras vesture [German Latvians in the History of Latvia and Latvian Culture]. Latvieši un Latvija. Akadēmiski raksti. IV sējums. Latvijas kultūra, izglītība, zinātne [Latvians and Latvia. Academic Articles. Volume IV. Culture, Education, Science of Latvia]. *Stradiņš, J.* (ed.-in-chief). Rīga: Latvijas Zinātņu akadēmija, 2013, pp. 225–208.

[154] Available: https://enciklopedija.lv/skirklis/62580 [last viewed 09.08.2021].

[155] It is not implied that both normative acts are identical; however, they are very similar and the improvements in the basic part of the text are not substantial. For example, in Art. 2 of the Regulation, which previously was para. 2, the list of various institutions where the official language had to be used, additionally includes a phrase "as well as in all private institutions of public law nature", etc.

[156] To understand the value of currency "lats" at the time, it must be noted that a qualified worker or a new farmer with a monthly income of 100 lats could provide subsistence, although very modest, for his wife and a couple of children.

[157] In para. 4 of the Regulation, which previously provided for "free use of any other language" in religious activities, the press, book publishing and trade, meetings and institutions of education and training, henceforth foreign languages may be used only with the permission by the Minister for the Interior.

[158] Instrukcija Nr. 94 par valsts valodas lietošanu dzelzceļu virsvaldē un tai padotās administratīvās vienībās. [Instruction No. 94 on the Use of the Official Language in the Executive Board of Railways and Administrative Units Subordinated to it]. 27.06.1934. Valdības Vēstnesis, No. 166, 28.07.1934.

in interpersonal communication and in communication with other institutions and the public only the official language" (para. 1). Applications, which were not written in the official language, had to be returned to the applicant (para. 3). The instruction also provided for compliance with the principle of good governance, because "employees, who are proficient in the respective foreign language, shall help railway clients who are not proficient in the official language (note to para 4). The penalty for violating this instruction was 1000 lats. The instruction, as well as the amendments referred to above revealed the priority of the new government – the Latvian language and everything Latvian was of the topmost priority of public good ("everything good").[159]

The Official Language Law, adopted on 5 January 1935, consolidated in a united text the regulation of 1932 and the amendments of 1934. The new law also included some provisions that hitherto were non-existent. Thus, for example, Art. 6 of the law provided that written agreements, deeds on gifts, bills of exchange, promissory notes and other writs of commitments, if these are concluded by citizens of Latvia after 1 February 1935, had the force of commitment and evidence only if these were drawn up in Latvian.

It must be said that, although Ulmanis' regime was preoccupied with "the policy of Latvianisation", it would be an exaggeration to say that the law of 5 January 1935 took a radical position towards national minorities[160]. A more appropriate conclusion would be that the new law established "broader"[161] and "fully" consolidated position of the Latvian language.[162] Substantive innovations (if the introduction of authoritarian principles is disregarded) with respect to the official language in civil service were not introduced. The same Regulation on Testing Civil Servants' Proficiency in the Official Language of 1921 [163] was used.

Clearly, Ulmanis' regime of 15 May had a special relationship with law and lawyers, it should be kept in mind that the coup was staged to reform the *Satversme*. Understandably, the government's laconic declaration served perfectly as the justification for the coup; however, following a declaration on such a high level to do nothing at all would have been dangerous. Theoretical substantiations for the government's existence,[164] directly commissioned by the government[165], were hard to understand for the people and caused perplexed smiles in the circle of experts, therefore the regime, instead of a new *Satversme*, achieves adoption of a new Civil Law in 1937.

In a parliamentary state, the work to codify the norms of the Baltic Civil Law of 1864 in a law would be very time-consuming, not to mention the need to consolidate political forces and to reach possible political compromises, whereas everything

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159 *Grīns, A.* Latvijas Vēsture [History of Latvia]. Rīga: issued by p/s "Zemnieka Domas", 1936, p. 275.

160 *Bleiere, D., Butulis, I., Feldmanis, I., Stranga, A., Zunda, A.* History of Latvia. The 20th Century. Jumava, Rīga: 2006, p. 213.

161 *Vanags, P.* Latviešu literārās valodas attīstība [Development of the literary Latvian language]. *Latvieši un Latvija., Akadēmiski raksti. I sējums. Latvieši* [Latvians and Latvia. Academic Articles. Vol. I. Latvians]. *Straḍiņš, J.* (ed.-in-chief). Rīga: Latvijas Zinātņu akadēmija, 2013, p. 194.

162 *Druviete, I., Kārkliņa, A., Kusiņš, G., Pastarṣ E., Pleps, J.* Satversmes 4. panta komentārs [Commentary on Article 4 of the *Satversme*]. Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi [Commentaries on the *Satversme* of the Republic of Latvia. Introduction. Chapter I. General Provisions]. Collective of authors under scientific editorship by Prof. R. Balodis. Rīga: Latvijas Vēstnesis, 2014, p. 301.

163 Anyone can ascertain this by looking into the edition by the Ministry of Justice in 1938, which is a collection of all most important civil laws of the time (see Valsts civildienesta likumi [Laws on State Civil Service]. Tieslietu ministrijas Kodifikācijas departaments. Rīga: Valsts tipogrāfija, 1938, pp. 7, 83).

164 *Kokareviča, D.* Kārlis Dišlers [Kārlis Dišlers]. Jurista Vārds, No. 51 (802), 17.12.2013.

165 *Dišlers, K. Negotorium gestio* publisko tiesību novadā [*Negotorium gestio* in the area of public law]. Tieslietu Ministrijas Vēstnesis, No. 1, 1935, pp. 40–41.

proceeds without a hitch in an authoritarian order: a narrow circle of persons convened together with leader Ulmanis at Krišjāņa Valdemāra iela 3and the thick Civil Law was approved. There were no cumbersome parliamentary procedures or debates, and it is not known whether the authoritarian Cabinet engaged in any debates at the time of adopting it. Alfreds Bērziņš, the Minister for Public Affairs, even while being in exile, wrote many years later:

> *The previous Civil Law was given to Latvians by non-Latvians, and it was based on a non-Latvian social order – it was, speaking in lawyers' language, a law of estates. We transferred this old law to archive, history... […] It was a major event in the life of our law and courts. President Ulmanis said […] that sources are found in the soul of the people* […].[166]

In scholarly articles, the Civil Law of 1937 was designated as Kārlis Ulmanis' Civil Law (e.g., Vasilijs Sinaiskis, etc.)[167] , although everyone knew perfectly well that nothing new had been written (except for the sharecropping contract, which could be explained by K. Ulmanis' idea of consolidating Latvia as an agrarian state), because the new norms of the Civil Law were the same norms, "given by non-Latvians" of the Baltic Civil Law of 1864. Of course, Ulmanis might have liked Sinaiskis' designation, as it allowed him to feel like Napoleon. Truth be said, in difference to Napoleon's Civil Code, the Latvian analogue was not a revolution in law,[168] because it had been available in Latvian for quite some time. The work of codifiers, of course, was praiseworthy, however, substantially, nothing innovative was done. The norms of the new code were not even arranged in logical sequence, only some editorial improvements had been introduced. Likewise, no work had been done to ensure consistency in terminology. K. Čakste once noted that terminology is not consistent in the provisions of the Baltic Civil Law of 1864.[169] The professor noted that the cause of differences in terms was the fact that the text of the law of 1864 had been translated into Latvian from Russian, where great variety in the use of terms existed. These shortcomings were not eliminated in the Civil Law of 1937, as it would have required extensive work and time from the authoritarian regime.

Summary

1. The Latvian language is an important element constituting the state law identity and national unity of Latvia, which has been recognised in the constitutional law doctrine as the symbol of the State, like the anthem, flag and coat-of-arms of the State of Latvia. From the moment when the state was established (1918) until the Soviet occupation (1940), the Latvian performed the role of an official language

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166 *Bērziņš, A.* Labie gadi [The Good Years]. Rīga: AS "Lauku Avīze", 2014, p. 192.

167 *Sinaiskis, V.* Saistību tiesības [Contract law]. Civiltiesību apskats [Overview of Civil Law]. LU Studentu padomes grāmatnīca, Rīga: 1940, p.3; *Vīnzarājs M.* Sabiedrības līgums jaunajā Civillikumā. Raksti par Prezidenta K. Ulmaņa Civillikumu [Articles about President K. Ulmanis' Civil Law]. Tieslietu ministrijas Vēstneša 1939. gada 1. burtnīcas pielikums. Tieslietu ministrijas izdevums, 1939, p. 56.

168 The French Civil Code of 1804 (*Code civil*) is also called Napoleon's Code because its codification had the Emperor's blessing. The codes created by Napoleon's lawyers were only outstanding work in law creation at the time, moreover, they marked a revolution in the European jurisprudence, and the codification work implemented at the time of the Emperor continues its developing to this day (see *Balodis, R.* Francijas Republikas savdabīgā konstitūcija [The Peculiar Constitution of the Republic of France]. Jurista Vārds, No. 42, 02.11.2004.

169 *Čakste, K.* Nejaušība un nepārvarama vara Latvijas Civillikumos [Contingency and *force majeure* in Latvian Civil Laws]. Jurists, No. 71/72, 1937.

in full, which is further proved by the fact that records were kept in Latvian and documents in Latvian circulated in state and local government institutions. During the first period of independence, attempts to include in the *Satversme* a norm on the Latvian language as the official language failed, which later significantly diminished the possibility for adopting a special law on the Latvian language as the official language. Assessment of the linguistic situation during the first period of independence allows concluding that, on the one hand, Latvian was the official language of public administration in Latvia, and yet, on the other hand, since the moment of establishing the State, actual trilingualism existed in the parliament (Latvian, German and Russian), and it was also possible to use the Latgalian dialect in Latgale region. With respect to the use of the Latgalian dialect in Latgale, we can speak of derogation from the literary Latvian language, however, it must be admitted that the Russian and German languages had a more privileged status vis-à-vis the languages of other ethnic minorities.

2. The Latvian *Satversme* was drafted by the Constitutional Assembly (1920–1922), by a special Committee for Drafting the *Satversme*, which organised its work in two sub-committees: Sub-committee No. 1 and Sub-committee No. 2. Each of these worked on its own, special part of the *Satversme*. Sub-committee No. 1 was responsible for the basic rules for organising the state, which was called the First Part of the *Satversme* (Preamble, Article 1 – 88), whereas Sub-committee No. 2 was preparing the Second Part of the *Satversme* or the part on fundamental rights (Articles 87–117). As opposed to many other constitutions in the world, the Latvian *Satversme* was not approved as one united project but as two different draft laws. Initially, each of the parts was approved in three readings by the responsible sub-committee, afterwards it was approved by the Committee for Drafting the *Satversme*, and only then the respective part of the *Satversme* was submitted to the Constitutional Assembly, where it had to be approved in three readings by the Constitutional Assembly. The First Part of the *Satversme* was approved in the third reading by the Constitutional Assembly on 15 February 1922, but the Second Part of the *Satversme* did not gain the majority support in the third reading on 5 April 1922. Due to this, on 30 June 1922 only the First Part of the *Satversme*, adopted in three readings, could be promulgated.

2.1. Since only part of the draft *Satversme* became the *Satversme*, regulation on the Latvian language as the official language did not acquire a constitutional status. It was intended in Article 115, worded as follows:

> *115. The Latvian language shall be the official language. Those having the rights of minorities shall be guaranteed free use of their language both in speech and in writing. Which minority languages and to what extent are admissible in state local government and judicial institutions shall be defined by a special law.*

Since the Latvian language did not gain the status of the official language, the Law on Languages of Ethnic Minorities (1922), which nearly had been approved by the Committee for Drafting the *Satversme*, and had been drafted by taking into account the second sentence of Art. 115, also failed. This was the second unsuccessful draft law on languages of ethnic minorities, which was not approved by the Latvian parliament, the first one failed approval at the People's Council (1919). The Constitutional Assembly finished its work without enshrining the status of the official language for Latvian and without adopting a separate regulation for ethnic minorities on the use of their languages.

2.2. When the draft of the *Satversme* was discussed at the general meetings of the Constitutional Assembly, deputies from Latgale, the country's eastern region, tried to enshrine in the *Satversme* the particularity of their regional dialect and add the following sentence to Art. 115: "Latgale shall enjoy the rights of regional self-government, which shall be defined by a separate law". When this attempt failed, the deputies from Latgale did not vote for the Second Part of the *Satversme*, explaining that this was because their proposals had been dismissed in examining the *Satversme*. It must be noted that the government, formed by the Constitutional Assembly, made great effort to issue several regulations in the area of language, *inter alia*, also on the right to use the Latgalian dialect in Latgale and paid great attention to supervision of the affairs of this region. Thus, for example, a government regulation provided that, in appointing civil servants in Latgale, "preference should be given to those candidates, with other traits being similar, who know the Latgalian dialect and known the local conditions", etc. In view of the fact that it would have sufficed with their votes to adopt the Second Part of the *Satversme* in the third reading and it would have become, together with the First Part, a modern constitution for those times, there are grounds to consider that the issue of language became *res controversa*[170] of the *Satversme*, the authors of which failed to reach an agreement on this.

3. Within the hierarchy of the national normative legal acts, the constitution ranks supreme. The norms of the *Satversme,* in their abstract wording, become the beacon and a definite, inviolable legal framework for the *Saeima* and the Cabinet. Establishing the status of the official language for Latvian in the *Satversme* is of great ideological and practical significance. There is no doubt that the law on the official language, as well as the law on the languages of ethnic minorities, to which the second sentence of Art.115 of the draft *Satversme* of 1922 referred to, would have been adopted. The State cannot refuse to exercise a right if has been set out in the *Satversme*. This would no longer be a right recognised only in society or among some politicians, but its protection would a constitutional value of Latvia, as the example of neighbouring state Lithuania clearly shows. In view of the fact that the status of Latvian was not defined in the *Satversme* and the special law (more precisely, Regulation with the force of law, issued by the government and supported by the parliament) was adopted only on 18 February 1932, the State's policy relating to the official language is fragmented and depends on the personal opinion of some politicians and the combination of parties in the ruling coalition of the time. Fundamental improvements were obviously needed in the education system because outside public administration large communities of inhabitants formed, which were internally self-sufficient and who were not interested in learning the official language. Regulation with the force of law of 1932 defined Latvian as the official language. The new regulation stipulated that legal persons could not use the excuse of not knowing the official language and ignore "applications in the official language applicable to their activities. It was allowed to freely use any language in assemblies, in the private sector, Regulation allowed ethnic minorities to maintain internal office work, including ("trade communication", engaging in religious activities, in the press, "book publishing and trade", institutions of education and training institutions) in the minority language, whereas communication with state institutions (accounts,

[170] A matter in controversy (Latin).

etc.) are permitted only in the official language. Regulation allowed using Russian and German in local governments, providing in Art. 1 an algorithm that allowed using Russian and German in local governments upon the condition that they had at least ½ of inhabitants speaking in one of these languages, etc.

4. On 15 May 1934, a *coup d'état* was staged in the state and the Latvian parliament was abolished. On 5 January 1935, the authoritarian regime adopts the Official Language Law. Deeper analysis of the Official Language Law of 5 January 1935 shows that it is an altered Regulation with the force of law of 18 February 1932. Only some new provisions were introduced to the Law, and these were not many. Thus, for example, Art. 6 of the law provided that written agreements, deeds on gifts, bills of exchange, promissory notes and other writs of commitments, if these are concluded by citizens of Latvia after 1 February 1935, have the force of commitment and evidence only if these are drawn up in Latvian. Minister for the Interior was responsible for the functioning of the law and for imposing penalties. At the same time, also after the Regulation with the force of law and, later, the law were adopted, respecting the status of the Latvian language, the procedure set out in the law on the use of German and Russian was retained.

Sources

Bibliography

1. *Balodis, J.* Atmiņu burtnīcas 1918.–1939. gads [Notebooks of Reminiscence 19181939]. *Caune, A.* (comp.). Rīga: Latvijas Vēstures institūta apgāds, 2015.
2. *Balodis, R.* (sc. ed.). Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi [Commentaries on the *Satversme* of the Republic of Latvia. Introduction. Chapter I. General Provisions]. Collective of authors under scientific editorship by Prof. R. Balodis. Rīga: Latvijas Vēstnesis, 2014.
3. *Balodis, R.* (sc. ed.). Latvijas Republikas Satversmes komentāri. II nodaļa. Saeima [Commentaries on the *Satversme* of the Republic of Latvia. Chapter II. The *Saeima*]. Collective of authors under scientific editorship by Prof. R. Balodis. Rīga: Latvijas Vēstnesis, 2020.
4. *Balodis, R.* (sc. ed.). Latvijas Republikas Satversmes komentāri. III nodaļa. Valsts prezidents. IV nodaļa. Ministru kabinets [Commentaries on the *Satversme* of the Republic of Latvia. Chapter III. The President. Chapter IV. The Cabinet]. Collective of authors under scientific editorship by Prof. R. Balodis. Rīga: Latvijas Vēstnesis, 2017.
5. *Balodis, R.* (sc. ed.). Latvijas Republikas Satversmes komentāri. VI nodaļa. Tiesa. VII nodaļa. Valsts kontrole [Commentaries on the *Satversme* of the Republic of Latvia. Chapter VI. Court. Chapter VII. The State Audit Office]. Collective of authors under scientific editorship by Prof. R. Balodis. Rīga: Latvijas Vēstnesis, 2013.
6. *Balodis, R.* (sc. ed.). Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības [Commentaries on the *Satversme* of the Republic of Latvia. Chapter VIII. Fundamental Human Rights]. Collective of authors under scientific editorship by Prof. R. Balodis. Rīga: Latvijas Vēstnesis, 2011.
7. *Balodis, R.* (sc. ed.). Parlamentārā izmeklēšana Latvijas Republikā 2. Saeimas izmeklēšanas komisiju galaziņojumi, viedokļi, liecības [Parliamentary Investigation in the Republic of Latvia. Final Reports, Opinions, Testimonies of the Inquiry Committees of the 2nd *Saeima*]. Rīga: Latvijas Vēstnesis, 2016.
8. *Balodis, R.* Ārkārtējās situācijas normatīvais regulējums: vēsture un nākotnes izaicinājumi [Normative Regulation on Emergency Situation: History and Future Challenges]. Jurista Vārds, No. 6, 09.02.2021.
9. *Balodis, R.* Francijas Republikas savdabīgā konstitūcija [The Peculiar Constitution of the Republic of France]. Jurista Vārds, No. 42, 02.11.2004.
10. *Bērziņš, A.* Labie gadi [The Good Years]. Rīga: AS "Lauku Avīze", 2014.
11. *Bleiere, D., Butulis, I., Feldmanis, I., Stranga, A., Zunda, A.* History of Latvia the 20th Century. Rīga: Jumava, 2006.
12. *Bleiere, D., Butulis, I., Feldmanis, I., Stranga, A., Zunda, A.* Latvija Otrajā pasaules karā (1939–1945) [Latvia in the Second World War (1939–1945)]. Rīga: Jumava, 2008.

13. *Blūzma, V., Celle, O., Jundzis, T., Lēbers, D. A., Levits, E. Zīle, Ļ.* Latvijas valsts atjaunošana 1986. – 1993 [Restoration of the State of Latvia 1986–1993]. Rīga: LU žurnāla "Latvijas Vēsture" fonds, 1998.
14. *Buzajevs, V.* Mazākumtautību tiesiskais un faktiskais stāvoklis Latvijā [The Legal and Actual State of Ethnic Minorities in Latvia]. Pēc viņu aizstāvju datiem. Demogrāfija, valoda, izglītība, vēsturiskā atmiņa, pilsonība, sociālā nevienlīdzība [According to the Data of their Advocates. Demography, Language, Education, Historical Memory, Citizenship, Social Inequality]. Collected articles. Rīga: Latvijas Cilvēktiesību komiteja, 2015.
15. *Cielēns, F.* Laikmetu maiņā. Atmiņas un atziņas. II Sējums. Latvijas neatkarīgās demokrātiskās republikas lielais laiks [In the Change of Eras. Recollections and Instights. Volume II. The Grand Time of the Independent Democratic Republic of Latvia]. Stokholma: Apgāds Memento, 1963.
16. *Čakste, K.* Nejaušība un nepārvarama vara Latvijas Civillikumos [Contingency and *force majeure* in Latvian Civil Laws]. Jurists, No. 71/72, 1937.
17. *Dišlers, K. Negotorium gestio* publisko tiesību novadā [*Negotorium gestio*in the area of public law]. Tieslietu Ministrijas Vēstnesis, No. 1, 1935, pp. 40–41.
18. *Grīns, A.* Latvijas Vēsture [History of Latvia]. Rīga: issued by p/s "Zemnieka Domas", 1936.
19. *Hidens, Dž.* Pauls Šīmanis – minoritāšu aizstāvis [Paul Schiemann – defender of minorities]. Rīga: Avots, 2016.
20. *Jundzis, T.* (ed.). The Baltic States at Historical Crossroads. Political, economical, and legal problems and opportunities in the context of international co-operation at the beginning of the 21st century. 2nd revised and expanded edition. Rīga: Latvian Academy of Sciences, 2001.
21. *Klīve, Ā.* Brīvā Latvija: Latvijas tapšana: atmiņas, vērojumi un atzinumi [Free Latvia: Creation of Latvia: Recollections, Observations and Insights]. Bruklina: Grāmatu Draugs, 1969.
22. *Kokareviča, D.* Kārlis Dišlers. Jurista Vārds, No. 51 (802), 17.12.2013.
23. *Kusiņš, G.* Latvijas parlamentārisma apskats [Overview of the Latvian Parliamentarism]. Rīga: Saeimas kancelejas izdevums, 2016.
24. *Kūle, M.* Jābūtības vārdi. Etīdes par zināšanām un vērtībām mūsdienu Latvijā [Words of Moral Obligation. Sketches on Knowledge and Values in Contemporary Latvia]. Rīga: Apgāds Zinātne, 2016.
25. Latvijas Civiltiesību apskats [Overview of the Latvian Civil Law]. LU Studentu padomes grāmatnīca, Rīga, 1940.
26. *Levits, E.* Valstsgriba. Idejas un domas Latvijai 1985–2018 [A Will for Statehood. Ideas and Thoughts for Latvia 1985–2018]. Rīga: Latvijas Vēstnesis, 2019.
27. *Levits, E.* Piezīmes par Satversmes 8. nodaļu – Cilvēka pamattiesības. Satversme un cilvēktiesības [Notes on Chapter 8 of the *Satversme* – Fundamental Human Rights. The *Satversme* and Human Rights]. Gadagrāmata 1999, Cilvēktiesību Žurnāls No. 9–12, Rīga: Latvijas Universitāte, 1999.
28. *Lēbers, A.* Lekcijas par Ievadu tiesību zinātnē. II daļa [Lectures on Introduction to Law. Part II]. Rīga: LU stud. pad. grāmatnīca, 1922.
29. *Līgotnis* (ed.). Degsme. Dr. Kārļa Ulmaņa atziņas, norādījumi, aicinājumi un vēlējumi [Fervour. Insights, instructions, appeals and wishes of Dr. Kārlis Ulmanis]. 2nd issue. Rīgā: A. Gulbja izdevniecība, 1938.
30. Latvijas Satversmes sapulces stenogrammu izvilkums 1920–1922 [Extracts from the Transcripts of the Latvian Constitutional Assembly 1920–1922]. Latvijas Republikas Satversmes projekta apspriešana un apstiprināšana [Extract of transcripts of the meeting of the Latvian Constitution 1920--1922. Discussion and approval of the draft Constitution of the Republic of Latvia], digital publication. Rīga: Tiesu namu aģentūra, 2006.
31. *Lazdiņš, J.* Rechtspolitische Besonderheiten bei der Entstehung des lettischen Staates und seiner Verfassung. Juridiskā zinātne / Law, No. 7, 2014.
32. *Osipova, S.* Valsts valoda kā konstitucionāla vērtība [Official Language as a Constitutional Value]. Jurista Vārds, No. 42 (689), 08.10.2011.
33. *Osipova, S.* Latviešu juridiskās valodas attīstība pēc Pirmā pasaules kara [Development of Legal Latvian after the First World War]. Juridiskā zinātne, No. 1, 2010.
34. *Pleps, J.* Pamattiesību katalogs starpkaru periodā [Catalogue of Fundamental Rights in the Inter-War Period]. Jurista Vārds, No. 48, 23.12.2008.
35. *Pleps, J.* Latgaliešu valoda un Satversm. [The Latgalian Language and the *Satversme*]. Jurista Vārds, No. 43 (690), 25.10.2011.
36. Raksti par Prezidenta K. Ulmaņa Civillikumu. [Articles on President K. Ulmanis' Civil Law.] Tieslietu ministrijas Vēstneša 1939. gada 1. burtnīcas pielikums. Tieslietu ministrijas izdevums. 1939.

37. *Ruks, M.* Latviskās enerģijas nesējs. Kārlim Ulmanim – 135 [The Bearer of Latvian Energy. Kārlis Ulmanis Turns 135]. Latvijas Avīze, 04.09.2012.
38. Skujenieks M. Otrā tautas skaitīšana Latvijā. [The Second Population Census in Latvia.] Rīga, 1925, 52
39. *Spekke, A.* History of Latvia. Rīga: Jumava, 2006.
40. *Sosāre, M.* Valodu likumdošanas jautājumi Latvijas Republikas pastāvēšanas sākuma posmā [Legislative Issues Relating to Languages in the Initial Stage of the Republic of Latvia]. Latvijas Zinātņu Akadēmijas Vēstis A daļa, Nr. 4. (01.04.1992.).
41. *Stradiņš, J.* (ed.-in-chief). Latvieši un Latvija. Akadēmiski raksti. I sējums. Latvieši [Latvians and Latvia., Academic Articles. Vol. I. Latvians]. Rīga: Latvijas Zinātņu akadēmija, 2013.
42. *Stradiņš, J.* (ed.-in-chief). Latvieši un Latvija., Akadēmiski raksti. II sējums "Valstiskums Latvijā un Latvijas valsts – izcīnītā un zaudētā" [Statehood in Latvia and the State of Latvia – the Destroyed and the Lost]. Rīga: Latvijas Zinātņu akadēmija, 2013.
43. *Stradiņš, J.* (ed.-in-chief). Latvieši un Latvija. Akadēmiski raksti. III sējums. Atjaunotā Latvijas valsts [Latvians and Latvia., Academic Articles. Vol. III. The Restored State of Latvia]. Rīga: Latvijas Zinātņu akadēmija, 2013.
44. *Stradiņš, J.* (ed.-in-chief). Latvieši un Latvija. Akadēmiski raksti. IV sējums. Latvijas kultūra, izglītība, zinātne [Latvians and Latvia., Academic Articles. Vol. IV. Culture, Education and Science of Latvia]. Rīga: Latvijas Zinātņu akadēmija, 2013.
45. *Šilde, Ā.* Latvijas vēsture, 1914–1940 [History of Latvia, 1914–1940]. Valsts tapšana un suverēna valsts [State formation and sovereign state]. Stokholma: Daugava, 1976.
46. Valsts civildienesta likumi [Laws on the State Civil Service]. Tieslietu ministrijas Kodifikācijas departaments, Valsts tipogrāfija. Rīga, 1938.
47. *Veisbergs, A.* (ed.). Valsts Valodas Komisija. Raksti, 10. sējumos. Valoda un valsts [Collected Articles of the Commission of the Official Language in 10 Volumes. Language and State]. Rīga: Zinātne, 2019.
48. *Vīķe-Freiberga, V.* V.V.-F. 4 plus 4. Runas 1999 – 2007 [V.V.-F. 4 plus 4. Speeches 1999–2007]. Rīga: Pētergailis, 2007.
49. 1918.–1920. gads Latvijas Republikas Pagaidu valdības sēžu protokolos, notikumos, atmiņās [The years of 1918–1920 in the Minutes of the Sittings of the Provisional Government of the Republic of Latvia, Events, Recollections]. Rīga: Latvijas Vēstnesis, 2013.

Normative acts

1. Tautas padomes politiskā platforma [Political Platform of the People's Council]. Adopted at the meeting of the Latvian People's Council on 17.11.1918. *Valdības Vēstnesis*, No. 1, 14.12.1918.
2. Latvijas pilsoņiem! Tautas Padomes Latvijas Republikas proklamēšanas akts [For the citizens of Latvia! Proclamation Act of the People's Council of Latvia]. 18.11.1918. Latvijas Pagaidu Valdības Likumu un Rīkojumu Krājums, No. 1, 05.07.1919.
3. Par Latvijas tiesām un tiesāšanās kārtību: Tautas padomes pagaidu nolikums [On the Courts and Procedure of Litigation in Latvia: Provisional Regulation by the People's Council]. Pagaidu Valdības Vēstnesis, 14.(01).12.1918. Latvijas Pagaidu Valdības Likumu un Rīkojumu Krājums, No. 1, 15.07.1919.
4. Latvijas Tautas Padomes kārtības rullis [The Rules of Procedure of the Latvian People's Council]. Law, 23.08.1919. Likumu un Valdības Rīkojumu Krājums, No. 11, 1919.
5. Lietuvas Satversme [Constitution of Lithuania]. Tautas Tiesības, No.11/12, 16.06.1927.
6. Likums "Par Latvijas izglītības iestādēm" [Law "On Latvia's Institutions of Education"]. 08.12.1919. Likumu un valdības rīkojumu krājums, No. 13, 31.12.1919.
7. Likums "Par mazākuma tautību skolu iekārtu Latvijā" [Law "On the System of Ethnic Minority Schools in Latvia"]. 08.12.1919. Likumu un valdības rīkojumu krājums No. 13, 31.12.1919.
8. Satversmes Sapulces kārtības rullis [The Rules of Procedure of the Constitutional Assembly]. Law. Valdības Vēstnesis, No. 251, 02.11.1920.
9. Deklarācija par Latvijas valsti [Declaration on the State of Latvia]. Latvijas valsts pagaidu iekārtas noteikumi [Provisions of the temporary order of the Latvian state]. Adopted at the plenary session of the Latvian Constitutional Assembly on 01.06.1920. Likumu un Valdības Rīkojumu Krājums, No. 4, 31.08.1920.
10. Noteikumi par ierēdņu pārbaudīšanu valsts valodas prašanā [Regulation on Testing Civil Servants' Proficiency in the Official Language]. (22.11.1921). Valdības Vēstnesis, No. 269, 28.11.1921.

11. Ministru kabineta noteikumi par ierēdņu pārbaudīšanu valsts valodas prašanā [The Cabinet Regulation on Testing Civil Servants' Proficiency in the Official Language]. 22.11.1921. Valdības Vēstnesis, No. 269, 28.11.1921.
12. Ministru kabineta noteikumi par Latgales lietu pārzināšanu [The Cabinet Regulation on the Overseeing of Latgale's Affairs]. 30.06.1921). Valdības Vēstnesis, No. 177, 10.08.1921.
13. Ministru kabineta noteikumi par ierēdņu iecelšanu Latgalē [The Cabinet Regulation on Appointing Civil Servants in Latgale]. 26.07.1921. Valdības Vēstnesis, No. 174, 08.08.1921.
14. Ministru kabineta noteikumi par latgaliešu izloksnes lietošanu [The Cabinet Regulation on the Use of the Latgalian Dialect]. 11.08.1921. Valdības Vēstnesis, No. 183, 17.08.1921.
15. Latvijas Republikas Satversme [*Satversme* [Constitution] of the Republic of Latvia]. 15.02.1922. Valdības Vēstnesis, No. 141, 1922.
16. Latvijas Universitātes Satversme [The Constitution of the University of Latvia]. 27.04.1923. Valdības Vēstnesis, No. 66, 28.03.1923.
17. Papildinājums noteikumos par ierēdņu pārbaudīšanu valsts valodas prašanā [Addition to the Regulation on Testing Civil Servants' Proficiency in the Official Language]. 06.02.1923. Likumu un Ministru kabineta noteikumu krājums, 19.03.1923.
18. Noteikumi par Latgales apgabaltiesas vecākā notara darbības atjaunošanu attiecībā uz aktu apstiprināšanu. (izdoti Latvijas Republikas Satversmes 81. panta kārtībā) [Regulation on Reinstating the Activities by the Senior Notary of the Latgale Regional Court with Respect to Certification of Acts issued pursuant to Art. 81 of the *Satversme* of the Republic of Latvia]. 04.10.1923. Valdības Vēstnesis, No. 222, 08.10.1923.
19. Papildinājums noteikumos par ierēdņu pārbaudīšanu valsts valodas prašanā [Addendum to Regulation on Testing Civil Servants' Proficiency in the Official Language]. 06.02.1923. Likumu un Ministru kabineta noteikumu krājums, 19.03.1923.
20. Saeimas kārtības rullis: likums [The Rules of Procedure of the *Saeima*: Law]. 26.03.1923. Valdības Vēstnesis, No. 65, 27.03.1923.
21. Likums par virsnieku un kara ierēdņu pārbaudīšanu valsts valodas prašanā [On Testing the Proficiency in the Official Language of Officers and Military Officials]. 17.11.1924. Valdības Vēstnesis, No. 262, 22.11.1924.
22. Saeimas kārtības rullis: likums [The Rules of Procedure of the *Saeima*: Law]. 20.03.1929. Valdības Vēstnesis, No. 79, 10.03.1929.
23. Noteikumi ar likuma spēku par valsts valodu (izdoti Latvijas Republikas Satversmes 81. p. kārtībā) [Regulation with the Force of Law on the Official Language issued pursuant to Art. 81 of the *Satversme*]. 18.02.1932. Valdības Vēstnesis, No. 39, 08.02.1932.
24. Pārgrozījums likumā "Par Latvijas izglītības iestādēm" [Amendments to the Law "On Latvia's Institutions of Education"]. 20.04.1932. Issued pursuant to Art. 81 of the *Satversme.* Valdības Vēstnesis, No. 89, 22.03.1932.
25. "Pārgrozījumi un papildinājumi noteikumos par valsts valodu" ["Amendments and Additions to the Regulation on the Official Language"]. Valdības Vēstnesis, No. 132, 16.06.1934.
26. Instrukcija Nr. 94 par valsts valodas lietošanu dzelzceļu virsvaldē un tai padotās administratīvās vienībās [Instruction No. 94 on the Use of the Official Language in the Executive Board of Railways and Administrative Units Subordinated to it]. 27.06.1934. Valdības Vēstnesis, No. 166., 28.07.1934.
27. Likums par valsts valodu [The Official Language Law]. Law of Republic of Latvia. 05.01.1935. Valdības Vēstnesis, No. 7, 1935.
28. Par Latvijas Republikas neatkarības atjaunošanu [On the Restoration of Independence of the Republic of Latvia]. Declaration of the Supreme Council, 04.05.1990. Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs, No. 20, 17.05.1990.

Case law

1. Decision by the Department of Administrative Cases of the Supreme Court Senate on 18 August 2009 in case No. SKA596/2009.
2. Judgement by the Constitutional Court of the Republic of Latvia on 13 March 2001 in case No. 2000-08-0109.
3. Judgement by the Constitutional Court of the Republic of Latvia on 16 December 2005 in case No. 2005-12-0103.
4. Judgement by the Constitutional Court of the Republic of Latvia on 31 March 2010 in case No. 2009-76-01.

5. Judgement by the Constitutional Court of the Republic of Latvia on 3 February 2012 in case No. 2011-11-01.
6. Judgement by the Constitutional Court of the Republic of Latvia on 2 May 2012 in case No. 2011-17-03.
7. Dissenting Opinion of Justice of the Constitutional Court of the Republic of Latvia AldisLaviņš in case No. 2019-33-01 "On Compliance of Section 155 (1) of the Labour Law with the First Sentence of Article 110 of the *Satversme* of the Republic of Latvia".

Other sources

Transcripts

1. Transcript of the 8th sitting of IV session of the People's Council on 27 August 1919.
2. Transcript of the 2nd sitting of IV Session of the Latvian Constitutional Assembly on 21 September 1921.
3. Transcript of the 5th sitting of IV Session of the Latvian Constitutional Assembly on 28 September 1921.
4. Transcript of the 7th sitting of IV Session of the Latvian Constitutional Assembly on 4 October 1921.
5. Transcript of the 8th sitting of IV Session of the Latvian Constitutional Assembly on 5 October 1921.
6. Transcript of the 10th sitting of V Session of the Latvian Constitutional Assembly on 7 February 1922.
7. Transcript of the 33rd sitting of V Session of the Latvian Constitutional Assembly on 4 April 1922.
8. Transcript of the 34th sitting of V Session of the Latvian Constitutional Assembly on 5 April 1922.
9. Transcript of the 7th sitting of I Session of I *Saeima* of the Republic of Latvia on 13 December 1922.
10. Transcript of the 6th sitting of II Session of III *Saeima* of the Republic of Latvia on 8 February 1929.
11. Transcript of the 1st sitting of VIII Session of III *Saeima* of the Republic of Latvia on 20 January 1931.
12. Transcript of the 2nd sitting of II Session of IV *Saeima* of the Republic of Latvia on 23 February 1932.
13. Transcript of the 3rd sitting of II Session of IV *Saeima* of the Republic of Latvia on 1 March 1932.
14. Transcript of the 3rd sitting of IX Session of IV *Saeima* of the Republic of Latvia on 3 May 1934.
15. Transcript of the 5th sitting of IX Session of IV *Saeima* of the Republic of Latvia on 4 May 1934.

Minutes

1. Minutes No. 58 of the sitting of the *Satversme* Committee on 3 November 1921.
2. Minutes No. 61 of the sitting of the *Satversme* Committee on 19 January 1922.
3. Minutes No. 70 of the sitting of the *Satversme* Committee on 8 July 1922.
4. Minutes No. 77 of the sitting of the *Satversme* Committee on 14 July 1922.
5. Minutes No. 60 of the sitting of the 2nd Sub-Committee of the *Satversme* Committee on 29 April 1921.

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Minimum Wage Fixing Mechanisms in the EU Member States: A Comparative Overview in the Light of the Draft Directive on Adequate Minimum Wages[1]

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This paper focuses on a comparative legal overview of the minimum wage in Austria, France, Germany, Italy, Poland, Portugal, Romania and Spain. The author uses this context to discuss the significance of constitutions, statutes and collective bargaining agreements. Attention is drawn to the amount of detail in relevant constitutional provisions, the reasons for the discrepancies, as well as to the correlation between the way in which the minimum wage is regulated in the constitution and the way it is regulated by way of statute or collective bargaining agreement. The influence of international and European legal acts on the norms adopted in particular states is also assessed. Next, the structure of various national minimum wage fixing mechanisms is analysed in an attempt to indicate regularities in their formation. The paper refers to the draft Directive on adequate minimum wages in the European Union and provides an assessment of its potential impact on domestic legal systems. Further, the article evaluates national minimum wage fixing mechanisms from the perspective of their compatibility with the requirements introduced by the draft Directive.

Keywords: minimum wage, draft Directive on adequate minimum wages in the European Union, minimum wage fixing mechanism, collective bargaining agreements, European Pillar of Social Rights.

Contents

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Introduction

The minimum wage is an expression of state interference in the operation of the market in pursuit of specific social and economic objectives. This instrument is firmly rooted in both international and European systems of social human rights and the values that underpin them[2]. This refers in particular to Article 23(3) of the UN Universal Declaration of Human Rights[3] and Article 7(a)(ii) of the UN International Covenant on Economic, Social and Cultural Rights[4]. The conventions of the International Labour Organisation explicitly refer to the minimum wage[5], including Convention No. 131 concerning Minimum Wage Fixing, with Special Reference to Developing Countries[6]. In turn, as far as European law is concerned, Article 4(1) of the European Social Charter needs to be invoked[7]. The legal instrument in question has also been the subject of the draft Directive on adequate minimum wages in the European Union[8]. It must be emphasized that on 7 June 2022 the Council and the European Parliament reached a provisional political agreement on the abovementioned draft Directive. The agreement in point increases the chances of the Directive being adopted.

The main objective of this study is to conduct a comparative overview of national minimum wage regulations adopted in Austria, France, Germany, Italy, Poland, Portugal, Romania and Spain. The above-mentioned countries are considered to be representative as they employ different legal solutions at the constitutional level and in secondary legislation. The minimum wage in these countries is determined by way of statute or collective agreement. Those states have ratified legal acts of international law and European law that directly or indirectly refer to minimum wage with varying degrees. All of them are the European Union Member States. Thus, their legal systems should be based on similar assumptions. This background

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[2] Cf. *Shelton, D. L.* Advanced Introduction to International Human Rights Law. Cheltenham-Northampton: Edward Elgar Publishing, 2014, p. 170 ff.

[3] United Nations Universal Declaration of Human Rights (10.12.1948). Available: https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf [last viewed 30.06.2022].

[4] United Nations International Covenant on Economic, Social and Cultural Rights (19.12.1966). Available: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights [last viewed 30.06.2022].

[5] *Bomba, K.* Minimalne wynagrodzenie za pracę w działalności Międzynarodowej Organizacji Pracy [Minimum wage for work in the activities of the International Labor Organization]. Praca i Zabezpieczenie Społeczne, No. 10, 2021, pp. 15–16. DOI:10.33226/0032-6186.2021.10.2. Available: https://www.pwe.com.pl/czasopisma/praca-i-zabezpieczenie-spoleczne/minimalne-wynagrodzenie-za-prace-w-dzialalnosci-miedzynarodowej-organizacji-pracy,a1446148109 [last viewed 30.06.2022]. See also *Bomba, K.* Instrumenty prawa międzynarodowego kształtujące standard minimalnego wynagrodzenia za pracę [Instruments of international law shaping the standard of minimum remuneration for work]. In: Roczniki Administracji i Prawa. Rok XXI. Zeszyt specjalny: In labore virtus et vita. Księga jubileuszowa Prof. Marka Pliszkiewicza, *Borski, M. Ćwiertniak, B. M. Lekston, M.* (eds). Sosnowiec: Oficyna Wydawnicza Humanitas, 2021, p. 269 ff. DOI:10.5604/01.3001.0015.6389. Available: https://rocznikiadministracjiiprawa.publisherspanel.com/resources/html/article/details?id=226463 [last viewed 30.06.2022].

[6] International Labour Organization. Minimum Wage Fixing Convention No. 131 concerning Minimum Wage Fixing, with Special Reference to Developing Countries (3.06.1970). Available: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C131 [last viewed 30.06.2022].

[7] Council of Europe. European Social Charter (18.10.1961). Available: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=035 [last viewed 30.06.2022]

[8] Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union. COM(2020) 682 final, Brussels (28.10.2020). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0682 [last viewed 30.06.2022].

is used in an attempt to formulate regularities and indicate differences in particular legal orders with regard to the method of regulation and the type of mechanisms for fixing the minimum wage. Furthermore, this paper refers to the draft Directive on adequate minimum wages in the European Union and discusses its possible impact on the legal systems in the analysed countries. Against the background of the draft Directive, this study analyses the margin of discretion of the Member States to shape their national mechanisms of minimum wage fixing. It also takes into account the minimum conditions that should be met by Member States. Moreover, the article evaluates national minimum wage fixing mechanisms from the perspective of their compatibility with the requirements introduced by the draft Directive.

1. Comparative overview of constitutional regulations

The minimum wage is not addressed in all national constitutions *expressis verbis*. Those that do refer to it explicitly, however, do so with varying degrees of comprehensiveness. The broadest treatment of the minimum wage is found in the Constitution of Portugal[9]. Article 59(2)(a) thereof provides that the state is charged with ensuring that workers are provided with proper conditions of work, remuneration and leisure to which they are entitled. In particular, the state is obliged to establish and update a national minimum wage which, among other factors, shall have regard to workers' needs, increases in the cost of living, the level of development of the forces of production. Consequently, the above provision is not limited to the mere formulation of legal guarantees of minimum wage and its adjustment but also regulates the criteria for fixing its amount. When compared to other states, this regulation is exceptionally detailed.

Although some constitutions formulate minimum wage guarantees, it is the subordinate legislation's responsibility to provide further details. This type of arrangement is found in the Constitution of Romania[10], whose Article 41(2) explicitly formulates the employees' right to social protection, including the minimum wage. Similarly, in Poland, Article 65(4) of the Constitution[11] stipulates that the minimum level of remuneration for work, or the manner of setting its levels, shall be specified by statute. In this way, the Constitution imposes the obligation on the legislator to fix the amount of the minimum wage but does not specify clear guidelines in this respect[12].

One can also point to states where the constitutions do not refer to minimum wages directly but allude to the concept of fair remuneration. Such solutions can be found in Article 36 of the Italian Constitution[13] and Article 35 of the Spanish

[9] Constitution of the Portuguese Republic (25.04.1974). Available: https://mobile.dre.pt/constitution-of-the-portuguese-republic [last viewed 30.06.2022].

[10] The Constitution of Romania (21.11.1991). Available: https://www.presidency.ro/en/the-constitution-of-romania [last viewed 30.06.2022].

[11] The Constitution of the Republic of Poland (02.04.1997). Available: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [last viewed 30.06.2022].

[12] Cf. *Czerniak-Swędzioł, J.* The Principle of Fair Remuneration. In: Principles of Polish Labour Law, *Baran, K.W*. (ed.). Warsaw: C. H. Beck, 2019, p.60 ff.

[13] Article 36 of the Italian Constitution: "Workers have the right to wages in proportion to the quantity and quality of their work and in all cases sufficient to ensure them and their families a free and dignified existence." Cf. Constitution of the Italian Republic (22.12.1947). Available: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf [last viewed 30.06.2022].

Constitution[14]. Finally, there are also states that do not explicitly refer to the minimum wage. In these cases, its justification may be sought indirectly in the ideas underlying the respective domestic legal orders[15]. Austria, Germany and France fall into this group.

The discrepancies in the constitutional regulations governing social rights can be viewed from a historical perspective in connection with the development of both the international and the European systems of social rights. Constitutions adopted during the interwar period (Austria[16]), as well as the constitutions passed immediately after the end of World War II (Germany[17] and France[18]), in principle do not address social issues, leaving their regulation to lower-ranking legal acts. One exception is the Constitution of Italy of 1947, which formulated the right to a decent remuneration in response to the pressure generated by left-wing parties and the social teachings of the Church[19]. The signing of the European Social Charter in 1961, together with the International Covenant on Economic, Social and Cultural Rights of 1966, contributed to the popularization of the idea of social rights, including the guarantee of a decent remuneration. This was reflected in the national constitutions adopted in the 1970s (in Portugal and Spain). It should be noted that the constitutions of Central and Eastern European countries adopted after 1989 take into account the need for the state to intervene in the operation of the market to ensure a minimum amount of remuneration. However, under the circumstances of political and economic transformation, no decision was made to lay down detailed rules in the constitutions. The legislators limited themselves to establishing guarantees of minimum wages, further specifying them in statutes[20].

It is important to note that all the states under review have ratified the UN International Covenant on Economic, Social and Cultural Rights. In addition, most of them have ratified at least one of the ILO conventions relating to the minimum wage directly (No. 26, No. 99 or No. 131). Each of the countries mentioned herein has ratified the European Social Charter, although not all of them are bound by Article 4(1) of the ESC, which aims to ensure that workers are paid a remuneration

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[14] Article 35 of the Spanish Constitution: *1.* "All Spaniards have the duty to work and the right to employment, to free choice of profession or trade, to advancement through their work, and to sufficient remuneration for the satisfaction of their needs and those of their families; moreover, under no circumstances may they be discriminated against on account of their gender. 2. The law shall establish a Workers' Statute." Cf. The Spanish Constitution (31.10.1978). Available: https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf [last viewed 30.06.2022].

[15] Cf. e.g. *Mertens, T.* A Philosophical Introduction to Human Rights. Cambridge: Cambridge University Press, 2020, p. 25; *Collins, H., Lester, G. Mantouvalou, V*. Introduction: Does Labour Law Need Philosophical Foundations? In: Philosophical Foundations of Labour Law, *Collins, H., Lester, G., Mantouvalou, V.* (eds). Oxford: Oxford University Press, 2018, p. 13.

[16] Federal Constitutional Law in Austria (1920, as amended). Available: https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.html [last viewed 30.06.2022].

[17] Basic Law for the Federal Republic of Germany (8.05.1949). Available: https://www.gesetze-im-internet.de/englisch_gg/ [last viewed 30.06.2022].

[18] Constitution of France (4.10.1958). Available: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf [last viewed 30.06.2022].

[19] *Nowak, M.* Prawo do godziwego wynagrodzenia w konstytucjach państw europejskich. Praca i Zabezpieczenie Społeczne, No. 5, 2002, p. 12.

[20] The impact of political and economic reforms in Central and Eastern European countries on the minimum wage system is discussed by *Kohl, H., Platzer, H.-W.* Minimum wages in Central and Eastern Europe. In: Minimum wages in Europe, *Schulten, T., Bispinck, T., Schäfer, C.* (eds). Brussels: ETUI-REHS, 2006, p. 177 ff.

that allows them and their families to have a decent standard of living (e.g. Poland). Hence, it may be observed that there is no direct link between regulating minimum wages in national constitutions and ratification of individual acts of international and European law[21].

2. Comparative overview of sub-constitutional regulations

The basis for the minimum wage established by the constitution may be substantiated by way of statute or by collective agreement. Under the statutory model, the constitutional provisions are made more specific in a statute, which may also contain a delegation to set the amount of the minimum wage in lower-order government regulations. As regards the states under study, such a method has been applied in Germany, France, Portugal, Spain, Romania and Poland.

In Germany, the minimum wage is governed by the Minimum Wage Act of 11.08.2014 (MiLoG)[22]. Its amount is set by the Government based on the proposal made by the Minimum Wage Commission (in German – *Mindestlohnkommission*). In France, the minimum wage is regulated primarily by the Labour Code[23] , particularly in Articles L.3231-2 to L.3231-11, while its amount is fixed by decree. Likewise, in Portugal, the constitutional obligation to establish and update the minimum wage is further detailed in Articles 273 and 274 of Labour Code Law No. 7/2009 of 12.02.2009[24], with the amount of the minimum wage set by decree[25]. In Spain, Article 27 of the Workers' Statute[26] plays an important role in formulating, among other things, the criteria for fixing the minimum wage. The amount thereof is determined by way of a decree. In Romania, the minimum wage is regulated by the Labour Code[27]. Pursuant to Article 164(1) of the Labour Code, its amount is fixed through a decision of the Romanian government. Similarly, the obligation arising from Article 65(4) of the Polish Constitution to regulate the minimum wage was effected in Poland by the Act of 10.10.2002[28], whereas the amount of this remuneration is determined by the government ordinance[29].

Under the collective bargaining model, the issue of minimum wages is subject to collective labour agreements. This model is in place in Austria and Italy. Under Austrian law, the minimum wage is determined by social partners through collective

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21 Cf. *Bomba, K.* Minimalne wynagrodzenie, p. 180 ff.

22 Gesetz zur Regelung eines allgemeinen Mindestlohns, Federal Law Gazette I, p. 1348 (as amended). Available: https://www.gesetze-im-internet.de/milog/ [last viewed 30.06.2022].

23 Code du travail. Available: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006072050/ [last viewed 30.06.2022].

24 Lei n.º 7/2009, Código do Trabalho, Diário da República n.º 30/2009, Série I de 2009-02-12, consolidated text. Available: https://dre.pt/dre/legislacao-consolidada/lei/2009-34546475 [last viewed 30.06.2022].

25 Direção-Geral do Emprego e das Relações de Trabalho (DGERT), Ministério do Trabalho, Solidariedade e Segurança Social (MTSSS), Evolução da Remuneração Mínima Mensal Garantida (RMMG). Available: https://www.dgert.gov.pt/evolucao-da-remuneracao-minima-mensal-garantida-rmmg [last viewed 30.06.2022].

26 Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores, Boletín Oficial del Estado nº 255, 24.10.2015. Available: https://www.boe.es/buscar/act.php?id=BOE-A-2015-11430 [last viewed 30.06.2022].

27 Codul Muncii, 24.01.2003, Legea nr. 53/2003, Monitorul Oficial nr. 345/ 18.05.2011. Available: https://legislatie.just.ro/Public/DetaliiDocument/41627 [last viewed 30.06.2022].

28 Act of 10.10.2002 on the minimum wage, consolidated text, Journal of Laws of 2018, item 2177 as amended.

29 Cf. *Hajn, Z.* In: Labour Law in Poland, *Hajn, Z., Mitrus, L.* Warsaw: Wolters Kluwer, 2019, pp. 130–131.

bargaining[30]. Statutory instruments provide a supplementary method for fixing minimum wages for groups of workers not subject to minimum rates established through collective bargaining. It is worth mentioning in this context the Austrian Collective Labour Relations Act of 14.12.1973[31] and the Anti-Wage and Social Dumping Act of 28.04.2011[32]. Similarly, in Italy, there is no statute explicitly addressing the issue. Minimum wages are fixed through collective bargaining, the legal framework for which is provided by the state. However, it should be noted that there is an ongoing discussion regarding the introduction of statutory minimum wage regulation[33]. In this respect, E. Menegatti concludes that it would be best to fix a minimum level of remuneration based on a sectoral collective bargaining agreement concluded by the most representative trade unions, combined with a solution involving the adoption of a statutory minimum wage for workers outside an employment relationship[34]. It is important to note that the government approved the text of the Update Note to the Economic and Financial Document on 5.10.2020[35]. This document addresses the recovery of the Italian economy in the period 2021–2023, and one of the methods is expected to be the statutory regulation of the minimum wage.

The above overview shows that the statutory method is used both in states that have thoroughly regulated the minimum wage in their constitution (e.g. Portugal) and in those countries where the Constitutions do not explicitly refer to the minimum wage (e.g. Germany, France). In the Austrian Constitution, where the collective bargaining mechanism applies, there are no references to social rights. Meanwhile, in Italy, where a collective bargaining mechanism has also been adopted, the constitution formulates the right to fair remuneration. As a result, it must be assumed that the way in which the minimum wage is regulated at the constitutional level does not, in principle, exert a direct influence on the design of the minimum wage mechanism in the country concerned[36].

3. Structure of domestic minimum wage fixing mechanisms

3.1. Statutory mechanisms

In those states where statutory mechanisms are in place, it is generally accepted that the minimum wage is regulated through statutes and lower-order government regulations. These mechanisms are not identical and differ, in particular, in the form of involvement of the social partners. In my view, two alternatives can be distinguished in this respect. The first option means the involvement of the social partners in this

[30] Cf. *Hermann, Ch*. Minimum wage in Austria. In: Minimum wages in Europe. *Schulten, T., Bispinck, R., Schäfer, C.* (eds). Brussels: ETUI-REHS, 2006, p. 304 ff.

[31] Bundesgesetz vom 14. Dezember 1973 betreffend die Arbeitsverfassung (Arbeitsverfassungsgesetz – ArbVG), BGBl. Nr. 22/1974. Available: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10008329 [last viewed 30.06.2022].

[32] Lohn- und Sozialdumping-Bekämpfungsgesetz, BGBl. I Nr. 44/2016. Available: https://www.ris.bka.gv.at/eli/bgbl/I/2016/44 [last viewed 30.06.2022].

[33] Cf. *Bellavista, A*. Il salario minimo legale. Diritto delle Relazioni Industriali, No. 3, XXIV-2014, p. 743 ff.

[34] *Menegatti, E*. Wage-setting in Italy: The Central Role Played by Case Law. Italian Labour Law e-Journal, Vol. 12, Issue 2, 2019, p. 66. Available: https://doi.org/10.6092/issn.1561-8048/10017 [last viewed 30.06.2022].

[35] Documento di Economia e Finanza 2020 Nota di Aggiornamento, Deliberata dal Consiglio dei Ministri il 5 ottobre 2020. Available: https://www.dt.mef.gov.it/export/sites/sitodt/modules/documenti_it/analisi_progammazione/documenti_programmatici/nadef_2020/NADEF_2020_Pub.pdf [last viewed 30.06.2022].

[36] Cf. *Bomba, K*. Minimalne wynagrodzenie, p. 190 ff.

mechanism and takes the form of consultation. In the second option, the social partners co-decide together with the public authorities on the minimum wage rate[37].

The first variant of the statutory mechanism – based on consultations – assumes that the minimum wage is set by the public authority after consulting the social partners. Despite the prevalence of this formula, the solutions adopted in states are not consistent as regards the body with which the public authority has to fulfil its consultation obligation. To this extent, an interesting solution has been adopted in Spain, where the consultation of employers' and workers' organisations is carried out with the assistance of a body established *ad hoc*[38]. Pursuant to Article 27(1) of the Workers' Statute, the government shall fix the interprofessional minimum wage each year after consultation with the most representative trade unions and employers' organizations[39]. D. Pérez del Pedro points out that disregarding the consultation process would prejudge the invalidity of the decree fixing the minimum wage. Consultation is therefore mandatory but non-binding. In this context, the author states that the government is free to decide, regardless of the results of the consultation[40]. In turn, M. Llompart Bennàssar remarks that the consultation may turn into a negotiation based on indicators presented by the government if the social partners and the government wish to do so[41].

In general, however, the consultations between the public authorities and employers' organisations and trade unions are carried out through permanently operating tripartite bodies. These are usually Economic and Social Councils, and their mandate is not limited to wage-related issues. Such a mechanism exists, for instance, in Portugal[42]. According to Article 273(1) of the Labour Code, the amount of the minimum wage shall be determined after consultation with the Standing Committee for Social Dialogue (Pt. *Comissão Permanente de Concertação Social*). Pursuant to Articles 2 and 6 of Law No. 108/91[43], it constitutes a body of the Economic and Social Council (Pt. *Conselho Económico e Social*). Similarly, in Romania, according to Article 164(1) of the Labour Code, the minimum wage is fixed through a government decision (Rom. *hotărâre a Guvernului*) following consultations with trade unions and employers, which, as per Article 78(a) of Law No. 62/2011 on social dialogue [44] take place within the framework of the Tripartite National Council (Rom. *Consiliului Național Tripartit*).

Similarly, the minimum wage in France is fixed following consultation within a permanent body of a tripartite nature[45]. According to Article R.3231-1 of the Labour

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[37] Cf. *Bomba, K.* Minimalne wynagrodzenie, p. 287 ff.

[38] Cf. *Recio, A.* The statutory minimum wage in Spain. In: Minimum wages in Europe, *Schulten, T., Bispinck, R., Schäfer, C.* (eds). Brussels: ETUI-REHS, 2006, p. 151 ff.

[39] *Pérez del Prado, D.* El Salario Mínimo Interprofesional en el debate jurídico y económico. Revista de Informatión Laboural, issue 1, 2017, part II.2; *Paillisser, J.-B.* Le droit social en Espagne. Paris: Lamy, 1998, p. 65.

[40] *Pérez del Prado, D.* El Salario Mínimo Interprofesional, part II.2.

[41] *Llompart Bennàssar, M.* La subida del salario mínimo interprofesional: repercusiones en la esfera Laboral y de seguridad social. Trabajo y Derecho, issue 57, 2019, part II.2.

[42] *Schulten, T., Müller, T.* Between Poverty Wages And Living Wages, p. 108 ff.

[43] Lei n.º 108/91, *Conselho Económico e Social*, Diário da República n.º 188/1991, Série I-A de 1991-08-17. Available: https://dre.pt/dre/legislacao-consolidada/lei/1991-58928557 [last viewed 30.06.2022].

[44] Lege nr. 62 din 10 mai 2011, dialogului social (republicată), Monitorul Oficial nr. 625 din 31 august 2012. Available: https://legislatie.just.ro/Public/DetaliiDocument/128345 [last viewed 30.06.2022].

[45] *Aftalion, F.* Le salaire minimum. Nice: Libréchange, 2017, p. 21 ff.; *Schmid, B., Schulten, T.* The French minimum wage (SMIC). In: Minimum wages in Europe, *Schulten, T., Bispinck, R., Schäfer, C.* (eds). Brussels: ETUI-REHS, 2006, pp. 126–131.

Code, the Council of Ministers is competent to issue a decree on the minimum wage, after consulting the National Commission for Collective Bargaining, Employment and Vocational Training (Fr. *Commission nationale de la négociation collective de l'emploi et de la formation professionnelle*). The National Commission submits to the Minister of Labour a reasoned position on the level of the minimum wage. It does so after reviewing the annual report on the increase in the minimum wage prepared by the Group of Experts (Article L.2271-1(5) of the Labour Code)[46]. Before submitting its report, the Group of Experts hears the representatives of employers' organizations and trade unions that are part of the National Commission for Collective Bargaining and attaches their opinions to its report (Article 2 of Decree No. 2013-123 of 7.02.2013 on the conditions for the valorisation of the minimum wage[47]).

Against the background of the above-mentioned regulations, an exceptional solution has been implemented in Germany, where the procedure for fixing the minimum wage is based on cooperation between the federal government and the special commission[48]. The federal government has set up a permanent Minimum Wage Commission which prepares proposals to change the minimum wage (§ 4 (1) MiLoG). The commission presents its position on the minimum wage to the federal government with proper justification every two years (§9 (1) and (4) MiLoG). The federal government can adjust the minimum wage based on the Commission's proposal by issuing a regulation. However, it cannot introduce amendments to the Commission's proposals (§ 11 MiLoG)[49]. Therefore, the Commission's recommendation is not binding, but rejecting it and fixing a different remuneration rate is not left to the arbitrary discretion of the government[50].

The second variant of the statutory mechanism – based on co-decision involving both the public authority and the social partners – involves fixing the minimum wage either by tripartite bodies or by special committees[51]. The model in question differs from the previous one in that the government is bound by the decision of such an entity and fixes the minimum wage following its conclusions. Thus, the burden of the decision regarding the minimum wage is transferred to the entity which remains structurally outside the public authority. Only if no agreement is reached by such an entity is the minimum wage fixed by the government. In the my opinion, Poland should qualify under this model.

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[46] Cf. Rapport du Groupe d'Experts, *Salaire Minimum Interprofessionnel de Croissance* (26.11.2021), p. 5 ff. Available: https://www.tresor.economie.gouv.fr/Articles/284b121f-b187-4280-b327-05f18064c3fa/files/36296c31-5b87-4e8c-a4ac-62a9c63d5ae1 [last viewed 30.06.2022].

[47] Décret n° 2013-123 du 7 février 2013 relatif aux modalités de revalorisation du salaire minimum de croissance, NOR: ETSX1301417D, JORF n°0033 du 8 février 2013. Texte n° 17. Available: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000027041943 [last viewed 30.06.2022].

[48] *Nyklewicz, K.* Minimum wage and its impact on the job market in Germany. Olsztyn Economic Journal, Vol. 11, issue 2, 2016, p. 153 ff. Available: https://doi.org/10.31648/oej.2917 [last viewed 30.06.2022].

[49] Cf. *Deinert, O.* Wage-setting in a System of Self-Regulation through Collective Private Autonomy. Italian Labour Law e-Journal, Vol. 12, issue 2, 2019, p. 8. Available: https://doi.org/10.6092/issn.1561-8048/10138 [last viewed 30.06.2022].

[50] See also *Hu, Q.* An incomplete breakthrough: Questioning the momentum and efficiency of Germany's minimum wage law. In: European Labour Law Journal, Vol 9, issue 1, 2018, p. 96. Available: https://doi.org/10.1177/2031952517752168 [last viewed 30.06.2022].

[51] The ILO Committee of Experts has classified such procedures in the category of tripartite minimum wage fixing machinery. For more details, see: International Labour Organization, Committee of Experts on the Application of Convention and Recommendation, General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135), Report III (Part 1B). Geneva 2014, p. 54.

In Poland, pursuant to Article 2 of the Act on Minimum Wage, its amount is negotiated annually within the Council for Social Dialogue, which is a tripartite body bringing together representatives of public authorities, employers and workers[52]. Negotiations are conducted following the proposal put forward by the government[53]. Should the Council for Social Dialogue fail to agree on the amount of the monthly minimum wage or the minimum hourly rate, the government shall determine them by way of ordinance no later than 15 September each year. The values fixed by the government may not be lower than the rates previously proposed to the Council of Social Dialogue[54]. It needs to be recognized that the difficulties in reaching an agreement through the tripartite dialogue result in the fact that, in practice, it has become a rule in Polish law that the minimum remuneration for work is set by the government and not by the Council for Social Dialogue. Therefore, in my opinion, social partners in Poland, in practice, primarily play an opinion-making role in shaping the level of the minimum remuneration for work[55].

In light of the above overview, one can assume that within the framework of the statutory mechanism, the preferred form of participation of social partners in the discussed mechanism in individual states is consultation (the first option).

3.2. Collective bargaining mechanisms

As already indicated, the collective bargaining mechanism has been adopted in Italy and Austria. In Italy, Article 36 of the Constitution formulates the principle of equivalent and fair remuneration. In order to implement it in line with the Constitution, the division of skills has been established between the social partners and the legislator. It is the responsibility of the former to ensure by way of a collective agreement that remuneration is adequate for the work performed, while it is the responsibility of the legislator to ensure that this remuneration is fixed at a level sufficient to provide the worker and his/her family with a decent living. The social partners are well equipped to define the value of work in relation to specific sectors and occupational groups. The role of the legislator, on the other hand, is limited to ensuring that wages are fixed at a fair level and that they guarantee that public interests of a social, political and economic nature are satisfied, even if this were to lead to interference in the freedom of collective bargaining, for example, by extending the scope of sectoral collective bargaining agreements. Consequently, this makes constitutional monitoring of the determination of fair wages possible[56]. On the other hand, in Austria, the minimum wage is, in principle, determined by way of collective bargaining agreements, which are most often sectoral in nature. Their application

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[52] Cf. *Zieleniecki, M*. On a new Formula for Social Dialogue at the National Level. In: Trade unions and non-union employee representation in Europe – the current state of play and prospects for the future, *Carby-Hall, J., Rycak, M*. (eds). Warsaw: C. H. Beck, 2016, p. 187 ff.

[53] *Lekston, M*. Social dialogue. In: Polish Collective Employment Law, *Baran, K.W.* (ed.). Warszawa: C. H. Beck, 2019, p. 146 ff.; *Wujczyk, M*. Social Dialogue. In: Outline of Polish Labour Law System, *Baran, K. W*. (ed.). Warsaw: Wolters Kluwer, 2016, p. 416 ff.

[54] *Mróz, E*. Minimalne wynagrodzenie zatrudnionych w postindustrialnej Polsce i Niemczech. In: Zatrudnienie w epoce postindustrialnej, *Godlewska-Bujok, B., Walczak, K.* (eds). Warsaw: C. H. Beck, 2021, s. 244.

[55] Also *Wratny, J*. Minimalne wynagrodzenie za pracę – nowe regulacje prawne. Praca i Zabezpieczenie Społeczne, No. 6, 2003, p. 5.

[56] *Menegatti, E*. Wage-setting in Italy: The Central Role Played by Case Law. Italian Labour Law e-Journal, Vol. 2, issue 2, 2019, p. 59 ff. Available: https://doi.org/10.6092/issn.1561-8048/10017 [last viewed 30.06.2022]. At the same time, the author points out that Article 39 of the Constitution which allows the extension of the application of sectoral collective agreements has not yet been applied in practice.

can be extended by the Federal Conciliation Commission to workers not covered by the agreements.

The dichotomous divide between countries with a statutory mechanism and a collective bargaining mechanism is not separable in nature. In states where the minimum wage is fixed by statute, collective bargaining may result in a higher minimum wage for particular groups of workers. In such a situation, the statutory minimum wage rate is universal, while the collective bargaining rate applies to specific groups of workers on a preferential basis[57]. As far as the countries where collective bargaining is the main mechanism for fixing the minimum wage are concerned, statutory regulations are of a subsidiary character. They can be applied to groups of workers not covered by a collective bargaining agreement, as, for example, in Austria[58].

4. Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages

Over the last few years, the European Union has seen a departure from the neoliberal narrative focused on increasing the competitiveness of national economies by making labour markets more flexible and lowering the cost of labour. T. Schulten and T. Müller note that the new direction in EU discourse is marked by the formula of Social Europe, where labour protection standards and social security systems play a major role in ensuring economic development and political stability[59]. The above change was reflected in 2017 with the adoption of the European Pillar of Social Rights[60]. In the context of the minimum wage, particular attention should be paid to section 6 of the Pillar, which states that an adequate minimum wage shall be ensured in a way that provides for the satisfaction of the needs of the worker and his / her family in the light of the national economic and social conditions while safeguarding access to employment and incentives to seek work. In-work poverty shall be prevented. As a follow-up to this commitment, the European Commission presented a proposal for a Directive on adequate minimum wages in the European Union in 2020.

The draft Directive is concerned primarily with the mechanisms employed to fix minimum wages, seeking to ensure that workers are guaranteed minimum wages – in an adequate amount – by way of statutory instruments or collective agreements.[61] Article 1 of the draft merely lays down a framework to improve the adequacy of minimum wages and increase workers' access to minimum wage protection, yet it does not aim at either harmonizing minimum wage rates across the Union or establish a uniform mechanism for fixing minimum wages, nor does it affect

[57] In Spain, for example, the applicability of the statutory minimum wage is limited due to the protection provided by collective agreement in this respect. See *Pérez del Prado, D*. El Salario Mínimo Interprofesional…, part II.1.

[58] International Labour Organization, Committee of Experts… *General Survey…* Geneva, 2014, p. 50 ff.

[59] Cf. *Schulten, T., Müller, T*. A paradigm shift towards Social Europe? The proposed Directive on adequate minimum wages in the European Union. Italian Labour Law e-Journal, Vol. 14, issue 1, 2021, p. 6. Available: https://doi.org/10.6092/issn.1561-8048/13368 [last viewed 30.06.2022].

[60] Inter-institutional Proclamation on the European Pillar of Social Rights, Official Journal of the European Union. C 2017/428/10. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017C1213%2801%29 [last viewed 30.06.2022].

[61] *Lübker, M., Schulten, T.* WSI Minimum Wage Report 2022. Towards a new Minimum Wage Policy in German and Europe. Report No. 71, March 2022. WSI Institute of Economics and Social Research 2022, p. 4.

the freedom of the Member States as they fix statutory minimum wages or support access to minimum wage protection provided for in collective agreements. Moreover, those Member States in which minimum wage protection is only provided for by collective agreements are not obligated to institute a statutory minimum wage or to apply collective agreements across the board. Furthermore, the draft does not define a hierarchy between statutory solutions and collective bargaining as methods to fix minimum wages, allowing the States to choose their preferred mechanism freely in line with the particular features of their national systems, national competencies, the autonomy of the social partners and freedom of contract.[62] With regard to the above, A. Aranguiz and S. Garben state that the Member States will retain the competence to determine their minimum wages, by collective agreement or by statutory provisions, provided that the national regulations comply with the EU criteria for fixing adequate minimum wages[63].

At the same time, the draft formulates the requirements to which national mechanisms for fixing an adequate minimum wage should conform. Firstly, in the case of a statutory mechanism, states should ensure the actual participation of social partners in fixing and adjusting minimum wages. According to Article 7 of the draft, Member States shall take the necessary measures to ensure that the social partners are involved in a timely and effective manner in statutory minimum wage setting and updating, including through participation in consultative bodies referred to in Article 5(5). The provisions of the Directive do not set forth detailed rules for such cooperation but draw attention to the need to have social partners involved in the activities of advisory bodies. The operation of the latter is provided for in the abovementioned Article 5(5) of the Directive, pursuant to which the Member States shall establish consultative bodies to advise the competent authorities on issues related to statutory minimum wages.

Secondly, the draft seeks to strengthen the role of collective bargaining in all Member States of the Union[64]. It underlines the importance of collective bargaining in ensuring wage adequacy and states the need to create the conditions in which it may take place. Therefore, regardless of the adopted type of mechanism, as per Article 4(1) of the proposal, Member States should create a favourable environment in which the wages can be agreed upon. To this end – in consultation with the social partners – the states must take steps to increase the scope of collective bargaining in that they, for example, support social partners to develop and strengthen their capacity to engage in collective bargaining over wage-fixing at the sectoral or cross-sectoral level and encourage social partners to engage in constructive, substantial and informed negotiations concerning pay. Meanwhile, Article 4(2) of the draft Directive provides that countries in which the scope of collective bargaining does not exceed 70% of the workforce should also establish a framework of favourable conditions for collective bargaining in consultation or agreement with the social partners and adopt an action plan to promote collective bargaining. According to Recital 19 of the preamble, this framework should be established by law or by way of a tripartite agreement.

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[62] COM(2020) 682 final, p. 3, substantiation.

[63] *Aranguiz, A., Garben, S.* Combating income equality in the EU: a legal assessment of a potential EU minimum wage directive. European Law Review, Vol. 2, 2021, p. 164.

[64] *Visentini, L.* Directive on Adequate Minimum Wages: European institutions must respect the promise made to workers! Italian Labour Law e-Journal, Vol. 14, issue 1, 2021, p. 35. Available: https://doi.org/10.6092/issn.1561-8048/13371 [last viewed 30.06.2022].

When assessing the implications of the adoption of the Directive for domestic legal orders, attention should be paid to the fact that it is a legally binding instrument that provides for the introduction of a legal framework for minimum wage fixing mechanisms. The adoption of the Directive will therefore require Member States to fulfil their obligations stemming from it.

When it comes to the obligation to ensure that public authorities and social partners are consulted under the mechanism, it should be noted that most of the states under review provide for appropriate solutions in this regard[65]. This way, the obligation under Article 7 of the Directive is fulfilled[66]. The situation is different in Poland, where the adoption of the Directive will necessitate the introduction of a procedure of consultation of public authorities with social partners if the negotiations on fixing the minimum wage prove unsuccessful[67]. The Spanish regulation, which has been subject to reservations regarding the actual nature of consultations with employers' representatives and workers' representatives, is also potentially in need of revision[68].

Moving on to the states' obligation to strengthen collective bargaining, it should be noted that in most EU Member States it will be necessary to take steps to implement this obligation. Collective bargaining coverage exceeds 70% in only 10 out of 27 states. This indicator has been achieved in Austria, France, Spain, Portugal and Italy, among others. Poland (where collective bargaining coverage is below 14%) faces a greater challenge in implementing the Directive than any of the analysed countries.[69] In connection with the proposal for a Directive, M. Fuchs draws attention to the necessity of introducing an action plan to strengthen collective bargaining in Germany, where the subjective coverage of such bargaining stands at 44%.[70] According to E. Menegatti, in particular states the strengthening of company collective bargaining on a sectoral level could be achieved through state intervention in two areas. The first area would involve the introduction of legislation favouring the development and spread of sectoral and intersectoral autonomous collective bargaining. To this end, states could adopt a range of measures to enhance the capacity of social partners to participate in collective bargaining through, *inter alia*, training, provisions to facilitate trade union access to workplaces, benefits for employers for their participation in intersectoral collective agreements or their membership in an employers' organisation. The second area of state intervention would include differentiated support for collective bargaining, such as the introduction of a mechanism for extending sectoral agreements. The cited

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[65] Cf. *Pasquier, T*. Proposal for a Directive on adequate minimum wages in the European Union: A look at French law. Italian Labour Law e-Journal, Vol. 14, issue 1, 2021, p. 79. Available: https://doi.org/10.6092/issn.1561-8048/13373 [last viewed 30.06.2022].

[66] Cf. *Fuchs, M*. Notes on the proposal for a directive on adequate minimum wages: A German perspective. Italian Labour Law e-Journal, Vol. 14, issue 1, 2021, p. 72. Available: https://doi.org/10.6092/issn.1561-8048/13372 [last viewed 30.06.2022].

[67] *Surdykowka, B. Pisarczyk, Ł*. The Impact of the Directive on Adequate Minimum Wages in the European Union on Polish Labour Law. Italian Labour Law e-Journal, Vol. 14, issue 1, 2021, p. 97. Available: https://doi.org/10.6092/issn.1561-8048/13374 [last viewed 30.06.2022].

[68] Unión General de Trabajadores de España. Consideraciones de la U.G.T. de España acerca de la aplicación del Convenio No 131 y la Recomendacion No 135 sobre salarios minimos, not published, 2013, p. 2.

[69] Organisation for Economic Cooperation and Development. How do collective bargaining systems and workers' voice arrangements compare across OECD and EU countries? Data from 2018 or more recent data available: https://www.oecd.org/employment/ictwss-database.htm [last viewed 30.06.2022].

[70] *Fuchs, M*. Notes on the proposal, p. 70.

author indicates that the Directive does not impose these solutions, but Member States are free to adopt them after consulting the social partners[71].

The high requirements for strengthening collective bargaining may contribute to replacing the agreement-based mechanism for fixing the minimum wage with a statutory mechanism. The adoption of the Directive may produce this effect in Italy[72]. M. Delfino highlights the difficulties in reforming the Italian trade union organisational model and the fact that this model does not allow for the implementation of the EU Directive on adequate minimum wages. Therefore, the legislative intervention is required, the extent of which should be further clarified[73]. Implementation of the Directive may require amending the rules on trade union representativeness, supporting collective bargaining, or introducing a statutory minimum wage[74].

However, the adoption of the Directive does not necessarily imply a departure from a statutory to an agreement-based mechanism. For instance, according to the social partners in Austria, the collective mechanism for fixing the minimum wage is characterised by stability and almost universal subjective coverage. For these reasons, they fail to recognise the need for statutory regulation. Trade unions, in particular, fear that statutory regulation will become a reference point for collective bargaining, making collective agreement solutions dependent on the political situation. Such a development will eventually lead the trade unions to lose their autonomy in determining the amount of the minimum wage. It should be noted that the introduction of a statutory mechanism also raises controversies within political parties[75].

Summary

This analysis leads to the conclusion that domestically used mechanisms for fixing minimum wages are not uniform. The minimum wage in the analysed states is more often fixed by statute and lower-order government regulations (Poland, Germany, France, Spain, Portugal, Romania). The collective bargaining mechanism is used less frequently (Austria, Italy). The type of employed mechanism varies depending on country-specific traditions and additional legal solutions.

Cooperation between government and social partners permits consideration of the needs and priorities of those most affected by minimum wage policies. It also fosters greater acceptance on the part of the social partners of minimum wage decisions. In general, national legislators recognise these regularities, providing for the participation of the social partners in statutory mechanisms. Yet they do not agree on the formula for their involvement. In the majority of states, tripartite bodies, comprising the government, employers' organisations and trade unions, take on the central role (Poland, France, Portugal). Sometimes, however, the national mechanism provides for the interaction of employers' and workers' representatives in bilateral bodies (Germany). Moreover, domestic legislators generally assume

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[71] *Menegatti, E.* Much ado about little: The Commission proposal for a Directive on adequate wages. Italian Labour Law e-Journal, Vol. 14, issue 1, 2021, p. 22. Available: https://doi.org/10.6092/issn.1561-8048/13369 [last viewed 30.06.2022].

[72] *Menegatti, E.* Wage-setting in Italy, p. 66.

[73] *Delfino, M.* The Proposal for the EU Directive on adequate Minimum Wages and its impact on Italy. Italian Labour Law e-Journal, Vol. 14, issue 1, 2021, p. 57. Available: https://doi.org/10.6092/issn.1561-8048/13370 [last viewed 30.06.2022].

[74] *Delfino, M.* The Proposal for the EU Directive, pp. 62–63.

[75] *Schulten, T., Müller, T.* Between Poverty Wages, p. 23.

that the role of the social partners takes the form of consultation. In this context, the Polish legal regulation stands out, as it gives priority to cooperation between the representatives of the government, the employers' organizations and the trade unions within the Social Dialogue Council, and subsequently, it allows for unilateral fixing of the minimum wage by the government.

In view of the domestic mechanisms shaped in this way, the implementation of the proposal for a Directive on adequate minimum wages will not result in fundamental changes to the legal systems of individual states. The Directive will not lead to the harmonisation of domestic legal systems, which manifests itself, among other things, in leaving the states free to opt for either statutory or collective bargaining mechanisms. However, the new legal regulations will not remain indifferent to the way they are shaped as regards social partners' involvement. The fulfilment of the obligations arising from the Directive will require the Member States to introduce consultations between the public authorities and the social partners into their domestic mechanisms. In most cases, it will oblige them to take measures aimed at strengthening the role of collective bargaining.

Sources

Bibliography

1. *Aftalion, F.* Le salaire minimum. Nice: Libréchange, 2017.
2. *Aranguiz, A., Garben, S.* Combating income equality in the EU: A legal assessment of a potential EU minimum wage directive. European Law Review, issue 2, 2021.
3. *Bellavista, A*. Il salario minimo legale. Diritto delle Relazioni Industriali, No. 3, XXIV-2014.
4. *Bomba, K.* Minimalne wynagrodzenie za pracę jako instrument realizacji społecznych praw człowieka [Minimum remuneration for work as an instrument for the realization of social human rights]. Warsaw: C. H. Beck, 2022.
5. *Bomba, K.* Minimalne wynagrodzenie za pracę w działalności Międzynarodowej Organizacji Pracy [Minimum wage for work in the activities of the International Labour Organization]. Praca i Zabezpieczenie Społeczne, No. 10, 2021.
6. *Bomba, K.* Instrumenty prawa międzynarodowego kształtujące standard minimalnego wynagrodzenia za pracę [Instruments of international law shaping the standard of minimum remuneration for work]. In: Roczniki Administracji i Prawa. Rok XXI. Zeszyt specjalny: In labore virtus et vita. Księga jubileuszowa Prof. Marka Pliszkiewicza, *Borski, M., Ćwiertniak, B., Lekston, M.* (eds). Sosnowiec: Oficyna Wydawnicza Humanitas, 2021.
7. *Collins, H., Lester, G., Mantouvalou, V*. Introduction: Does Labour Law Need Philosophical Foundations? In: Philosophical Foundations of Labour Law, *Collins, H., Lester, G., Mantouvalou, V.* (eds). Oxford: Oxford University Press, 2018.
8. *Czerniak-Swędzioł, J.* The Principle of Fair Remuneration. In: Principles of Polish Labour Law, *Baran, K. W*. (ed.). Warsaw: C. H. Beck, 2019.
9. *Delfino, M*. The Proposal for the EU Directive on adequate Minimum Wages and its impact on Italy. Italian Labour Law e-Journal, Vol. 14, issue 1, 2021.
10. *Hajn, Z.* In: Labour Law in Poland, *Hajn, Z., Mitrus, L*. Warsaw: Wolters Kluwer, 2019.
11. *Hu, Q*. An incomplete breakthrough: Questioning the momentum and efficiency of Germany's minimum wage law. In: European Labour Law Journal, Vol. 9, issue 1, 2018.
12. *Fuchs, M*. Notes on the proposal for a directive on adequate minimum wages: A German perspective. Italian Labour Law e-Journal, Vol. 14, issue 1, 2021.
13. *Hermann, Ch*. Minimum wage in Austria. In: *Minimum wages in Europe*, *Schulten, T., Bispinck, R., Schäfer, C.* (eds). Brussels: ETUI-REHS, 2006.
14. *Kohl, H. Platzer, H.-W.* Minimum wages in Central and Eastern Europe. In: Minimum wages in Europe, *Schulten, T., Bispinck, T., Schäfer, C.* (eds). Brussels: ETUI-REHS, 2006.
15. *Menegatti, E*. Wage-setting in Italy: The Central Role Played by Case Law. Italian Labour Law e-Journal, Vol. 12, issue 2, 2019.
16. *Menegatti, E.* Much ado about little: The Commission proposal for a Directive on adequate wages. Italian Labour Law e-Journal, Vol. 14, issue 1, 2021.

17. *Mertens, T.* A Philosophical Introduction to Human Rights. Cambridge: Cambridge University Press, 2020.
18. *Mróz, E*. Minimalne wynagrodzenie zatrudnionych w postindustrialnej Polsce i Niemczech [Minimum wages for employees in post-industrial Poland and Germany]. In: Zatrudnienie w epoce postindustrialnej, *Godlewska-Bujok, B., Walczak, K.* (eds). Warsaw: C. H. Beck, 2021.
19. *Nowak, M.* Prawo do godziwego wynagrodzenia w konstytucjach państw europejskich [The right to fair remuneration in the constitutions of European countries]. Praca i Zabezpieczenie Społeczne, No. 5, 2002.
20. *Nyklewicz, K.* Minimum wage and its impact on the job market in Germany. Olsztyn Economic Journal, Vol. 11, issue 2, 2016.
21. *Lekston, M*. Social dialogue. In: Polish Collective Employment Law, *Baran, K. W.* (ed.). Warszawa: C. H. Beck, 2019.
22. *Llompart Bennàssar, M*. La subida del salario mínimo interprofesional: repercusiones en la esfera Laboural y de seguridad social. Trabajo y Derecho, issue 57, 2019.
23. *Lübker, M. Schulten, T.* WSI Minimum Wage Report 2022. Towards a new Minimum Wage Policy in German and Europe. Report No. 71, March 2022. WSI Institute of Economics and Social Research, 2022.
24. *Paillisser, J.-B*. Le droit social en Espagne. Paris: Lamy, 1998.
25. *Pasquier, T*. Proposal for a Directive on adequate minimum wages in the European Union: A look at French law. Italian Labour Law e-Journal, Vol. 14, issue 1, 2021.
26. *Pérez del Prado, D*. El Salario Mínimo Interprofesional en el debate jurídico y económico. Revista de Informatión Laboural, issue 1, 2017.
27. *Recio, A*. The statutory minimum wage in Spain. In: Minimum wages in Europe, *Schulten, T. Bispinck, R. Schäfer, C.* (eds). Brussels: ETUI-REHS, 2006.
28. *Schulten, T., Müller, T*. Between Poverty Wages And Living Wages. Minimum wage regimes in the European Union. European Studies for Social and Labour Market Policy, No. 1, 2020.
29. *Schulten, T., Müller, T*. A paradigm shift towards Social Europe? The proposed Directive on adequate minimum wages in the European Union. Italian Labour Law e-Journal, Vol. 14, issue 1, 2021.
30. *Schmid, B., Schulten, T*. The French minimum wage (SMIC). In: Minimum wages in Europe, *Schulten, T., Bispinck, R., Schäfer, C.* (eds). Brussels: ETUI-REHS, 2006.
31. *Shelton, D. L*. Advanced Introduction to International Human Rights Law. Cheltenham-Northampton: Edward Elgar, 2014.
32. *Surdykowka, B., Pisarczyk, Ł.* The Impact of the Directive on Adequate Minimum Wages in the European Union on Polish Labour Law. Italian Labour Law e-Journal, Vol. 14, issue 1, 2021.
33. *Wratny, J*. Minimalne wynagrodzenie za pracę – nowe regulacje prawne [Minimum remuneration for work – new legal regulations]. Praca i Zabezpieczenie Społeczne, No. 6, 2003.
34. *Wujczyk, M*. Social Dialogue. In: Outline of Polish Labour Law System, *Baran, K.W*. (ed.). Warsaw: Wolters Kluwer, 2016.
35. *Visentini, L*. Directive on Adequate Minimum Wages: European institutions must respect the promise made to workers! Italian Labour Law e-Journal, Vol. 14, issue 1, 2021.
36. *Zieleniecki, M*. On a New Formula for Social Dialogue at the National Level. In: Trade unions and non-union employee representation in Europe – the current state of play and prospects for the future, *Carby-Hall, J., Rycak, M*. (eds). Warsaw: C. H. Beck, 2016.

Normative acts

1. United Nations Universal Declaration of Human Rights (10.12.1948). Available: https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf [last viewed 30.06.2022].
2. United Nations International Covenant on Economic, Social and Cultural Rights (19.12.1966). Available: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights [last viewed 30.06.2022].
3. International Labour Organization. Minimum Wage Fixing Convention No. 131 concerning Minimum Wage Fixing, with Special Reference to Developing Countries (3.06.1970). Available: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C131 [last viewed 30.06.2022].
4. Council of Europe. European Social Charter (18.10.1961). Available: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=035 [last viewed 30.06.2022].
5. Inter-institutional Proclamation on the European Pillar of Social Rights, Official Journal of the European Union. C 2017/428/10. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017C1213%2801%29 [last viewed 30.06.2022].

6. Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union. COM(2020) 682 final, Brussels (28.10.2020). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0682 [last viewed 30.06.2022].
7. Constitution of the Italian Republic (22.12.1947). Available: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf [last viewed 30.06.2022].
8. Spanish Constitution (31.10.1978). Available: https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf [last viewed 30.06.2022].
9. Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores, Boletín Oficial del Estado nº 255, 24.10.2015. Available: https://www.boe.es/buscar/act.php?id=BOE-A-2015-11430 [last viewed 30.06.2022].
10. The Constitution of the Republic of Poland (02.04.1997). Available: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [last viewed 30.06.2022].
11. Act of 10.10.2002 on the minimum wage, consolidated text, Journal of Laws of 2018, item 2177 as amended.
12. The Constitution of Romania (21.11.1991). Available: https://www.presidency.ro/en/the-constitution-of-romania [last viewed 30.06.2022].
13. Codul Muncii, 24.01.2003, Legea nr. 53/2003, Monitorul Oficial nr. 345/ 18.05.2011. Available: https://legislatie.just.ro/Public/DetaliiDocument/41627 [last viewed 30.06.2022].
14. Lege nr. 62 din 10 mai 2011, dialogului social (republicată), Monitorul Oficial nr. 625 din 31 august 2012. Available: https://legislatie.just.ro/Public/DetaliiDocument/128345 [last viewed 30.06.2022].
15. Constitution of the Portuguese Republic (25.04.1974). Available: https://mobile.dre.pt/constitution-of-the-portuguese-republic [last viewed 30.06.2022].
16. Lei n.º 7/2009, Código do Trabalho, Diário da República n.º 30/2009, Série I de 2009-02-12, consolidated text. Available: https://dre.pt/dre/legislacao-consolidada/lei/2009-34546475 [last viewed 30.06.2022].
17. Lei n.º 108/91, *Conselho Económico e Social*, Diário da República n.º 188/1991, Série I-A de 1991-08-17. Available: https://dre.pt/dre/legislacao-consolidada/lei/1991-58928557 [last viewed 30.06.2022].
18. Federal Constitutional Law in Austria (1920, as amended). Available: https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.html [last viewed 30.06.2022].
19. Basic Law for the Federal Republic of Germany (8.05.1949). Available: https://www.gesetze-im-internet.de/englisch_gg/ [last viewed 30.06.2022].
20. Gesetz zur Regelung eines allgemeinen Mindestlohns, Federal Law Gazette I, p. 1348 (as amended). Available: https://www.gesetze-im-internet.de/milog/ [last viewed 30.06.2022].
21. Bundesgesetz vom 14. Dezember 1973 betreffend die Arbeitsverfassung (Arbeitsverfassungsgesetz – ArbVG), BGBl. Nr. 22/1974. Available: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10008329 [last viewed 30.06.2022].
22. Lohn- und Sozialdumping-Bekämpfungsgesetz, BGBl. I Nr. 44/2016. Available: https://www.ris.bka.gv.at/eli/bgbl/I/2016/44 [last viewed 30.06.2022].
23. Constitution of France (4.10.1958). Available: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf (last viewed 30.06.2022].
24. Code du travail. Available: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006072050/ [last viewed 30.06.2022].
25. Décret n° 2013-123 du 7 février 2013 relatif aux modalités de revalorisation du salaire minimum de croissance, NOR: ETSX1301417D, JORF n°0033 du 8 février 2013. Texte n° 17. Available: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000027041943 [last viewed 30.06.2022].

Other sources

1. International Labour Organization. Committee of Experts on the Application of Convention and Recommendation. General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135), Report III (Part 1B). Geneva, 2014.
2. Organisation for Economic Cooperation and Development. How do collective bargaining systems and workers' voice arrangements compare across OECD and EU countries? Data from 2018 or more recent data available: https://www.oecd.org/employment/ictwss-database.htm [last viewed 30.06.2022].
3. Direção-Geral do Emprego e das Relações de Trabalho (DGERT), Ministério do Trabalho, Solidariedade e Segurança Social (MTSSS), *Evolução da Remuneração Mínima Mensal Garantida*

(RMMG): https://www.dgert.gov.pt/evolucao-da-remuneracao-minima-mensal-garantida-rmmg [last viewed 30.06.2022].

4. Rapport du Groupe d'Experts, Salaire Minimum Interprofessionnel de Croissance (26.11.2021), p. 5 ff. Available: https://www.tresor.economie.gouv.fr/Articles/284b121f-b187-4280-b327-05f18064c3fa/files/36296c31-5b87-4e8c-a4ac-62a9c63d5ae1 [last viewed 30.06.2022].
5. Documento di Economia e Finanza 2020 Nota di Aggiornamento, Deliberata dal Consiglio dei Ministri il 5 ottobre 2020. Available: https://www.dt.mef.gov.it/export/sites/sitodt/modules/documenti_it/analisi_progammazione/documenti_programmatici/nadef_2020/NADEF_2020_Pub.pdf [last viewed 30.06.2022].
6. Unión General de Trabajadores de España. Consideraciones de la U.G.T. de España acerca de la aplicación del Convenio No 131 y la Recomendacion No 135 sobre salarios minimos, not published, 2013.

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General Principles of Law as Common Constitutional Traditions of the European Union Member States

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The article examines the notion of "common constitutional traditions" of the European Union Member States looking for the content of this open-ended term. It is agreed and even on the international level that fundamental rights are the part of the common constitutional traditions, but in this article, it is suggested to connect the notion with the notion of the general principles of law thus obtaining more comprehensive and elaborate understanding of what the content of the common constitutional traditions really involve. General principles of law are a common source of law to all the legal arrangements of the European Union Member States as they are derived from the same Basic Norm – democratic state based on the Rule of Law, and fundamental rights are only one part of the general principles of law as they are much wider notion. That is why looking from the perspective of the general principles of law as common source of law of all the legal arrangements based on the Basic Norm – democratic state based on the Rule of Law common constitutional traditions besides the human rights involve also legal methods and those general principles of law which govern the system requirements for the legal arrangement.

Keywords: general principles of law, common constitutional traditions, Basic Norm, constitutional identity, values.

Contents

Introduction

What we know exactly about the meaning and content of common constitutional traditions is that it is an open ended term left in the text of the law by the legislator in a form of an intentional gap in law, and thus should be filled with the contents by the applier of a legal norm using the legal method of *praeter legem*[1]. Nevertheless, this gives us the possible content of the term within the typology of cases or typical cases methodology. It means that although the norm applier is the one who fills the content of the open ended term in the given case at hand the content is already pre-set by the similar – typical cases and it has to ensure the same values and legal interests which are protected in those other similar cases.

One of the main questions, which could be raised about common constitutional traditions is whether they involve only fundamental rights which, of course, are general principles of law or the term is broader and involves also other elements of the Rule of Law. Further, if it does involve other elements of the Rule of Law then what are they exactly? According to the opinion of the Venice Commission[2] besides the respect for human rights the Rule of Law involves also legality (supremacy of the law), legal certainty, prohibition of arbitrariness, access to justice before independent and impartial courts, and non-discrimination and equality before the law. Legal doctrine in Latvia has gone much further than that in finding the true content of the Rule of Law and connects it directly with the notion of the general principles of law.[3]

The author of this paper suggests to put the general principles of law in the centre of the discussion on what the common constitutional traditions are, in connection with the legal arrangement of the state which is based on the Basic Norm – democracy and the Rule of Law – as all the Member States of the European Union are – and answer to the above questions would come straightforward from the meaning and application practices of the term "general principles of law" and that for sure would include all the aforementioned elements of the Rule of Law agreed on by the Venice Commission, but also even some more legal provisions.

1. Modern legal theory and legal arrangement

The notion of common constitutional traditions is mentioned not only starting with the early case law[4] of the Court of Justice of the European Union (the Court),

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[1] On *praeter legem* method see extensively in: *Sniedzīte, G.* Tiesību normu iztulkošana *praeter legem* I, II, III (Interpretation of the Legal Norms Using *Praeter Legem* Method). Likums un Tiesības, 2005, Nr. 10, 325.–331. lpp., Nr. 11, 351.–358. lpp., Nr. 12., 374.–382. lpp.

[2] Report on the Rule of Law. European Commission for Democracy through Law (Venice Commission). Adopted by the Venice Commission at its 86th plenary session (Venice, 25–26 March 2011). Available: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e [last viewed 10.04.2022].

[3] See extensively on the theory of general principles of law in: *Rezevska, D.* Vispārējo tiesību principu nozīme un piemērošana [The Meaning and Application of General Principles of Law]. Rīga: D. Rezevskas izd., 2015.

[4] In the Internationale Handelsgesellschaft case (Judgment of 17 December 1970, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, C-11/70, EU:C:1970:114) the Court stipulated for the first time that the protection of fundamental rights at the Community level, "inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community." Or even before that, looking at the reasoning in the Algera judgment of 1957, where after discussing the possibility of revoking unlawful administrative acts, and having clarified that this was "a problem which is familiar in

but also it is *expressis verbis* referred to in the Article 6 (3) of the Treaty on European Union[5] as "the constitutional traditions common to the Member States". From the text of the Article it is clearly to be concluded that fundamental rights are by no means a part of these common constitutional traditions. But what else this notion covers? To understand that it is necessary to consider the notion of the values of the legal arrangement, namely values protected within the particular legal arrangement. The term "legal arrangement" is used here to refer to the system that encompasses the broadest possible issues of law in a given country: all the legal phenomena of that country's society, including both legal and institutional issues. Thus, the legal arrangement covers: 1) all sources of law, including legal acts adopted (issued) or otherwise binding in the state; 2) all institutions that are in some way related to the application of law (both judicial and administrative institutions); 3) all the legal relations that have arisen and exist in this arrangement.[6]

At the same time, it is crucial to understand the meaning of a legal norm in the contemporary legal theory. Modern legal theory holds that there are two radically different and incompatible ways of understanding legal norms – the hyletic understanding and the expressive understanding of legal norms.[7] These, in turn, are based on the concept of natural law and the concept of positive law respectively. The hyletic approach holds that legal norms are conceptual units which exist irrespective of language but can be expressed linguistically – for example, through sentences which possess a prescriptive meaning. The expressive understanding holds that legal norms are instructions, which is the result of the prescriptive use of language.

This article is based on the fundamental postulate that in a democratic country, where the Rule of Law prevails, a legal norm is no longer viewed exclusively in the context of a normative legal act. Rather, it is seen as a prescription, with respect to which legal arrangements that are based on sovereign's will regulate legal relationships on the basis of general principles of law in a specific country, irrespective of whether the legislature has managed to verbalize the norm to an adequate degree. A legal norm is more than just the text, and in terms of its scope it can coincide with the written text or not coincide with it.

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the case-law and learned writing of all the countries of the Community, but for the solution of which the Treaty does not contain any rules," the Court concluded that "unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries." (Joined Cases C-7/56, 3/57 to 7/57, Algera v. Common Assembly of ECSC, ECLI:EU:C:1957:7, Judgment of 12 July 1957, para. 55).

[5] "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." The Treaty on European Union. Available: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF [last viewed 10.04.2022].

[6] See similar in: *Rezevska, D.* Legal Methods in Latvia's Legal Arrangement and European Integration. In: European Integration and Baltic Sea Region: Diversity and Perspectives. Collection of Papers of International Conference held by the University of Latvia. Riga: The University of Latvia Press, 2011, pp. 222–234.

[7] *Weinberger, O.* The Expressive Conception of Norms: An Impasse for the Logic of Norms. In Normativity and Norms: Critical Perspective on Kelsenian Themes. *Paulson, S. L.* (ed.). Oxford: Clarendon Press, 1999, p. 413. See also: *Alchourron, C. E., Bulygin, E.* The Expressive Conception of Norms. In: Normativity and Norms. Critical Perspectives on Kelsenian Themes. *Paulson, S. L.* (ed.). Oxford: Clarendon Press, 1999, pp. 384–385.

1.1. The Basic Norm – democratic state based on the Rule of Law

What is common to all the legal arrangements of the Member States of the European Union is that they all are founded on the basis of the same Basic Norm[8] – democratic state based on the Rule of Law, proclaimed by the respective sovereigns – the people. Otherwise, they would never be able to join this union, and at the same time it sets compulsory quality features to the legal arrangements of these countries. It means that to continue to be the Member State of this union it is not enough that at one point in history the state corresponded to the criteria established by the Basic Norm – democratic state based on the Rule of Law, but it has to continue to obey these requirements and to function and develop on the basis of these requirements constantly and continuously. What are these requirements? They are general principles of law – unwritten legal norms as from the point of view of natural law doctrine, but as generally binding as any positive law as also recognized by the legal positivism – thus serving as a conciliator phenomenon between these two doctrines. General principles of law are derived from this particular Basic Norm, governing the legal arrangement of the state, setting limits to the legislature, executive, and the courts but also to the sovereign itself.[9] The Constitutional Court of the Republic of Latvia (the Constitutional Court) has recognized the doctrine of the Basic Norm – the sovereign's will which defines the content of the respective legal arrangement, namely, it speaks to the type of country in which the sovereign wishes to live, and in its case law (starting 2016) has *expressis verbis* stated:

> *The principle of the protection of legitimate expectations derived from the Basic Norm – democratic state based on the Rule of Law, and embodied in the scope of Article 1 of the* Satversme *protects only those rights which are based on legal, justified and reasonable expectations, which are the core of this general principle of law*[10]

or

> *One of the general principles of law derived from the Basic Norm democratic state based on the Rule of Law is the principle of the rule of law. It requires the existence of such a system of law where the legal regulation that does not comply with the Constitution or other legal norms of higher legal force would*

[8] On the original notion of basic norm see: *Kelsen, H.* Introduction to the Problems of Legal Theory. A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law. Oxford: Clarendon Press, 2002, pp. 58–59. In his "Pure Theory of Law: Introduction to the Problems of Legal Theory", Hans Kelsen argued that all norms gain their legal force from a basic norm, or *Grundnorm* in German. This is an unwritten norm from which even a formal constitution draws its power. The basic norm, as Kelsen understands it, is a hypothetical assumption of the regulations which define the procedure for approving the initial constitution or a new constitution is there has been a revolutionary breakdown in the system of state. Moreover, the basic norm is propounded as the means of giving unity to the legal system and enabling the legal scientist to interpret all valid legal norms as a non-contradictory field of meaning. For more on this see also: *Pleps, J.* Normatīvo tiesību aktu hierarhija: profesors Hanss Kelsens un mūsdienas (I) [The Hierarchy of Acts of Legal Norms: Professor Hans Kelsen and the Present Day]. Likums un Tiesības, 2007, Nr. 2, p. 49.; *Morton, P.* An Institutional Theory of Law: Keeping Law in Its Place. Oxford: Clarendon Press, 1998, p. 7.; *Freeman, M. D. A.* Introduction to Jurisprudence, Sweet & Maxwell ltd., London, 1994, pp. 282–289.

[9] See more detailed on this: *Rezevska, D.* Legal Methods, pp. 222–234. This conclusion is also based on the principle of militant democracy; for example regarding this, see: *Rijpkema, B.* Militant Democracy. The Limits of Democratic Tolerance. New York: Routledge, 2018.

[10] Decision of the Constitutional Court of the Republic of Latvia in case No. 2016-03-01 on 21 October 2016, para. 13. Available in Latvian: www.satv.tiesa.gov.lv [last viewed 10.04.2022].

> *be eliminated as completely as possible [...] The principle of the rule of law in a democratic state based on the Rule of Law also imposes requirements on the legislative process [...] These requirements form the content of the principle of good legislation derived from the principle of the rule of law.*[11]

Nevertheless, it is suggested that legal arrangements of the European Union Member States regarding their systems of fundamental rights protection, despite having a handful of similarities, have some core differences. Namely, that each has their own history which has led to its own specific legal language and legal tools. All of the differences can undeniably lead to divergences in the judicial interpretation of the same fundamental right, which can naturally lead to, among other things, different standard of protection of the said right and to differences in balancing it with other interests and other fundamental rights.[12] But is it really so? Can these legal arrangements, which are based on exactly the same Basic Norm, have core differences in the "interpretation of the same fundamental right"?

Author of this article strongly suggest that it cannot be the case. Moreover, it cannot be true, if the justifying argument for this is their "own specific legal language and legal tools". In fact, with this type of arguments we can see that the discourse of written legal norms versus unwritten is brought to the centre of this argumentation. Namely, legal thinking based on the legal positivism versus legal thinking based on the natural law doctrine. What prevails – the written legal norms as they are positivized by the legislature in the texts of the constitutions, or the unwritten legal norms which are derived from the Basic Norm – democratic state based on the Rule of Law, as well as exist and are valid before the legislature, and set limits to the discretionary power of the legislator including the power to decide on the contents of the written legal norms. As these contents are already determined by the Basic Norm – these written legal norms should correspond to the Basic Norm and general principles of law derived from it.

Following this way of thinking – based on the natural law doctrine, one can clearly see that unwritten norms derived from the same Basic Norm cannot differ in their core from country to country, but what can be different actually are the wordings of the texts of written legal norms adopted by the specific legislator. At the same time, it does not and even cannot change the content of the unwritten legal norms as written text of the articles of the constitutions in parts where they describe general principles of law are only guidelines to the content of these general principles of law, and thus are subordinated to the unwritten legal norm – general principle of law.

1.2. Legal arrangement and natural law thinking

The doctrine of the general principles of law is based on the natural law doctrine[13] and the hyletic approach to the concept of legal norms as only within the natural law thinking philosophy it is possible to reach the ultimate goal of the democratic and

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[11] Judgement of the Constitutional Court of the Republic of Latvia in case No. 2018-11-01 on 6 March 2019, para. 18.1. Available in Latvian: www.satv.tiesa.gov.lv [last viewed 10.04.2022].

[12] *Cafaggi, F., Moraru, M., Casarose, F., Fontanelli, F., Lazzerini, N., Mataija, M., Martinico, G., Podstawa, K., Pitea, C., Perez, A.* Final Handbook Judicial Interaction Techniques – Their Potential and Use in European Fundamental Rights Adjudication. Fiesole: Centre for Judicial Cooperation, 2014, p. 14. Available: http://pak.hr/cke/pdf%20eng/JUDCOOP%20Final%20Handbook%20-%20Use%20of%20Judicial% 20Interaction % 20Techniques%20in%20the%20field%20of%20EFRs.pdf [last viewed 10.04.2022].

[13] On natural law as valid and applicable legal norms see: *Šulcs, L.* Dabisko tiesību jēdziens [The Meaning of Natural Law]. Jurists, Nr. 1/2, 1937.

Rule of Law based legal arrangement – just and reasonable decision in each and every case. It can be reached only following the basic postulates of natural law thinking such as that the system of laws comprises of written and unwritten legal norms, and that it is objectively complete so to be able to resolve each and every case brought in by the sovereign. This legal thinking is not uncommon also for the European Union legal system as it is recognised that a general principle, as inspired by common constitutional traditions, is capable of having a scope or an expansive potential that is broader than the codified version of the right in the Charter of Fundamental Rights of the European Union[14] (the Charter). Namely, general principles can apply to situations that fall beyond the scope of the corresponding rights contained in the Charter.[15]

The Basic Norm as the act of will of the sovereign determines the character and structure of the legal arrangement of the particular state. General principles of law are derived directly from the Basic Norm – democratic Rule of Law based state and only from this Basic Norm. Respectively, such source of law as general principles of law is inherent only within this legal arrangement. Thus, general principles of law are not simply values or some recommendations, or some supplementary source of law – general principles of law are directly applicable generally binding unwritten legal norms that being derived from the Basic Norm – democratic state based on the Rule of Law determine the content of the legal arrangement and impose limits on the state power.[16]

2. The values

On the other hand, looking from the perspective of the values, we know that the values have a culturally determined meaning that provides them with a particularistic significance that effectively severs the idea of values from any universalistic claims.[17] To prove this, one usually refers to the texts of the constitutional documents, which, in their turn, refer to the values and emphasize on the history and tradition.[18] Thus, references to the state's (nation's) history, traditions, language, conditions of the establishing and development of the country are "encoded" (directly or indirectly) in the constitutions.[19]

But then, there are values introduced into the legal arrangement by the Basic Norm – democratic state based on the Rule of law and this part of the values is protected by the general principles of law derived as unwritten legal norms directly from the Basic Norm proclaimed by the sovereign. For example, the Constitutional Court has recognized that:

> *The State of Latvia is based on such fundamental values that, among the rest, include basic rights and fundamental freedoms, democracy, sovereignty*

[14] Charter of Fundamental Rights of the European Union. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT [last viewed 12.05.2022].

[15] *Fichera, M., Pollicino, O.* The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe? German Law Journal, No. 20, 2019, pp. 1097–1118.

[16] *Rezevska, D.* Vispārējo tiesību principu nozīme, pp. 47–55.

[17] *Jacobson, G. J.* Constitutional Values and Principles. In: The Oxford Handbook of the Comparative Constitutional Law. *Rosenfeld, M., Sajo, A.* (eds). Oxford: Oxford University Press, 2012, p. 785.

[18] Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu [On the Constitutional Foundations of the State of Latvia and the Inviolable Core of the Constitution]. Opinion of the Constitutional Law Commission. 17 September 2012. Available: http://blogi.lu.lv/tzpi/files/2017/03/17092012_Viedoklis_2.pdf, para. 163 [last viewed 07.04.2022].

[19] *Pleps, J.* Baltijas valstu konstitucionālā identitāte [Constitutional Identity of The Baltic States]. Jurista Vārds, Nr. 34, 2016.

> *of the State and people, separation of powers and Rule of law. The State has the duty to guarantee these values and they cannot be infringed by introducing amendments to the Satversme, or by adopting the law.*[20]

A distinct set of values can be recognized, for example, in the judgement of 4 June 2021 of the Constitutional Court, where it continued to explore the notion of constitutional identity in connection with the notion of values. It becomes apparent that between the values like traditional Latvian folk wisdom or Christian values, and the values mentioned above – democracy, Rule of Law or separation of powers, exist some differences. The Constitutional Court stated:

> *Each state is characterised by its constitutional identity, which allows differentiating it from other states. The formation of identity, inter alia, constitutional identity is a long process that depends upon the historical circumstances. [...] It follows from the above, in turn, that the constitutional identity is not static. The constitutional identity comprises the state's legal identity that characterises a state and the identity of the state's order. It provides an answer both to the question what the particular state is like, i.e., reflects the classical constitutive elements of the state recognised in international law – territory, nation and sovereign state power, and to the question what the particular state order is like. In reflecting the territory of the state, the nation and the state power in the* Satversme*, such* ***extra-legal factors*** *as history, politics, national, cultural and other factors that identify the respective state are taken into account. Whereas the identity of the particular state order is determined by the general overarching legal principles that characterise this order of the state. Hence, constitutional identity is a broad phenomenon, deep as to its content, consisting of elements that are different as to their nature, of which only a part is the generally binding legal norms. Such are, for instance,* ***the overarching principles of democracy, rule of law, nation state and socially responsible state that determine the identity of Latvia's order of the state****. Whereas the references included in the constitution to, inter alia,* ***the history of the state and the nation, traditions, circumstances in which the state was established, purposes of the state and other elements****, which, from the perspective of constitutional law, help to recognise the particular state, ascribes a specific meaning to it, characterise it, are elements of the state's identity on which the particular state is founded [...].These elements comprise both references to the legal principles of the particular state and to values which determined the path in which the constitutional identity of this state evolved; however,* per se*, these are not generally binding legal norms.*
>
> *[...] It is mentioned in the Preamble to the* Satversme*,* inter alia*, that the identity of Latvia in the European cultural space, since ancient times, has been shaped by Latvian and Liv traditions, Latvian folk wisdom, the Latvian language, universal human and Christian values. Loyalty to Latvia, the Latvian language as the only official language, freedom, equality, solidarity, justice, honesty, work ethic and family are the foundations of a cohesive society. These findings characterise the roots of the cultural identity of the Latvian people – this identity is rooted both in Latvian traditions and folk wisdom and in universal values, which are derived from the ideas of the Enlightenment and Christian values*

[20] Judgement of the Constitutional Court of the Republic of Latvia in case No. 2008-35-01 on 7 April 2009, para. 17. Available: http://www.satv.tiesa.gov.lv/wp-content/uploads/2008/09/2008-35-01_Spriedums_ENG.pdf [last viewed 10.04.2022].

> *which have influenced the entire European cultural space. [...] Harmony should be ensured between the values reflected in the Preamble to the* Satversme*,* inter alia*, Christian and universal values and Latvian folk wisdom and the general principles of law included in the* Satversme*, respecting the will of the Latvian sovereign, the people, to live in a democratic state governed by the rule of law* [all the emphases here added by the author].[21]

Consequently, the constitutional identity of the country actually enshrines two types of values – those are: 1) the values which are historically and culturally connected with the given sovereign and 2) the values which are introduced into the legal arrangement by the Basic Norm – democratic state based on the Rule of Law.[22] And while the first type of values – the ones which are historically and culturally connected with the given sovereign – are particular and specific, and characteristic only to the given sovereign and given country, the second set of the values introduced by the Basic Norm – democratic state based on the Rule of Law is **common and universal** to all the Member States and thus cannot have core differences. And this is why there cannot be a situation where there is a lack of the common constitutional traditions in the part of protecting the values introduced by the same Basic Norm as they by no doubts exist even if they are on an unwritten normative level in a form of general principles of law and maybe the legislators have not been able to write them down appropriately into the written law. If we are speaking about the plurality of constitutional cultures,[23] then it can be referred only to that part of the values, which are historically and culturally connected with the given sovereign and not to the part introduced by the same Basic Norm.

Saying that, there is an obvious question arising regarding the Court's approach to the issue of constitutional (national) identity, and namely, how principle of respect for human dignity being the general principle of law derived from the Basic Norm – democratic state based on the Rule of Law and inherent to all the legal arrangements of the Member States – can have "a particular status as an independent fundamental right" in Germany as referred to in "Omega case"[24]**?** And the answer is – it cannot. In turn, it is a common constitutional tradition. And the fact that human dignity was *expressis verbis* written in the text of the German Basic Law (*Grundgesetz fur die Budesrepublik Deutschland*[25]*)* does not mean that it is not a common constitutional tradition of all the Member States as they all are proclaimed on the basis of the Basic Norm – democratic state based on the Rule of Law, and thus human dignity as an unwritten legal norm – a general principle of law and human right is inherent legal norm of all these legal arrangements.

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[21] Judgement of the Constitutional Court of the Republic of Latvia in case No. 2020-39-02 on 4 June 2021, para. 14. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/08/2020-39-02_Judgement.pdf#search= [last viewed 10.04.2022].

[22] *Rezevska, D.* Ideology, Values, Legal Norms and Constitutional Court. In: The second collection of research papers in conjunction with the 6th International Scientific Conference of the Faculty of Law of the University of Latvia "Constitutional Values in Contemporary Legal Space II". Riga: University of Latvia, 2017, pp. 72–78.

[23] *Lachmayer, K.* The Constitution of Austria in International Constitutional Networks: Pluralism, Dialogues and Diversity. In: *Albi, A., Bardutzky, S.* (eds). National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law. The Hague: Asser Press, 2019, p. 1304.

[24] Judgment of 14 October 2004, Omega, C-36/02*,* EU:C:2004:614, para. 34.

[25] Grundgesetz fur die Budesrepublik Deutschland. Available: https://www.gesetze-im-internet.de/gg/BJNR000010949.html [last viewed 10.04.2022].

3. The general principles of law

The values, which are historically and culturally connected with the given sovereign, serve as the basis for the sovereign when expressing its will in the form of the Basic Norm. Hence, the Basic Norm of the given legal arrangement is the act of will of the respective sovereign. When sovereign's will is formulated in a basic norm, the legal arrangement in the relevant country is governed by the principles emanating from that norm. In case of a democratic state based on the Rule of Law, these are a specific source of law called general principles of law. In deciding to create a democratic state based on the Rule of Law, the sovereign subsequently cannot affect the existence and content of these general principles of law.[26]

Thus, general principles of law define the content and structural elements of the legal arrangement of the relevant country and are unwritten though real and directly applicable legal norms consisting of legal content and legal consequences and having generally binding effect or legal force. Why general principles of law are generally binding legal norms? The courts refer to the general principles of law in the cases of legislative gaps. A system of laws being a part of a legal arrangement of a democratic state based on the Rule of Law is objectively (impartially) complete and consists of all written and unwritten legal norms which can resolve every case arising in the given legal arrangement as evidenced by the general principle of law – prohibition of legal obstruction.[27] General principles of law have also all the features of the generally binding legal norm: 1) the application of general principles of law is ensured by state authorities and officials, namely, the violation of principle leads to coercive measures enforced by the state, and 2) they are applicable to an unlimited number of persons in all such of a kind factual situations. They also are valid and directly applicable legal norms as they have a structure of legal content – "If…" and legal consequences "then …". For example – *if* state institutions, if have passed normative act (*legal content*), *then* [they] in their activities as regards this act, shall be consistent (*legal consequences*)" – principle of the protection of legitimate expectations; or – *if* persons, if in similar and comparable situations, then have the right to similar outcomes – principle of equality; or – *if* court, if applying written legal norm, then uses interpretation methods (as literal, historical, systemic, teleological) to find the true content of the legal norm – principle of reasonable application of legal norms.[28]

General principles of law have two distinctive features in order to separate them from other principles of law: 1) general principles of law are derived directly from the Basic Norm – democratic state based on the Rule of Law, and 2) they function (operate in a full capacity) only in a democratic legal arrangement based on the Rule of Law.

Consequently, general principles of law define the content and structural elements of the relevant legal arrangement – the norms which must exist in the legal arrangement so as to settle all disputes that may emerge. These principles can be divided into three groups in terms of what they address:

1) Those, which identify the highest values of a legal arrangement, i.e., which reflect a certain way of living. Here we find all human rights norms, those which present the individual as being of **the highest value** in a democratic country where the Rule of Law prevails; it includes the right to equality, right to

[26] *Rezevska, D.* Vispārējo tiesību principu nozīme, pp. 39–46.
[27] Ibid., pp. 47–55.
[28] *Rezevska, D*. Vispārējo tiesību principu nozīme, pp. 47–55.

fair trial, legal certainty (clarity and legitimate expectations); and the principle of justice as an ultimate goal of the legal arrangement;

2) Those which define the systematisation of the legal arrangement. These are general principles, which define **the structure of the legal arrangement** and system of laws, for example – the principle of separation of power – how the power is distributed among the legislative, executive and judicial branch of government, the hierarchy of legal norms;
3) And finally – those which determine to the institutions applying the legal norms how the norm is to be identified, examined, interpreted, etc. Here we find the general principles of law which speak to the process of the application of legal norms in a democratic state based on the Rule of Law – **the legal methods** – interpretation methods, further development of law methods, collision norms, methods of argumentation and reasoning, etc.[29]

Thus, the general principles of law in a form of unwritten legal norms protect the Basic Norm – the Sovereign's will to live in a democratic state based on the Rule of Law. As they are introduced to the legal arrangements of all the Member States of the European Union by the same Basic Norm, general principles of law are common and universal to all the Member States. Thus, common constitutional traditions contain all three types of general principles of law (human rights, system principles and legal methods) and they do not have core differences even if the written texts of the normative legal acts adopted by the legislators would suggest otherwise. On the other hand, that part of the constitutional identity which is based on the values historically and culturally connected with the given sovereign indeed can present particularities and differences among the Member States asking for the protection of their constitutional (national) identity.

Summary

1. Modern legal theory holds that there are two radically different and incompatible ways of understanding legal norms – the hyletic understanding that legal norms are conceptual units which exist irrespective of language, but can be expressed linguistically, and the expressive understanding of legal norms that legal norms are instructions, which is the result of the prescriptive use of language. In a democratic country where the Rule of Law prevails, a legal norm is a prescription with respect to which legal arrangements that are based on sovereign's will regulate legal relationships on the basis of general principles of law, irrespective of whether the legislature has managed to verbalize the norm to an adequate degree. A legal norm is more than just the text, and in terms of its scope it can coincide with the written text or not coincide with it.
2. Based on the natural law doctrine, the unwritten norms derived from the same Basic Norm cannot differ in their core from country to country as it is a case in the European Union Member States, but what can be different actually are the wordings of the texts of written legal norms adopted by the specific legislator.
3. General principles of law derived from the Basic Norm – democratic state based on the Rule of Law – are unwritten legal norms and thus they are common and universal to the Member States of the European Union even if some of them are not written down in the texts of the constitutions.

[29] *Rezevska, D.* Vispārējo tiesību principu nozīme, pp. 31–32.

4. Common constitutional traditions contain all three types of general principles of law (human rights, system principles and legal methods) and as they are protecting the set of the values introduced by the Basic Norm – democratic state based on the Rule of Law they are common and universal to all the Member States and thus cannot have core differences even if the written texts of the normative legal acts adopted by the legislators would suggest otherwise. Thus for example human dignity as an unwritten legal norm – a general principle of law and human right is inherent legal norm of all these legal arrangements notwithstanding that it would not be written down *expressis verbis* in the texts of some of the constitutions. It also applies to the system principles and legal methods.
5. The values, which are historically and culturally connected with the given sovereign, are particular and specific, and characteristic only to the given sovereign and given country, thus asking for their protection through the protection of the constitutional (national) identities of the Member States.
6. Plurality of constitutional cultures within the European Union can be referred only to that part of the values, which are historically and culturally connected with the given sovereign and not to the part introduced by the same Basic Norm.

Sources

Bibliohraphy

1. *Alchourron, C. E., Bulygin, E.* The Expressive Conception of Norms. In: Normativity and Norms. Critical Perspectives on Kelsenian Themes, *Paulson, S. L.* (ed.). Oxford: Clarendon Press, 1999.
2. *Cafaggi, F., Moraru, M., Casarose, F., Fontanelli, F., Lazzerini, N., Mataija, M., Martinico, G., Podstawa, K., Pitea, C., Perez, A.* Final Handbook Judicial Interaction Techniques – Their potential and use in European Fundamental Rights Adjudication. Fiesole: Centre for Judicial Cooperation, 2014. Available: http://pak.hr/cke/pdf%20eng/JUDCOOP%20Final%20Handbook%20-%20Use% 20of% 20Judicial% 20Interaction % 20Techniques%20in%20the%20field%20of%20EFRs.pdf [last viewed 10.04.2022].
3. *Fichera, M., Pollicino, O.* The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe? German Law Journal, 20, 2019.
4. *Freeman, M. D. A.* Introduction to Jurisprudence. Sweet & Maxwell ltd., London, 1994.
5. *Jacobson, G. J.* Constitutional Values and Principles. In: The Oxford Handbook of the Comparative Constitutional Law. *Rosenfeld, M., Sajo, A.* (eds). Oxford: Oxford University Press, 2012.
6. *Kelsen, H.* Introduction to the Problems of Legal Theory. A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law. Oxford: Clarendon Press, 2002.
7. *Lachmayer, K.* The Constitution of Austria in International Constitutional Networks: Pluralism, Dialogues and Diversity. In: National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law, *Albi, A., Bardutzky, S.* (eds). The Hague: Asser Press, 2019.
8. *Morton, P.* An Institutional Theory of Law: Keeping Law in Its Place. Oxford: Clarendon Press, 1998.
9. *Pleps, J.* Baltijas valstu konstitucionālā identitāte [Constitutional Identity of the Baltic States]. Jurista Vārds, Nr. 34, 2016.
10. *Pleps, J.* Normatīvo tiesību aktu hierarhija: profesors Hanss Kelsens un mūsdienas (I) [The Hierarchy of Acts of Legal Norms: Professor Hans Kelsen and the Present Day]. Likums un Tiesības, Nr. 2, 2007.
11. *Rezevska, D.* Ideology, Values, Legal Norms and Constitutional Court. In: The second collection of research papers in conjunction with the 6th International Scientific Conference of the Faculty of Law of the University of Latvia "Constitutional Values in Contemporary Legal Space II". Riga: University of Latvia, 2017.
12. *Rezevska, D.* Legal Methods in Latvia's Legal Arrangement and European Integration. In: "European Integration and Baltic Sea Region: Diversity and Perspectives". Collection of Papers of International Conference held by the University of Latvia. Riga: The University of Latvia Press, 2011.
13. *Rezevska, D.* Vispārējo tiesību principu nozīme un piemērošana [The Meaning and Application of General Principles of Law]. Rīga: D. Rezevskas izd., 2015.

14. *Rijpkema, B.* Militant Democracy. The Limits of Democratic Tolerance. New York: Routledge, 2018.
15. *Sniedzīte, G.* Tiesību normu iztulkošana *praeter legem* I, II, III [Interpretation of the Legal Norms Using *Praeter Legem* Method]. Likums un Tiesības, Nr. 10, Nr. 11, Nr. 12, 2005.
16. *Šulcs, L.* Dabisko tiesību jēdziens [The Meaning of Natural Law]. Jurists, Nr. 1/2, 1937.
17. *Weinberger, O.* The Expressive Conception of Norms: An Impasse for the Logic of Norms. In: Normativity and Norms: Critical Perspective on Kelsenian Themes, *Paulson, S. L.* (ed.). Oxford: Clarendon Press, 1999.

Normative acts

1. The Treaty on European Union. Available: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF [last viewed 10.04.2022].
2. Charter of Fundamental Rights of the European Union. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT [last viewed 10.04.2022].

Case law

1. CJEU, Joined Cases C-7/56, 3/57 to 7/57, Algera v. Common Assembly of ECSC, ECLI:EU:C:1957:7.
2. CJEU, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, C-11/70, EU:C:1970:114.
3. CJEU, Judgment of 14 October 2004, Omega, C-36/02, EU:C:2004:614.
4. Judgement of the Constitutional Court of the Republic of Latvia in case No. 2020-39-02 on 4 June 2021.
5. Judgement of the Constitutional Court of the Republic of Latvia in case No. 2018-11-01 on 6 March 2019.
6. Decision of the Constitutional Court of the Republic of Latvia in case No. 2016-03-01 on 21 October 2016.
7. Judgement of the Constitutional Court of the Republic of Latvia in case No. 2008-35-01 on 7 April 2009.

Other sources

1. Report on the Rule of Law. European Commission for Democracy through Law (Venice Commission). Adopted by the Venice Commission at its 86th plenary session (Venice, 25–26 March 2011). Available: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e [last viewed 10.04.2022].
2. Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu [On the Constitutional Foundations of the State of Latvia and the Inviolable Core of the Constitution. Opinion of the Constitutional Law Commission]. 17 September 2012. Available: http://blogi.lu.lv/tzpi/files/2017/03/17092012_Viedoklis_2.pdf [last viewed 07.04.2022].

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Awareness of Violence as a Prerequisite for Prevention of Domestic Violence

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Domestic violence is widespread in Estonia, – every second violent crime committed in Estonia is a domestic violence crime. Domestic violence offences include offences against the person (except offences against the deceased), robbery and aggravated breach of public order under the Penal Code, violence committed between current or former spouses, cohabiting partners, partners, and it may also include violence between relatives or siblings, irrespective of whether the perpetrator lives or has formerly lived in the same dwelling with the victim. Domestic violence is a human rights problem that undermines people's right to liberty, security, dignity, mental and physical integrity and non-discrimination. It causes great suffering to the victim and his or her loved ones, and harm to society (medical costs, loss of working capacity, deterioration in people's quality of life, etc.).

According to the author, the main prerequisite for the prevention of domestic violence is the awareness of violence as violence. Recognition of violence as such would also contribute to reducing stereotypical attitudes and victim-blaming in society.

Keywords: violence, domestic violence, awareness of violence, prevention of domestic violence.

Contents

Introduction

In Estonia, the police receive reports of more than 40 cases of domestic violence every day, and in every fourth case (nearly 30% of domestic violence crimes) a child is either a victim or a witness. It is important to note that, according to the Istanbul Convention[1], children are also victims of domestic violence if they are witnesses of domestic violence. The statistics on domestic violence in Estonia (Table 1) clearly show that the number of cases of domestic violence has remained high over the years.

Since 2011, the proportion of domestic violence crimes has been steadily increasing, both as a proportion of all crimes and as a proportion of all violent crimes.[2] In the last five years, at least 46 people have lost their lives to domestic violence in Estonia.[3] Domestic violence has been the cause of at least 46 deaths.

More important than dealing with the consequences of violence, including domestic violence, is the prevention of any kind of violence, the main prerequisites for which, according to the author, are an awareness of what violence means, an understanding of the dangerous nature of domestic violence, and the seriousness of the various forms of domestic violence. Attitudes and mindsets are the key words here. Attitude is understood as "a persistent, stereotyped disposition or predisposition to react in a certain way. An attitude may be a particular state of mind, an expectation, a system of attitudes, which is shaped by a person's prior social and/or practical experience."[4] A person's attitude towards a particular good (e.g., life and health, other people's property, public order, etc.) is expressed in his or her corresponding attitude. Attitudes have a cognitive dimension, which relates to the beliefs and ideas that a person has about the subject of the attitude. One element of the structure of attitudes is the cognitive element, which is largely made up of knowledge. However, what is meant here is not so much legal knowledge, but mainly and primarily the knowledge of the existence and content of socio-legal values. The aim of this article is to highlight the factors that determine the need to raise the population's awareness of violence, using Estonian society as an example. The article uses data from the 2019 survey of the Estonian population conducted by the Estonian Open Society Institute and the Faculty of Law of the University of Tartu. The author of this article was one of the authors of the survey and one of the authors of the questionnaire.

Table 1. **Registered domestic violence offences in Estonia 2011–2020[5]**

2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
1939	2231	2752	2721	2997	3017	2632	3607	4119	3987

[1] Naistevastase vägivalla ja perevägivalla ennetamise ja tõkestamise Euroopa Nõukogu konventsioon [Istanbul Convention. Action against violence against women and domestic violence]. Preamble. Istanbul, 11V.2011. Available: https://www.riigiteataja.ee/akt/226092017002 [last viewed 15.01.2022].

[2] Kuritegevus Eestis 2015 [Crime in Estonia 2015]. Justiitsministeerium. Tallinn 2016, lk 34. Available: http://www.kriminaalpoliitika.ee/sites/krimipoliitika/files/elfinder/dokumendid/kuritegevus_eestis_2015.pdf [last viewed 15.01.2022].

[3] Kuritegevus Eestis 2019 [Crime in Estonia 2019]. Available: https://www.kriminaalpoliitika.ee/kuritegevuse-statistika/perevagivald-ja-ahistamine.html [last viewed 17.01.2022].

[4] *Bachmann, T., Maruste, R.* Psühholoogia alused [Basics of psychology]. Tallinn 2008, lk 79.

[5] Kuritegevus Eestis [Crime in Estonia] 2011; 2012; 2013; 2014; 2015; 2016; 2017; 2018; 2019; 2020. Justiitsministeerium [Ministry of Justice]. Selle artikli kirjutamise ajal ei olnud 2021.a kuritegevuse statistika veel avaldatud. (At the time of writing this article, crime statistics for 2021 had not yet been published).

1. What has been done in Estonia to prevent domestic violence?

Estonia does not have an independent law on the prevention of domestic violence, which may be one of the reasons why with the country predominantly deals with the consequences of violence rather than its prevention. Also, there are few people working in Estonia in the field of domestic violence prevention, rehabilitation of victims and correction programs for perpetrators of violence: there are only 28 specialists working in the field of victim support all over Estonia, 13 shelters for women have been set up, and there are a few NGOs providing counselling services, which are not enough to address the problem on a national scale.

On a positive note, despite the fact that the vast majority of victims of domestic violence are female, there is also a counselling centre for men in Estonia: in 2010, the Tallinn Women's Crisis Home opened a counselling centre "Ava silmad" ("Open Your Eyes"), where, in addition to women suffering from domestic violence, free initial counselling was also offered to men who have suffered domestic violence.[6] The NGO "Meeste Kriisikeskus" ("Men's Crisis Centre"), founded in 2011, offers a victim support service specifically for men.[7] The men who have experienced domestic violence can also receive counselling from the EELK Family Centre, which opened in 2014.[8]

So far, Estonia has been guided by two strategy documents in the prevention of violence: the first one, the Development Plan for Reducing Violence[9] , which focused specifically on the prevention of violence, was in force in 2010–2014, and the second one, the Violence Prevention Strategy – in 2015–2020 [10]. For the period 2021–2025, a Violence Prevention Pact was developed, which aims to continue to develop anti-violence policies in partnership between sectors and based on well-targeted objectives and firm agreements. The agreement was prompted by the fact that Estonia's strategic planning framework does not foresee a separate sectoral development plan and programme for violence prevention, but the need for cross-sectoral agreements remains topical. The Government Coalition Agreement 2021–2023[11] includes an important objective to enhance the prevention and reduction of violence, and the Government Action Programme 2021–2023[12] foresees the drafting of a Violence Prevention Agreement. The drafting of a separate plan to prevent violence, especially violence against children, women and families, and trafficking in human beings, has

[6] Ka ahistatud mehed saavad varjupaigast abi [Harassed men also receive help from the shelter]. Delfi, 21.10.2010. Available: http://www.delfi.ee/news/paevauudised/eesti/ka-ahistatud-mehed-saavad-varjupaigast-abi?id=34118637 [last viewed 16.01.2022].

[7] Meeste Kriisikeskus MTÜ [Men`s Crisis Centre]. Available: https://www.inforegister.ee/80335660-MEESTE-KRIISIKESKUS-MTU [last viewed 16.01.2022].

[8] vt EELK Perekeskuse koduleheküljelt (see: Homepage of the Estonian Evangelical Lutheran Church). Available: http://perekeskus.eu/eelk-perekeskuse-avamine/ [last viewed 16.01.2022].

[9] Vägivalla vähendamise arengukava [Development Plan for the Reduction of Violence]. Available: https://www.kriminaalpoliitika.ee/et/vagivalla-ennetamise-strateegia/vagivalla-vahendamise-arengukava-2010-2014-materjalid [last viewed 16.01.2022].

[10] Vägivalla ennetamise strateegia [Violence Prevention Strategy]. Available: https://www.kriminaalpoliitika.ee/sites/krimipoliitika/files/elfinder/dokumendid/vagivalla_ennetamise_strateegia_aastateks_2015-2020.pdf [last viewed 16.01.2022].

[11] Valitsuse moodustamise kokkulepe aastateks 2021–2023 [Agreement on the formation of the government 2021–2023]. Available: https://www.valitsus.ee/valitsuse-eesmargid-ja-tegevused/valitsemise-alused/koalitsioonilepe [last viewed 16.01.2022].

[12] Vabariigi Valitsuse tegevusprogramm 2021–2023 [Action Programme of the Government of the Republic 2021–2023]. Available: file:///C:/Users/skaugia/Downloads/2021.02.23_Vabariigi%20Valitsuse%20tegevusprogramm%202021-2023.pdf [last viewed 16.01.2022].

also been recommended in a number of international documents (e.g., Council of Europe conventions). The agreement is the basis for the design and implementation of policies and actions to prevent violence. It is intended for policy makers, practitioners and all those in the public sector, local authorities, voluntary and private organizations who wish to promote non-violence. In order to implement the agreement, its specific activities will be included in the programmes of the different sectors (e.g., rule of law, internal security, welfare, health, education, youth, etc.) and in the work plans of the responsible authorities. The programmes will also provide the necessary resources for the implementation of the activities. The agreement was drawn up by the Ministry of Justice in cooperation with a wide range of partners, victim support organizations and practitioners in the field, taking into account expert assessments and recommendations from international organizations, as well as the results of research and the implementation of the existing violence prevention strategy. The agreement will be approved by the Government of the Republic. Every year, an assessment is made of the need to renew the agreement. The implementation of the agreement is coordinated by the Ministry of Justice through the Violence Prevention Steering Group, to which the responsible authorities – the Ministry of the Interior, the Ministry of Social Affairs, the Ministry of Education and Science, the Ministry of Culture and other ministries together with the institutions of the administration – appoint a representative, and more broadly through the Violence Prevention Network, which includes partners working on violence prevention from NGOs, representative organizations, educational and health institutions and elsewhere. The Ministry of Justice regularly monitors the implementation of the Non-Violence Agreement and ensures the exchange of information between non-violence professionals and stakeholders.

2. Documents highlighting the need to raise awareness of violence

Effective prevention can be based on awareness and elimination of potential danger signs that could develop into domestic violence. Article 12 of the Istanbul Convention, which obliges the Parties to the Convention to take the necessary measures to promote changes in the socially and culturally determined behaviour of women and men in order to eradicate prejudices, customs, traditions and practices which are based on the devaluation of women and on stereotyped roles for women and men, also points to a fundamental measure. This is a principle that must find expression at both national and societal level. It is important to note here that Estonia has acceded to the Istanbul Convention: Estonia became the 37th country to accede to the Convention[13] The Estonian Parliament, the Riigikogu, ratified the Convention on 20 September 2017.

Article 13 of the Istanbul Convention refers to the need to raise awareness:

> 1. *Parties shall promote or conduct, on a regular basis and at all levels, awareness-raising campaigns or programs, including in co-operation with national human rights institutions and equality bodies, civil society and non-governmental organizations, especially women's organizations, where appropriate, to increase awareness and understanding among the general public of the different manifestations of all forms of violence covered by the scope of this Convention, their consequences on children and the need to prevent such violence.*

[13] Justiitsminister allkirjastas Istanbuli konventsiooni [The Minister of Justice signed the Istanbul Convention]. Available: http://www.just.ee/et/uudised/justiitsminister-allkirjastas-istanbuli-konventsiooni [last viewed 16.01.2022].

2. *Parties shall ensure the wide dissemination among the general public of information on measures available to prevent acts of violence covered by the scope of this Convention.*

3. How recognizable is violence?

The 2019 Estonian Population Survey suggests that violence is not always easy to recognize. The responses of survey respondents to the question of what forms of violence are considered violence were surprising in two ways. Firstly, it was certainly surprising that all of the behaviours we proposed (grossly insulting or humiliating the spouse (partner), forbidding the spouse (partner) to go to work, restricting or forbidding the spouse (partner) to communicate with friends/relatives, depriving the spouse (partner) of his/her personal money, putting the spouse's (partner's) property in his/her own name, not paying maintenance) were not considered violent, whereas intimidating the spouse (partner) into violence if he/she does not obey orders, using physical force against the spouse (partner), torturing the spouse's (partner's) pet, sexual intercourse against the spouse's (partner's) will, using physical force to force the spouse (partner) into sexual intercourse, – the actions which are considered to be intimate partner violence, are also considered to be such by the majority of respondents. The statement that these acts constitute violence was agreed with, as follows: behaviours considered the least violent by all respondents were non-payment of alimony (51%), severe insults, humiliation (57%) and refusal to allow the partner to work (58%); the most violent were sexual intercourse against the spouse's (partner's) will (80%), the use of physical force (hitting) and the use of physical force to force the spouse (partner) into sexual intercourse. All the forms of violence indicated in the questionnaire were perceived as more violent by women than by men – by as much as 10–20 percentage points.

The second surprise relates to the fact that a relatively high proportion of respondents do not recognize the violence of violent acts. For example, 8% of respondents consider that taking away a spouse's (partner's) personal money, 11% that forbidding a spouse (partner) to work, 8% that putting a spouse's (partner's) property in one's own name are not considered acts of violence. It is also worrying that 4% of respondents consider that intimidating a spouse (partner) with violence (Table 2), 3% consider that using physical force against a spouse (partner) (Table 3) or using physical force to force a spouse (partner) into sexual intercourse (Table 4), as well as sexual intercourse against the spouse's (partner's) will (Table 5) are not acts of violence. This view is expressed by both men and women, respondents from all age groups between 15–75+ years and respondents of different nationalities. It is also striking that a relatively high percentage of respondents were unable to say whether the act of violence was violence or not.Assessing the reported acts of violence as violent or non-violent proves more difficult as people get older, with the response option "don't know" being chosen more frequently by the 75+ age group. Ethnically, Estonians selected this response option less than other nationalities. A gender comparison shows that men are more likely to agree that these acts do not amount to violence or that they do not know how to assess the act in terms of violence.

This may be one of the reasons why domestic violence is a largely latent crime. In Estonia, one in four cases of domestic violence brought to the police, or 25% of all cases, end up in court. The stereotypical perception in society that women are guilty of domestic violence even if they are the victims certainly plays a role in the victim not informing the police or withdrawing the complaint. As of today,

Table 2. **Intimidating a spouse (partner) with violence if he/she does not obey orders (%)**

		Gender		Age							Ethnicity		
This is violence	Total	Men	Women	15–19	20–29	30–39	40–49	50–59	60–74	75+	Estonian	Russian	Another ethnicity
Do not agree	4	5	3	3	2	4	5	3	4	6	4	4	6
Do not know	6	9	3	3	3	6	6	6	6	8	5	7	9

Table 3. **Use of physical force against spouse (partner) (e.g., pushing or shoving) (%)**

		Gender		Age							Ethnicity		
This is violence	Total	Men	Women	15–19	20–29	30–39	40–49	50–59	60–74	75+	Estonian	Russian	Another ethnicity
Do not agree	3	4	2	3	2	4	4	3	2	6	3	3	2
Do not know	6	9	3	3	2	6	6	5	7	8	5	7	6

Table 4. **Use of physical force to coerce a spouse (partner) into sexual activity (%)**

		Gender		Age							Ethnicity		
This is violence	Total	Men	Women	15–19	20–29	30–39	40–49	50–59	60–74	75+	Estonian	Russian	Another ethnicity
Do not agree	3	5	2	3	2	4	4	5	2	4	4	4	–
Do not know	6	10	3	3	3	7	7	6	7	10	6	7	6

Table 5. **Sexual intercourse against spouse's (partner's) will (%)**

		Gender		Age							Ethnicity		
This is violence	Total	Men	Women	15–19	20–29	30–39	40–49	50–59	60–74	75+	Estonian	Russian	Another ethnicity
Do not agree	3	4	4	3	1	4	4	5	2	2	3	3	2
Do not know	7	12	4	5	3	8	8	7	-	12	6	9	9

according to the latest EMOR survey, conducted in 2016, the population's attitudes towards the blame of victims of domestic violence are divided in half: 49% agree that victims are partly to blame and 47% that they are not. A qualitative survey on the same topic in 2014 suggests that one aspect of victims' "guilt" may be to related to victims remaining in their "victim position" (although it was also acknowledged that it can be difficult for victims to get out of this postion for various reasons). Those who agree that the victim is partly to blame are more likely to be men (54%), aged 50 and over (59%), of other ethnicities (58%), with secondary or higher education (52%) and living in South Estonia (60%) and Viru County (58%). Disagreement is higher among women (51%), 25–49-year-olds (58%), Estonians (51%), people with higher education (55%) and residents of the Tartu region (59%). When it comes to sexual violence, the majority of people agree that it is not only women who can be victims of sexual violence, but also men and boys (92%). This is particularly the case among 25–49-year-olds (96%), people with secondary education (93%) and residents of Tallinn (95%). Fewer 15–24-year-olds agree with this risk: 8% disagree that men could be victims of sexual violence (the population average is 4%). A high proportion of people still agree that women themselves cause rape by the way they dress – 42%. Older people (54% of those aged 65 and over), non-Estonians (54%), the less educated (basic education or less – 50%) and residents of South Estonia and Viru County (54% and 50% respectively) are more likely to believe this. 53% of the population disagree with women's guilt. Among those who disagree, there are more 25–49-year-olds (62%), Estonians (58%) and people with higher education (65%). Attitudes towards victims of sexual violence have not changed compared to 2014. [14]

4. Knowledge and awareness

Knowledge is an important component of the structure of legal consciousness, alongside emotions, attitudes, behavioural attitudes and other elements.[15] Firstly, knowledge in the sense of knowledge of the law.

There are at least three areas where knowledge of the applicable law is essential: (1) activities of a procedural nature, governed by legal rules which lay down the operation for carrying out certain acts, the procedure (e.g., rules governing the procedures for submitting or applying for certain documents, entering university, obtaining a pension, etc.); (2) professional activities, in particular those of a legal nature, governed by the rules governing the professional activities of a professional (e.g., civil servants); 3) activities in the field of relations between citizens and the State, where legal rules of a directly political nature are in operation, laying down, on the one hand, the content of civil liberties and the obligations of the citizen *vis-à-vis* the State and, on the other, the limits of the State's powers and obligations *vis-à-vis* the citizen. Knowledge of these rules gives people a real opportunity to defend their political rights. [16]

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[14] Eesti elanikkonna teadlikkuse uuring soopõhise vägivalla ja inimkaubanduse valdkonnas [Estonian population awareness survey in the field of gender-based violence and human trafficking]. TNS EMOR. Sotsiaalministeerium [Ministry of Social Affairs], 2016. Available: https://www.kriminaalpoliitika.ee/sites/krimipoliitika/files/elfinder/dokumendid/eesti_elanikkonna_teadlikkuse_uuring_soopohise_vagivalla_ja_inimkaubanduse_valdkonnas_2016.pdf [last viewed 17.01.2022].

[15] *Kaugia, S.* Õigusteadvuse olemus ja arengudeterminandid [Essence of Legal Consciousness and Determinants of Development]. Tartu: Tartu Ülikooli kirjastus, 2011, lk 37-72.

[16] *Raska, E.* Õiguse apoloogia. Sissejuhatus regulatsiooni sotsioloogiasse [Apologetics of law. Introduction to the sociology of regulation]. Tartu: OÜ Fontese Kirjastus, 2004, lk 170.

However, people generally follow the rules without knowing their content or understanding their meaning. This suggests that in their behaviour they move from law to other social levels, looking at social norms in general. Most people avoid committing crimes not because they have the appropriate legal knowledge and training, but because the basic rules of human social life, which have evolved and developed over millennia, as well as the norms of morality and conduct, are closely aligned with the rules of law. By adopting rules as cultural elements (this is done in the process of socialization), human beings ultimately realize the requirements of the rule of law in their behaviour, irrespective of their legal knowledge in the strict sense of the word. Thus, it is not the existence of formal norms and the sanctions they contain that ensures the legitimate behaviour of the more conscious individual, but respect for the rules of human collective life.

This is inextricably linked to the human psyche, which contains rational and emotional elements and connections. These two aspects of the human psyche are also involved in our everyday social behaviour, which is based on certain common rules. Recognition of these rules at the level of the psyche is crucial in choosing the 'right' behavioural options. Here it is a question of the knowledge of law as the awareness of being based on norms.

When acting legitimately, people are usually guided not by written rules of conduct but by other elements of consciousness, often without being able to explain why they behaved as they did. However, when they are forced to justify their behaviour, they usually refer to established beliefs, habits, etc. On the whole, the bystander may get the impression that people's behaviour is not guided by a highly developed sense of justice, but by irrational principles. In essence, however, it is primarily a matter of relying on a sense of justice. The legitimate behaviour of the vast majority of people is based on a well-developed sense of justice, which is the foundation of legal consciousness. The real content of legal consciousness is ultimately expressed in the legal behaviour that people in society accept.

This allows us to take the view that, despite the fact that there is no domestic violence law in Estonia, society has a legitimate expectation that its members will behave in a non-violent manner. By recognizing domestic violence as a very serious form of violence, we, as (potential) victims, would come to the realization that no one has to suffer violence or live in a situation of violence; as potential perpetrators of violence, we would come to the realization that our behaviour is not acceptable and will in any case lead to negative reactions from society and any restrictions that may be imposed.

5. Changes in awareness of domestic violence

A 2016 EMOR survey[17] for the first time mapped the extent to which domestic violence as a societal problem has become more visible. To this end, respondents were asked to rate the extent to which their awareness had changed over the past three years. 73% of the population had noticed information or campaigns against domestic violence in the last three years. 63% of the population could specify the channel through which they had noticed these messages. Television (52%) was the main source of information on this topic, followed by the press and the internet (31%), social media

[17] Eesti elanikkonna teadlikkuse uuring soopõhise vägivalla ja inimkaubanduse valdkonnas [Estonian population awareness survey in the field of gender-based violence and human trafficking]. TNS EMOR. Sotsiaalministeerium 2016, lk 57-59. Available: https://www.kriminaalpoliitika.ee/sites/krimipoliitika/files/elfinder/dokumendid/eesti_elanikkonna_teadlikkuse_uuring_soopohise_vagivalla_ja_inimkaubanduse_valdkonnas_2016.pdf [last viewed 17.01.2022].

(18%), street advertising or other public information (17%) and radio (15%). 24% have not noticed any information or campaigns. 3% could not say whether they had noticed them or not. Men are less likely to have noticed communications than women – 29% of men and 20% of women respectively. 5–24-year-olds and 25–34-year-olds have received most of their information from television, but more than other age groups from social media, posters and leaflets. Estonians are more likely than non-Estonians to have noticed information and campaigns – 79% and 58% respectively. Estonians are more likely to have noticed a campaign on TV, in the press, on the internet, in social media and on the radio. 24% of people think they have been more aware of domestic violence in the last three years. Half of them have intervened more where necessary. Just over a third (35%) say they are as aware of the issue as they were three years ago, and 26% still do not know much about it. 15% do not know whether their awareness of the issue has changed.

Summary

Domestic violence has been under a lot of scrutiny for a long time (about 20 years in Estonia) and although there are positive signs, it needs to be addressed on a continuous basis. In Estonia, violence is under-reported and reporting of domestic violence is even lower than average. This means that people do not always know how to recognize violence and seek help. Domestic violence affects all members of the family, adults and children alike, although women are more often the victims.

Estonia has implemented several measures to reduce domestic violence: victim support services are in place, non-profit organizations providing counselling services have been established, counselling and family centres have been opened, and the Istanbul Convention has been ratified. At the national level, a number of strategic documents have been adopted to prevent domestic violence: the Development Plan for Reducing Violence, the Violence Prevention Strategy, the Violence Prevention Pact. The latter[18] focuses on children growing up in a violent environment, who are more likely than other children to be involved in delinquent behaviour, to be at risk of physical and mental health problems, to be truant from school and to drink alcohol at an early age.

However, according to the author, the main prerequisite for the prevention of domestic violence is the awareness of violence as violence. Talking to children about violence must start as early as possible – in pre-school – and continue at all levels of school.[19]

What is more important than knowing whether and how violent acts are judged by existing laws is whether or not people perceive these behaviours as violent. A victim will turn to the police for help if he or she considers the behaviour towards him or her to be violence that he or she does not have to endure or suffer. This "knowing" allows the victim to put self-blaming for violence and try to break out of the cycle of violence. Recognition of violence as violence would also contribute to reducing stereotypical attitudes and victim-blaming in society. If violence is not recognized, it is difficult to confront it, let alone prevent it.

[18] Vägivallaennetuse kokkulepe 2021–2025 [Violence Prevention Agreement 2021–2025]. Available: https://www.just.ee/sites/www.just.ee/files/vagivallaennetuse_kokkulepe_2021-2025_0.pdf [last viewed 17.01.2022].

[19] At the Faculty of Law of the University of Tartu, the subject "Domestic Violence in the Modern Legal Space" has been taught as an elective subject for six academic years, i.e., since the academic year 2015/2016. The aim of the subject is to draw the attention of our students to the issue of intimate partner violence as a very serious problem that lawyers face in one way or another in their daily work.

Sources

Bibliography

1. *Bachmann, T., Maruste, R.* Psühholoogia alused [Basics of psychology]. Tallinn, 2008.
2. *Kaugia, S.* Õigusteadvuse olemus ja arengudeterminandid [Essence of Legal Consciousness and Determinants of Development]. Tartu: Tartu Ülikooli kirjastus 2011.
3. Kuritegevus Eestis [Crime in Estonia] 2011; 2012; 2013; 2014; 2015; 2016; 2017; 2018; 2019; 2020. Justiitsministeerium [Ministry of Justice].
4. *Raska, E.* Õiguse apoloogia. Sissejuhatus regulatsiooni sotsioloogiasse [Apologetics of law. Introduction to the sociology of regulation]. Tartu: OÜ Fontese Kirjastus, 2004.

Other sources

1. EELK Perekeskuse koduleheküIg [Homepage of the Estonian Evangelical Lutheran Church]. Available: http://perekeskus.eu/eelk-perekeskuse-avamine/ [last viewed 16.01.2022].
2. Eesti elanikkonna teadlikkuse uuring soopõhise vägivalla ja inimkaubanduse valdkonnas [Estonian population awareness survey in the field of gender-based violence and human trafficking]. TNS EMOR. Sotsiaalministeerium [Ministry of Social Affairs], 2016. Available: https://www.kriminaalpoliitika.ee/sites/krimipoliitika/files/elfinder/dokumendid/eesti_elanikkonna_teadlikkuse_uuring_soopohise_vagivalla_ja_inimkaubanduse_valdkonnas_2016.pdf [last viewed 17.01.2022].
3. Justiitsminister allkirjastas Istanbuli konventsiooni [The Minister of Justice signed the Istanbul Convention]. Available: http://www.just.ee/et/uudised/justiitsminister-allkirjastas-istanbuli-konventsiooni [last viewed 16.01.2022].
4. Ka ahistatud mehed saavad varjupaigast abi [Harassed men also receive help from the shelter]. Delfi, 21.10.2010. Available: http://www.delfi.ee/news/paevauudised/eesti/ka-ahistatud-mehed-saavad-varjupaigast-abi?id=34118637 [last viewed 16.01.2022].
5. Kuritegevus Eestis 2015 [Crime in Estonia 2015]. Justiitsministeerium. Tallinn, 2016. Available: http://www.kriminaalpoliitika.ee/sites/krimipoliitika/files/elfinder/dokumendid/kuritegevus_eestis_2015.pdf [last viewed 15.01.2022].
6. Kuritegevus Eestis 2019 [Crime in Estonia 2019]. Justiitsministeerium. Tallinn, 2020. Available: https://www.kriminaalpoliitika.ee/kuritegevuse-statistika/perevagivald-ja-ahistamine.html [last viewed 17.01.2022].
7. Meeste Kriisikeskus MTÜ [Men`s Crisis Centre]. Available: https://www.inforegister.ee/80335660-MEESTE-KRIISIKESKUS-MTU [last viewed 16.01.2022].
8. Naistevastase vägivalla ja perevägivalla ennetamise ja tõkestamise Euroopa Nõukogu konventsioon [Istanbul Convention. Action against violence against women and domestic violence]. Preamble. Istanbul, 11V.2011. Available: https://www.riigiteataja.ee/akt/226092017002 [last viewed 15.01.2022].
9. Vabariigi Valitsuse tegevusprogramm 2021-2023 [Action Programme of the Government of the Republic 2021–2023]. Available: file:///C:/Users/skaugia/Downloads/2021.02.23_Vabariigi%20Valitsuse%20tegevusprogramm%202021-2023.pdf [last viewed 16.01.2022].
10. Valitsuse moodustamise kokkulepe aastateks 2021–2023 [Agreement on the formation of the government 2021–2023]. Available:
11. https://www.valitsus.ee/valitsuse-eesmargid-ja-tegevused/valitsemise-alused/koalitsioonilepe [last viewed 16.01.2022].
12. Vägivallaennetuse kokkulepe 2021–2025 [Violence Prevention Agreement 2021–2025]. Available: https://www.just.ee/sites/www.just.ee/files/vagivallaennetuse_kokkulepe_2021-2025_0.pdf [last viewed 17.01.2022].
13. Vägivalla ennetamise strateegia [Violence prevention strategy]. Available: https://www.kriminaalpoliitika.ee/sites/krimipoliitika/files/elfinder/dokumendid/vagivalla_ennetamise_strateegia_aastateks_2015-2020.pdf [last viewed 16.01.2022].
14. Vägivalla vähendamise arengukava [Development Plan for the Reduction of Violence]. Available: https://www.kriminaalpoliitika.ee/et/vagivalla-ennetamise-strateegia/vagivalla-vahendamise-arengukava-2010-2014-materjalid [last viewed 16.01.2022].

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Liability for Unlawful Use of a Trademark

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The aim of this report is to provide a brief overview of litigation over trademark violations from 2014 until 2019. This period is significant for at least two reasons: first, the beginning of this period coincides with a decade since the accession of several East European countries, including Latvia, to the European Union; second, the end of this period coincides with the end of application of the Law On Trademarks and Indications of Geographical Origin of 1999, which was replaced by a new law enacted on 6 March 2020. The procedure for the opposition process as part of trademark registration was reformed as the Law on Industrial Property Institutions and Procedures came into force on 1 January 2016.[1] Although reform of trademark registration and the opposition procedure did not have a direct impact on trademark rights already in place, it could be anticipated that protection of trademark rights as established since 2016 would be more robust and the peculiarities of the previous period would be extinguished. As litigation over the registration and opposition procedure lags behind the filing of applications for registration of trademarks, no cases have been heard over applications filed under the new system, i.e., after 1 January 2016.

Keywords: counterfeit, fault, liability, license, trademark.

Contents

[1] Available: https://likumi.lv/ta/en/en/id/275049-law-on-industrial-property-institutions-and-procedures [last viewed 22.02.2022].

Introduction

It could be asserted that during the first decade since accession there was a gradual switch from applicants preferring national registration to those who preferred EU registration. During the same period, there was also a big influx of applications in Latvia for international trademarks registered under the Madrid system. Owners of internationally registered trademarks seem to be more active in seeking compensation from infringers.

The preconditions for liability for unlawful use of trademarks are very important. The "[v]alue of the trademark system depends on the extent to which the activities of others can be categorized by the trademark owner as 'infringing acts' so that the full force of the legal system can be brought to bear against them".[2] However, as this overview will demonstrate, the preconditions for civil, administrative and criminal liability for violation of trademark rights differ. Only the basic terms coincide in all three types of liability: the understanding of an infringing act, the term "use" of the victim's trademark by the infringer in the meaning of Article 5(1) of Directive 2004/48/EK)[3], interpretation of Article 5(4) of Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights (OJ 2003 L 196, p. 7) and Article 146 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trademark (OJ 1994 L 11, p. 1), as amended by Council Regulation (EC) No 1992/2003 of 27 October 2003 (OJ 2003 L 296, p. 1; "Regulation No 40/94").[4]

Right holders could reasonably expect that if an "infringing act" (Article 10, part 3 Directive 2015/2436[5], which replaced Directive 2004/48/EK)[6] has taken place, then the trademark protection system not only prevents violation of trademark rights but also ensures that perpetrators are punished and damage suffered by the victims compensated. An overview of court cases involving trademark violations from 2014 to 2019 shows a relatively small number of compensation cases. There are significantly more cases where infringers escaped unscathed, with the court merely prohibiting violation of trademark rights but not imposing any duty of compensation of damage caused by such acts.

Directive 2004/48/EK was implemented in Latvian law on 1 March 2007, although it should have been implemented no later than 29 April 2006. Due to this delay, the Supreme Court Senate (court of cassation, the highest instance court) in Judgment SKC-96/2015[7] decided that the principles of civil liability of the Directive should be applied with retroactive effect, i.e., from the moment the Directive should have been transposed.

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[2] *Philips, J.* Trademark Law. A Practical Anatomy. Oxford University Press, 2003, pp. 193–194.

[3] Available: https://eur-lex.europa.eu/legal-content/lv/HIS/?uri=CELEX:32004L0048 [last viewed 22.02.2022].

[4] See, for instance, case No. C-302/08 – Zino Davidoff. Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=73510&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2554017 [last viewed 22.02.2022].

[5] Available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L2436&from=LV [last viewed 22.02.2022].

[6] Available: https://eur-lex.europa.eu/legal-content/lv/HIS/?uri=CELEX:32004L0048 [last viewed 22.02.2022].

[7] Available: https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/civillietu-departaments/hronologiska-seciba?lawfilter=0&year=2015 [last viewed 22.02.2022].

Article 56 of the Law on Trademarks[8] provides a remedy for the victim in the form of recovering material and moral damages. This right could be executed, if certain conditions are met. The victim must prove violation of trademark rights, damage, and causation between the violation and damage.

Whether a violation of trademark rights has taken place depends on whether the acts of the offender interfere with the scope of the victim's trademark rights, and also if the person who has violated the IP right "should have known" of the existence of that right. Nowhere does the new Latvian trademark law expressly point to the subjective attitude of the infringer. Nevertheless, on the one hand, courts are call attention to knowingly committed acts as an additional feature which somehow should aggravate the amount of liability. On the other hand, there are no clear indications that a subjective attitude translates into a greater degree of liability, as the Latvian courts tend to slash the amount of damages calculated by claimants (see below: civil liability).

In case No. C-690/17[9] the ECJ ruled accordingly concerning use of a sign that was identical with, or similar to, an individual trademark consisting of a quality label by using the quality label for "consumer information and consultancy" services, which are covered by the services for which those marks are registered.

1. Trademark rights as an object of protection

Trademark rights as a specific object of protection appear in the case law of the inter-war period of independent Latvia (1918–1940). There are references to regulation of trademark rights. After Latvia regained *de facto* independence following Soviet and German occupation (1940–1991), the first trademark law was set in force (1993). Paradoxically, registration of trademarks started earlier. Owners of internationally recognised brands were entitled to file for registration of their brands, which were already registered in the Soviet Union. Re-registration of those brands was carried out by the newly established[10] patent board. The procedure was provided by Regulations No. 72 of 28 February 1992 as enacted by the Council of Ministers.[11] Registration boomed. Within the first months after registration started and even before any legal framework would be created regarding the scope of rights which registration involved since the first law on trademarks was rushed through parliamentary commissions, the number of registered trademarks grew from zero to several thousand. The newly registered international trademarks immediately fell victim to distributors of underground counterfeit goods. Local brands soon followed suit and were registered as Latvian national trademarks. First came Soviet brands, which existed without any registration, in the form of labels, which were widely applied to various products for consumption – from candies to alcoholic beverages. As identical products were still being imported from other newly established countries of what used to be the Soviet Union, the right holders of newly registered ex-Soviet

[8] Available: https://likumi.lv/ta/id/312695-precu-zimju-likums [last viewed 22.02.2022].The law on trademarks was enacted by the *Saeima* (Latvian Parliament) on 21 February 21 2020.

[9] Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=212909&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=878090 [last viewed 22.02.2022].

[10] Latvijas Republikas Ministru Padomes lēmums Nr. 72 [Regulation No. 72 of the Council of Ministers of 28 February 1992]. *Ziņotājs,* Nr. 17, 1992.

[11] *Rozenfelds, J.* The Concept of Property and Intellectual Property in Latvia. Juridiskā Zinātne (Journal of Legal Science. University of Latvia, 2010, No. 1, 2010, p. 102. Available (in Latvian): https://www.journaloftheuniversityoflatvialaw.lu.lv/fileadmin/user_upload/lu_portal/projekti/journaloftheuniversityoflatvialaw/No1/J_Rozenfelds.pdf [last viewed 22.02.2022].

trademarks instantly found themselves involved in legal battles over different trademarks, which in their appearance were almost identical, as were products, which still came out of various enterprises – survivors of the highly standardized and centralized Soviet economy. There were, for instance, more than fifty factories producing and distributing sparkling wine using the method of second fermentation. The product was still called *Sovetskoye Shampanskoye*. This name was used on labels either in Latin or Russian letters. Products of this kind flooded the Latvian market not only from nearby countries but even from places as far away as Italy. Local producers struggled to seize such products as counterfeit. To their frustration, one of the respondents – a local company which imported drinks from Belorussia – filed a counterclaim stating that sparkling wine of Latvian, as well as Belorussian origin is a product of one and the same type. Consequently, the *Sovetskoye Shampanskoye* brand as registered by the claimant was generic, and as such should be annulled. The court of first instance – the Riga Regional Court – duly declared trademark registration by the claimant null and void. The court of appeal (Supreme Court of Latvia) considered the judgment by the Riga Regional Court too harsh and handed down a judgment which spared controversial registration of the trademark by the claimant but disclaimed the key words *Sovetskoye Shampanskoye* from it. Only recently have courts abandoned the ill-founded practice of establishing limitations on trademark rights in the shape of disclaimers by court judgment.[12]

Another peculiarity of Latvian case law is reluctance to admit evidence from the parties, which was submitted as a proof of the notoriety of trademarks in cases where internationally recognized famous but still unregistered trademarks were not recognized by the Latvian courts as well-known trademarks deserving wider protection due to extensive and long-standing use. The peculiarity of the Latvian approach is that courts are reluctant to admit international recognition of a trademark as evidence that this very trademark should be recognized as well-known, even if the mark has not been extensively used and advertised in Latvia. For instance, as recently as in a judgment handed down by the court for the Vidzeme suburb of Riga on 7 June 2018 in case No. C30587217[13], the court dismissed a claim by *Apple Inc.* that a slogan which was introduced and extensively used by late Steve Jobs (ONE MORE THING) should be regarded as a well-known trademark in Latvia. The court reasoned that such a finding could not be corroborated on the basis of international (not local) publications and advertisements, as if Latvian consumers were still relying only on local media as sources of information.

As those episodes of trademark litigation demonstrate, judgments are far from perfect.

It did not help the matters that since the early 1990s the Latvian judicial system survived several stages of reform. The first step in establishing a judicial system capable of protecting trademark rights was to establish a kind of specialised court. From 1993,

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[12] *Rozenfelds, J., Mantrovs, V.* Is a National Court Competent to Introduce a Disclaimer into a Trademark Registration? The Latvian Supreme Court Finally Says 'No'. GRUR International, Vol. 70, No. 8, 2021, pp. 760–763. Available: https://doi.org/10.1093/grurint/ikab084 , URL: https://academic.oup.com/grurint/article-abstract/70/8/760/6315021?redirectedFrom=fulltext ISSN 2632-8623 [last viewed 22.02.2022].

[13] The judgments referred to in this article with few exceptions are not available to the wider public. The author of this publication has an access to the internet site maintained by the Courts Administration under the auspices of the Latvian Ministry of Justice. In the internet site "Manas tiesas" ("My Courts") the court judgments could be identified by the number of the case consisting of eight figures which are provided as reference numbers.

the Riga Regional Court was chosen as the court with an exclusive jurisdiction in all disputes over trademark rights. Since 1 February 2004, all the disputes regarding the trademark registration procedure became a subject of administrative procedure.[14] As of 1ˢJanuary 2015, the trademark disputes are under the jurisdiction of the Court for the Vidzeme district of Riga.[15] The Riga Regional Court at the same time became the court of appeal.

2. Civil liability

In each case, where a compensation claim is based on an assertion by the claimant that the defendant's action amounts to unlawful use of a trademark owned by the claimant (or the claimant is the rightful holder of trademark rights), the claimant must prove the likelihood of confusion caused in the perception of consumers by signs, trade names, packages, etc., which are exploited by the infringer in their business activities. This part of the factual background in reviewed cases was dealt with by the courts in Latvia in line with the guidelines for interpretation of EU law, as interpreted by the ECJ, usually (but not always) including a reference to European case law, such as case No. T-104/01,[16] C-251/95,[17] C-39/97,[18] C-425/98,[19] C-292/00,[20] joined cases No. C-414/99 to C-416/99,[21] case No. T-108/08.[22]

One of the unsolved questions is whether a claimant who seeks compensation has to prove not only that their trademark rights have been violated, but also that the defendant has acted knowingly. Liability for damage in the IP area tends to be objective, i.e., an obligation to compensate arises even if no positive action by the defendant has taken place,[23] notwithstanding whether the defendant has been aware or should have known about the claimant's IP rights. The situation in Latvia is different: Latvian law points to fault as a precondition for liability.

If unlawful use of a trademark has occurred due to someone's fault, the owner of the trademark, as well as a licensee are entitled to claim damages and compensation for moral damage caused (Article 56, Trademark Law[24]; Article 28[1], Law On Trademarks

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[14] *Rozenfelds, J.* Intelektuālais īpašums. Otrais, labotais un papildinātais izdevums [Intellectual property. Second, amended and supplemented edition]. Riga, 2008, pp. 259–260.

[15] Amendments to Article 24 Civil Procedure Law since 1 January 2015. Available: https://likumi.lv/ta/en/en/id/50500-civil-procedure-law [last viewed 22.02.2022].

[16] Available: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=47801&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2918725 [last viewed 22.02.2022].

[17] Available: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=43450&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2921478 [last viewed 22.02.2022].

[18] Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=44123&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2917713 [last viewed 22.02.2022].

[19] Available: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=45384&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2922356 [last viewed 22.02.2022].

[20] Available: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=47953&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2554017 [last viewed 22.02.2022].

[21] Available: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=46851&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2554017 [last viewed 22.02.2022].

[22] Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=107530&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2554017 [last viewed 22.02.2022].

[23] Monsanto Canada Inc. v. Schmeiser. Supreme Court Judgments, 2004. Available: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2147/index.do [last viewed 22.02.2022].

[24] Article 56, Law on trademarks of 2020, instead of fault, provides objective criteria as a precondition for liability. A person is responsible for an infringement if they knew or should have known of the existence of trademark rights.

and Indications of Geographical Origin). The Law of 1999 (the old trademark act) lays down almost identical preconditions for liability as compared to the latest act.

Preconditions for civil liability in the IP area have not been a specific subject of research. Although there is an abundance of research on fault as a general precondition for civil liability in Latvian legal doctrine,[25] research work in the IP area is fairly limited. Some publications (in Latvian) are devoted mainly to problems of implementing EU law and court injunctions in particular.[26] The mainstream view leans towards liability for knowingly violating a competitor's rights, i.e., away from the concept of strict liability.[27]

Regulations (EC) No. 3295/94 and No. 1383/2003 provide objective criteria for liability, whereas Article 28[1] of the Law On Trademarks and Indications of Geographical Origin, as well as the Law of 1999 (old trademark act) provides fault as one of the preconditions for liability.[28]

The law provides that the precondition for liability is "If unlawful use of a trademark has occurred due to someone's fault" (Article 28[1], Law On Trademarks and Indications of Geographical Origin of 1999 (the old trademark act which was in force until 6 March 2020, when the Law on trademarks of 1999 was replaced by new act "On Trademarks"). Due to this law, the method of calculating damages based on the amount which may be received by the owner of the trademark for handing over the rights to use the trademark to a licensee was only provided as a substitute under the condition that the actual damages cannot be determined in accordance with the traditional method of the calculating damages under Latvian Civil Law. It seems that Latvian judges were reluctant to apply this method because they were used to following the rule that

> *mere possibilities shall not be used as the basis for calculating lost profits, rather there must be no doubt, or it must at least be proven to a level that would be credible as legal evidence, that such detriment resulted, directly or indirectly […], from the act or failure to act which caused the loss* (Article 1787, Civil Law).

The method which involves calculation for a fictional licensee brings an element of speculation and involves probabilities, which could lead to overcompensation.[29]

In case No. C04181114, the Riga Regional Court allowed a claim by a company, which was importing dairy products from Russia. The claimant owned a trademark, which was registered under the Madrid registration system in relation to various goods in class No. 29., 30., 31., 32 Nice classification, *inter alia*, on different products in class No. 29. The claimant asserted that the defendant violated its registered

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[25] See, for instance, *Brants, E.* Role of foreseeability in imposition of civil liability. Socrates RSU elektroniskais juridisko zinātnisko rakstu žurnāls [Journal of electronic articles on legal science of Rīga Stradiņš University], No. 2 (20), 2021, pp. 268–286. Available: https://dspace.rsu.lv/jspui/bitstream/123456789/6276/1/Socrates-20-2_19-Brants_268-286.pdf [last viewed 22.02.2022].

[26] *Pētersone, Z.* Intelektuālā īpašuma civiltiesiskās aizsardzības līdzekļi [Legal remedies for protection of intellectual property]. TNA, 2013.

[27] *Rasnačs, L.* Vainas nozīme atbildības piemērošanā par negodīgas konkurences aizlieguma pārkāpumiem. Aktuālas tiesību realizācijas problēmas. LU 69.konferences rakstu krājums [The role of fault in implementing liability for violations of the ban on unfair competition. Collection of articles of the 69th conference of the University of Latvia], 2011, p. 55.

[28] The objective criteria under Regulation No. 1383/2003 for trademarks which are registered as EU trademarks differ from the criteria under the Latvian law on trademarks of 1999 which applies to trademarks registered as national (Latvian) trademarks. This shows the unnecessary leniency of Latvian law.

[29] *Abdussalam, M.* Reining in the rules for "lost profits" damages in patent law. Queen Mary Journal of Intellectual Property, Vol. 9, No. 4, 2019, pp. 366–367.

trademark rights. The defendant had bought sunflower oil, cheese, butter and mayonnaise from the claimant since 2009. The defendant distributed said goods in Latvian supermarkets. In 2012, the defendant registered a trademark in class No. 29, 30 on various goods including oil and mayonnaise. The claimant contested the trademark registered by the defendant. The said trademark was invalidated by the decision of OHIM on 9 September 2013. The defendant filed a complaint and litigation over the trademark registered by the defendant was still ongoing in 2015. The claimant found out on 20 January 2013 that the defendant was importing from Poland and distributing in Latvia cheese and butter, using a label for identification of these products, which contained images that were confusingly similar to the images forming part of the trademark registered by the claimant. By doing so, the defendant was knowingly violating the claimant's trademark rights. The claimant claimed, *inter alia*, damages of 28 287.07 EUR. Income of 138 117.89 EUR collected by the defendant could bring 20 000 EUR plus interest at 6% per annum in royalties, if the same rights were to be licenced out by the claimant. In addition to that, the Riga Regional Court awarded moral damages of 2400 EUR.

The defendant filed an appeal, whereby it contested the court judgment as to moral and material damages. The judgment was not contested in the part in which trademark violation was corroborated. The court of appeal allowed the claim for the award of moral damages but dismissed the compensation claim, finding that the calculation provided by the claimant was wrong in that the amount of income, as well as profit margin provided by the claimant were overvalued.

The court of appeal contradicted itself. On the one hand, if a trademark violation took place, the claimant deserved some kind of compensation based on the amount of goods in issue. On the other hand, if the court of appeal considered that the claim would lead to overcompensation, it should find out the amount of real damage caused by violation of trademark rights, which was not contested by the defendant. The only explanation for this controversy would be that the court of appeal did not believe in the method of calculation of damages by using the fictitious licensee concept. Perhaps the court would prefer to stick to the traditional method of calculating damages as provided by the Civil Law, which expressly prohibits anyone to rely on "mere probabilities" in calculating damages. The problem is that the fictitious licensee method provided by the Directive is based on "mere probabilities" *per se*. As a result of this decision, courts in general tend to dismiss claims for damages based on an imaginary licensee. Instead, the Latvian courts would rather allow a claim for moral harm instead. Hence the trend, which could be followed not only in case No. C04181114 but also in other cases within the same period – from 2016 to 2019. Little wonder that damages claims are extremely rare. Only in approximately one-third of cases of violation of trademark rights is a claim to stop counterfeit activities supplemented with a damages claim.

Only in ten cases out of thirty during the same timeframe were damages awarded by court ruling. Only a fraction (17 222 EUR) of the compensation claimed in ten cases (117 148 EUR) was allowed during the same period. Claimants were slightly more successful in claiming moral damages as compared to compensation claims. Modest claims by *IKEA* in the amount of 2000 EUR were allowed in full[30], whereas in cases where moral claims significantly exceeded this amount, they were either slashed or dismissed altogether. This standard amount was awarded notwithstanding different circumstances: type of goods, whether there were small, cheap items (*IKEA*'s claim

[30] Case No. C30693118; C30618416.

for 7 114.40 EUR was allowed in the amount of 1 420 EUR)[31], or very valuable ones (used tractors produced by J. C. Bamford Excavators Limited unlawfully offered on the Latvian market by a Latvian company under internationally registered trademark JCB without permission of the owner of the trademark claim in the amount indicated below)[32] involved the question whether violation of trademark rights was long-lasting transgression or one-off, whether an infringer acted incidentally or knowingly. This probably explains why compensation claims are such a rarity – why bother to pay state dues for filing a compensation claim (these are significantly higher than the fixed fee for a claim to put an end to a trademark violation), if the chances of satisfaction are so slim!

In case No. C04292106, the corporation *Société des Produits Nestlé S.A.* sought a prohibition on unlawful use of EU registered trademark No. 002801702, international trademarks registered within the Madrid system No. IR 793933 and No. IR 796607. On top of that, *Nestlé* claimed damages of 26 716.44 LVL (37 937.34 EUR). *Nestlé*, it seems, overestimated what could be the value of imaginary royalties from a would-be licensee. The defendant pointed out in reply to the claim that damages as stated by the claimant were based on a wrong assumption, namely, that royalties from an imaginary licensee should be in the amount of 6 % of income, which is way too high. Damages were slashed, because the fictitious licensee terms were discriminatory towards the defendant. The principles of so-called FRAND (Fair, Reasonable and Not Discriminatory) terms are firmly established in the area of licensing out the so-called SEP (Standard Essential Patents).[33] The court also disagreed with the claimant's view of how long the infringement had taken place. The Riga Regional Court found that at the time when the damage was caused in 2006, royalties from licences on the goods in issue (coffee) were between 0.2% and 2 %. The court awarded damages of 4840.74 EUR.

The reasoning for judgments regarding claims for moral damage is even more difficult to understand.

In case No. C04494311, *J. C. Bamford Excavators Limited* sued a Latvian company, which offered on the Latvian market used tractors, produced by the claimant under the internationally registered trademark *JCB* without permission of the owner of the trademark.

The defendant sought to dismiss the claim. They cited an exhaustion of rights clause as an excuse. The court rightly found that, although the defendant offered used items, nevertheless, they had acted in a manner as if their business was somehow connected to the claimant, and in doing so misled customers. This part of the judgment is in line with interpretation of exhaustion of rights by the ECJ in cases No. C-558/08,[34] C-337/95,[35] C-63/97.[36]

The claimant was also seeking compensation for moral damage in the amount of 24 457.44 EUR. The court of first instance allowed the claim in full. The court of

[31] Case No. C04366712.

[32] Case No. C04494311.

[33] *Yo Sop Choi.* Standard essential patents – a comparison of approaches between East and West. Queen Mary Journal of Intellectual Property, Vol. 8, No. 4, 2018, pp. 313–332.

[34] Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=83130&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2923483 [last viewed 22.02.2022].

[35] Available: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=43440&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2924631 [last viewed 22.02.2022].

[36] Available: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=44426&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2925693 [last viewed 22.02.2022].

appeal, although agreeing with the finding at the first instance that infringement was caused in violation of the law with full knowledge of all aggravating circumstances, refused any recovery of damages whatsoever.

A legalistic attitude could be one of the factors exerting an impact on court decisions regarding civil liability in general, and for IP rights violations in particular. In their assessments of what amounts to civil liability, the courts tend to stick to the plain meaning of the law rather than trying to grasp the substance. In case No. C04375909, US company *Hewlett-Packard Development Company*, L.P. sought to preclude a trademark right violation by Latvian company SIA (Limited Liability Company) *RF Serviss*, and filed the respective claim on 29 October 2009 at the Riga Regional Court. The court allowed the claim in its judgment of 17 August 2010 and awarded the claimant compensation of state dues for filing the case (100EUR) and the claimant's representative's fee for presenting case to the court: 1062 EUR (748.49 LVL). The Supreme Court as the court of appeal arrived at a similar result. The Supreme Court Senate as cassation instance dismissed the case as to part of the compensation of the representative's fee, citing incorrect interpretation of the Civil Procedure Law. Art. 33 (3) para. 1 provides "expenses for the assistance of advocates" meaning lawyers, members of the bar, whereas the representative of the claimant happened to be a patent attorney who is not an "advocate" in the meaning of Art. 33.[37] Thus, the court refused compensation of expenses not because their existence or reasonability would be contested and even not because the claimant was not entitled to such compensation, but because it considered that such expenses somehow fall outside the scope of regulation by law (Article 28^1 Law On Trademarks and Indications of Geographical Origin of 1999 does not refer to the Civil Procedure Law nor does any law expressly preclude compensation of such kind of expenses), and because it was used to interpret existing law strictly in accordance with the plain meaning of its wording. A similar outcome can be observed in case No. C04502510.

3. Administrative liability

The Law on Administrative Liability was enacted on 14 November 2018, and came into force on 1 July 2020.[38] During the period 2015–2019, administrative liability for unlawful use of trademark rights was not expressly prescribed. An administrative fine could be imposed on individuals, ranging from 250 EUR up to 700 EUR, whereas for legal entities – in the amount of 1 400 EUR and up to 14 000 EUR, and confiscation of the counterfeit goods (Article 166^{17} Latvian Administrative Violations Code adopted on 7 December 1984).[39] In practice, even these modest fines were rarely imposed. Sometimes, the fine was slashed beneath the minimum. The smallest fine during this period was in case No. 1A26001417, where the defendant company was fined in amount of 75 EUR.[40] This controversial decision was upheld by the court and a complaint by the company – subject to the fine – dismissed.

Importers of counterfeit goods could be subject to an administrative fine (Article 201^{10}, Latvian Administrative Violations Code). In case No. A420671211, the State Revenue Service (SRS) imposed a fine of 1500 LVL (2130 EUR) on the importer. The court of appeal on 30 April 2014 cancelled the decision by SRS, dismissing

[37] Available: https://likumi.lv/ta/en/en/id/50500-civil-procedure-law [last viewed 22.02.2022].
[38] Available: https://likumi.lv/ta/en/en/id/303007-law-on-administrative-liability [last viewed 22.02.2022].
[39] Available: https://likumi.lv/ta/en/en/id/89648-latvian-administrative-violations-code [last viewed 22.02.2022].
[40] Available: https://likumi.lv/ta/en/en/id/14740-official-language-law [last viewed 22.02.2022].

the case on the grounds that the importer had not violated the law. The court cited, inter alia, a judgment handed down by the European Court of Justice (ECJ) of 1 December 2011 in case No. C-446/09 on the subject of the common commercial policy of combating entry into the European Union of counterfeit and pirated goods as provided by Regulations (EC) No. 3295/94[41] and No. 1383/2003[42] (repealed by Regulation (EU) No. 608/2013 of 12 June 2013[43]). The Latvian court of appeal found that even if imported items constitute counterfeit goods, nevertheless, the fine was imposed wrongly because the goods at issue were only stored and were not intended for distribution in the Latvian market: "goods coming from a non-member State which are imitations of goods protected in the European Union by a trademark right or copies of goods protected in the European Union by copyright, a related right or a design cannot be classified as 'counterfeit goods' or 'pirated goods' within the meaning of those regulations merely on the basis of the fact that they are brought into the customs territory of the European Union under a suspensive procedure" (para. 78 Judgment of the ECJ in case No. C-446/09). Such a broad interpretation of EU law would "hinder legitimate international trade transactions in goods transiting through the European Union" (para 54 in case No. C-446/09).

Regulation No. 3295/94 Article 1, para. 2 (d) provides that "Goods which are intended either for export or re-export should be treated as 'counterfeit goods'".

In case No. A420674510 the Regional Administrative Court dismissed a complaint filed by a Polish company, which considered that an administrative fine in the amount of LVL 1000 (EUR 1400) for violating rights of the owner of the trademark was imposed wrongly. The fine was imposed by the Latvian customs authorities, which considered that the company had violated Regulation No. 1383/2003 by importing counterfeit goods which were labelled with the sign "Matador". In their complaint on imposition of a fine, the Polish company did not contest the conclusion that the imported goods constituted infringement of the registered "Matador" trademark. The complaint stated that Latvian customs seized the counterfeit goods prematurely. Seizure was imposed on 9 November, whereas confirmation from the victim, i.e. the right holder that the ˢᵉized goods indeed constituted a violation of the victim's IP rights was filed on 10 November 2009. The court rightly dismissed this argument. Regulation provides that all that is necessary is the information provided to the customs authorities by the victim that the applicant holds the right to the goods in question.

In case No. 132059413 the Regional Administrative Court dismissed a complaint filed by a local company regarding a fine of LVL 500 (EUR 711.44) and confiscation of counterfeit goods. The complaint stated, *inter alia*, that the company was wrongly subjected to the fine because it was only representing another company. The court rightly dismissed this argument because Regulation (EEK) No. 2913/92 establishing the Community Customs Code provides (Article 5, para. 4) that a person who fails to state that they are acting in the name of or on behalf of another person or who states that they are acting in the name of or on behalf of another person without

[41] Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31994R3295 [last viewed 22.02.2022].

[42] Available: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32003R1383 [last viewed 22.02.2022].

[43] Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0608 [last viewed 22.02.2022].

being empowered to do so shall be deemed to be acting in their own name and on their own behalf.[44]

In case No. 130037115 the Riga Vidzeme District Court imposed a fine in the amount of EUR 1400 and confiscation of two items of counterfeit goods.

In case No. 129112015 the Court for the Latgale district of Riga imposed a fine in the amount of EUR 1400 and confiscation of 205 (two hundred and five) items of counterfeit goods offered for sale by a local company in violation of the trademarks "Monster High," "Rolex", "Versace", "Bvlgari", "Chanel", "Gucci", "Hello Kitty", "Nike", "Apple", "Universal Studios", "Samsung".

In comparison to previous case No. 132059413, bearing in mind the amount of actual and potential damage caused by the infringer in case No.129112015, the maximum fine as provided by law seems inadequate.

In case No. 133089415 the court dismissed a decision by the SRO, which imposed an administrative fine on the importer. The SRO found that a local company imported from the Peoples Republic of China children's toys which were labelled with the signs "Angry Birds," (816 items), "Hello Kitty" (1565 items), "Spongebob" (607 items), "Spider-Man" (25 items), "Winnie The Pooh" (6 items), "Cars" (100 items), "Mickey Mouse" (21 items), "Happy" (34 items). Imported goods were apparently under-priced compared to the original items. The importer filed a complaint in the court stating that it was "unaware" of the counterfeit nature of the imported goods. The court found in favour of the importer and cancelled the fine imposed by the SRO, reasoning that although the fact that the goods in issue were counterfeit was not contested, the SRO had failed to prove the importer's knowledge of violations of trademark rights.

The court of appeal sustained the judgment by the court of first instance and applied Article 28^1 of the Law On Trademarks and Indications of Geographical Origin, which provides that only unlawful use of a trademark that has occurred due to someone's fault could bring liability for violation of IP rights.[45]

In contrast, in case No. 129046216 the court dismissed a complaint by a company, which insisted on absence of fault. Imported goods (some motorbike spare parts) which were ordered via internet from a US-based company turned out to be counterfeit goods. The importer was subjected to an administrative fine of EUR 700. In the complaint to the court, the importer claimed innocence, although did not contest the fact that the spare parts were wrongly labelled with the trade name "Honda". The spare parts were not for further distribution but for the needs of the importer. The court dismissed the complaint. The fine imposed remained in force.

In case No. 1A29011318, on 6 April 2017 Latvian customs seized 100796 pills which were labelled "Superwelgra 100" on suspicion that the pills declared were counterfeit. By a decision of the State Revenue Service (SRS) of 18 April 2017 the seized pills were confiscated and a fine in the amount of EUR 2100 imposed on the importer, as the confiscated goods were imported in violation of Article 4 of the Law On Trademarks and Indications of Geographical Origin and Article 201^{10} Latvian Administrative Violations Code. The importer complained, reasoning that the confiscated goods did not breach the trademark law because the goods declared were intended for re-export to a third country (Uzbekistan). The decision was

[44] Available: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31992R2913 [last viewed 22.02.2022].

[45] Article 56 of the Law "On Trademarks" of 2020, instead of fault provides objective criteria as a precondition for liability. A person is responsible for an infringement, if they knew or should have known of the existence of trademark rights.

sustained but the complaint dismissed both by the SRS Director General (14 June 2017) and the court (18 January 2019).

4. Criminal liability

In case No.11816008617, two individuals were accused of production and distribution of counterfeit goods. Investigation found that on 57 occasions since 2016 and until 19 July 2017 the accused had unlawfully via internet distributed various goods, which were deceptively labelled as "Nike" production. Counterfeit goods were seized on 19 October (24 items) and 27 October 2016 (353 items). All of those deceptively labelled with the trademark "Nike" were seized by the police on 27 October 2016. "Nike" filed a civil claim in the criminal case in the amount of EUR 20 455. The accused entered into an agreement in pre-trial criminal proceedings. (Article 433, Criminal Procedure Law[46]). On 19 February 2018, Daugavpils City Court approved the pre-trial agreement between the prosecutor, the accused and the victim.

In case No. 11120115906, the court tried three persons accused of various wrongdoings. They were accused, *inter alia,* of possessing and offering for sale counterfeit vodka labelled "Stolichnaya Russian vodka". This was considered by the prosecution a violation of trademark rights. The owner of the trademark put forward a compensation claim in amount of LVL 100 000 (EUR 142 000).

Article 206, Criminal Law, provides:

> *For a person who commits illegal use of a trademark, other distinguishing marks for goods or services or unauthorized use of a design, counterfeiting a mark or knowingly using or distributing a counterfeit mark, if it has been committed on a significant scale or has caused substantial harm to the State, or to the interests of a person protected by the law.*

The problem was that the law only regards unlawful use of trademark as a crime under the conditions that it *has been committed on a significant scale or it has caused substantial harm.* Both are equally difficult to prove. It is not sufficient that the suspect has possessed counterfeit goods. The prosecution must prove that counterfeit goods have actually been sold to somebody. The acquisition, production and possession of such goods alone does not qualify as a crime, because until the very moment when the items in issue change hands all the activities carried out by suspects qualify as an "attempt". Consequently, the amount of stored labels which copied images of the victim's registered trademark (police seized 6969 labels with a reproduction of the main distinctive elements of the world famous trademark "Stolichnaya"; 3656 of the trademark "Moskovskaya") did not count. Only a dozen bottles labelled with the same labels, which were seized by the police from the car of one of the suspects in combination with a recent wiretapped telephone conversation in which the suspect "accepted" an order to deliver the same amount of counterfeit products to the "customer" convinced the court that this amount – i.e. twelve bottles of illegally produced vodka – were indeed offered for sale in violation of the victim's trademark right.

The accused were convicted of illegal manufacture (production), storage, movement, and disposal of alcoholic beverages (Article 221, Criminal Law) but acquitted on charges of violation of intellectual property rights. The prosecution failed to prove that substantial harm was caused by illegally distributing twelve bottles of

[46] Available: https://likumi.lv/ta/en/en/id/107820-criminal-procedure-law [last viewed 22.02.2022].

counterfeit vodka. The threshold of "substantial harm" would be met if proven that at least an amount of five minimum wages would be caused as damage.[47] The problem was that not only was the amount of wages fixed by law was inadequate but also vodka was (and still is) ridiculously cheap. The accused in case No. 11120115906 exercised their right to remain silent, i.e., refused to testify (Article 60^2, Criminal Procedure Law).

The case was reviewed on grounds of interpretation of the law by the Supreme Court Senate (the highest court authority in Latvia; cassation instance) and reverted to the court of appeal three times[48] before even the accusation under Article 221 succeeded. So far, case No. 11120115906 was one of the best-built cases – if not the best-built case – against illegal distributors of smuggled alcoholic beverages. It also demonstrates the weaknesses of Latvian Criminal Law, which makes a conviction for violation of trademark rights almost impossible due to the necessity for the prosecution to prove the existence of "substantial harm" caused by usage of fake labels, because the law, as it stands, provides as one of the preconditions for this crime the distribution of such labels in large quantities, whereas mere possession of such labels only counts as "collection". The court also did not agree with the claim by the victim that the seized labels themselves actually constituted a violation of the particular trademarks as registered by the victim. As the images reproduced on the seized labels were only confusingly similar but not identical to the trademarks as registered and used by the victim, the court did not find that the defendants actually used the victim's trademarks on the bottles seized by the police. In doing so, the court ignored that interpreting the law which prohibits use of symbols which could lead to confusion with registered trademarks must take into consideration the provisions of Directive 89/104/EEC Article 5[49] which uses the term "sign", not trademark, an important distinction, which has also been stressed in numerous judgments handed down by the ECJ.[50]

Even if the prosecution had succeeded with regard to the accused in similar cases, this could only lead to the conviction of foot soldiers as part of a bigger game carried out by organized crime and involving several quite sophisticated activities: besides imitations of trademarks (usually printed abroad and smuggled into the country), this activity also involves bottling of smuggled spirit.

In case No. 11270014514, the court of first instance acquitted a person accused of committing a crime under Article 206, Criminal Law. The court considered that proof of damage caused by violation of a trademark was insufficient and for this reason the conditions under which criminal liability for violating trademark rights were not met, so that criminal liability should not occur. The court of appeal in a judgment handed down on 30 November 2015 cancelled the judgment of the court of first instance and ordered the case to be reviewed.

Some criminal cases during the period 2015–2019 were unsuccessful, as they were built on poor understanding by officials of the basics of IP. For instance, in case No. 1181601511, where a person was accused of, *inter alia*, committing a crime under Article 206, Criminal Law, the prosecutor wrongly considered that a dispute over a licensing agreement constitutes a crime under Article 206, Criminal Law.

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[47] *Hamkova, D., Liholaja, V.* Būtiska kaitējuma izpratne: likums, teorija, prakse. Jurista Vārds, 10.01.2012, No. 2, p. 8.

[48] The judgment came into force on 21 June 2017.

[49] Available: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0104:en:HTML [last viewed 22.02.2022].

[50] See, for instance, judgment in case No. C-206/01 (Arsenal Football Club). Available: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=47877&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2522792 [last viewed 22.02.2022].

The accused was acquitted, and a compensation claim for EUR 17 074 dismissed by a decision of the court of first instance on 9 March 2016.

Difficulties which Latvian institutions are facing in their fruitless attempts to implement criminal liability under Article 206, Criminal Law, have resulted in a high proportion of administrative fines as a replacement of sorts for the rather toothless mechanism of criminal liability for violation of trademark rights. In case No. 12904316, in due course of criminal investigation, the police found counterfeit goods with fake labels of the trademark "Redmond" (national registration number M66556). The rights holder asked the police to investigate whether the activities of a company, which possessed 17 counterfeit units for sale, amounted to *a significant scale or has caused substantial harm,* under Article 206 or otherwise. The police imposed an administrative fine in the amount of EUR 1400. A fine of the same amount was imposed on another importer of counterfeit goods in case No. 129023618. Seized goods with different deceptively used trademarks such as "Converse", "Ray Ban", "Fendi", "Christian Dior", "Porsche Design", "Versace", "Philipp Plein", "Minions", "Volkswagen" were confiscated. The decision by customs was sustained by the court on 27 March 2018.

In case No.168043118, a fine was imposed and sustained by the court on 1 November 2018 for violation of trademark rights as well as copyright. Police seized 124 DVD discs with counterfeit software owned by car companies. The violation of trademark rights was also found in this case, because said disks carried labels of almost all well-known car companies. However, the fine was strikingly small – EUR 300.

Summary

1. Only in less than one quarter of all court cases in Latvia over violations of trademarks rights from 2014 to 2019 the claimant was awarded some compensation.
2. The relatively low percentage of successful compensation cases could indicate that courts are reluctant to allow compensation claims even if the fact of violation of trademark rights is established.
3. Although the issue of fault as precondition for civil liability is still open for scientific discussion, the mainstream view leans towards liability for knowingly violating a competitor's rights, i.e., away from the concept of strict liability.
4. Reluctance by judges to allow compensation claims could be explained by the somehow hesitant implementation of the EU directive in legislation.
5. One of the disadvantages of the administrative mechanism of liability for violation of trademark rights is the lack of any possibility to seek compensation.
6. Civil liability in criminal procedure seems to be ineffective due to difficulties of qualification of acts of piracy, because the prosecution has to overcome not only a far too complicated burden of proof, but also because it is usually facing a skilful defence.
7. Additional factor, which could impair the effective implementation of compensation mechanisms on the infringers could be the tendency by Latvian courts to interpret the existing law strictly in accordance with the plain meaning of its wording.

Sources

Bibliography

1. *Abdussalam, M.* Reining in the rules for "lost profits" damages in patent law. Queen Mary Journal of Intellectual Property, Vol. 9, No. 4, 2019, pp. 366–367.
2. *Brants, E.* Role of foreseeability in imposition of civil liability. Socrates (Journal of electronic articles on legal science of Rīga Stradiņš University), No. 2 (20), 2021, pp. 268–286.

3. *Pētersone, Z.* Legal remedies for the protection of intellectual property (in Latvian). TNA, 2013.
4. *Philips, J.* Trade Mark Law. A Practical Anatomy. Oxford University Press, 2003.
5. *Rasnačs, L.* The role of fault in implementation of the liability for violations of the ban of unfair competition. Collection of articles of the 69th Conference of the University of Latvia (in Latvian), 2011.
6. *Rozenfelds, J.* Intelektuālais īpašums. Otrais, labotais un papildinātais izdevums [Intellectual property. Second, amended and supplemented edition]. Riga, 2008.
7. *Rozenfelds, J.* The Concept of Property and intellectual Property in Latvia. Juridiskā Zinātne [Journal of Legal Science. University of Latvia], No. 1, 2010 (In Latvian).
8. *Rozenfelds, J.*, Mantrovs, V. Is a National Court Competent to Introduce a Disclaimer into a Trade Mark Registration? The Latvian Supreme Court Finally Says 'No'. GRUR International, Vol. 70, No. 8, 2021, pp. 760–763.
9. *Yo Sop Choi.* Standard essential patents – a comparison of approaches between East and West. Queen Mary Journal of Intellectual Property, Vol. 8, No.4, 2018, pp. 313–332.

Normative acts

1. Directive 2004/48/EK.
2. Directive 2015/2436/EK.
3. Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community trade mark.
4. Council Regulation (EC) No. 3295/94.
5. Council Regulation (EC) No. 1383/2003 of 22 July 2003.
6. *Council Regulation* (*EC) No. 1992/2003 of 27 October 2003* amending *Regulation* (*EC) No.* 40/94 on the Community trade mark (OJ 2003 L 296.
7. Civil Law (01.09.1992). Available: https://likumi.lv/ta/en/en/id/225418-civil-law [last viewed 22.02.2022].
8. Civil Procedure Law (01.03.1999). Available: https://likumi.lv/ta/en/en/id/50500-civil-procedure-law [last viewed 22.02.2022].
9. Law on Industrial Property Institutions and Procedures (01.01.2016). Available: https://likumi.lv/ta/en/en/id/275049-law-on-industrial-property-institutions-and-procedures [last viewed 22.02.2022].
10. Law On Trade Marks and Indications of Geographical Origin (15.07.1999, end of validity 06.03.2020). Available: https://likumi.lv/ta/en/en/id/18863 [last viewed 22.02.2022].
11. Law "On Trademarks" (06.03.2020). Available in Latvian: https://likumi.lv/ta/id/312695-precu-zimju-likums [last viewed 22.02.2022].
12. Latvijas Republikas Ministru Padomes lēmums Nr. 72 [Regulation No. 72 of the Council of Ministers of 28 February 1992]. *Ziņotājs,* Nr. 17, 1992.

Case law

1. Judgement by the Supreme Court Senate on 9 December 2015 in case No. SKC-96/2015.
2. Judgement by the Supreme Court Senate on 30 October 2015 in case No. C04375909.
3. Judgement by the Supreme Court Senate on 13 October 2016 in case No. C 04502510.
4. Judgement by the Supreme Court Senate on 4 June 2018 in case No. C04292106.
5. Judgement by the Supreme Court Senate on 4 June 2018 in case No. C04494311.
6. Judgement by the Supreme Court Senate on 21 April 2016 in case No. C04366712.
7. Judgement by the Riga Regional Court on 3 February 2016 in case No. C04181114.
8. Judgement by the Riga Regional Court on 18th January 2017 in case No. C 04502510
9. Judgement by the Riga Regional Court on 15 February 2019 in case C30618416.
10. Judgement by the Riga Regional Court on 4 October 2019 in case No. C04494311.
11. Judgement by the Riga Regional Court on 6 March 2015 in case No. 132059413.
12. Judgement by the Riga Regional Court on 28 November 2016 in case No. 133089415.
13. Judgement by the Zemgale Regional Court on 21 June 2017 in case No. 11120115906.
14. Judgement by the Kurzeme Regional Court on 30 November 2015 in case No. 11270014514.
15. Judgement by the Regional Administrative Court on 3 September 2014 in case No. A420674510.
16. Judgement by the Regional Administrative Court on 18 January 2018 in case No. 1A29011318.
17. Judgement by the Riga Court of Vidzeme suburb on 14 June 2018 in case No. C30693118.
18. Judgement by the Riga Court of Vidzeme suburb on 26 May 2015 in case No. 130037115.

19. Judgement by the Riga Court of Vidzeme suburb on 14 June 2018 in case No. C30693118.
20. Judgement by the Riga Court of Latgale suburb on 10 February 2017 in case No. 129046216.
21. Judgement by the Daugavpils City Court on 19 February 2018 in case No. 11816008617.
22. Judgement by the Rezekne City Court on 22 June 2017 in case No. 1A26001417.

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The Procedure for Amending the Constitution in the Republic of Poland – Selected Issues[1]

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The article examines the procedure of amending the existing Constitution of the Republic of Poland. The authors present the procedure of amending the existing Constitution. The authors also consider in the article the scope of the postulated changes and seek the answer to the question whether the changes of the existing Constitution are needed. They also analyse the changes that have already been made to the Constitution. The research methods used for preparation of the current article are the dogmatic-legal method and the empirical method.

Keywords: Constitution, Republic of Poland, amendments to the Constitution, procedure for amending the Constitution.

Contents

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Introduction

The Constitution is a law because it is passed by the Parliament as the supreme legislator, it is a universally binding normative act, however it has some specific features that allow it to be referred to as the fundamental law. It is characterised by the fact that it contains norms of the highest legal force, regulating the foundations of the political and social system, it is passed by an appointed body and is amended in a special procedure.

The current Constitution of the Republic of Poland[2] was passed by the National Assembly, which consisted of the join chambers of the *Sejm* and Senate by a majority of two third of votes on 2 April 1997. The Constitution was approved by the nation in a referendum on 25 May 1997 and it came into force on 17 October 1997[3].

Article 8 of the Constitution states that the Constitution is the supreme law of the Republic, and its provisions are directly applicable. The system of Polish law is built on the principle of hierarchy of particular types of normative acts, with the Constitution at the top. Three consequences follow from the adoption of this principle: 1) The constitution is the primary and unlimited act and thus can normalize any matter; 2) The constitution has the highest legal force; this means that all other normative acts must be consistent with it; 3) All other normative acts must be consistent with the constitution, i.e. their contents must in the fullest possible way realize the provisions of the constitution[4].

Article 8 of the Constitution states that the provisions of the Constitution shall be applied directly. This means that the Constitution is binding in all types of legal relations and is directly applied by all types of state bodies, and an individual may directly invoke its norms.

1. Procedure for amending the current Constitution

The process of creating the law in itself represents an important characteristic of the statutory law culture. In this case, we deal with some diversification of the level of the process formalisation. The higher the rank of the given legal act, the more formalised the entire procedure. It is also important that in the statutory law culture the representatives of the society in the Parliament, bodies of the State, as well as the citizens have the legislative initiative. Attention should be drawn to the fact that, as a principle, the local authorities follow the example of the parliamentary form of the legislative procedure within the frameworks of their own legislative competences. The legislative referendum that represents a specific plebiscite, compulsory or facultative form of creating the law is also an important issue. Codifications likewise represent the issue characteristic to that legal culture. Usually, they represent statutory regulations collected into a single act concerning a given aspect of life or the law. Promulgation is done by the body other than the body that enacted the given law. In other words, it is the rule that the enacted law, to be valid, must be confirmed by another body, e.g., the President signs the Act of Parliament. Then this issue is also related to the appropriate publication of the legal act that takes place through

[2] Konstytucja Rzeczypospolitej Polskiej [The Constitution of the Republic of Poland] (02.04.1997). Available: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [last viewed 10.05.2022]. Hereinafter referred to as the Constitution.

[3] On the history of Polish constitutionalism see: *Prokop, K.* Polish constitutional law. Białystok: Temida2, 2008, pp. 11–15.

[4] Art. 87 of the Constitution.

appropriate publication in the medium for publication of legal acts. The point here is the so-called legal fiction concerning the knowledge of the law. Appropriately published legal act creates the situation of common knowledge of the given legal act.

Addressing a procedure for amending the Constitution, at the very beginning, the question arises as to whether the case is one of amending the Constitution or introducing changes within the Constitution. This is a fundamental question, since the concept of amending the Constitution may have different meanings and scope. Chapter XII of the Constitution of the Republic of Poland of 1997 is entitled "Amending the Constitution", and the legal regulations contained therein concern both the changes introduced to the current text, as well as the adoption of a completely new Constitution.

There is also an opinion in the literature that amending the Constitution is understood to mean the repeal or giving a different content to all or only some of the provisions of the Constitution, as well as the issuance of new constitutional norms in the manner provided for the amendment of the Constitution[5].

Activities of this kind are defined in various ways in the literature. We come across the term "change", sometimes "reform", "amendment" or "revision" of the Constitution, and these names are often used interchangeably. The most common term is "amendment", which is understood as a partial amendment or supplementation of an earlier act by a later act. The terms "reform of the Constitution" or its "revision" are used less frequently, and some authors give them a special meaning.

It should be emphasised that the stability of the state and the law it creates is a generally recognised value. However, this is a stability that should not be equated with the unalterableness of the law, including the norms of the Constitution. This is expressed by the constitutional legislator allowing the possibility of the occurrence of socio-political phenomena justifying the need to make appropriate changes to the Constitution.

The constitutional legislator defines them in Art. 235 of the Basic Law. It regulates the manner of their introduction. This procedure is more difficult compared to making changes to ordinary acts. This type of constitution is included in the category of rigid constitutions, as opposed to easily changeable, i.e. flexible, constitutions.

This is also expressed in the limited number of entities with the right to initiate these changes, strictly limited periods of time for conducting the legislative process, the requirement to support the proposed changes by a qualified majority of votes in the *Sejm*, and in the Senate by an absolute majority, as well as in the management of a referendum enabling voters to define their attitude to the proposed constitutional changes.

The procedural requirements for amending the Constitution are, as follows:

A bill to amend the Constitution may be submitted by the following: at least one-fifth of the statutory number of Deputies; the Senate; or the President of the Republic. Amendments to the Constitution shall be made by means of a statute adopted by the *Sejm* and, thereafter, adopted in the same wording by the Senate within a period of 60 days. The first reading of a bill to amend the Constitution may take place no sooner than 30 days after the submission of the bill to the *Sejm*. A bill to amend the Constitution shall be adopted by the *Sejm* by a majority of at least two-thirds

[5] *Banaszak, B.* Konstytucja Rzeczpospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. A commentary]. Warsaw, 2009, pp. 472–473; *Skrzydło, W.* Zmiana Konstytucji czy zmiany w Konstytucji Rzeczypospolitej Polskiej z 1997 roku? [Amendment of the Constitution or amendments to the 1997 Constitution of the Republic of Poland]. Teka Komisji Prawniczej, Vol. I, 2008, pp. 172–186.

of votes in the presence of at least half of the statutory number of Deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of Senators. The adoption by the *Sejm* of a bill amending the provisions of Chapters I, II or XII of the Constitution shall take place no sooner than 60 days after the first reading of the bill. If a bill to amend the Constitution relates to the provisions of Chapters I, II or XII, the subjects specified in para. 1 above may require, within 45 days of the adoption of the bill by the Senate, the holding of a confirmatory referendum. Such subjects shall make application in the matter to the Marshal of the *Sejm*, who shall order the holding of a referendum within 60 days of the day of receipt of the application. The amendment to the Constitution shall be deemed accepted if the majority of those voting express support for such amendment. After conclusion of the procedures specified in paras 4 and 6 above, the Marshal of the *Sejm* shall submit the adopted statute to the President of the Republic for signature. The President of the Republic shall sign the statute within 21 days of its submission and order its promulgation in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*).

The introduction of the presented difficulties is intended to protect the constitutional law against changes dictated by the short-term political interests of the ruling groups, and not resulting from the needs of the nation and the state.

2. The amendments made to the current Constitution to date

2.1. Amendment of the Constitution of the Republic of Poland – 2006

The President of the Republic of Poland submitted to the *Sejm* a bill on amending the Constitution with regard to the implementation of the European arrest warrant into the Polish legislation. The change proposed by the President was aimed at enabling continuity of the institution of the European arrest warrant, which had existed in the Polish legal system since 1 May 2004, i.e., since the date of Poland's accession to the European Union. Approved and appreciated by the Polish authorities, the European Arrest Warrant is a judicial decision issued by a Member State in order to arrest and surrender by another Member State a person prosecuted in connection with criminal proceedings conducted against him or her for an offence for which the maximum penalty is at least one year's imprisonment, or for the execution of a penalty or a protective measure involving deprivation of liberty of at least four months. Furthermore, the amendment of the Constitution was linked to a decision of the Constitutional Court in which one of the provisions of the criminal procedure implementing the Framework Decision of the Council of the European Union on the European Arrest Warrant was declared unconstitutional[6]. The Court did not apply the dynamic interpretation used so far by the Polish legislator in the process of implementation of EU law. The Constitutional Tribunal, stating the unconstitutionality of the provision of criminal procedure, on the basis of which it is possible to surrender a person to a foreign state, set the maximum 18-month deadline for postponing the loss of its binding force. He also stated that ensuring the continuity of the European Arrest Warrant should be a top priority for the Polish

[6] The Constitutional Tribunal (in the judgment P 1/05), finding on 27 April 2005, the unconstitutionality of the provision of the criminal procedure, on the basis of which it is possible to surrender a person with Polish citizenship to a foreign state, established an eighteen-month (maximum) period of postponement when its binding force ceased to exist. P 1/05, Legalis No. 68295, Judgement of the Constitutional Tribunal of the Republic of Poland of 27 April 2005 in case P 1/05. Available: https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&dokument=601&sprawa=3772 [last viewed 10.05.2022].

legislator, since the European Arrest Warrant is of vital importance for the proper functioning of the justice system and is an expression of advanced cooperation between Member States to combat crime and strengthen security[7].

2.2. Amendment of the Constitution of the Republic of Poland – 2009

In 2009, an amendment was passed concerning the right of suffrage (passive electoral right). It was intended to meet public expectations that the *Sejm* and Senate would not accept as members the individuals who had been validly convicted of intentional crimes prosecuted by public indictment. Citizens are almost unanimous that laws should not be made by criminals. Anyone convicted of an intentional offence prosecuted by public indictment can be described as a criminal. Surveys that have been published in the nationwide media indicate that as many as 85% of Poles believe that MPs with final sentences should lose their seats. Only 8% of respondents were of an opposite opinion. Amending the Constitution to eliminate criminals from the Polish parliament will improve the image of the legislative branch. It would be difficult for Poles to come to terms with the fact that those who participate in the creation of laws are those who break the law themselves and have a legally valid conviction to prove it. In order to meet the expectations of the citizens of the Republic of Poland, the proponents propose an amendment to the Constitution, which will enable the amendment of the electoral law for the *Sejm* and Senate and the law on the performance of the mandate of deputy and senator. The amendment of the provisions of the Constitution in the scope of regulations concerning the right to stand for election to the Sejm of the Republic of Poland and the Senate of the Republic of Poland is, in fact, a condition opening the way to further amendment of the provisions of the Constitution in the area of the regulations concerning the right to stand for election to the *Sejm* of the Republic of Poland, and the Senate of the Republic of Poland is a prerequisite for further amendments to the provisions concerning the ban on running for office and loss of seats by deputies or senators who have been validly convicted of an intentional crime prosecuted by public indictment.

The applicants (a group of MPs) stressed that analogous amendments had already been introduced by the legislator with regard to the mandates of members of local self-government bodies[8]. The standards required of MPs and senators cannot be lower

[7] Statistics on the use of the European Arrest Warrant. Available: https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie [last viewed 10.05.2022]. *Ossowska-Salamonowicz, D., Przybyszewska-Szter, B.* Harmonizacja prawa krajowego państw członkowskich UE a konieczność zmiany Konstytucji RP z 2 kwietnia 1997 r. [Harmonization of the national law of the EU Member States and the necessity of amending the Constitution of the Republic of Poland of 2 April 1997]. Toruń Polish-Italian Studies, Vol. XVII, 2021, pp. 237–250. Available: https://doi.org/10.12775/TSP-W.2021.016 [last viewed 10.05.2022].

[8] Article 7.2 of the Election Ordinance for Commune Councils, County Councils and Province Assemblies states: Persons do not have the right to be elected, if they are: 1) punished for an intentional crime prosecuted by public indictment; 2) those, who have been given a legally binding verdict conditionally discontinuing the criminal proceedings on the commission of an intentional crime prosecuted by public indictment prosecuted by public indictment; 3) those, who have been subject to a valid court ruling stating that they have lost the right to be elected, referred to in Art. 21a, item 2 of the Act of 18 October 2006 on the Disclosure of Information on Documents of State Security Agencies from the Years 1944–1990 and the Content of such Documents (Journal of Laws of 2007, No. 63, item 425, as amended). The provision of the Act expired on 01.08.2011. (Journal of Laws of 2011, No. 21, item 113). Ordynacja wyborcza do rad gmin, rad powiatów i sejmików województw [Election Ordinance for Commune Councils, County Councils and Province Assemblies] (16.07.1998). Available: https://pkw.gov.pl/uploaded_files/1456318776_Ordynacja_wyborcza_do_rad_gmin_rad_powiatow_sejmikow_wojewodztw_-_wersja_aktualna.pdf [last viewed 10.05.2022]. It was replaced by Art. 10 a new law of

than those required of local government officials. The changes will not, however, exclude from parliament the persons who have been convicted by a court of a crime prosecuted by private prosecution, i.e. have committed libel. Members of parliament and senators will also be able to become members if they have been convicted of an intentional offence prosecuted by a private prosecutor, but have been given a fine or a restriction of liberty by the court. People whose offences have been erased, i.e., deleted from the National Criminal Register, will also have the right to be elected to parliament[9].

During work on the amendment of the Constitution, it was argued, among other things, that parliamentary immunity as a derogation from the fundamental principle of equality of citizens before the law, set out in Article 32 of the Constitution, should not be a pass to an oasis of impunity. Unfortunately, this exceptional privilege of parliamentarians is often abused. Sometimes, MPs have used it to avoid responsibility for common crimes, such as rape, drunk driving, forgery, paid protection or simple fraud. There have also been situations in which persons suspected of committing crimes have obtained a parliamentary seat solely on the basis of so-called party arrangements, while immunity has provided them with a safe haven for four years. Behaviour of this kind definitely lowers the level of citizens' trust in MPs and senators[10]. It is therefore important to eliminate criminals from the Polish Parliament. However, the movers' draft has met with much criticism. Arkadiusz Mularczyk, MP, stated that the draft under consideration is the most restrictive in the entire European Union. The conclusions of the analysis are very surprising. In many countries, such as Hungary, Italy, Slovakia, Estonia, Andorra, Albania, only the people who serve prison sentences are precluded from becoming members of parliament. By contrast, in countries such as Italy, the United Kingdom, Croatia and Israel, it is the court that determines whether someone can be a parliamentarian or not. There are also limits on the length of imprisonment that a person can serve as a parliamentarian or senator. In countries such as Germany, the United Kingdom and Italy, only people with a prison sentence exceeding 12 months are eligible to vote. In these countries, only committing certain crimes makes a person ineligible to be a parliamentarian, these are, for example, crimes against elections, constitutional order or public security. It is also sometimes the case that a person's mandate is not revoked until that person has been convicted during her/his term of office. On the other hand, some legal systems do not provide for limitations on the right to stand for election, such as Finland, Norway, Georgia and Slovenia. In the United States, the Fourteenth Amendment to the Constitution provides that a parliamentarian's mandate expires only if he or she has been convicted of treason. However, the rules of procedure of the Democratic

5 January 2011. Provisions introducing the Act – Election Code. Ustawa – Przepisy wprowadzające ustawę – Kodeks wyborczy [Act – Introductory provisions to the Act – Election Code] (05.01.2011). Available: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20110210113/T/D20110113L.pdf [last viewed 10.05.2022].

[9] *Jaraszek, A.* Posłem nie zostanie osoba skazana [A convicted person will not become an MP]. Dziennik Gazeta Prawna 2009-10-21; Available: https://prawo.gazetaprawna.pl/artykuly/363204,poslem-nie-zostanie-osoba-skazana.html [last viewed 10.05.2022].

[10] Draft Act amending the Constitution of the Republic of Poland. Stenographic reports from the sittings of the *Sejm* of the Sixth Term of the Republic of Poland. Transcript of the 15th sitting of the 6th *Sejm* of 8 May 2008. Available: https://orka2.sejm.gov.pl/StenoInter6.nsf/0/1AE638233535823BC12574440002956D/$file/15_b_ksiazka.pdf [last viewed 10.05.2022]. Despite being convicted by 32 final sentences, Ignacy Daszyński successfully ran for the Austrian Parliament. In 1897, he became a member of the Austrian Parliament and remained there until 1918. 12.11. *Jarosiński M.*, Ignacy Daszyński (1866-1936). Available: https://dzieje.pl/postacie/ignacy-daszynski [last viewed 10.05.2022].

and Republican Parties there provide that these parties simply do not include formerly convicted people on electoral lists; such people are simply eliminated. All this means that practically in most European countries, in the United States and in Israel, there are certain limits which determine when someone cannot be a parliamentarian. There is no situation in which every offence would eliminate a person from public life. There are no regulations of this kind at all in countries such as the Czech Republic or Switzerland[11]. Despite the stormy work on amending the Constitution, the parliamentary majority has decided that there is no way that good laws can be made by people who do not abide by them themselves, thus lowering the authority of the High Chamber[12]. A dignified performance of one's duties in the Republic of Poland and the conscientious discharge of one's duties towards the nation should be characterised, first and foremost, by adherence to the Constitution and other legal provisions in force in the territory of the Republic. As a result, on 07.05.2009, the *Sejm* passed a law amending the Constitution of the Republic of Poland. In the vote participated 413 deputies (out of 460). A majority of 2/3 of votes (i.e., 276) was necessary to adopt the amendment to the Constitution. There were 404 votes in favour of amending the Constitution, none against and 9 abstentions. The Senate did not make any amendments, and the President signed the law on 09.07.2009[13].

3. Draft amendments

However, the small number of real amendments to the Constitution does not translate into the absence of numerous submitted draft amendments. In the *Sejm* of the 3rd term (1997–2001), still in the year of the enactment of the Constitution, appeared a project of amending the content of Article 105 (concerning changing the scope of immunity of MPs and senators). The draft was rejected at the first reading[14]. On 27 April 2000, the *Sejm* received a parliamentary bill amending the Constitution as regards equipping the National Bank of Poland with the capacity to issue universally binding acts of law. However, it has never been subject to the procedure[15]. In the *Sejm* of the 5th term (2005–2007), several amendment bills were worked on:

[11] Draft Act amending the Constitution of the Republic of Poland. Transcripted reports from the sittings of the *Sejm* of the Sixth Term of the Republic of Poland. Available: https://orka2.sejm.gov.pl/StenoInter6.nsf/0/1AE638233535823BC12574440002956D/$file/15_b_ksiazka.pdf [last viewed 10.05.2022], pp. 165–167.

[12] One of the proposed amendments to the Constitution stipulated that Art. 99, section 4 would have the following wording: "The right to vote in elections to the *Sejm* and to the Senate does not apply to persons who served or worked before 1 January 1990 in the structures of the Polish United Workers' Party and the state coercive apparatus subordinated to it, conducted activities that were directed against the aspirations of the nation for independence and freedom, the rights of citizens and the rights of the Church and independent social institutions, including persons conducting and supporting these activities". Transcript of the session of the *Sejm* of 07.05.2009, pp. 209–212. Available: 41_b_ksiazka.indb (sejm.gov.pl) [last viewed 10.05.2022].

[13] Since 21.10.2009, the amended (by adding paragraph 3) content of Article 99 of the Constitution has been in force. Article 99 (1) Every citizen who is an active voter and has attained the age of 21 on election day at the latest has the right to vote. (2) Every citizen who has attained the age of 30 years on the day of the elections at the latest shall be eligible to vote in the Senate. (3) No person may be elected to the *Sejm* or the Senate who has been sentenced by a final sentence to imprisonment for an intentional offence prosecuted by public indictment. Available: https://www.sejm.gov.pl/prawo/konst/polski/kon1.htm [last viewed 10.05.2022].

[14] The course of the legislative process of the *Sejm* of the 3rd term. Available: https://orka.sejm.gov.pl/proc3.nsf/0/B665ABD455962574C1257456004D731C?OpenDocument [last viewed 10.05.2022].

[15] The course of the legislative process of the *Sejm* of the 3rd term. Available: https://orka.sejm.gov.pl/proc3.nsf/0/98268B53989D0DC1C1257456004D5077?OpenDocument [last viewed 10.05.2022].

1) supplementing the existing provision by guaranteeing the protection of life from the moment of conception (print No. 993[16]); the method of appointment of persons holding the judiciary, included a proposal to introduce the institution of a judge appointed to hold office for a fixed period (from 2 to 4 years), which would enable cases to be heard by bodies meeting constitutional standards of independence and independence without dependence on executive bodies (print No. 1605[17]);
2) restriction of the right of election to the *Sejm* and Senate or expiry of the mandate of a deputy or senator due to a final conviction for an intentional offence prosecuted by public indictment or a fiscal offence (print No. 1834[18]);
3) limiting the formal immunity of MPs and senators by, inter alia, dropping the requirement that the *Sejm* or Senate consent to the prosecution of an MP or senator for criminal offences and imprisonment of an MP convicted by a final court judgement and to the use of preventive measures in the form of pre-trial detention on the same terms as for other citizens (print No 1835[19]);
4) amending the rules on parliamentary immunity (print No 1883[20]).

In the 6th *Sejm* (2007–2011), in addition to the effective amendment concerning the change in the premises for the right to stand for election to the *Sejm* and Senate of the Republic of Poland, a number of bills were debated:

(1) The abolition of provisions relating to the formal immunity to which MPs and senators are entitled (print No. 433[21]);
(2) Eliminating the influence of the professional self-government (corporations) on the access to a given profession of persons wishing to practice it, i.e., potential competitors of the existing members of the corporation; clearing the communist past; constitutional admissibility of coercive medical influence (in particular pharmacological) on persons who, due to a mental disorder, pose a threat to life, health and physical integrity of another person (print No 1518[22]);
(3) Amendment of the provisions concerning the composition of the *Sejm* and Senate, the rules for elections to the *Sejm*, the scope of parliamentary formal immunity, the rules for the consideration of a presidential veto by the *Sejm*, the rules for adjudication by the Constitutional Tribunal in cases concerning the compliance of laws with the Constitution at the request of the President of the Republic of Poland, the rules for the performance of duties by the President of the Republic of Poland, the rules for proposing candidates for the office of President of the Republic of Poland, the principles of temporary performance of

[16] The course of the legislative process of the *Sejm* of the 5th term. Available: https://orka.sejm.gov.pl/proc5.nsf/opisy/993.htm, [last viewed 10.05.2022], rejected at the 3rd reading.

[17] The course of the legislative process of the *Sejm* of the 5th term https://orka.sejm.gov.pl/proc5.nsf/opisy/1605.htm, case not closed, referred for further work, but due to end of term no further work undertaken. Available: [last viewed 10.05.2022].

[18] The course of the legislative process of the *Sejm* of the 5th term. Available: https://orka.sejm.gov.pl/proc5.nsf/opisy/1834.htm [last viewed 10.05.2022].

[19] The course of the legislative process of the *Sejm* of the 5th term. Available: https://orka.sejm.gov.pl/proc5.nsf/opisy/1835.htm [last viewed 10.05.2022].

[20] The course of the legislative process of the *Sejm* of the 5th term. Available: https://orka.sejm.gov.pl/proc5.nsf/opisy/1883.htm [last viewed 10.05.2022].

[21] The course of the legislative process of the *Sejm* of the 6th term. Available: https://orka.sejm.gov.pl/proc6.nsf/opisy/433.htm, draft withdrawn by applicants.

[22] The course of the legislative process of the *Sejm* of the 6th term. Available: https://orka.sejm.gov.pl/proc6.nsf/0/C26D7F0E2F5D0A2EC12577D1004F13AE?OpenDocument, draft rejected at first reading [last viewed 10.05.2022].

the functions of President of the Republic of Poland by the Marshal of the *Sejm*, the principles of ratification of international agreements, the principles of cooperation of authorities in the field of foreign policy, the principles of appointment by the President of the Republic of Poland of the Chief of General Staff of the Polish Armed Forces and commanders of the types of the Armed Forces, the scope of the President's prerogatives, the principles of appointment of judges – the introduction of provisions concerning the public prosecutor's office; – the repeal of provisions concerning the National Security Council, the National Broadcasting Council, the individual political responsibility of members of the Council of Ministers and the procedure for expressing a vote of no confidence in a minister (print No 2989[23]);

(4) The provisions of the Constitution of the Republic of Poland concerning the competence of the Constitutional Tribunal as regards the subject matter of the adjudicated cases, the provisions concerning the publication of the decisions of the Constitutional Tribunal and the effects of certain decisions of the Constitutional Tribunal (print No 3399[24]);

(5) Introducing solutions to facilitate the effective implementation of EU law by fully implementing the commitments undertaken in the Accession Treaty as regards participation in Economic and Monetary Union and adoption of the euro; – introducing a procedure for adopting Poland's position in the new EU procedures and standardising the procedure for taking a decision on withdrawal from the EU (Rec. 3598[25]);

(6) Inserting a new Chapter Xa entitled: Transfer of competences to an international organisation or international body. The provisions of the proposed chapter define the conditions and procedure for transferring the competence of state authorities in certain matters to an international organisation or international body, and the procedure for taking a decision to withdraw from such an organisation or to refrain from transferring competence (Rec. 3687[26]).

In the *Sejm* of the 7th term (2011–2015), three draft amendments to the Constitution were considered. None, however, was passed on for further work in the Senate or for the President's signature[27]. In the *Sejm* of the 8th term (2015–2019) only one, a bill to amend the Constitution, was brought forward. A group of MPs proposed to introduce new provisions on the Constitutional Court: The Supreme Court was to rule on the constitutionality of the law on the Constitutional Court; judges of

[23] The course of the legislative process of the *Sejm* of the 6th term. Available: https://orka.sejm.gov.pl/proc6.nsf/0/AE6D4427F5C96244C12577D1004F4092?OpenDocument [last viewed 10.05.2022].

[24] The course of the legislative process of the *Sejm* of the 6th term. Available: https://orka.sejm.gov.pl/proc6.nsf/0/E7DE10E42675758EC12577D1004F4C84?OpenDocument [last viewed 10.05.2022].

[25] The course of the legislative process of the *Sejm* of the 6th term. Available: https://orka.sejm.gov.pl/proc6.nsf/0/05F1EB6178E851A1C12577E40048933D?OpenDocument [last viewed 10.05.2022].

[26] The course of the legislative process of the *Sejm* of the 6th term. Available: https://orka.sejm.gov.pl/proc6.nsf/0/469996B32D66CFC9C12577F90047ABD6?OpenDocument [last viewed 10.05.2022].

[27] List of bills amending the Constitution. Available: https://www.sejm.gov.pl/sejm7.nsf/proces.xsp?view=S [last viewed 10.05.2022]. One of the bills concerned the strengthening of the status of the civic legislative initiative, the introduction of an obligatory national referendum when the initiative is submitted by a group of at least 1000000 citizens, granting citizens the right to initiate amendments to the Constitution (print No. 1646). The second of the drafts concerned guaranteeing State Treasury-owned forests protection from the ownership transformation process, including commercialisation and privatisation (print No. 2374). The third one concerned the possibility to change the electoral system in elections to the Sejm of the Republic of Poland; the draft provided for the deletion of the requirement of proportionality of those elections (print No. 3424).

the Constitutional Court were to be elected by a 2/3 majority in the presence of at least half of the statutory number of deputies (qualified majority). It was proposed that the composition of the Constitutional Tribunal be expanded to 18 judges; the President and Vice-President of the Constitutional Tribunal were to be appointed by the President from among three candidates presented by the General Assembly of the Tribunal. The draft did not find acceptance even in the *Sejm*. Work on the draft ended at the first reading[28]. In the current term of office, the *Sejm* received two bills on the amendment of the Constitution. The parliamentary bill on the amendment of the Constitution of the Republic of Poland concerns the proposal of a new form of the term of office of the President of the Republic of Poland. The President would be elected for one seven-year term (print No. 337[29]). The draft bill presented by the President of the Republic of Poland amending the Constitution of the Republic of Poland concerns the introduction of a ban on the adoption of a child by a person cohabiting with a person of the same sex (print No. 456[30]).

Summary

The Constitution is the fundamental Act, which means that it has the highest legal power. It contains the provisions concerning the character of the state, its bodies, fundament of the political, economic and social system, and it defines the rights and duties of the citizens. The Constitution, by means of the guaranties contained in it and the possibility of direct application, plays the stabilising function in relation to the reality of the state[31]. The fundamental Act first of all is a rigid act, both in the procedure for its enactment, and as regards introduction of amendments thereto. It should be highlighted that the legislative stability that is guaranteed by the Constitution manifests in a very small number of amendments to the fundamental Act since its coming into force.

Sources

Bibliography

1. *Jaraszek, A*. Posłem nie zostanie osoba skazana [A convicted person will not become an MP]. Dziennik Gazeta Prawna 2009-10-21. Available: https://prawo.gazetaprawna.pl/artykuly/363204, poslem-nie-zostanie-osoba-skazana.html [last viewed 10.05.2022].
2. *Ossowska-Salamonowicz, D., Przybyszewska-Szter*, *B.* Harmonizacja prawa krajowego państw członkowskich UE a konieczność zmiany Konstytucji RP z 2 kwietnia 1997 r. [Harmonization of the national law of the EU Member States and the necessity of amending the Constitution of the Republic of Poland of 2 April 1997]. Toruń, Polish-Italian Studies, Vol. XVII, 2021. Available: https://doi.org/10.12775/TSP-W.2021.016 [last viewed 10.05.2022].
3. *Prokop, K.* Polish constitutional law. Białystok: Temida2, 2008.

[28] The course of the legislative process of the *Sejm* of the 8th term. Available: https://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?id=53605CF3F18511A7C1257F2C002D97B7 [last viewed 10.05.2022].

[29] The course of the legislative process of the *Sejm* of the 9th term. Available: https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=DED36818BF3F27E0C125854B0031EFCD [last viewed 10.05.2022].

[30] Draft amendment to the Constitution. Available: https://orka.sejm.gov.pl/Druki9ka.nsf/0/76090A38C0788C87C125859F00306DE0/%24File/456.pdf [last viewed 10.05.2022].

[31] *Sobczyk P.,* Konstytucja Rzeczypospolitej Polskiej jako akt normatywny, którego przepisy stosuje się bezpośrednio [The Constitution of the Republic of Poland as a normative act whose provisions are directly applicable]. In: Akty normatywne i administracyjne [Normative and administrative acts]. *Karpiuk M*.(ed.). Warszawa: Difin, 2009, p. 43.

4. *Skrzydło, W.* Zmiana Konstytucji czy zmiany w Konstytucji Rzeczypospolitej Polskiej z 1997 roku? [Amendment of the Constitution or amendments to the 1997 Constitution of the Republic of Poland?]. Teka Komisji Prawniczej, Vol. I, 2008.
5. *Sobczyk, P.* Konstytucja Rzeczypospolitej Polskiej jako akt normatywny, którego przepisy stosuje się bezpośrednio [The Constitution of the Republic of Poland as a normative act whose provisions are directly applicable]. In: Akty normatywne i administracyjne [Normative and administrative acts]. *Karpiuk, M.*(ed.). Warszawa: Difin, 2009.

Normative acts

1. Konstytucja Rzeczypospolitej Polskiej [The Constitution of the Republic of Poland] (02.04.1997). Available: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [last viewed 10.05.2022].
2. Ordynacja wyborcza do rad gmin, rad powiatów i sejmików województw [Election Ordinance for Commune Councils, County Councils and Province Assemblies] (16.07.1998). Available: https://pkw.gov.pl/uploaded_files/1456318776_Ordynacja_wyborcza_do_rad_gmin_rad_powiatow_sejmikow_wojewodztw_-_wersja_aktualna.pdf [last viewed 10.05.2022].
3. Ustawa – Przepisy wprowadzające ustawę – Kodeks wyborczy [Act – Introductory provisions to the Act – Election Code] (05.01.2011). Available: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20110210113/T/D20110113L.pdf [last viewed 10.05.2022].

Case law

1. Judgement of the Constitutional Tribunal of the Republic of Poland of 27 April 2005 in case P 1/05, Available: https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&dokument=601&sprawa=3772 [last viewed 10.05.2022].

Other sources

1. Statistics on the use of the European Arrest Warrant. Available: https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie [last viewed 10.05.2022].
2. Transcript of the 15th sitting of the 6th *Sejm* of 8 May 2008. Available: https://orka2.sejm.gov.pl/StenoInter6.nsf/0/1AE638233535823BC12574440002956D/$file/15_b_ksiazka.pdf [last viewed 10.05.2022].
3. *Jarosiński M.* Ignacy Daszyński (1866–1936). Available: https://dzieje.pl/postacie/ignacy-daszynski [last viewed 10.05.2022]. Transcript of the session of the Sejm of. 8. 05. 2008, pp. 165-167, Available: https://orka2.sejm.gov.pl/StenoInter6.nsf/0/1AE638233535823BC12574440002956D/$file/15_b_ksiazka.pdf . [last viewed 10.05.2022].
4. Transcript of the session of the *Sejm* of 07.05.2009, pp. 209–212. Available: 41_b_ksiazka.indb (sejm.gov.pl) , [last viewed 10.05.2022].
5. The Constitution of the Republic of Poland of 2 April 1997. Available: https://www.sejm.gov.pl/prawo/konst/polski/kon1.htm [last viewed 10.05.2022].
6. The course of the legislative process of the *Sejm* of the 3rd term. Available: https://orka.sejm.gov.pl/proc3.nsf/0/B665ABD455962574C1257456004D731C?OpenDocument [last viewed 10.05.2022].
7. The course of the legislative process of the *Sejm* of the 3rd term. Available: https://orka.sejm.gov.pl/proc3.nsf/0/98268B53989D0DC1C1257456004D5077?OpenDocument [last viewed 10.05.2022].
8. Parliamentary bill to amend the Constitution of the Republic of Poland, Print No. 993. Available: https://orka.sejm.gov.pl/proc5.nsf/opisy/993.htm [last viewed 10.05.2022].
9. Bill presented by the President of the Republic of Poland amending the Constitution of the Republic of Poland, Print No. 1605. Available: https://orka.sejm.gov.pl/proc5.nsf/opisy/1605.htm [last viewed 10.05.2022].
10. Parliamentary bill to amend the Constitution of the Republic of Poland, Print No. 1834. Available: https://orka.sejm.gov.pl/proc5.nsf/opisy/1834.htm [last viewed 10.05.2022].
11. Parliamentary bill to amend the Constitution of the Republic of Poland, Print No. 1835. Available: https://orka.sejm.gov.pl/proc5.nsf/opisy/1835.htm [last viewed 10.05.2022].
12. Parliamentary bill to amend the Constitution of the Republic of Poland of 2 April 1997, Print No. 1883. Available: https://orka.sejm.gov.pl/proc5.nsf/opisy/1883.htm [last viewed 10.05.2022].
13. Parliamentary bill to amend the Constitution of the Republic of Poland of 2 April 1997, Print No. 433. Available: https://orka.sejm.gov.pl/proc6.nsf/opisy/433.htm

14. A parliamentary draft act on the amendment of the Constitution of the Republic of Poland, Print No. 1518. Available: https://orka.sejm.gov.pl/proc6.nsf/0/C26D7F0E2F5D0A2EC12577D1004F13AE?OpenDocument [last viewed 10.05.2022].
15. Parliamentary bill to amend the Constitution of the Republic of Poland, Print No. 2989. Available: https://orka.sejm.gov.pl/proc6.nsf/0/AE6D4427F5C96244C12577D1004F4092?OpenDocument [last viewed 10.05.2022].
16. Parliamentary bill to amend the Constitution of the Republic of Poland, Print No. 3399. Available: https://orka.sejm.gov.pl/proc6.nsf/0/E7DE10E42675758EC12577D1004F4C84?OpenDocument [last viewed 10.05.2022].
17. Bill presented by the President of the Republic of Poland amending the Constitution of the Republic of Poland, Print No. 3598. Available: https://orka.sejm.gov.pl/proc6.nsf/0/05F1EB6178E851A1C12577E40048933D?OpenDocument [last viewed 10.05.2022].
18. Parliamentary bill to amend the Constitution of the Republic of Poland, Print No. 3687. Available: https://orka.sejm.gov.pl/proc6.nsf/0/469996B32D66CFC9C12577F90047ABD6?OpenDocument [last viewed 10.05.2022].
19. List of bills amending the Constitution. Available: https://www.sejm.gov.pl/sejm7.nsf/proces.xsp?view=S [last viewed 10.05.2022]
20. Parliamentary bill to amend the Constitution of the Republic of Poland, Print No. 166. Available: https://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?id=53605CF3F18511A7C1257F2C002D97B7 [last viewed 10.05.2022].
21. Parliamentary bill to amend the Constitution of the Republic of Poland, Print No. 337. Available: https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=DED36818BF3F27E0C125854B0031EFCD [last viewed 10.05.2022].
22. Bill to amend the Constitution of the Republic of Poland, Print No. 456. Available: https://orka.sejm.gov.pl/Druki9ka.nsf/0/76090A38C0788C87C125859F00306DE0/%24File/456.pdf [last viewed 10.05.2022].

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Polish Constitutional Tribunal's Judgement Regarding Supremacy of the Polish Constitution Over EU Law: The Next-Level Debate on the "Last Word"

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2021 judgement K 3/21 of Poland's Constitutional Tribunal (*Trybunał Konstytucyjny*, hereinafter – the Tribunal) concerns compatibility of some norms of Treaty on European Union (TEU) with Polish constitution.

According to the Tribunal, contested norms of TEU are incompatible with relevant norms of the Polish constitution. It also suggested that Polish government institutions follow national constitutional rules in case of any conflicts.

In essence, the Tribunal ruled that Polish constitution shall supersede TEU in specific cases brought before the constitutional court.

This article aims to explore the contents of Tribunal's judgement, analyse its legal rationale, reflect upon relationship between EU law and national constitutional laws from a broader legal and political perspective, and draw conclusions regarding the next steps.

Keywords: European Union law, Constitution, Constitutional Court, European Court of Justice.

Contents

Introduction

Prime Minister of Poland requested the Tribunal to assess the conformity of some TEU norms and their interpretation with relevant provisions of the Polish constitution. The Tribunal's opinion on the request was that some TEU provisions were incompatible with relevant articles of the Polish constitution. The Tribunal's reasoning was based on two core assumptions, namely, that constitution of Poland has the supreme power over other laws, that it stands above any EU law or principal treaty in the legal hierarchy of Poland. And secondly, Tribunal's assumptions regarding Poland's European Union membership and legal implications. The issue, which now caused by the Tribunal, heated debate across the Union, but it is nothing new. The only difference is that the debate has now reached a new level. This article reflects upon relationship between EU law and national constitutional laws from a broader legal and political perspective.

1. Content of the Tribunal's judgement

1.1. Prime Minister's request to the Tribunal

Prime Minister of Poland requested the Tribunal to evaluate conformity of the following TEU norms and their interpretation with relevant provisions of the Polish constitution:

1) Article 1, first and second paragraphs[1], in conjunction with Article 4(3) of the Treaty on European Union – construed in the way that it enables and/or compels a law-applying authority (in Poland) to refrain from applying the Polish constitution or requires the said authority to apply provisions of law in the way that is inconsistent with the constitution – to Article 2, [2] Article 7,[3] Article 8(1)[4] in conjunction with Article 8(2), Article 90(1) and Article 91(2), as well as Article 178(1) of the Constitution of the Republic of Poland;
2) Article 19(1), second subparagraph[5], in conjunction with Article 4(3) of the TEU – construed in the way that, for the purpose of ensuring the effective legal protection, a law-applying authority is competent and/or obliged to apply provisions in the way that is inconsistent with the Constitution, including a provision which has, on the basis of a ruling by the Constitutional Tribunal, ceased to have effect due to being inconsistent with the Constitution – to Article 2, Article 7, Article 8(1) in conjunction with Article 8(2) and Article 91(2), Article 90(1), Article 178(1) as well as Article 190(1) of the Constitution of the Republic of Poland;

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[1] TEU Article 1: "By this Treaty, the high Contracting Parties establish among themselves a European Union, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common. This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen".

[2] Article 2 of the Polish constitution: "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice." Note. Since Polish constitution has not been officially translated into Latvian, all the references are based on its official English translation.

[3] Article 7 of the Polish constitution: "The organs of public authority shall function on the basis of, and within the limits of, the law."

[4] Article 8.1 of the Polish constitution: "The Constitution shall be the supreme law of the Republic of Poland."

[5] TEU Article 19(1): "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

3) Article 19(1), second subparagraph, in conjunction with Article 2 of the TEU – construed in the way that it authorises a court to review the independence of judges appointed by the President of the Republic of Poland as well as to review the National Council of the Judiciary's resolution to refer a request to the President of the Republic to appoint a judge – to Article 8(1) in conjunction with Article 8(2), Article 90(1) and Article 91(2), Article 144(3)(17) as well Article 186(1) of the Constitution of the Republic of Poland.[6]

1.2. Opinion and reasoning of the Tribunal

The Tribunal's opinion[7] on all three requests was that these TEU provisions were incompatible with relevant articles of the Polish constitution. The main reasoning for Tribunal's conclusions was, as follows:

1) European Union is an association of equal and sovereign states. According to Tribunal, paragraphs 1 and 2 of the TEU Article 1, i.e., provisions stating that "this Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe" based on EU law and case law of the Court of Justice of the European Union (CJEU), expand the mandate of EU institutions to "act outside the scope of the competences conferred upon them by the Republic of Poland in the Treaties".

This is a blatant contradiction with aforementioned constitutional norms, which provide that Poland is a democratic country upholding the rule of law, and hierarchy of sources of law established by it gives constitution the highest power. This hierarchy also includes international treaties, such as the principal treaties[8], which are placed after the constitution.

The Tribunal recognises CJEU's exclusive right to interpret the EU law and underlines that it, in turn, holds similar exclusive power – the right to last word – over Polish constitutional norms, including assessment of conformity of principal treaties and their provisions, i.e., the norms described in those treaties (in their text) and interpreted by CJEU through its case law, with the Polish constitution.

Tribunal insists that European Union institutions, such as Court of Justice of the European Union, should act only in scope of competences conferred to them according to the principal treaties of the EU. Moreover, these conferred competences, *inter alia*, do not empower EU institutions to judge whether member state's judicial systems are appropriate and how they should be run. EU is not entitled to assume any additional functions alongside those conferred upon it by the member states.

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[6] Press release of the Poland's Constitutional Tribunal which explains the legal reasoning of the judgement. Available: https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11664-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej [last viewed 29.05.2022].

[7] See: https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej [last viewed 29.05.2022]. Press release of the Poland's Constitutional Tribunal, which explains the legal reasoning of the judgement: https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11664-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej [last viewed 29.05.2022]. Poland's Constitutional Tribunal on the status of EU law: The Polish government got all the answers it needed from a court it controls: https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/ [last viewed 29.05.2022]. Complete English translation of the judgement was not available at the time of writing.

[8] Principal treaties of the European Union, which lay down its constitutional principles (so-called primary laws) are Treaty on the European Union (TEU) and Treaty on the Functioning of the European Union (TFEU). Both treaties have been amended repeatedly since they originally came into force, most recently – by the Treaty of Lisbon in 2009.

2) Paragraphs 1 and 2 of Article 19(1) of the TEU, insofar as it concerns Polish courts' right to digress from the constitution of Poland or apply Polish laws revoked by the Tribunal, are in contradiction with the above constitutional principles, which state that Poland is a democratic country upholding the rule of law and its authorities should operate within confines of the law, with constitution being the supreme law of Poland.
3) Paragraphs 1 and 2 of Article 19(1) and Article 19(2) of the TEU, insofar as they concern Polish courts' right to review the legality of the procedure for appointing a judge, are in contradiction with constitutional principles, which state that Poland is a democratic country upholding the rule of law, with constitution being the supreme law of Poland.

2. Legal rationale behind Tribunal's reasoning

The Tribunal's reasoning is based on two core assumptions. First: as Article 8 says, constitution of Poland has the supreme power over other laws. It stands above any EU law or principal treaty in the legal hierarchy of Poland. Second: Tribunal's assumptions regarding Poland's European Union membership and legal implications.

This is a purely constitutional interpretation of what Poland represents as a state. It ignores the fact that European Union is a *quasi-state*, a *sui generis* organisation, which maintains its own autonomous legal order for member states.[9]

First, the Tribunal establishes that Poland joined the EU in 2004 and thus agreed to confer part of its (universal) national competences. All of these competences are explicitly listed in Article 2–6 of the TFEU. The Tribunal does not contest the primacy of the EU law in these areas.

But then its reasoning starts to contradict the interpretation of CJEU. The Tribunal claims that Article 1 of the TEU, which says that "this Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe", reinforced by *active* interpretations of the CJEU, leads to *creeping* expansion of EU competences at the expense of member states. Tribunal believes that CJEU is constantly *discovering* new EU competences in abstract legal constructs and values that are referred to in Article of TEU.

That is what the Tribunal thinks is happening. It believes that CJEU is using a very "creative" interpretation of Article 19(1) of TEU to seize these competences, although member state judicial systems, their governance structures and appointment of judges (their selection) are not in scope of EU competences according to the Article 2–6 of the TFEU. The Tribunal considers that CJEU has acted *ultra vires*.

CJEU, on the other hand, believes that TEU values and principles, including values and principles developed by CJEU over time through its case-law, give European Court of Justice the right to interpret competences mentioned in Article 2–6 of TFEU according to these principles and values, and thus ensure that EU's legal system is efficient, i.e., not hindered by 27 different national laws and regulations of member states. Similarly, principles of efficiency (*effet utile*) and EU law primacy[10] are not explicitly defined either in principal treaties or in CJEU case law.

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[9] Comp.: *Rosas, A., Armati, L.* EU Constitutional Law. An Introduction. 2nd ed. Hart Publishing, Oxford 2012, p. 15.

[10] Judgment of 15 July 1964 of the European Court of Justice in case 6/64 Costa/Enel (ECLI:EU:C:1964:66). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61964CJ0006 [last viewed 29.05.2022].

The main source of dispute is *which* institution holds the right to establish *whether* CJEU has competence over the area in question.

EU's competences are listed *expressis verbis* in the TFEU, and CJEU has exclusive authority to interpret the EU law, including principal treaties, and CJEU believes that it is entitled to also interpret the competences conferred upon EU by this Treaty – in other words, establish the limits of such competences.

The Tribunal thinks otherwise. It finds it unfair that CJEU has the right to decide where its competence extends. The Tribunal basically doubts the CJEU's ability and will to assess the limits/extent of its competences in an impartial manner.

Confident that *widening* of EU competences will automatically narrow the national competences of member states (Article 4(1) of the TEU), Tribunal refers to its constitutional norms, which stipulate that Poland is a sovereign and democratic country upholding the rule of law, and constitution is its supreme law, and claims that it has the right and duty to check whether CJEU has acted *ultra vires*, i.e., overstepped its competence with regard to Poland.

3. Poland's Constitutional Tribunal judgement in a broader legal and political context of relationship between the European Union and national constitutional laws

The backdrop of the Tribunal's judgement is a dispute about whether Poland is capable of guaranteeing sufficient independence of judges through existing selection procedures, and the legitimacy of the Tribunal itself, which was hand-picked by the government in 2015 after a series of odd interpretations skewing the understanding of the existing laws. European Union declared Polish system for selection of judges incompatible with TEU provisions[11]. Legitimacy of the current composition of the Tribunal has also been challenged by the European Court of Human Rights[12]. On the domestic front, as well, the ruling parties/coalition are feuding with opposition about these legal dilemmas, and there are even conflicts between lawyers.[13]

However, the judgement itself, the judgement about the legitimacy of the Tribunal, does not address the core of the problem. It rejects the very idea of CJEU having any authority over it, instead claiming that any such acts should be construed as *ultra vires*.

In his address to the members of the European Parliament in Strasbourg on 18 October 2021, Polish premier gave unequivocal position of Poland on the EU, claiming that it is not a state itself, it is a union of sovereign states that have delegated some of their competences to it,[14] and "if the institutions established by the Treaties

[11] Judgment of 2 March 2021 of the European Court of Justice in case C-824/18 A.B. and Others (ECLI:EU:C:2021:153), para. 150, 167. Available: https://curia.europa.eu/juris/liste.jsf?language=en&num=C-824/18 [last viewed 29.05.2022], in reaction to which Polish prime minister requested Poland's Constitutional Tribunal to assess the above conditions, which are analysed here through Tribunal's judgement of 7 October 2021.

[12] Judgment of 7 May 2021of the European Court of Human Rights in case Xero Flor w Polsch sp. zo.o. v. Poland, No. 4907/18, para. 174–291. Available: https://www.coe.int/en/web/cdcj/caselaw-4907-18 [last viewed 29.05.2022].

[13] See: *Koncewicz, T. T.* From Constitutional to Political Justice: The Tragic Trajectories of the Polish Constitutional Court. Verfassungsblog, 27 February 2019. Available: https://verfassungsblog.de/from-constitutional-to-political-justice-the-tragic-trajectories-of-the-polish-constitutional-court / [last viewed 29.05.2022].

[14] See: https://www.gov.pl/web/primeminister/statement-by-prime-minister-mateusz-morawiecki-in-the-european-parliament [last viewed 29.05.2022].

exceed their powers – Member States must have the instruments to react". In Poland's opinion, it is their constitution that serves as such instrument, which can be applied in areas that are delegated to the EU and shall supersede the EU law. According to Polish premier, this is one of the national sovereignty safeguards that member states can use against EU institutions, especially the CJEU, to prevent them from seizing more and more new functions.

The issue, which has now caused a heated debate across the Union, is nothing new. The only difference is that the debate has now reached a new level.

From early days of the European Union, up until late 1990s, Court of Justice of the EU (at the time – European Community) served as a kind of a "motor" for the EU[15], filling principal treaties with legal constructs and evolving them, including the principle of precedence. There was very little opposition to that among the member states.

However, theoretical doubts about a rather "one-sided" interpretation of the principle of primacy began to emerge and grow stronger through legal writings and case law of the national supreme and constitutional courts of early 1990s. Different doctrines were developed, of which *ultra vires*[16] was one of the most popular, giving national courts the "last word" under specific circumstances.[17]

German Federal Constitutional Court was one of the frontrunners with its 12 October 1993 judgement known as the Maastricht judgement,[18] announcing that it shall *reserve* the right to check whether CJEU has operated within the scope of competences conferred to it by a member state. A number of other national constitutional courts have made similar claims.

Judgement of the Constitutional Court of Latvia of 7 April 2009 in the case 2008-35-01 (Paragraph 17) also points out that the conferral of competences to EU shall not extend to where it

> *contradicts the fundamental principles of independent, sovereign and democratic republic based on respect for rule of law and basic rights. It shall not interfere with citizens' right to decide issues fundamental for the functioning of a democratic state. Article 2 of* Satversme *(constitution of Latvia) not only stipulates the right to 'last word' but it also provides an obligation to assess the guiding principles of international organisations.* [19]

Judgement of the Constitutional Court of Latvia essentially provides *expressis verbis* that Latvia (Constitutional Court of Latvia) reserves the right to "last word". This

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[15] *Horsley, T.* Reflections on the role of the Court of Justice as the "motor" of European integration: Legal limits to judicial lawmaking. Common Market Law Review, Vol. 50, issue 4, 2013, p. 931.

[16] In addition to *ultra vires*, national identity doctrine was widely accepted. According to Paragraph 2 of the Article 4 of the TEU, European Union must respect the *national identity* of member states. There are, however, contradicting views as to which institution should determine these national identities – CJEU or national constitutional courts. Comp.: *Von Bogdandy, A., Schill, S.* Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty. Common Market Law Review, Vol. 48, 2011, p. 1417. Judgement of Poland's Constitutional Tribunal analysed here is based on *ultra vires* doctrine.

[17] *Craig, P.* The ECJ and ultra vires action: A conceptual analysis. Common Market Law Review. Vol. 48, Issue 2, 2011, p. 395.

[18] Judgement of the German Federal Constitutional Court in cases 2 BvR 2134/92, 2 BvR 2159/92. Available: https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf [last viewed 29.05.2022].

[19] Judgment of the Contitutional Court of the Republic of Latvija of 7 April 2009 in case No. 2008-35-01. Latvijas Vēstnesis, No. 56, 09.04.2009.

concept was later integrated into the concept of the inviolable core of the constitution (*Satversme*)[20], and later, in 2014, included in the Preamble.

Member state national courts, however, have resorted to this theoretical reservation only a few times because triggering it would automatically put them at odds with CJEU. Still, most of the cases in question have resulted in refusal to follow the edict of the European Court of Justice. Some of the better known cases include Czech Constitutional Court judgement of 12 January 2012 in the case Landtová[21], Denmark's Supreme Court judgement of 6 December 2016 in the case Ajos[22], and German Federal Constitutional Court judgement (the most extensive argumentation) of 5 May 2020 in the case PSPP.[23] The last of these examples in particular has come under heavy criticism for ruining the EU's legal system.[24]

However, there is an essential difference between the judgements of the Polish Constitutional Tribunal and German Federal Constitutional Court, which has a lot more consistency and reaches a lot further in many respects:[25]

Firstly, while judgement of the German Federal Constitutional Court generally accepts the supremacy of the EU law over its laws, including constitution, and states that CJEU has acted *ultra vires* only with respect to specific norms of secondary acts, whereas Polish judgement states that primary laws of the EU (Article 1 and Article 19 of TEU) have contradicted the Polish constitution, which makes Poland's position towards infringement of its rights on the part of CJEU more "aggressive" than that of the German Federal Constitutional Court.

Secondly, while Germany's judgement is "closed", i.e., concerns specific case, which has taken place in the past, Polish ruling is "open-ended" and attempts to establish a precedent for the future, i.e., it seeks to prevent EU from applying the provisions of Article 1 and Article 19 of TEU (specific to the particular circumstances) to any other potential future conflict involving Poland. Strictly speaking, this would mean that Poland would from now on be exempted from these TEU provisions and would figuratively exit the EU's common legal space.

Thirdly, while German judgement concerned the actions of only one of EU's institutions, the Court of Justice of the European Union, judgement of the Polish Constitutional Tribunal was intended for all EU institutions whose actions would henceforth be reviewed by it.

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[20] See: Opinion of the Constitutional Law Committee on Latvia's constitutional foundations and the inviolable constitutional core. Riga, 17 September 2012. Latvijas Vēstnesis (Official Journal), 2012, p. 27 and further.

[21] See: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl%20US%205-12.pdf [last viewed 30.05.2022].

[22] See: https://europeanlawblog.eu/wp-content/uploads/2020/05/Judgment-15-2014-Danish-Constitutional-Court-DI-Final-Judgment.pdf [last viewed 30.05.2022].

[23] See https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html [last viewed 30.05.2022].

[24] National Courts Cannot Override CJEU Judgments. A Joint Statement in Defense of the EU Legal Order. Verfassungsblog, 26 May 2020. Available: https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/ [last viewed 30.05.2022].

[25] Comp.: *Dafnis, T.* Some thoughts on Poland's top court ruling. CESI, 15.10.2021. Available: https://www.cesi.org/posts/some-thoughts-on-polands-top-court-ruling/ [last viewed 30.05.2022].

Summary

Judgement of Poland's Constitutional Tribunal has stirred up a harsh reaction of the European Commission[26] and CJEU has awarded Poland the biggest penalty ever applied to any of EU's member states.[27] This has only deepened the general crisis in the Union.[28]

Legal scholars have been debating the principle of "last word" for decades now. There is no reason to believe that this dilemma can be solved simply by applying a legal solution or financial penalties.[29] It is a part of an inherent problem in the structure of the European Union. On the one hand, Union consists of sovereign member states. On the other hand, it is a common legal space with autonomous system of laws, where EU law supersedes national laws. That is how the Union functions.[30]

Judgement in the case Costa/Enel[31] gives a very clear justification for the precedence principle:

> *By contrast with ordinary international treaties, the EEC Treaty* [32] *has created its own legal system, which […] became an integral part of the legal systems of the member states and which their courts are bound to apply. […]. The integration into the laws of each member state of provisions which derive from the community and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system.*

We should, however, not forget that European Union is not a federal state and member states are still sovereign. At least the core principles and provisions (the core) of the national constitutions shall therefore supersede any other general legal provision. That is also a view shared by the Constitutional Court of Latvia as described earlier.

Dialogue – both the political, and legal – is the appropriate way to resolve these differences.

The "first order of business" is to establish whether the Polish Constitutional Tribunal's judgement restricting the national application of key principles of TEU

[26] Brussels vows to punish Poland for challenging supremacy of EU law. Financial Times, 19 October 2021. Available: https://www.ft.com/content/fb7c2484-8923-446c-8328-51ca76175412 [last viewed 30.05.2022].

[27] See: https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-10/cp210192en.pdf [last viewed 30.05.2022].

[28] See: European Parliament resolution of 21 October 2021, which cites Poland's Constitutional tribunal composition legitimacy issues as the reason to challenge its right to interpret the Polish constitution, condemning its judgement. Available: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0439_EN.html [last viewed 30.05.2022].

[29] This is a view shared by German Chancellor Angela Merkel and other politicians who believe that this is an issue that requires a political agreement. See: Merkel says EU must resolve Polish problem in talks, not courts. Reuter, 15 October 2021. Available: https://www.reuters.com/world/europe/eu-needs-resolve-differences-talks-rather-than-courts-merkel-says-2021-10-15/ [last viewed 30.05.2022].

[30] The EU as a community of law. Overview of the role of law in the Union. European Parliament, March 2017. Available: https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599364/EPRS_BRI(2017)599364_EN.pdf [last viewed 29.05.2022].

[31] Judgment of 15 July 1964 of the European Court of Justice in case 6/64 Costa/Enel (ECLI:EU:C:1964:66). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61964CJ0006 [last viewed 29.05.2022].

[32] Principal treaty of the time was Treaty establishing the European Economic Community (EEC Treaty).

is acceptable, as that would allow other member states to pursue the same course of action for their domestic goals, putting an end to EU as the common legal space.

However, it is equally questionable whether CJEU should be given exclusive right to unilaterally decide which national identity dimensions (Article 4(2) of the TEU) it should consider and how far its competence should extend (*ultra vires*). Such uncompromising view is almost incompatible with growing self-awareness and confidence of many national constitutional courts.

The author is confident that constitutional pluralism[33] is the way forward and should lead to the way out of the current deadlock. Everything depends on willingness of both sides to reach for the compromise, the good faith of parties in the name of the European project.[34]

Latvia could play a great role in facilitating this dialogue, both at the political and legal science aspect. As far as legal science dialogue is concerned, it has already started to do just that with the first CJEU and national constitutional court conference held in Riga on 2–3 September 2021. Conference was conceived by the CJEU and Constitutional Court of Latvia. To put the European legal dialogue back on track towards fruitful cooperation, it needs to cover more areas of common legal space.

Meanwhile, politicians must focus on political solutions to this problem. No one wants to see the European Union divided.

Sources

Bibliography

1. *Craig, P.* The ECJ and ultra vires action: A conceptual analysis. Common Market Law Review, Vol. 48, issue 2, 2011, pp. 395–437.
2. *Horsley, T.* Reflections on the role of the Court of Justice as the "motor" of European integration: Legal limits to judicial lawmaking. Common Market Law Review, Vol. 50, issue 4, 2013, pp. 931–964.
3. *Koncewicz, T. T.* From Constitutional to Political Justice: The Tragic Trajectories of the Polish Constitutional Court. Verfassungsblog, 27 February 2019. Available: https://verfassungsblog.de/from-constitutional-to-political-justice-the-tragic-trajectories-of-the-polish-constitutional-court / [last viewed 29.05.2022].
4. *Rosas, A., Armati, L.* EU Constitutional Law. An Introduction. 2nd ed. Hart Publishing, Oxford, 2012.
5. *Von Bogdandy, A., Schill, S.* Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty. Common Market Law Review, Vol. 48, issue 5, 2011, pp. 1417–1453.
6. *Bobić, A.* Constitutional Pluralism Is Not Dead: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice. 6 March 2019. Available: https://www.cambridge.org/core/journals/german-law-journal/article/constitutional-pluralism-is-not-dead-an-analysis-of-interactions-between-constitutional-courts-of-member-states-and-the-european-court-of-justice/C4E3DAF6E78AA76AEF88057CE970E2E6 [last viewed 30.05.2022].
7. *Dafnis, T.* Some thoughts on Poland's top court ruling. CESI, 15.10.2021. Available: https://www.cesi.org/posts/some-thoughts-on-polands-top-court-ruling/ [last viewed 30.05.2022].

[33] *Bobić, A.* Constitutional Pluralism Is Not Dead: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice. 6 March 2019. See: https://www.cambridge.org/core/journals/german-law-journal/article/constitutional-pluralism-is-not-dead-an-analysis-of-interactions-between-constitutional-courts-of-member-states-and-the-european-court-of-justice/C4E3DAF6E78AA76AEF88057CE970E2E6 [last viewed 30.05.2022].

[34] See: Speech by the President of the Constitutional Court Ineta Ziemele at the conference "Constitutional EUdentity 2019 unity in diversity – common and particular values". 8 March 2019. Available: https://www.satv.tiesa.gov.lv/en/runas-un-raksti/can-constitutional-courts-delimit-european-identity/ [last viewed 30.05.2022].

Normative acts

1. Consolidated Version of the Treaty on European Union [2008] OJ C115/13.
2. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C202/1 (TFEU).
3. Constitution of the Republic of Poland. Available: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [last viewed 29.05.2022].

Case law

1. Judgment of 7 May 2021of the European Court of Human Rights in case Xero Flor w Polsch sp. zo.o. v. Poland, No. 4907/18. Available: https://www.coe.int/en/web/cdcj/caselaw-4907-18 [last viewed 29.05.2022].
2. Judgment of 2 March 2021 of the European Court of Justice in case C-824/18 A.B. and Others (ECLI:EU:C:2021:153). Available: https://curia.europa.eu/juris/liste.jsf?language=en&num=C-824/18 [last viewed 29.05.2022].
3. Judgment of 15 July 1964 of the European Court of Justice in case 6/64 Costa/Enel (ECLI:EU:C:1964:66). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61964CJ0006 [last viewed 29.05.2022].
4. Judgment of the Contitutional Court of the Republic of Latvija 0f 7 April 2009 in case No. 2008-35-01. Latvijas Vēstnesis, No. 56, 09.04.2009.
5. Judgement of the German Federal Constitutional Court in cases 2 BvR 2134/92, 2 BvR 2159/92. Available: https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf [last viewed 29.05.2022].
6. Judgment of Czech Republic Constitutional Court Pl. ÚS 5/12 of 31 January 2012. Available: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl%20US%205-12.pdf [last viewed 30.05.2022].
7. Judgment of the Supreme Court by Denmark 6 December 2016 case 15/2014. Available: https://europeanlawblog.eu/wp-content/uploads/2020/05/Judgment-15-2014-Danish-Constitutional-Court-DI-Final-Judgment.pdf [last viewed 30.05.2022].

Other sources

1. European Parliament resolution of 21 October 2021 on the rule of law crisis in Poland and the primacy of EU law. Available: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0439_EN.html [last viewed 30.05.2022].
2. Opinion of the Constitutional Law Committee on Latvia's constitutional foundations and the inviolable constitutional core. Riga, 17 September 2012. Latvijas Vēstnesis (Official Journal), 2012, pp. 27. and further. Available: http://blogi.lu.lv/tzpi/files/2017/03/17092012_Viedoklis_2.pdf [last viewed 29.05.2022].
3. The EU as a community of law. Overview of the role of law in the Union. European Parliament, March 2017. Available: https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599364/EPRS_BRI(2017)599364_EN.pdf [last viewed 29.05.2022].
4. Bussels vows to punish Poland for challenging supremacy of EU law. Financial Times, 19 October 2021. Available: https://www.ft.com/content/fb7c2484-8923-446c-8328-51ca76175412 [last viewed 30.05.2022].
5. Merkel says EU must resolve Polish problem in talks, not courts. Reuter, 15 October 2021. Available: https://www.reuters.com/world/europe/eu-needs-resolve-differences-talks-rather-than-courts-merkel-says-2021-10-15/ [last viewed 30.05.2022].
6. National Courts Cannot Override CJEU Judgments. A Joint Statement in Defense of the EU Legal Order. Verfassungsblog, 26 May 2020. Available: https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/ [last viewed 30.05.2022].
7. Speech by the President of the Constitutional Court Ineta Ziemele at the conference "Constitutional EUdentity 2019 unity in diversity – common and particular values". 8 March 2019. Available: https://www.satv.tiesa.gov.lv/en/runas-un-raksti/can-constitutional-courts-delimit-european-identity/ [last viewed 30.05.2022].
8. Headnotes to the Judgment of the Second Senate of 5 May 2020. Available: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html [last viewed 30.05.2022].

9. Statement by Prime Minister Mateusz Morawiecki in the European Parliament. Available: https://www.gov.pl/web/primeminister/statement-by-prime-minister-mateusz-morawiecki-in-the-european-parliament [last viewed 29.05.2022].
10. Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union. Available: https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej [last viewed 29.05.2022].
11. Constitutional Tribunal on the status of EU law: The Polish government got all the answers it needed from a court it controls. Available: https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/ [last viewed 29.05.2022].
12. Press release of the Poland's Constitutional Tribunal which explains the legal reasoning of the judgement. Available: https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11664-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej [last viewed 29.05.2022].

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Virtual Corporate Seat: The Lithuanian Perspective[1]

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The article focuses on current developments in substantive company law by exploring an innovative concept of the virtual corporate seat which could be introduced as an alternative to the physical corporate seat, in its traditional understating, through the Lithuanian legislative initiative. Following the analysis on how the proposed concept of the virtual corporate seat is aligned with the concept of the real seat of a domestic company under substantive company law, the article argues that the proposed virtual seat of a company incorporated under national law has to be approached under the formalistic understanding of the corporate seat instead. It concludes that the concept of the virtual corporate seat should be essentially based on the concept of the registered office. The article supports the progressive idea on the virtual corporate seat and addresses the major drawbacks of the proposed legislative initiative on virtual corporate seat to improve it.

Keywords: virtual corporate seat, registered office, incorporation theory, real seat theory, domestic business address.

Contents

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Introduction

Article 49 in conjunction with Article 54 of the Treaty on the Functioning of the European Union[2] entitles companies that are products of national law of Member States to exercise the freedom of establishment as long as the criteria listed in Article 54 of the TFEU are fulfilled. While in the absence of harmonization of substantive company law requirements for establishment of a domestic company, each Member State determines its own conditions regulating incorporation of a company under national law and maintenance of its legal status over the course of its functioning and existence.[3]

To improve a notion of the corporate seat that should be registered in the business register once a new company is incorporated under national law and be maintained as long as the company continues to exist, by making it more business-friendly, the Lithuanian lawmakers have proposed an innovative concept of the virtual corporate seat which could be introduced as an alternative to the physical corporate seat through the Lithuanian legislative initiative.[4] The proposed legislative initiative could be potentially attractive for small and medium-size enterprises (hereafter – SMEs) to reduce some administrative and financial costs, and in particular, for SMEs engaging in online business.

The proposed innovation has inspired the author of the article to analyse how this concept fits under the traditional company law framework, making an inquiry on the example of a private limited liability company legal form.[5] For this purpose, the first part of the article outlines the currently prevailing requirements for corporate seat of a domestic company under the Lithuanian substantive company law as well as describes the Lithuanian legislative initiative on virtual corporate seat. The second part of the article proceeds with the analysis on whether the currently applied real seat approach under substantive company law, which requires a domestic company to maintain its real seat in Lithuania, in general, is up-to-date and whether the proposed concept of the virtual corporate seat is aligned with the concept of the real seat of a domestic company. Then the article evaluates the meaning of the concept of the virtual corporate seat of a domestic company under the formalistic understating with the problematic issues that accompany the concept of the formal corporate seat. The article provides conclusions in the Summary section by supporting the progressive idea on the virtual corporate seat and highlighting the major drawbacks of the Lithuanian legislative initiative, as it currently stands.

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[2] Treaty on the Functioning of the European Union (Consolidated version 2016), Treaty on the Functioning of the European Union (Consolidated version 2016). OJ C 202, 07.06.2016 (hereafter – the TFEU).

[3] *Kurcz, B., Paizis, A.* Company Law, Connecting Factors and the Digital Age – A New Outlook. European Company and Financial Law Review, No. 16 (4), 2019, pp. 437–442.

[4] Draft law amending Article 2.49 of the Civil Code of the Republic of Lithuania No. XIIIP-2833 of 2018 with Explanatory Note No. XIIIP-2833. Available: https://e-seimas.lrs.lt [last viewed 20.04.2022]. The legislative initiative was an outcome of the project "Create Lithuania" conducted by Raminta Olbutaitė and Adelė Jaškūnaitė that endorsed the concept of the virtual registered office (see: Strategic action plan on establishing virtual registered office (LT) as of February 2018, etc. Available: http://kurklt.lt/wp-content/uploads/2017/10/Virtualios-buvein%C4%97s-%C4%AFgyvendinimo-alternatyv%C5%B3-planas_su-priedais.pdf [last viewed 12.09.2021].

[5] Legal entities for profit making activities and established under Lithuanian law (including a private limited liability company (*uždaroji akcinė bendrovė*, *UAB*) which is the most popular company form in Lithuania), have to be entered in the Register of Legal Entities.

1. Corporate seat of a domestic company in Lithuania

1.1. The state of play

In Lithuania, a limited liability company established under Lithuanian law has to be entered in the Register of Legal Entities (hereafter – a domestic company[6]). To set up a domestic company, founders have to fulfil certain requirements, including a prerequisite for a domestic company to have the corporate seat situated in Lithuania.[7]

A corporate seat of a domestic company should be situated at the place of a permanent managing organ of the company, and it should be defined as the address of the premises in which the corporate seat is located.[8]

Data on corporate seat are one of the particulars that have to be specified in the company's incorporation document.[9] Incorporation document and company's statutes are executed as separate documents, and it is not required that the statutes specify information about the corporate seat.[10] A subsequent change of the corporate seat does not thus entail amending the company's statutes,[11] even though shareholders' general meeting has an exclusive authority to decide on a change of the corporate seat.[12] Consent of the owner of the premises to register the corporate seat at the premises owned by persons other than founders and a company as well as a consent of the co-owner of the premises has to be delivered when incorporating a company or upon a subsequent change of the corporate seat.[13]

In any case – either during the incorporation process or upon a subsequent change of a corporate seat, information about the corporate seat (address) forms part of the essential data about the company, that have to be compulsory disclosed in

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[6] Para. 1 of Art. 1, para. 1 of Art. 11 of the Law on Stock Companies of the Republic of Lithuania No. VIII-1835 of 2000 (State News, 2000, No. 64-1914, with further amendments and supplements; hereafter – the LSC); Art. 2.59, para. 1 of Art. 2.62, para. 1 of Art. 2.63 of the Civil Code of the Republic of Lithuania No. VIII-1864 of 2000 (State News, 2000, No. 74-2262, with further amendments and supplements; hereafter – the CC).

[7] Para. 7 of Art. 2 of the LSC. The article analysis the concept of the virtual corporate seat under Lithuanian law as of 1 April 2022.

[8] Para. 1 of Art. 2.49 of the CC. The Supreme Court of Lithuania ruled that a business place of the company is presumed to be at the location of its corporate seat, simultaneously emphasizing that the law does not oblige the company to carry out business at the place of its corporate seat (e.g., the rulings of the Supreme Court of Lithuania in civil cases: 13 February 2012 No. 3K-3-24/2012, 25 November 2008, No. 3K-3-558/2008). A similar view was earlier shared by the Lithuanian scholars (see: *Bartkus*, *G.* In: *Mikelėnas, V., Bartkus, G., Mizaras V., Keserauskas, Š.* Lietuvos Respublikos civilinio kodekso komentaras [Commentary on the Civil Code of the Republic of Lithuania]. Antroji knyga. Asmenys. Pirmasis leidimas. Vilnius: Justitia, 2002, pp. 125–126). However, Article 2.49 of the CC does not presume that business should take place at the location of the corporate seat. The requirements concerning a location of the principal place of business and the permanent managing organ of a company are different, the legal underpinning of such a presumption is not sufficiently clear.

[9] Item 2 of para. 2 of Art. 7 of the LSC.

[10] Para. 1 of Art. 2.47 of the CC; para. 2 of Art. 4 of the LSC.

[11] Pursuant to Explanatory Note No. XIP-908 of 2009. Available: https://e-seimas.lrs.lt [last viewed 14.05.2021]. Before the change in the law, data about the corporate seat have had to be compulsory stated in the company's articles of association. By amending the law, lawmakers attempted to reduce administrative burden and related costs since a change of the corporate seat was often the case in practice.

[12] Item 2 of para. 1 of Art. 20 of the LSC.

[13] Resolution of the Government of the Republic of Lithuania No. 1407 concerning approval of the Regulations of the Register of Legal Entities of 2003 (State News, 2003, No. 107-4810, with further amendments and supplements), para. 61, 148.

the Register of Legal Entities.[14] Address of the premises (municipality, city, street, exact number of the premises) and the unique number of the premises issued by another public register – the Register of Real Estate have to be submitted to the Register of Legal Entities.[15] It follows that the corporate seat is linked to the physical address. In addition, a domestic company has an obligation to disclose its corporate seat in the correspondence with third parties (both written and those signed with electronic signature and transmitted by electronic means) and on the company website (in cases when the company has it).[16]

If the permanent managing organ of the company is situated at the place other than its registered office, third parties may rely on the actual place where the permanent managing organ of a company is located; although, a company may indicate another address for correspondence.[17]

A special role of the registered office for enabling third parties to contact with the legal entity as well as ensuring predictability and legal certainty for participants in legal relations, including those with the creditors, was highlighted by the Supreme Court of Lithuania. The Court ruled that a legal entity should both disclose particulars to the Register of Legal Entities and ensure that procedural documents and other correspondence can be actually served at the registered office of a legal entity.[18] From a procedural perspective, judicial documents in civil proceedings have to be served at the registered office of a company, unless the company indicates another address for service of procedural documents or when service is effected by electronic means.[19] To ensure a fair hearing in civil proceedings, a company as a party to the proceedings may incur adverse consequences of not being informed and heard in the proceedings if the company cannot demonstrate necessary diligence in complying with the disclosure requirements about the corporate seat, and the court treats such conduct of the company as a waiver of its rights.[20]

Given that the mechanism of a public disclosure of information about the corporate seat has to enable third parties contacting the Lithuanian company, the Constitutional Court has emphasized that there should not be a situation when a legal entity maintains no corporate seat and data about the corporate seat are not entered in the Register of Legal Entities.[21] In its jurisprudence, the Supreme Court of Lithuania has upheld that a legal person cannot function without maintaining a corporate seat (registered office) with its data not being compulsorily disclosed in the Register of Legal Entities.[22]

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[14] Item 4 of para. 1 of Art. 2.66 of the CC; the ruling of the Supreme Court of Lithuania of 22 May 2019 in civil case No. e3K-3-80-403/2019, para. 19.

[15] Regulations of the Register of Legal Entities No. 1407, para. 18.4; Application form JAR-1: Request to register a legal entity in the Register approved by the decision of the General Manager of the State Enterprise Centre of Registers No.VE-293 (1.3 E) of 2020 (TAR, 2020, No. 8922, with further amendments and supplements).

[16] Item 3 of para. 1 of Art. 2.44 of the CC; para. 6 of Art. 2 of the LSC.

[17] Para. 2 & 3 of Art. 2.49 of the CC.

[18] The rulings of the Supreme Court of Lithuania in civil cases: 22 May 2019 No. e3K-3-80-403/2019, para. 21; 3 January 2018 No. 3K-3-14-1075/2018, para. 24.

[19] Para. 2 of Art. 122 of Code of Civil Procedure of the Republic of Lithuania No. IX-743 of 2002 (State News, 2002, No. 36-1340, with further amendments and supplements).

[20] The rulings of the Supreme Court of Lithuania in civil cases: 22 May 2019 No. e3K-3-80-403/2019, para. 21; 3 January 2018 No. 3K-3-14-1075/2018, para. 24.

[21] The ruling of the Constitutional Court of the Republic of Lithuania No. KT10-N6/2018 of 4 May 2018, case No. 6/2017, para. 6.5, 11.5, 16.1.

[22] Ruling of the Supreme Court of Lithuania in civil case No. 3K-3-14-1075/2018 of 3 January 2018, para. 23.

To sum up, the Lithuanian substantive company law follows the real seat approach by defining the concept of a corporate seat as a place at which the permanent managing organ of a domestic company is situated, and it also implies that a place of the real seat of the company and a place of its registered office (physical address) both have to coincide and should properly disclosed at the business register.

1.2. Legislative initiative on virtual corporate seat

In 2018, the Lithuanian Government together with the Ministry of the Economy and Innovation submitted the legislative proposal to introduce a virtual seat for a legal entity.[23] Even though at that time the legislative initiative proved to be unsuccessful, the Lithuanian Parliament is currently considering it revisiting.[24]

The proposed legislative initiative in Lithuania entitles founders (shareholders) of a legal entity to choose between the traditional (physical) and innovative (virtual) corporate seat. Definition of the physical corporate seat intends to remain the same as under the current regime, i.e. the registered office of the company incorporated under Lithuanian law is identified by the address of the premises in Lithuania where the permanent managing organ of the company is situated.

While the virtual corporate seat is characterised by the following two cumulative attributes. These are: the municipality in Lithuania and the digital address of a legal entity (hereafter – address of eDelivery box) in the Lithuanian state-owned information system that provides electronic delivery services – the National information system for delivery of electronic messages and electronic documents to individuals and legal entities, using the post network (hereafter – the eDelivery system). It is also provided that founders (shareholders) may opt for the virtual corporate seat only if other laws governing legal entities, EU law or international treaties do not require maintaining the physical corporate seat of a legal entity.

Therefore, the proposed new law intends introducing the incorporation approach in relation to the virtual corporate seat of a company established under Lithuanian law, and, at the same time, maintaining the real seat approach in relation to the physical corporate seat of a domestic company.

2. Real seat approach in the context of the proposed legislative initiative

Given that the legislative initiative embodies the twofold approach in addressing a "corporate citizenship" of a company established under Lithuanian law, the following questions arise: firstly, whether for the purpose of substantive company law a requirement for a domestic company to have a real seat situated in Lithuania is up-to-date? Secondly, whether the proposed new rule which places the real seat approach in relation to the physical corporate seat and the incorporation approach in relation to the virtual corporate seat on equal footing is conceptually grounded?

A place of the permanent managing organ of a company shall be the place where operational decisions of the company are made by the corporate body on a regular basis.[25] The case law has been, however, evidencing that the company's real seat did not necessarily coincide with its registered office, and on the company website

[23] Draft law amending Article 2.49 of the CC No. XIIIP-2833 with Explanatory Note No. XIIIP-2833.

[24] Resolution of the Parliament of the Republic of Lithuania No. XIV-968 concerning approval of the Work Program of the IV (Spring) Session of the Parliament of the Republic of Lithuania of 2022 (TAR, 2022, No. 5779), Chapter IV, Section Eleven.

[25] *Bartkus, G.* In: *Mikelėnas, V. et al.* Lietuvos Respublikos civilinio kodekso, p. 125.

and in the correspondence with third parties (contracts, invoices, correspondence, etc.) companies have been disclosing the real seat, which was located at a different place than the registered office, as well as that in the civil proceedings third parties have experienced difficulties in reaching the company at the address indicated in the Register of Legal Entities.[26] It may suggest that, in practice, companies not always have physical presence at the registered office.

Since in Lithuania the seat of a legal entity has to be situated at the place of its permanent managing organ, which implies an actual place at the particular premises, in the early 2000s the Lithuanian scholars shared the view that a mere post box cannot serve as the corporate seat.[27] It cannot remain, however, unnoticed that intermediary service providers offer such type of services as provision of the company's registration address, as well as assistance in handling corporate correspondence. The statistical data suggest that there is a market for such services. For example, pursuant to the *travaux preparatoires* of 2018, there were more than eight thousand companies registered at six locations (addresses) in Vilnius City.[28]

Having said that, the above demonstrates that, in practice, the rule providing that the registered office and the real seat of a domestic company should coincide does not effectively function, it is worth mentioning that even situations when the business register has no any data about the registered office of a domestic company at all should not be excluded.

An example of such unique situation can be a case when the company's right of contract to use the premises ceases, and, following a request of the owner of the premises, the business register has to delete data about the corporate seat (registered office) of the company in that premises.[29] With the rationally behind the rule to protect the ownership rights, as well as avoid situations when data about the corporate seat that are disclosed in the business register let mislead honest third parties dealing with the company, particulars concerning the registered office of the company have to be deleted from the Register of Legal Entities, even though the company fails to provide new data about the registered office.[30] To balance multiple interests, there is a 6-month notice period to rectify the situation before the corporate seat is deregistered from the premises at the business register. A notification on a forthcoming de-registration of the corporate seat has to be addressed to the members of the managing organs of the company at their addresses indicated in the Register of Legal Entities and

[26] See, e.g., the rulings of the courts in civil cases: Court of Appeal of Lithuania of 20 March 2020, No. e2-608-585/2020, para. 13–19; Kaunas district court of 28 January 2021, No. e2S-236-587/2021, Klaipėda district court of 26 November 2020 No. e2S-1358-524/2020, Klaipėda district court of 15 November 2018 No. e2S-1485-613/2018; Klaipėda district court of 26 April 2018 No. e2S-431-730/2018.

[27] *Bartkus, G.* In: *Mikelėnas, V. et al.* Lietuvos Respublikos civilinio kodekso, p. 126.

[28] Explanatory Note No. XIIIP-2833.

[29] Regulations of the Register of Legal Entities No. 1407, para. 195–197.

[30] The legal framework was enacted on the basis of the ruling of the Constitutional Court of 2018. The provisions of the regulations that permitted an owner of the premises to demand for a de-registration of the registered office of the company from that premises only in the circumstances when the company has a special legal status, namely the company is subject to the bankruptcy or liquidation proceedings, were declared unconstitutional on the basis of the violation of ownership rights of the owners of the premises. The Constitutional Court also held that a company could have maintained a fictitious corporate seat if the owner of the premises had no right to demand for a de-registration of the corporate seat from that premises even though contractual relations have already terminated (the ruling of the Constitutional Court of the Republic of Lithuania No. KT10-N6/2018 of 4 May 2018, case No. 6/2017, para. 18).

the request of the owner of the premises is announced in the electronic publication issued by the administrator of the Register of Legal Entities.

A notice of the intended de-registration of the corporate seat addressed to the members of the managing organs of the company should also contain information on a possible initiation of the compulsory liquidation of the company in accordance with Article 2.70 of the CC.[31] However, the analysis of the provisions of Article 2.70 of the CC suggests that the administrator of the Register of Legal Entities has a right to initiate a corporate dissolution as the *ultima ratio* measure, and that a mere fact that the company has not entered data about the registered office in the Register of Legal Entities should not *per se* be a sufficient ground to initiate the compulsory corporate liquidation. There should be other circumstances demonstrated, and the most relevant basis justifying an initiation of a compulsory liquidation of the legal entity should be a situation when for a period lasting more than 6 months the company cannot be contacted at its physical address of the corporate seat, at its digital address (the address of eDelivery box of the company) and at the addresses of members of the managing organs of the company indicated in the Register of Legal Entities.[32] To avoid a commencement of the compulsory liquidation of the company, within a 3-month period the members of the managing organs of a company have to produce the evidence that they can actually be contacted or renew data on the registered office.

Although it can be debated whether the mechanism on compulsory corporate liquidation is effectively applied when the company does not indicate particulars of the corporate seat in the business register and it cannot be simultaneously contacted at the above indicated addresses,[33] it is likely that there is no effective mechanism for the Register of Legal Entities to scrutinize whether the real seat of the company coincides with its registered office.[34]

On comparative basis, there are examples when Member States have shifted from the real seat approach under substantive company law, according to which domestic companies have had to situate the effective management or central administration or the principal place of business in their territory to the formal-based approach of

[31] Regulations of the Register of Legal Entities No. 1407, para. 187–189, 191; Decision of the General Manager of the State Enterprise Centre of Registers No. VE-639 (1.3 E) on Approval of the Rules for Maintaining the Register of Legal Entities of 18 December 2018 (TAR, 2019, No. 20370, with further amendments and supplements), para. 59–61, 63–64.

[32] If there is no possibility contacting the company at the indicated addresses, the notification has to be published in the electronic publication issued by the administrator of the Register of Legal Entities as well as delivered at the e-mail address provided by the company for communication purposes.

[33] Item 3, para. 1 of Art. 2.70 of the CC. According to the data of the State Enterprise Centre of Registers of 21 April 2021, there were 1152 of closed stock companies liquidated at the initiative of the administrator of the Registrar of Legal Entities on the basis of Article 2.70 of the CC in the period of 2007–2021. The data, however, are not exclusively limited to the circumstances where the company and members of the corporate managing bodies cannot be contacted at the corporate seat and their addresses specified in the Register Legal Entities (i.e., Item 3 of para. 1 of Art. 2.70 of the CC). The provided statistics also include other grounds for a compulsory liquidation of a legal entity at the initiative of the administrator the Registrar of Legal Entities as provided by Article 2.70 of the CC, without differentiating the data concerning a concrete ground for a compulsory corporate liquidation.

[34] *Heemann, F., Gasparke, K.* Lithuania. In: *Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P., Siems, M.* (eds). *The* Private International Law of Companies in Europe. The Private International Law of Companies in Europe. Munchen: C. H. Beck, 2019, pp. 528–529.

the corporate seat (e.g., Czech Republic,[35] Denmark[36], Germany[37]). For example, in Germany, after a reform, a German company is no longer required maintaining commercial links with the German territory, but it has to have a corporate seat indicated in the statutes of the company which is understood as a place of the registered office in Germany (but which does not refer to an address of the office), and a domestic business address, which has to be disclosed in the business register.[38] In addition, German case law has modified its real seat approach under private international company law by following the place of the incorporation as the main connecting factor in determining the applicable company law in relation to foreign companies incorporated under law of an EU and EEA Member State, while retaining the centre of administration as a connecting factor for private international company law purposes concerning third country-foreign companies (unless the bilateral treaties provide for the incorporation theory for mutual recognition of companies).[39]

Bearing in mind that under national law Lithuania applies the incorporation theory for recognition of foreign companies as a conflict of law rule,[40] a systematic approach in ensuring a similar level playing for domestic companies should be encouraged, as well. With the liberal approach related to determination of applicable company law, Lithuania supports a party autonomy and contractual freedom towards foreign companies, respect their choice to govern internal organizational matters by company law of the place of incorporation.[41] As a matter of policy, the more liberal legislative approach applying the formal criterion as a connecting factor for the purposes of determining the law applicable to a foreign company when the substantive criterion under more conservative legislative approach for substantive company law purposes is retained towards a domestic company is, however, difficult to support. In theory, an indirect effect of the substantive company law rule, which requires a domestic company to have a real seat in Lithuania, along with other local factors may be that investors that intend to enlarge their business more internationally within several Member States are not sufficiently promoted in establishing themselves through formation of a Lithuanian company.

To contribute to the debate on whether it is appropriate to retain the real seat approach under substantive company law for a domestic company formed under Lithuanian law, it is worth mentioning a role of the corporate seat in determining a national jurisdiction in civil proceedings concerning the company. The abovementioned substantive company law rule concerning protection of third parties,

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[35] *Pauknerova, M., Brodec, J.* Czech Republic, In: *Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P., Siems, M.* (eds). The Private International Law of Companies in Europe. The Private International Law of Companies in Europe. Munchen: C. H. Beck, 2019, pp. 309–310.

[36] *Birkmose, H. D.* Denmark. In: *Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P., Siems, M.* (eds). The Private International Law of Companies in Europe. *The* Private International Law of Companies in Europe. Munchen: C. H.Beck, 2019, pp. 335–336.

[37] *Teichmann, C., Knaier, R.* Experiences with the competition of regulators – a German perspective. In: *A. Jorge Viera González, A., Teichmann, C.* (eds). Private Company Law Reform in Europe: The Race for Flexibility. Cizur Menor: Thomson Reuters Aranzadi, 2015, pp. 220–221.

[38] *Gerner-Beuerle, C., Siems, M.* Germany. In: *Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P.,* Siems, M. (eds). The Private International Law of Companies in Europe. *The* Private International Law of Companies in Europe. Munchen: C. H. Beck, 2019, pp. 385–387.

[39] Ibid., pp. 387–389.

[40] Para. 1 of Art. 1.19 of the CC.

[41] For incorporation theory and real seat theory under private international law of companies see, e.g.: *Rammeloo, S.* Corporations in Private International Law: A European Perspective. 1 publ. Oxford etc.; Oxford University Press, 2001, pp. 9–86; *Paschalidis, P.* Freedom of establishment and private international law for corporations. 1st ed. Oxford: Oxford University Press, 2012, pp. 3–14, 26–32.

permitting them to invoke the real seat of a company, which does not coincide with its registered office, should not apply when a territorial jurisdiction for civil law cases involving a company is determined.[42] As the case law stands, Article 29 of the Code of Civil Procedure as procedural law, which establishes that a corporate seat of a legal entity indicated in the Register of Legal Entities shall determine the competent court to bring a claim against the legal entity, has to be applied. In that case, the registered office serves to establish which court is competent for the civil proceedings.

Digital transformation also plays a role in mitigating the real seat approach. Virtual corporate meetings that become new normal especially after the Covid-19 pandemic may bring a challenge in identifying a place where the corporate organ meets for a decision-making geographically. Virtual corporate meetings could be deemed to have taken place at the location (address) of the registered office when substantive company law follows the real seat approach and requires a place of the effective management of the company is in the territory of a Member State of incorporation of the company (e.g., in Luxemburg[43]).

The foregoing demonstrates serious doubts about the effectiveness of the substantive law rule for a domestic company to maintain a real seat in Lithuania, and, in particular, as far as the real seat of the company should coincide with its registered office. The rule is neither effective in practice nor fits the legal framework systematically, therefore, an approach-based change in a substantive company law by shifting from the real seat theory to the incorporation theory should be encouraged. A concept of the formal seat (the registered office), as an objective and formal criterion, *ex ante* providing legal certainty for participants in legal relations concerning a company, should be a sufficient condition to establish a domestic company and maintain the company's legal status.

It should be further stressed that the legislative initiative would enable founders (shareholders) of a domestic company to select between the real seat of a company located at the physical address, on the one hand, and a virtual corporate seat, on another hand, i.e. between the real seat approach and the incorporation approach. The proposed law would enable a domestic company (founders, shareholders) to decide on the "corporate citizenship". Conceptually, this part of the legislative approach is difficult to support.

Furthermore, introduction of the concept of the virtual corporate seat of a company established under Lithuanian law by its essence means a transition to the adherence to the incorporation theory for substantive company law purposes.

3. Virtual corporate seat as a formal seat of a company

Pursuant to the Lithuanian legislative initiative, it can be assumed that a virtual corporate seat of a company established under Lithuanian law would be determined without a physical address and would encompass two elements – the municipality as the location of the company's registered office in Lithuania and the special digital

[42] E.g., rulings of the courts in civil cases: Court of Appeal of Lithuania of 12 May 2016 No. e2-992-381/2016; Court of Appeal of Lithuania 12 June 2014 No. 2-1063/2014; Klaipėda district court 15 November 2018 No. e2S-1485-613/2018; Šiauliai district court 24 August 2015 No. 2S-777-569/2015.

[43] *Conac, P. H., Cuniberti, G.* Luxembourg. In: *Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P., Siems, M.* (eds). The Private International Law of Companies in Europe. *The* Private International Law of Companies in Europe. *Munchen:* C. H. Beck, 2019, p. 545; For online board meetings in a public limited liability company.

address of a company (the address of eDelivery box) as a business address enabling third parties to officially contact the company by electronic means.[44]

A virtual corporate seat of a domestic company should follow the formalistic understanding of the concept of the corporate seat when a connection between company's activities or company's management or company's administration and its registered office or other place in the territory of that Member State is not required, and it should essentially be based on the notion of the registered office. A virtual corporate seat being viewed under the concept of the formal seat should be built on these premises. It follows that the concept of the virtual corporate seat of a domestic company should be developed to serve similar purposes as the ones to the concept of the registered office are designated. Further, the legal framework should tackle similar problematic issues that are traditionally encountered when for communication purposes a domestic company is permitted to have a mere postal address (post box) in the jurisdiction.

Having said that, at this stage, one fundamental aspect should be emphasized as to that the legislative initiative sets for an electronic communication with the company maintaining the virtual corporate seat. Pursuant to the proposed legislative initiative, the company would have to be officially contacted at the address of eDelivery box.[45] It can be assumed that the special digital address alone would be used as sufficient for communication with the company. The address of eDelivery box, as one of the compulsory particulars of a legal entity, has to be indicated in the Register of Legal Entities and in the correspondence with third parties and on the company website.[46] A delivery through the eDelivery system by using an address of eDelivery box of a company has a similar legal and evidentiary value as a traditional paper based delivery of the registered postal mail.[47]

Without a physical address, use of the address of eDelivery box as a proper way to contact the company is, however, not without its own problems. It should be, in particular, noted that an electronic communication under the eDelivery system is limited to the domestic context and, generally, does not enable foreigners to become users of the eDelivery system.[48] Therefore, to achieve the goals related to the proposed concept of the virtual corporate seat of a domestic company, the legislative framework should be suitable for that company to be contacted by third parties.

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[44] Also see *Mikalonienė, L.* Having Company Law Fit More for a Digital Age. European Company Law. Editorial, Vol. 19 (1), 2022, pp. 4–5.

[45] Draft law amending Article 2.49 of the CC No. XIIIP-2833 with Explanatory Note No. XIIIP-2833.

[46] Effective from 1 January 2022, an address of eDelivery box is compulsory data of a legal entity that have to be entered in the business register. The rule applies to legal entities that after that date are registered at the business register as well as to legal entities that decide to modify relevant corporate particulars in the register (para. 2 of Art. 14 of the Law amending articles 1.73, 1.122, 2.44, 2.49, 2.54, 2.66, 6.166, 6.192, 6.228^{7}, 6.228^{14}, 6.901, 6.991 and 6.993 of the Civil Code of the Republic of Lithuania No. XIV-421 of 2021 (TAR, 2021, No. 14578).

[47] Law on Public Administration of the Republic of Lithuania No. VIII-1234 (State News, 1999, No. 60-1945, with further amendments and supplements), Art. 9(1).

[48] Resolution of the Government of the Republic of Lithuania No. 914 concerning approval of Regulations on provision of electronic delivery services by means of the National information system for electronic delivery using the post network of 2015 (TAR, 2015, No. 13240, with further amendments and supplements), para. 4. Pursuant to Conclusion of the Economic Committee of the Lithuanian Parliament No. 108-P-48 of 5 December 2018 regarding the draft law amending Article 2.49 of the CC No. XIIIP-2833 (Available: https://e-seimas.lrs.lt/ [last viewed 14.05.2021]), the proposed law concerning a virtual seat of the legal entity has had to be improved since foreign nationals could not become users of the eDelivery system.

Furthermore, a threat of potentially undue intervention into a private autonomy of a company electing the virtual corporate seat as a result of the imposed duty to use particular electronic communication means (the eDelivery system) and an uncertainty in whether fair competition is preserved, as long as a particular Lithuanian state-owned service provider has a reserved right to supply the services, as emphasized in the *travaux preparatoires,* should be taken into consideration in the assessment of the proposed legislative initiative as well.[49]

These drawbacks should not, however, lead to withdrawing the innovative idea of the virtual corporate seat, but should rather encourage to further improving and developing the proposed legislative initiative.

Summary

The Lithuanian legislative initiative, which proposes an enabling approach for founders (shareholders) of a domestic company to choose between a virtual corporate seat rather and a physical corporate seat in its traditional meaning, and has a focus on promoting more flexible regulatory approach in substantive company law from an SME and start-up perspectives, should be supported. Yet, at this stage, it fails to address certain significant aspects and should be further improved and developed. Firstly, the proposed innovative concept of the virtual corporate seat of a domestic company by its essence means a transition to the adherence to the incorporation theory for substantive company law purposes, and an overall change from the real seat theory to the incorporation theory under substantive company law should be clearly embodied *ex lege*. Secondly, when proposing a concept of the virtual corporate seat which is essentially to be viewed under the notion of a registered office, the lawmakers should offer solutions on how a domestic company maintaining the virtual corporate seat can be properly contacted by third parties.

Sources

Bibliography

1. *Birkmose, H. D.* Denmark. In: *Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P., Siems, M.* (eds). The Private International Law of Companies in Europe. Munchen: C. H. Beck, 2019, pp. 334–349.
2. *Conac, P. H., Cuniberti, G.* Luxembourg. In: *Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P., Siems, M.* (eds). The Private International Law of Companies in Europe. Munchen: C. H. Beck, 2019, pp. 544–554.
3. *Gerner-Beuerle, C., Siems, M.* Germany. In: *Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P., Siems, M.* (eds). The Private International Law of Companies in Europe. Munchen: C. H. Beck, 2019, pp. 385–414.
4. *Heemann, F., Gasparke, K.* Lithuania. In: *Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P., Siems, M.* (eds). The Private International Law of Companies in Europe. Munchen: C. H. Beck, 2019, pp. 527–543.
5. *Kurcz, B., Paizis, A.* Company Law, Connecting Factors and the Digital Age – A New Outlook. European Company and Financial Law Review, No. 16 (4), 2019, pp. 434–456.
6. *Mikalonienė, L.* Having Company Law Fit More for a Digital Age. European Company Law. Editorial, Vol. 19 (1), 2022, pp. 4–5.
7. *Mikelėnas, V., Bartkus, G., Mizaras V., Keserauskas, Š.* Lietuvos Respublikos civilinio kodekso komentaras [Commentary on the Civil Code of the Republic of Lithuania]. Antroji knyga. Asmenys. Pirmasis leidimas. Vilnius: Justitia, 2002.

[49] Conclusion of the Legal Department at the office of the Lithuanian Parliament regarding the Draft law amending Article 2.49 of the CC No. XIIIP-2833 of 9 November 2018. Available: https://e-seimas.lrs.lt/ [last viewed 14.05.2021].

8. *Paschalidis, P.* Freedom of establishment and private international law for corporations. 1st ed. Oxford: Oxford University Press, 2012.
9. *Pauknerova, M., Brodec, J.* Czech Republic. In: *Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P., Siems, M.* (eds). The Private International Law of Companies in Europe. Munchen: C. H. Beck, 2019, pp. 308–333.
10. *Rammeloo, S.* Corporations in Private International Law: A European Perspective. 1st publ. Oxford, etc.: Oxford University Press, 2001.
11. *Teichmann, C., Knaier, R.* Experiences with the competition of regulators – a German perspective. In: *A. Jorge Viera González, A., Teichmann, C.* (eds). Private Company Law Reform in Europe: The Race for Flexibility. Cizur Menor: Thomson Reuters Aranzadi, 2015, pp. 209–241.

Normative acts

1. Treaty on the Functioning of the European Union (Consolidated version 2016). OJ C 202, 07.06.2016.
2. Code of Civil Procedure of the Republic of Lithuania No. IX-743 of 2002 (State News, 2002, No. 36-1340, with further amendments and supplements).
3. Civil Code of the Republic of Lithuania No. VIII-1864 of 2000 (State News, 2000, No. 74-2262, with further amendments and supplements).
4. Law amending articles 1.73, 1.122, 2.44, 2.49, 2.54, 2.66, 6.166, 6.192, 6.228^{7}, 6.228^{14}, 6.901, 6.991 and 6.993 of the Civil Code of the Republic of Lithuania No. XIV-421 of 2021 (TAR, 2021, No. 14578).
5. Law on Stock Companies of the Republic of Lithuania No. VIII-1835 of 2000 (State News, 2000, No. 64-1914, with further amendments and supplements).
6. Resolution of the Parliament of the Republic of Lithuania No. XIV-968 concerning approval of the Work Program of the IV (Spring) Session of the Parliament of the Republic of Lithuania of 2022 (TAR, 2022, No. 5779).
7. Resolution of the Government of the Republic of Lithuania No. 1407 concerning approval of Regulations of the Register of Legal Entities of 2003 (State News, 2003, No. 107-4810, with further amendments and supplements).
8. Resolution of the Government of the Republic of Lithuania No. 914 concerning approval of Regulations on provision of electronic delivery services by means of the National information system for electronic delivery using the post network of 2015 (TAR, 2015, No. 13240, with further amendments and supplements).
9. Decision of the General Manager of the State Enterprise Centre of Registers No.VE-293 (1.3 E) of 2020 approving Application form JAR-1: Request to register a legal entity in the Register (TAR, 2020, No. 8922, with further amendments and supplements).
10. Decision of the General Manager of the State Enterprise Centre of Registers No. VE-639 (1.3 E) on Approval of the Rules for Maintaining the Register of Legal Entities of 18 December 2018 (TAR, 2019, No. 20370, with further amendments and supplements).

Case law

1. Ruling of the Constitutional Court of the Republic of Lithuania No. KT10-N6/2018 of 4 May 2018, case No. 6/2017.
2. Ruling of the Supreme Court of Lithuania No. e3K-3-80-403/2019 of 22 May 2019.
3. Ruling of the Supreme Court of Lithuania No. 3K-3-14-1075/2018 of 3 January 2018.
4. Ruling of the Court of Appeal of Lithuania No. e2-608-585/2020 of 20 March 2020.
5. Ruling of the Court of Appeal of Lithuania No. e2-992-381/2016 of 12 May 2016.
6. Ruling of the Court of Appeal of Lithuania No. 2-1063/2014 of 12 June 2014.
7. Ruling of Kaunas district court No. e2S-236-587/2021 of 28 January 2021.
8. Ruling of Klaipėda district court No. e2S-1358-524/2020 of 26 November 2020.
9. Ruling of Klaipėda district court No. e2S-1485-613/2018 of 15 November 2018.
10. Ruling of Klaipėda district court No. e2S-431-730/2018 of 26 April 2018.
11. Ruling of Šiauliai district court No. 2S-777-569/2015 of 24 August 2015.

Other sources

1. Draft law amending Article 2.49 of the Civil Code of the Republic of Lithuania. Available: https://e-seimas.lrs.lt [last viewed 20.04.2022].
2. Explanatory Note No. XIIIP-2833 of 2018. Available: https://e-seimas.lrs.lt [last viewed 20.04.2022].

3. Explanatory Note No. XIP-908 of 2009. Available: https://e-seimas.lrs.lt [last viewed 14.05.2021].
4. Conclusion of the Economic Committee of the Lithuanian Parliament No. 108-P-48 of 5 December 2018 regarding the draft law amending Article 2.49 of the Civil Code of the Republic of Lithuania No. XIIIP-2833. Available: https://e-seimas.lrs.lt/ [last viewed 14.05.2021].
5. Conclusion of the Legal Department at the office of the Lithuanian Parliament regarding the Draft law amending Article 2.49 of the Civil Code of the Republic of Lithuania No. XIIIP-2833 of 9 November 2018. Available: https://e-seimas.lrs.lt/ [last viewed 14.05.2021].
6. Project "Create Lithuania" conducted by Raminta Olbutaitė and Adelė Jaškūnaitė. Strategic action plan on establishing virtual registered office (LT) as of February 2018. Available: http://kurklt.lt/wp-content/uploads/2017/10/Virtualios-buvein%C4%97s-%C4%AFgyvendinimo-alternatyv%C5%B3-planas_su-priedais.pdf [last viewed 12.09.2021].
7. Data of the State Enterprise Centre of Registers of 21 April 2021.

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Several Aspects of the Protection of Trade Secrets

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The present article contains a discussion of several aspects important for the protection of trade secrets. It provides analysis of certain facets of trade secret, definition, for instance, the meaning of commercial value of keeping the information secret. This article also views the scope of the duty of an employer to inform his employees about the trade secret status of the respective information and provides a suggestion about interpretation and exemption from this duty. In addition, this article also examines the mental element of infringer as precondition of his liability, as well as the meaning of non-competition agreements between the employers and employees as a tool for protection from trade secret infringements.

Keywords: trade secrets, intellectual property, know-how, tort, employment relationship, employer, employee, restriction of competition, non-competition agreement.

Contents

Introduction

On 8 June, 2016, the Directive (EU) 2016/943 of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (hereinafter the "Trade Secret Directive") was adopted.[1] It emphasized the role of trade secrets as

[1] Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. OJ L 157, 15.06.2016, pp. 1–18.

"the currency of the knowledge economy" on account of them providing a competitive advantage, and elaborated on the value of trade secrets, envisioning them as equal to patents and other intellectual property rights.

According to the requirements of the Trade Secret Directive, EU Member States have adopted new laws or amended the existing ones in order to implement the said directive. Latvia has decided to adopt entirely new Trade Secret Protection Law (in Latvian – *Komercnoslēpuma aizsardzības likums*)[2], which came into effect on 1 April, 2019. Although it was not applied in a large of cases, to a certain degree, it has been the matter of analysis of legal scholars. The Trade Secret Directive has also been analysed from several aspects, even before it was adopted. This analysis and discussions, together with some other thoughts, which inevitably occur to nearly anyone after repeatedly revisiting certain questions, inspired the author of the present paper to contribute his share to the some of these discussions and to offer a slightly different approach to some matters.

Of course, the present paper does not intend to cover all aspects, issues and discussions related to the protection of the trade secrets. It would comprise a fairly large scope, fit for a book, perhaps in several volumes, instead of a mere article. The current article is mainly dedicated to the aspects pertaining to the protection of trade secrets in Latvia. The analysis contained in the present article mainly concerns the duty of trade secret holder to describe the trade secret, and the scope of the duty of an employer to inform his employees about the trade secret status of the respective information. In addition, the author emphasises an interesting detail, provided in the Trade Secret Protection Law, that certain type of information is *per se* considered as a trade secret. Such approach has certain reasons, however, in the view of the author, the scope of this information should be broader. The author of the present paper also enters into discussion with other legal scholars about the meaning of commercial value as a prerequisite for information to be considered as a trade secret and examines the particularity of the legal provisions of Germany, which, unlike the provision of the law of Latvia and several other EU Member States, speaks about intent or negligence as of one of the preconditions to held a person liable for the unauthorised acquisition, use or disclosure of trade secrets (hereinafter – the "trade secret infringement"). Last, but not least, the author takes a look on non-competition agreements between the employers and employees as a tool for protection from trade secret infringements.

Of course, the opinion, provided in the present paper is not meant to be the final truth about the respective topics. It is rather intended as an encouragement for discussion, which, as the author sincerely hopes, at least in some degree will follow after the publication of this article.

1. Duty to describe a trade secret

At first glance, one may say that there is nothing to be added regarding the definition of a trade secret, because the Trade Secret Directive and the Trade Secret Protection Law already provide rather extensive definitions. However, the first impression may be misleading. It would be more accurate to say that the comprehensive definition of a trade secret is, in a sense, the Holy Grail of contemporary jurisprudence. Something that numerous legal scholars and practitioners may try to reach, but it is at least dubious, whether someone has succeeded and ever will succeed to complete this task.

[2] Komercnoslēpuma aizsardzības likums [Trade Secret Protection Law] (28.02.2019). Available: https://likumi.lv/ta/en/en/id/305532-trade-secret-protection-law [last viewed 27.02.2022].

The author of the present paper is not in opinion that he will be the one to reach this target. However, the author would like to add and emphasize some aspects of the existing definitions. After all, the question about components of this definition is important not only as the scholastic debate, but also because one of the difficulties mentioned by entrepreneurs, which prevents them from commencing the civil litigation in order to protect their trade secrets, is the difficulty to prove that certain information, which has been disclosed, acquired or used without authorisation, should be considered as a trade secret.[3] Hence, the question what should be and what should not be considered as a trade secret is of an utmost importance in disputes, related to the trade secrets' infringements.

Article 2 (1) of the Trade Secret Directive provides:

> *'trade secret' means information which meets all of the following requirements:*
> *a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;*
> *b) it has commercial value because it is secret;*
> *c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret".*

Article 2 (1) of the Trade Secret Protection Law provides slightly different definition, stipulating that

> *(1) A trade secret is undisclosed information of an economic nature, technological knowledge, and scientific or any other information which conforms to all of the following requirements:*
> *1) it is secret in the sense that it is not generally known among or available to persons who normally use such kind of information;*
> *2) it has actual or potential commercial value because it is secret;*
> *3) the trade secret holder, under the circumstances, has taken appropriate and reasonable steps to maintain secrecy of the trade secret.*

The author suggests taking closer look at the differences between both definitions.

First of all, in contrast to the Directive, the definition provided in the Trade Secret Protection Law stipulates non-comprehensive list of types of an information, which may be considered as a trade secret. It is an "information of an economic nature, technological knowledge, and scientific or any other information". However, as *Dr. iur.* Rihards Gulbis has indicated, these particularities are of a merely descriptive nature and shall not be treated as comprehensive, particularly because the list ends with the wording "any other information".[4] However, it does include literally "any other information". Namely, this other information shall be related to the competition of any sort.[5] It should not be separated from the private information. It may overlap with private information, if it is at the same time related to the competition.[6]

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[3] *Gulbis, R.* Komercnoslēpuma aizsardzības priekšnosacījumi, nelikumīga iegūšana, izmantošana un izpaušana [Preconditions of Trade Secret Protection, Illegal Acquisition, Use and Disclosure]. Jurista Vārds, Nr. 41 (1203), 12.10.2021, p. 7

[4] *Gulbis, R.* Komercnoslēpuma aizsardzības priekšnosacījumi, p. 9.

[5] *Suosa e Silva, N.* What exactly is a trade secret under the proposed directive? Journal of Intellectual Property Law & Practice, Vol. 9, No. 11, 2014, p. 925.

[6] Ibid.

This wording of "any other information" indirectly emphasizes a duty of a trade secret holder to define, which information shall be classified as the trade secret. Such classification is amongst the measures to be taken by the trade secret holder in order to keep the respective information secret. Other measures are (a) categorization of the information according to the degree of its importance and (b) organizational, physical (technical) and legal (contractual) measures, which shall be taken in order to keep the respective information secret. Organisational measures may include, *inter alia*, the measures taken in order to ensure that every employee has access only to those trade secrets, which are necessary for the performance of his duties. Physical and technical measures usually relate to the access to the respective information. Legal measures do include the conclusion of contracts with relevant confidentiality requirements, instructions for employees whose work involves trade secrets, etc.[7] As these organisational, physical (technical) and legal measures shall be in line with the classification of the information made by the trade secret holder, it may be said, that the classification of the information reflects, itself, and shall be reflected in the other measures, which shall be taken by the trade secret holder in order to keep the relevant information secret.

Therefore, it is important for the trade secret holder to properly describe the information, which shall be kept as trade secret. In relations with employees it is important in order to properly instruct the employees, which information shall be kept secret and shall not be disclosed even after the termination of labour relations.

However, the requirement to describe the trade secret is accompanied with the issue, that in a lot of cases it may be difficult to give a comprehensive description for the exact piece of information, which shall be considered as a trade secret. This aspect is particularly relevant in a case, which is explicitly mentioned in Article 2 (1) a) of Trade Secret Directive, but not in the definition, given in the Trade Secret Protection Law. Namely, it is a case, if a trade secret is not comprised from particular information as such, but from a particular combination of information.[8] An example may be the recipe of a dish, which in general is widely-known, such as risotto or Wiener schnitzel, but which has been enhanced with some specific twist or ingredients by the particular restaurant. In such case, this recipe with that particular twist or ingredients could be considered as a trade secret. Generally, the restaurant, *inter alia*, acting as employer shall describe and most precisely instruct the employee, what exactly shall be treated as a trade secret.[9] However, what if in the given example the restaurant has failed to precisely describe the combination of ingredients, methods or other features, which make the recipe so enjoyed by guests of the restaurant? Should it therefore not be considered as a trade secret and should the restaurant be deprived from the protection of the recipe? The author would say that the answer should not be overly strict and should provide the fair balance between the interests of employers and employees, maintain the competition and provide the customers with a possibility to receive the benefit from intense competition on merits.

Recital 13 of the preamble of the Trade Secret Directive emphasizes that this directive should not be understood as restricting the freedom of establishment, the free movement of workers, or the mobility of workers as provided for in Union law. Also, it should be kept in mind that in several jurisdictions of Continental

[7] *Gulbis, R.* Komercnoslēpuma aizsardzības priekšnosacījumi, pp. 11, 12.

[8] Ibid., p. 10.

[9] *Rācenājs, K.* Komercnoslēpums darba tiesiskajās attiecībās [Trade Secret in Labour Relations]. Jurista Vārds, Nr. 41 (1203), 12.10.2021, p. 34.

Europe, for instance, Germany and Netherlands, the main principle is that a former employee is free to use all the acquired knowledge, including real trade secrets of the previous employer, and it may be limited only in a very narrow group of cases.[10] Therefore, any deviations from the requirement to the trade secret holder to provide detailed description of his trade secrets and to precisely inform his employees about this description shall be interpreted in a narrow sense. At the same time, the requirement for precise description of trade secrets shall not be underestimated as it may prevent entrepreneurs from innovations and it may lead to the decrease of competition and negative impact on the well-being of customers. In this context, one must also bear in mind the aspect, which is rightly emphasized in legal doctrine, that "[p]roperty owners are not required to erect a fence in order to later sue an unwelcome visitor for trespass".[11] Namely, there could be cases, when in the light of circumstances of the case, if may be expected from the employee, taking into account his position, remuneration, qualification, experience and other factors, to understand that certain information shall be treated as trade secret, even if it was not precisely indicated by the employer as a trade secret. Similar approach could be applied towards other persons, to whom the trade secret was disclosed, if it could be reasonably expected from these persons, that they should understand that this information was a trade secret. Such conclusion may be made in dispute dealing with a trade secret infringement by the court *ex officio,* if the circumstances of particular cases justify such conclusion. In the light of such considerations, the author of the present paper suggests amending the Trade Secret Protection Law with a provision stating that the court is entitled to conclude that the defendant had to treat the particular information as trade secret, if, according to the circumstances of the case, he should reasonably come to such conclusion.

2. Information always to be treated as a trade secret

Other difference between the provisions of the Trade Secret Directive and the Trade Secret Protection Law is that the Trade Secret Protection Law does mention several types of the information, which in any case shall be considered as a trade secret and several other types of information, which in any case shall not be considered as a trade secret.[12] Namely, Article 3 (1) Trade Secret Protection Law provides, that the information which is related to the implementation of State administration functions or tasks and also – in the cases specified in laws and regulations – actions with State or local government financial resources or property cannot be regarded as a trade secret. The first sentence of the sub-article (2) of the same article does add, that in accounting, information and data which in accordance with laws and regulations are subject to inclusion in the reports of natural or legal persons performing economic activity cannot be regarded as a trade secret. In its turn, the second sentence of the same sub-article provides that all remaining information in accounting shall be regarded as a trade secret and shall be only available to auditors, tax administration, law enforcement authorities, courts and other authorities in the cases specified in laws and regulations.

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[10] *Van Caenegem, W.* Trade Secret and Intellectual Property. Breach of Confidence, Misapproproation and Unfair Competition. Alphen aan den Rijn: Kluwer Law International, 2014, p. 199.

[11] *Varadarajan, D.* Trade Secret Precautions, Possession and Notice. Hastings Law Journal, Vol. 68, No. 2, February 2017, p. 373.

[12] *Gulbis, R.* Komercnoslēpuma aizsardzības priekšnosacījumi, p. 12.

Such provisions specifying the information, which in any case shall be treated as trade secret and that which cannot be considered as a trade secret,are rather plausible, since they ensure a substantial legal certainty. However, the scope of this information, particularly the scope of information, which in any case shall be considered as a trade secret, gives rise to some questions and, in the author's opinion, could be subject of debates. These provisions were already included in the very first draft of the Trade Secret Protection Law.[13] The annotation of the draft Trade Secret Protection Law does mention these provisions, however, without giving any further grounds, why the scope of the information at any time shall be treated as the trade secret, it should not be broader.[14]

Notably, the findings made in the cases regarding agreements, decisions by associations of undertakings and concerted practices that are restrictive for competition, support the opinion that the list of information, which at any case shall be treated as trade secret, should be broader and could not be limited with accounting information, not included in the public reports. For instance, in one case, examined by the Latvian Competition Council (Latvian – *Konkurences Padome*), it was found that competitors had exchanged the information regarding their plans to participate in the public procurements and prices, offered in these procurements. From the decision of competition authority it could be concluded that such information should have been treated as trade secret and not disclosed to other persons, especially competitors.[15] This decision was later upheld by the court. Similar approach suggesting that the information regarding the plans to participate in the public procurements and prices, offered in these procurements, shall be considered as trade secret in any case, was applied also in later cases and was not challenged by the Supreme Court.[16]

Legal doctrine of the competition law provides examples, when such data as information about future projects, views of competitors regarding the price trends and future strategies were considered to be secret and the exchange of this information amounted to the competition law infringement.[17] Article 78 of the guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements do provide that, for example, information about prices, demand, output and costs shall be considered strategic and its disclosure may reduce the uncertainty of competitors and hence adversely affect the competition in the market.[18] Hence, it leads to the conclusion that this information shall be kept secret and most likely considered as a trade secret.

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[13] Annotation of the draft Trade Secret Protection Law. Available: http://tap.mk.gov.lv/lv/mk/tap/?dateFrom=2018-03-22&dateTo=2022-03-22&text=Komercnosl%C4%93puma&org=0&area=0&type=0 [last viewed 22.03.2022].

[14] Ibid.

[15] Konkurences padomes 2014. gada 24. oktobra lēmums Nr. E02-55 lietā p/13/03.01./2, 14. lpp. [Decision No. E02-55 in case No.p/13/03.01./2 of the Competition Council of 24 October 2014, p. 14]. Available in Latvian: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/GXFkq7zw7v.pdf [last viewed 22.03.2022].

[16] Latvijas Republikas Augstākās tiesas Senāta Administratīvo lietu departamenta 2021. gada 15. februāra spriedums lietā SKA-54/2021, 2.4. punkts, 3. lpp. [Judgment in the case SKA-54/2021 of the Administrative Department of the Supreme Court of the Republic of Latvia from 15 February 2021, point 2.4, page 3]. Available in Latvian: https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/administrativo-lietu-departaments/klasifikators-pec-lietu-kategorijam/konkurences-tiesibas [last viewed 22.03.2022].

[17] *Wish, R., Bailey, R.* Competition Law. 8th edition. Oxford: Oxford University Press, 2015, pp. 578, 579.

[18] Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements. OJ C 11, 14.01.2011, pp. 1–72.

Perhaps one may argue that the approach, adopted in competition law, could not be simply borrowed in the law dealing with protection of trade secrets as both areas of law have different objectives. Nevertheless, the approach adopted in competition law clearly demonstrates that the list of information, which shall be considered as a trade secret, could be broader. Therefore, the author suggests to commence the discussion about amending the Trade Secret Protection Law regarding the list of information, which in any case shall be considered as a trade secret.

3. Commercial value of a trade secret

One of the properties of a trade secret, indicated in both the Trade Secret Directive and the Trade Secret Protection Law is that the respective information, in order to be treated as a trade secret, has to have commercial value, because it is secret, or, as it is written in the said Latvian law, it has actual or potential commercial value by virtue of its being secret. However, what should be understood with actual or potential commercial value of a trade secret?

Legal doctrine provides several substantial aspects and examples, how this commercial value may manifest itself. First of all, this commercial value is caused by the secrecy of the information, i.e., there shall be a causal link between the value of the information and its secrecy.[19] Secondly, the conclusions about this value shall be based on objective assessments, not merely on the view of the trade secret holder. At the same time, it shall be noted that there is a commercial value in keeping the respective information secret, if the disclosure of this information may infringe the scientific or technical potential of the holder of the respective information, his business or financial interests, strategic positions or competitiveness. If a disclosure of the information does not affect either its value in the market (including also its value in potential purchase or licence agreement) or financial interests of the holder of this information, most likely, this information does not have a value because of its secrecy.[20]

This statement may lead to an impression that the commercial value, including the potential one, of a trade secret, is quite certain. General or overly hypothetical value may not be sufficient. However, this question is a matter of debate.

Some of the authors hold an opinion that it is necessary for the information to have actual value for maintaining its secrecy.[21] Other authors assert that the potential value is sufficient.[22] The author of the present paper is of the opinion that potential value is sufficient due to the following reasons.

Already regarding the proposal of the Trade Secret directive it was commented that this proposal stipulates just *de minimis* requirement, stating that it would be enough to demonstrate that the information had a minimum value resulting from secrecy, giving the holder a competitive advantage. Thus, the mere fact that someone is trying to enforce the trade secret is generally considered sufficient (*prima facie* evidence) to show the value of trade secrecy. The value of a trade secret should be treated separately from the matter of calculation of damages, caused by trade secret

[19] *Niebel, R., De Martinis, L., Clark, B.* The EU Trade Secrets Directive: All change for trade secret protection in Europe? Journal of Intellectual Property Law & Practice, Vol. 13, Issue 6, June 2018, p. 448.

[20] *Gulbis, R.* Komercnoslēpuma aizsardzības priekšnosacījumi, p. 11

[21] *Suosa e Silva, N.* What exactly is a trade secret, p. 929

[22] *De Carvalho, P.* The TRIPS Regime of Antitrust and Undisclosed Information. The Hague: Kluwer Law International, 2008, 223 ff. Quoted from: *Suosa e Silva, N.* What exactly is a trade secret, p. 929.

infringement.[23] Recital 14 of the preamble of the Trade Secret Directive confirms such conclusion, stating:

> *information should be considered to have a commercial value, for example, where its unlawful acquisition, use or disclosure is likely* [emphasis added] *to harm the interests of the person lawfully controlling it, in that it undermines that person's scientific and technical potential, business or financial interests, strategic positions or ability to compete.*

Moreover, Recital 2 of the preamble of the Trade Secret Directive emphasizes the importance of the trade secrets for businesses. If the threshold of value of trade secrets will be high and will stick to the requirement of proving the actual value of maintaining the secrecy, it will lead to the situation when businesses would not be able to obtain the protection of their trade secrets more frequently. Therefore, sticking to the said actual value could be interpreted as contradictive to the objectives of the Trade Secrets Directive.

For the sake of comparison, para. 2 (1) of the German Trade Secret Protection Law (German – *Gesetz zum Schutz von Geschäftsgeheimnissen*),[24] which has been adopted in order to implement the Trade Secret Directive, does provide several criteria for the information to be treated as the trade secret. The notion about commercial value is not among these criteria. Instead, there is the criteria of "a lawful interest to keep [the information] secret" (German – *ein berechtigtes Interesse an der Geheimhaltung*) or, as it is also called – "interest in maintaining secrecy" (German – *Geheimhaltungsinteresse*). Under the German law, the threshold of this interest is rather low. If the maintaining the secrecy of the information has a quantifiable impact on the firm's competitiveness, a legitimate interest will usually be presumed.[25] Hence, the German law also rather supports the idea that the potential value of secrecy of the respective information is sufficient.

Last but not least, the question could be asked about criteria for evaluation of the trade secrets. Case law and legal doctrine do suggest several criteria, which could be taken into account in order to determine, whether the respective information has a commercial value:

a) the value of the information to the owner and its competitors;
b) the amount of effort and/or money invested in developing the information;
c) the level and amount of effort invested into keeping the information secret;
d) the level of difficulty faced by others when acquiring or replicating the information; and
e) the accessibility of the information to the public, including whether any portion of this information is in the public domain or is made obtainable through prior patent application(s) or marketing.
f) reasonable measures have been taken by the owner to keep the information secret. The point to be noted here is that the steps taken/effort invested by the owner must be "reasonable" in amount.[26]

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[23] *Suosa e Silva, N.* What exactly is a trade secret, p. 930.

[24] Gesetz zum Schutz von Geschäftsgeheimnissen [Trade Secret Protection Law]. Available: http://www.gesetze-im-internet.de/geschgehg/BJNR046610019.html [last viewed 26.03.2022].

[25] *Van Caenegem, W.* Trade Secret, p. 175.

[26] *Tripathi, S.* Treating trade secrets as property: a jurisprudential inquiry in search of coherency. Journal of Intellectual Property Law & Practice, Vol. 11, Issue 11, November 2016, p. 843. See also: Learning Curve Toys Incorporated v. Playwood Toys Incorporated, 342 F 3d 714 (7th Cir. 2003) para. 38. Quoted from: *Suosa e Silva, N.* What exactly is a trade secret, p. 930.

The author of the present paper will not delve into the analysis of these criteria. Nevertheless, it goes without saying that these criteria are quite broad and hence they do require a sophisticated analysis in the light of the circumstances of each separate case. Such analysis is appropriate in order to calculate or evaluate the amount of damages, compensated to the trade secret holder. However, such analysis would be exaggerated, if from the result of this analysis will determine the answer on a very question, whether the particular information should be considered as a trade secret. As mentioned above, it will lead to the protection of trade secrets in rather limited number of cases, which would be contradictive to the objectives of the Trade Secret Directive.

4. Mental aspect of infringer

One of the basic general remedies, available for different infringements in private law, is compensation of damage. No surprise, that Article 14 (1) Trade Secret Directive and Article 11 (1) Trade Secret Protection Law also do provide the trade secret holder with such remedy in case of a trade secret infringement. However, these provisions stipulate several other preconditions, which shall be met, in order that the trade secret holder could claim the compensation of damage. One of these preconditions – that the defendant knew or ought to have known that he, she or it was engaging in unlawful acquisition, use or disclosure of a trade secret. This criterion is provided also in the law of other EU Member States, for example, in the Article 8 (1) of Dutch Trade Secret Law (Dutch – *Wet bescherming bedrijfsgeheimen*),[27] *and Article L. 151-6 of the French Commercial Code*.[28] It leads to the thought, that there could be no such thing as "innocent infringement of a trade secret". Moreover, apart from this aspect, what is the role of this criterion and how could the existence (or absence) of this criteria be established?

Legal doctrine emphasizes that this aspect, which may be called a "mental aspect of infringer".

> [It] *is helpful in the common situation where, for example, an ex-employee takes a trade secret with him and then uses it within a new business that he has set up, or provides it to his new employer company. When the new business does not know or have grounds to suspect the provenance of the confidential information at the time of its use or disclosure, it may have some protection and a limited defence.* [...] *However, once it is put on notice or has reason to suspect the information is a third party's trade secret and it continues to use or disclose it, it will apparently be equally liable along with, in this case, the ex-employee*.[29]

In other words, this "mental aspect" is the key element, which helps to distribute liability in a case of trade secret infringement.

This concept of "mental aspect" has not "come out of the blue" to land into the Trade Secret Directive. It is familiar in the English law, which does illustrate the threshold of proof to be met in order to prove that someone knew or ought to have known that he is infringing a trade secret. Usually this awareness of infringement

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[27] Wet bescherming bedrijfsgeheimen [Trade Secret Protection Law]. Available: https://wetten.overheid.nl/BWBR0041459/2018-10-23 [last viewed 19.08.2020].

[28] French Commercial Code. Available: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000037262111/ [last viewed 01.01.2021].

[29] *Grassie, G.* Trade Secrets: The New EU Enforcement Regime. Journal of Intellectual Property Law & Practice, 2014, Vol. 9, No. 8, p. 680.

does focus on the fact whether the defendant at the moment of infringement knew or ought to have known that the respective information is a trade secret and/or confidential.[30] United Kingdom Supreme Court has examined the case, where the claim was brought against ex-employee for the alleged trade secret infringement. The plaintiff, an ex-employer, tried to prove the awareness of the defendant by stating that she has "turned a blind eye" to certain facts, which actually signalled that there was or at least might have been a trade secret infringement. The plaintiff emphasized that knowledge (or awareness) that the respective information was a trade secret would not be limited to the actual knowledge of the defendant, and it would include what is sometimes called "blind-eye knowledge", hence requiring to further analyse whether the secret nature of the information should be understood by the defendant. In this context, in the opinion of the plaintiff, the defendant was "playing with the fire" by turning a blind eye on certain relevant facts.[31] However, the Supreme Court rejected such argument and found that these arguments were not sufficient in order to prove that the defendant was certainly aware of a possible infringement and considerations.[32] As it is explained in commentaries, the approach of the Supreme Court does concur with the approach of the English courts and hence does not cause a surprise. If the Supreme Court would accept the said argument of the plaintiff, it would mean a rather substantial change in the English law and amount to the strict liability for the trade secret infringements.[33] From this statement, it may be concluded that currently the liability of a trade secret infringement is something opposite to the strict liability and hence most likely it is fault based liability, requiring intent or negligence as one of the mandatory preconditions of liability for a trade secret infringement.

It appears to be confirmed by the manner in which Germany has implemented the Trade Secret Directive in the German law. Namely, Article 10 (1) of the German Trade Secret Protection Law requires intent or negligence as the said mandatory preconditions. Of course, such provision to a certain degree is made with a purpose to bring the respective provision closer to the German legal tradition, where the criterion of fault in the form of intent or negligence is generally accepted as a necessary requirement for the establishment of liability for tort[34] or breach of contract.[35] However, it is not a mere question of wording.

Fault in the form of intent (Latin – *dolus*) or negligence (Latin – *negligentia*) has been known as a precondition of liability in jurisprudence since Roman law.

Intent is constructed from the elements of awareness of the actual circumstances and will. The precondition of will does not require an exact will to cause an instance of injury or infringement. Instead, it is sufficient that the injuring party recognizes the risk that he may create, but nevertheless proceeds with the respective course of action.[36] It goes without saying, that such meaning of intent is covered by a broader scope of awareness and therefore the intentional trade secret infringement shall

[30] *Turner, S.* Knowledge a key factor for liability for trade secrets misuse. Journal of Intellectual Property Law & Practice, 2013, Vol. 8, No. 10, p. 761.

[31] Vestergaard Frandsen A/S (now MVF 3 ApS) and others v. Bestnet Europe Limited and others [2013] UKSC 31, United Kingdom Supreme Court, 22 May 2013, para. 26. Available: https://www.supremecourt.uk/cases/docs/uksc-2011-0144-judgment.pdf [last viewed 03.04.2022].

[32] Ibid., paras 40–43.

[33] *Turner, S.* Knowledge a key factor, p. 761

[34] *Hau, W., Poseck, R.* BeckOK BGB. 56th edition. München: C.H. Beck, 2020, BGB § 823, Rn. 5

[35] *Säcker, F. J., Rixecker, R., Oetker, H., Limpberg, B.* Münchener Kommentar zum Bürgerlichen Gesetzbuch. München: Verlag C. H. Beck, 2020, BGB § 280, Rn. 26–30.

[36] Ibid., Rn. 46–50.

be understood as a situation, when the infringer has been aware of a trade secret infringement and hence shall be held liable for damages of the trade secret holder.

Awareness also plays a certain role in the evaluation of possible negligence, although it is less important than in establishing of intent. Instead, when evaluating negligence, the attention is rather paid to whether the alleged infringer has acted with a necessary general, objective and individual diligence.[37] These criteria have been attributed to the evaluation of negligence at least since the Justinian era of Roman law, which (with later amendments from Pandect law) divided negligence into *culpa levis*, which is a failure to act as a *bonus pater familias* or a reasonable person, and *culpa lata*, which is a lack of any reasonable diligence or care, and *culpa (levis) in concreto* – the failure to act with the same care or diligence as one ordinarily would about his own affairs (an evaluation of a person's actions from his own subjective perspective).[38] Nowadays, *culpa levis* and *culpa lata* are merged into what we know as gross negligence, which requires the objective analysis of a person's actions and an evaluation of whether he has acted with an amount of diligence that could be expected from a standard, reasonable person.[39] Furthermore, gross negligence may be established if one lacks diligence to an unusually high degree and ignores the circumstances, which should have been evident to anyone in that situation.[40] *Culpa (levis) in concreto* is usually known as ordinary negligence and may be established if the person has not violated the requirements of general diligence, but nevertheless has acted with less diligence than he normally would apply to his own actions or affairs.[41] Hence, the evaluation of ordinary negligence mainly focuses on a subjective evaluation of diligence or that what may be expected from that particular person.[42] However, the degree of required diligence, which has crucial role in the examination of possible negligence, could be analysed and applied in order to examine, whether the defendant "ought to have known" that he is engaging in the trade secret infringement.

Summarizing the above analysis, the author arrives at the conclusion that the criteria, whether the defendant "knew or ought to have known" that he is engaging in the trade secret infringement, involve the examination, whether the defendant has acted with intent, gross or ordinary negligence.

5. Application of contractual instruments

Among organizational and physical measures, which the trade secret holder shall take in order to maintain the secrecy of the trade secret, there are legal measures with the same purpose.[43] Although it has not been stated explicitly, the wording used by some authors may suggest that they are of an opinion that contractual provisions, which prohibit the disclosure of a trade secret or otherwise, are stipulated with the purpose to protect the unauthorized disclosure, acquisition and use of the trade

[37] *Säcker, F. J., Rixecker, R., Oetker, H., Limpberg, B.* Münchener Kommentar zum Bürgerlichen Gesetzbuch. München: Verlag C. H. Beck, 2020, BGB § 280, Rn. 30–33.

[38] *Wright, C. A.* Gross Negligence. University of Toronto Law Journal, Volume XXXIII. University of Toronto Press, 1983, pp. 190, 192.

[39] *Säcker, F. J., Rixecker, R., Oetker, H., Limpberg, B.* Münchener Kommentar, Rn. 30–33.

[40] Oberlandesgericht Bremen, Urteil vom 17.08.2004. — 3 U 103/03 [Bremen Higher Court. Judgement from 17 August 2004 in case 3 U 103/03].

[41] *Säcker, F. J., Rixecker, R., Oetker, H., Limpberg, B.* Münchener Kommentar, Rn. 30-33

[42] *Ebenroth, C., Boujong, C., Joost, D., Strohn, J.* Handelsgesetzbuch. Band 2. §§ 343–475h, Transportrecht, Bank und Börsenrecht, 4. Auflage 2020. München: C. H. Beck, 2020, HGB § 347 Rn. 32–34.

[43] *Gulbis, R.* Komercnoslēpuma aizsardzības priekšnosacījumi, p. 11.

secrets, do constitute an entire body of such legal instruments.[44] The author of the present paper does not agree with it, since, for example, the notifications given to employees and other persons in order to inform them that the particular information is a trade secret, also fit into the category of these legal instruments.

Nevertheless, the said contractual provisions play an important role. They may be made in a form of separate non-disclosure or confidentiality agreement, which the parties may even conclude in the stage of contractual negotiations, before entering into any other contractual relations. Respective non-disclosure or confidentiality provisions may also be included into another contract. Last but not least, they may be concluded as some sort of prologue of contractual relations between the parties, with a purpose to maintain the secrecy of certain information, and to prevent the disclosure and use of it. Likewise, such contractual provisions are possible in relations between an employer and an employee. Moreover, employer and employee can conclude an agreement, which prohibits an employee, usually for the certain periods of time, to enter into labour or other cooperation agreement with competitors of the former employer or to start a business enterprise, which will compete with that of the former employer. In Latvian law, this type of agreements is regulated by the Article 84 of Labour Law (Latvian – Darba likums).[45] This section will further focus on several aspects of this type of agreements, known also as non-competition agreements.

Supreme Court of Latvia has provided that non-competition agreements are not the instruments for the protection of a trade secret. Instead, the purpose of a non-competition agreement is to protect the employer from the competition by the former employee after the termination of employment relationship.[46] Such opinion could not be supported. Firstly, legal doctrine clearly speaks about non-competition agreement as a tool for protecting from an unauthorised disclosure, acquisition or use of trade secrets.[47] Secondly, from the perspective of merits, the non-compete agreement likewise prevents the situations when a former employee may have an urge or desire to disclose or use the trade secrets of his former employer in favour of the employee's new employment or occupation.

Article 84 (1) of Latvian Labour Law does provide several mandatory requirements, which must be met for a non-competition agreement to be legally valid. These requirements are the goal of restriction on competition, due date of the restriction on competition, and adequate compensation for restriction on competition. These criteria are already comprehensively analysed by other authors.[48] Therefore, the author of the present paper will focus only on particular details of the said provision.

According to the Article 84 (2) of Labour Law, the scope of non-competition agreement may include only the field of activity, in which the employee has been engaged during the period of existence of employment relationship. In essence, this

[44] *Gulbis, R.* Komercnoslēpuma aizsardzības priekšnosacījumi, p. 11.

[45] Darba likums [Labour Law] (20.06.2001.) Available: https://likumi.lv/ta/en/en/id/26019-labour-law [last viewed 10.04.2022].

[46] Latvijas Republikas Augstākās tiesas Civillietu departamenta 2015. gada 27. februāra spriedums lietā Nr. SKC-0008/2015, 11.3.2. punkts, 15. lpp. [Judgment in the case SKC-0008/2015 of the Civil Department of the Supreme Court of the Republic of Latvia from 27 February, 2015, point 11.3.2., page 15]. Not published.

[47] *Van Caenegem, W.* Trade Secret, p. 203.

[48] *Kārkliņa, A.* Restriction of Competition After Termination of Employment Relationships. Journal of the University of Latvia. Law, No. 14, Riga: University of Latvia, 2021, pp. 159–183. Available: https://www.apgads.lu.lv/fileadmin/user_upload/lu_portal/apgads/PDF/Juridiska-zinatne_Law/Juridiska-zinatne-14/Jurid-zin-14_.pdf [last viewed 10.04.2022].

provision does provide certain proportionality limits for the restrictions, imposed on the former employee by non-competition agreement. Other jurisdictions do provide stricter proportionality limitations. For example, in France the non-competition agreement is nt permitted to create an effect whereby the former employee would be deprived from ability to work at all, which may be the case, if the former employee is able to work only within a narrow scope of specialisation.[49] As it will be analysed below, the Latvian law could be interpreted differently.

Article 84 (1) 2) of Latvian Labour Law provides that the maximum period of restriction of competition for a former employee may not exceed two years after the termination of the employment relations. This period is shorter in comparison with, for example, Portugal, which stipulates a three year period, and Italy, which stipulates a five year period.[50]

Article 84 (1) 3) of Latvian Labour Law requires the employer to pay the employee adequate monthly compensation for the compliance with the restriction on competition after termination of the employment relationship with respect to the whole time period of restriction on competition. The Latvian law does not set the fixed amount for adequate compensation. However, it usually varies in the range from 60 to 90% of the employee's average salary. Such threshold is rather high in comparison with other European countries, for example, France, where it must be at least 30% of previous salary; Lithuania, where it is required to be at least 40% of employee's average; Romania, where it must be at least 1/4 of current salary; Hungary, where it must be at least 1/3 of the employee's previous salary; and Germany, Belgium and Denmark, where it must equal at least one half of the current salary.[51] However, it shall be kept in mind, that higher thresholds of compensation justify the stricter limitations to the former employee. Therefore, it could be said at least in the light of Latvian law, that, if for example, the former employee receives compensation in the amount of 100% of his average salary, he may be subject to rather strict limitations in his non-competition agreement with the former employee. These limitations may even require the former employee to refrain from working at all during the limitation period.

Summary

1. The requirement to the trade secret holder to provide detailed description of his trade secrets and to precisely inform his employees about this description is not absolute, but at the same time any deviations from this principle shall be interpreted in a narrow sense.
2. The author suggests amending the Trade Secret Protection Law with a provision stating that the court is entitled to conclude that the defendant had to treat the particular information as trade secret, if, according to the circumstances of the case, he should reasonably have come to such conclusion.
3. Examples from the competition law practice indicate that the scope of information, specified in the Article 3 (2) of Trade Secret Protection Law, which in any case shall be considered as trade secret, should be broader and should not be limited simply to accounting information, which is not entered into public reports. The author suggests commencing the discussion about amending this provision of the Trade Secret Protection Law.

[49] *Van Caenegem, W.*, Trade Secret, pp. 156, 157.
[50] *Kārkliņa, A.* Restriction of Competition, p. 164.
[51] *Ibid.,* p. 167.

4. It is clearly provided in the Trade Secrets Directive and the Trade Secret Protection Law that, in order to be considered as a trade secret, the respective information has to have commercial value because of the secrecy of this information. The debate exists between legal scholars as to whether this commercial value has to be actual or should a potential value be sufficient. The author sides with the opinion that the potential value from keeping the information secret is sufficient for that information to be considered as a trade secret.
5. The criteria, whether the defendant "knew or ought to have known" that he is engaging in the trade secret infringement, involves the examination whether the defendant has acted with intent, gross or ordinary negligence.
6. The non-competition agreement, concluded between the employer and his employee, requesting after the termination of current employment to the employee to refrain from new employment, cooperation and commencing his own business, which may compete with the business of his than former employer, is an important tool for protection of trade secrets, not only a tool protecting the employer from competition created by his former employee.
7. At least in the light of Latvian law, for example, if the former employee receives compensation in the amount of 100% of his average salary, he may be subject to rather strict limitations in his non-competition agreement with the former employee. These limitations may even require the former employee to refrain from working at all during the limitation period.

Sources

Bibliography

1. *De Carvalho, P.* The TRIPS Regime of Antitrust and Undisclosed Information. The Hague: Kluwer Law International, 2008, 223 ff. Quoted from: *Suosa e Silva N.* What exactly is a trade secret under the proposed directive? Journal of Intellectual Property Law & Practice, Vol. 9, No. 11, 2014, p. 929.
2. *Ebenroth, C., Boujong, C., Joost, D., Strohn, J.* Handelsgesetzbuch. Band 2. §§ 343–475h, Transportrecht, Bank und Börsenrecht, 4. Auflage 2020. München: C. H. Beck, 2020, HGB § 347.
3. *Gulbis, R.* Komercnoslēpuma aizsardzības priekšnosacījumi, nelikumīga iegūšana, izmantošana un izpaušana [Preconditions of Trade Secret Protection, Illegal Acquisition, Use and Disclosure]. Jurista Vārds, 12.10.2021., Nr.41 (1203), pp. 7–17.
4. *Grassie, G.* Trade Secrets: The New EU Enforcement Regime. Journal of Intellectual Property Law & Practice, Vol. 9, No. 8., 2014.
5. *Hau, W., Poseck, R.* BeckOK BGB. 56th edition. München: C. H. Beck, 2020, BGB § 823.
6. *Niebel, R., de Martinis, L., Clark, B.* The EU Trade Secrets Directive: all change for trade secret protection in Europe? *Journal of Intellectual Property Law & Practice,* Vol. 13, Issue 6, June 2018.
7. *Kārkliņa, A.* Restriction of Competition After Termination of Employment Relationships. Journal of the University of Latvia. Law, No. 14, Riga: University of Latvia, 2021, pp. 159–183. Available: https://www.apgads.lu.lv/fileadmin/user_upload/lu_portal/apgads/PDF/Juridiska-zinatne_Law/Juridiska-zinatne-14/Jurid-zin-14_.pdf [last viewed 10.04.2022].
8. *Rācenājs, K.* Komercnoslēpums darba tiesiskajās attiecībās [Trade Secret in Labour Relations]. Jurista Vārds, Nr. 41 (1203), 12.10.2021., pp. 33–37.
9. *Säcker, F. J., Rixecker, R., Oetker, H., Limpberg, B.* Münchener Kommentar zum Bürgerlichen Gesetzbuch. München: Verlag C. H. Beck, 2020, BGB § 280.
10. *Suosa e Silva, N.* What exactly is a trade secret under the proposed directive? Journal of Intellectual Property Law & Practice, Vol. 9, No. 11, 2014.
11. *Tripathi, S.* Treating trade secrets as property: A jurisprudential inquiry in search of coherency. *Journal of Intellectual Property Law & Practice,* Vol. 11, Issue 11, November 2016.
12. *Turner, S.* Knowledge a key factor for liability for trade secrets misuse. Journal of Intellectual Property Law & Practice, Vol. 8, No. 10, 2013.

13. *Van Caenegem, W.* Trade Secret and Intellectual Property. Breach of Confidence, Misapproproation and Unfair Competition. Alphen aan den Rijn: Kluwer Law International, 2014.
14. *Varadarajan, D.* Trade Secret Precautions, Possession and Notice. Hastings Law Journal, Vol. 68, No. 2, February 2017.
15. *Wish, R., Bailey, R.* Competition Law. 8th edition. Oxford: Oxford University Press, 2015.
16. *Wright, C. A.* Gross Negligence. University of Toronto Law Journal, Vol. XXXIII. University of Toronto Press, 1983.

Normative acts

1. Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements. OJ C 11, 14.01.2011, pp. 1–72.
2. Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. OJ L 157, 15.06.2016, pp. 1–18.
3. Darba likums [Labour Law] (20.06.2001). Available: https://likumi.lv/ta/en/en/id/26019-labour-law [last viewed 10.04.2022].
4. Gesetz zum Schutz von Geschäftsgeheimnissen [Trade Secret Protection Law]. Available: http://www.gesetze-im-internet.de/geschgehg/BJNR046610019.html [last viewed 26.03.2022].
5. Komercnoslēpuma aizsardzības likums [Trade Secret Protection Law] (28.02.2019.). Available: https://likumi.lv/ta/en/en/id/305532-trade-secret-protection-law [last viewed 27.02.2022].

Case law

1. Learning Curve Toys Incorporated v. Playwood Toys Incorporated, 342 F 3d 714 (7th Cir. 2003) para. 38. Quoted from: *Suosa e Silva, N.* What exactly is a trade secret under the proposed directive? Journal of Intellectual Property Law & Practice, Vol. 9, No 11, 2014, p. 930.
2. Oberlandesgericht Bremen, Urteil vom 17.08.2004. – 3 U 103/03 [Bremen Higher Court. Judgement from 17 August 2004 in case 3 U 103/03].
3. Vestergaard Frandsen A/S (now MVF 3 ApS) and others v. Bestnet Europe Limited and others [2013] UKSC 31, United Kingdom Supreme Court, 22 May 2013, para 26. Available: https://www.supremecourt.uk/cases/docs/uksc-2011-0144-judgment.pdf [last viewed 03.04.2022].
4. Latvijas Republikas Augstākās tiesas Civillietu departamenta 2015. gada 27. februāra spriedums lietā Nr. SKC-0008/2015, 11.3.2. punkts, 15. lpp. [Judgment in the case No. SKC-0008/2015 of the Civil Department of the Supreme Court of the Republic of Latvia of 27 February, 2015, point 11.3.2., page 15]. Unpublished.
5. Latvijas Republikas Augstākās tiesas Senāta Administratīvo lietu departamenta 2021. gada 15. februāra spriedums lietā SKA-54/2021, 2.4. punkts, 3. lpp. [Judgment in the case No. SKA-54/2021 of the Administrative Department of the Supreme Court of the Republic of Latvia of 15 February, 2021, point 2.4, page 3] Available in Latvian: https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/administrativo-lietu-departaments/klasifikators-pec-lietu-kategorijam/konkurences-tiesibas [last viewed 22.03.2022].
6. Konkurences padomes 2014. gada 24. oktobra lēmums Nr. E02-55 lietā p/13/03.01./2, 14. lpp. [Decision No. E02-55 in case No. p/13/03.01./2 of the Competition Council of 24 October, 2014, p. 14]. Available: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/GXFkq7zw7v.pdf [last viewed 22.03.2022].

Other sources

1. Annotation of the draft Trade Secret Protection Law. Available: http://tap.mk.gov.lv/lv/mk/tap/?dateFrom=2018-03-22&dateTo=2022-03-22&text=Komercnosl%C4%93puma&org=0&area=0&type=0 [last viewed 22.03.2022].

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EU Considerations on New Protection of Whistleblowers

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Without some of the important information brought into light by whistleblowers, many current scandals would not have occurred. If whistleblowing is brought into the public domain, it can introduce a previously unforeseen and incorrigible milestone in the biography of whistleblowers, leading to financial loss, loss of work, impact on private life, and even health. Even in situations where the whistleblower acts in good faith, he or she runs the risk of being publicly judged and having the personal reputation tarnished by lack of protection. The persons who have reported wrongdoing may even be driven to complete isolation or pay with their lives or those of their families. In view of this, the European Union has foreseen a better protection for whistleblowers in a new directive, which is to be implemented through a trilateral whistleblower system.

The main new feature of the European Whistleblower Protection Directive is the obligation to establish internal whistleblower channels for legal entities in the public and private sectors with at least 50 or more employees. In the public sector, Member States may exempt cities with fewer than 10 000 inhabitants or fewer than 50 employees working in the public body from the obligation to establish whistleblowing channels. If the report to the company or public body is not successful, the whistleblower may report to the press.

European legislators had until December 2021 to transpose the provisions of this directive into national whistleblower protection regulations. To date, not all States have accomplished this task.

Keywords: compliance, whistleblowing channel, protection, Whistleblower Directive, European Union.

Contents

Introduction

The Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law (the "Directive")[1] was published on November 26, 2019 and went into effect in December of the same year.[2] European legislators have two years[3] at the national level to incorporate the provisions of this Directive into national whistleblower protection regulations.[4]

The inclusion of whistleblower reporting channels in compliance programs is not new and has long been considered an essential element in the structural framework of an effective compliance program.[5]

Work with whistleblowers in multinational companies is multifaceted and unique, either by virtue of the subject matter itself (i.e., the allegations and the analysis and investigation by the local compliance officer), or the diverse cultures to which whistleblowers belong, or the number and quality of functions of the people involved in the report (which often requires time in preparing and conducting interviews),

[1] Union Law is understood as European Union law.
[2] The Directive entered into force on 16 December 2019.
[3] By 17 December 2021, all European Union countries should have transposed the provisions of the Directive into their national legal systems.
[4] Resolution 2399, 2019, Improving the Protection of Whistleblowers All Over Europe: All EU member countries will be legally required to incorporate this Directive into their national law within two years from its effective date. However, the member states of the Council of Europe that are not, or not yet, members of the EU also have a strong interest in drawing on the draft Directive with a view to adopting or updating legislation in accordance with the new European standards.
[5] *Vitorino Clarindo dos Santos, J.* Rechtsfragen der Compliance in der internationalen Unternehmensgruppe. 2013, p. 58.

or the impact caused or that may be caused by the complaint submitted by the whistleblower in relation to the company.

With regard to the identification of risks, whistleblowing reporting channels are a means of helping to identify corporate wrongdoing.[6] Thus, the author recommends that all companies, even those governed by a corporate legal form that dispenses with the establishment of a compliance system and independent of the new Directive, establish whistleblower reporting channels, whether they are overseen by human resources, the legal department, the audit division, or a supervisory board, or placed under the direction of the works council, an ombudsman, or the compliance department itself.[7]

Whistleblowing reporting channels may allow the employee to raise a concern by telephone, e-mail, online (i.e., through the whistleblowing reporting channel established on the company's internet and/or intranet), or written mail, or the employee may be allowed to raise a concern directly with his or her superior, the compliance officer of the subsidiary in question, the chief compliance officer, or an ombudsman (if one exists), or the employee may contact the employee responsible for receiving the whistleblowing report in a department different than his or her own.

The explanatory memorandum to the proposed Directive lists several positive economic effects with the inclusion of whistleblower protection rules. Studies carried out by the European Commission in 2017 found that, in the field of public procurement alone, the annual loss of potential benefits for the proper functioning of the single market would be in the range of 5.8 to 9.6 billion euros.[8] Moreover, just with regard to the impact on the EU budget allocated to preventing fraud and corruption, the current risk of lost revenue is estimated to be between 179 and 256 billion euros per year.[9] Whistleblower protection should also contribute to more effective taxation in the EU by combating tax avoidance. The latter results in tax revenue losses for Member States and the Union of around 50 to 70 billion euros per annum.[10] As provided for in the Directive, protection for whistleblowers is instrumental in preventing the diversion of firearms, their parts, components and ammunition, as well as defence-related products, since it will encourage the reporting of violations of Union law, such as document fraud, altered marking and fraudulent acquisition of firearms within the Union, where breaches often imply a diversion from the legal to the illegal market.[11] Also, with regard to product manufacturing companies,

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[6] *Kremer, T.* Compliance-Programm in Industriekonzernen [Compliance programme in industrial groups]. ZGR, 2010, pp. 113, 132.

[7] In some countries and cultures, whistleblowing reporting channels can also be viewed suspiciously, since the nature of the whistleblowing disclosure by one co-worker to another takes away the trust that must exist for their usefulness in discovering and subsequently handling corporate wrongdoing effectively. See: *Deiseroth, D., Derleder, P.* Whistleblower und Denunziatoren [Whistleblowers and Denunciators]. ZRP, p. 248; *Mahnhold, T.* „Global Whistle" oder „deutsche Pfeife" – Whistleblower-Systeme im Jurisdiktionskonflikt ["Global whistle" or "German whistle" – whistleblower systems in jurisdictional conflicts]. NZA, 2008, p. 737 et seq.

[8] *Fernandes, M., McGuinn, J., Rossi, L.* Estimating the economic benefits of whistleblower protection in public procurement. Milieu Ltd., 2017. Available: https://op.europa.eu/pt/search-results?p_p_id=eu_europa_publications_portlet_search_executor_SearchExecutorPortlet_INSTANCE_q8EzsBteHybf&p_p_lifecycle=1&p_p_state=normal&queryText=Estimating+the+economic+benefits+of+whistleblower+protection+in+public+procurement+:+final+report.&facet.collection=EULex,EUPub,EUDir,EUWebPage,EUSummariesOfLegislation&startRow=1&resultsPerPage=10&SEARCH_TYPE=SIMPLE [last viewed 03.02.2022].

[9] Directive, p. 8.

[10] Ibid.

[11] Exposition of reasons to the European Directive on the protection of whistleblowers. 2019, p. 18.

the European Union estimates that they are the main source of uncovering unfair or illegal activities, with the result that whistleblowers' reports from these companies have a high added value, given their function in identifying possible unfair or illegal practices in the manufacturing, importing or distribution of products.[12]

Regarding the budgetary impact of the implementation of the whistleblower system in the public sector, the European Union foresees costs of more than 204.9 million euros in one-time costs and 319.9 million euros in annual operating costs.[13] For medium and large companies in the private sector, costs are expected to be over 542.9 million euros in one-time costs and annual operating costs around 1 016.6 million euros.[14]

To ensure that the positive effects of implementing an European whistleblowing system are realized, the European Union has defined a set of common minimum legal standards that provide protection against acts of retaliation against whistleblowers, without the latter having to bear any disadvantages, whether personal or economic.[15] It is undeniable that public disclosure of an anonymous whistleblower's identity can have a previously unforeseen and often irreversible effect in the reputation of the whistleblower. Not only Edward Snowden[16], but also Margrit Herbst[17], Chelsea Manning[18], Daniel Ellsberg[19], and Miroslav Strecker[20], among many others, are examples of the media exposure and public notoriety that often follows when the whistleblower's identity is revealed to the public. Public reactions can have a great impact on whistleblowers, including financial and job losses, and can affect the whistleblower's

[12] Exposition of reasons to the European Directive on the protection of whistleblowers. 2019, p. 18.

[13] Directive, p. 8.

[14] Ibid.

[15] Cf. Council of Europe Recommendation CM/Rec (2014) of 30 April 2014 on the protection of whistleblowers; Council of Europe Parliamentary Assembly Resolution 2171 (2017) of 27 June 2017.

[16] Edward Snowden is currently the world's best-known American whistleblower: While employed by an outside consulting firm in the service of the NSA intelligence agency, he uncovered and made public US government surveillance via the internet. In 2020, a US Federal Court ruled that the US intelligence phone surveillance program Snowden denounced was illegal. See: https://www.spiegel.de/netzwelt/netzpolitik/edward-snowden-enthuelltes-ueberwachungsprogramm-war-illegal-a-1e08c392-aec9-4149-94f1-cd8a6ad535fb [last viewed 03.02.2022].

[17] Margrit Herbst is a German veterinarian, who in 2001 received the whistleblower award from the association of German scientists, after having discovered and denounced the beginning of the BSE scandal (bovine spongiform encephalopathy, known as mad cow disease) in Germany during the 1990s. Margrit identified several suspected cases in 1994. However, her superiors not only ignored her, they released the infected animals for slaughter and their infected meat entered the market. When the number of cattle with suspected cases of the disease increased and the company continued to ignore the facts, the doctor gave a television interview in which she made the BSE cases public. See: https://www.anstageslicht.de/menschen-dahinter/dr-margrit-herbst/ [last viewed 03.02.2022].

[18] Chelsea Manning released war reports, classified military documents, and diplomatic dispatches from Afghanistan and Iraq to the WikiLeaks platform in 2013, making public the war crimes committed by the US military. Guilty of espionage, she spent seven years in prison, before then-President Barack Obama commuted much of her sentence. See: https://www.faz.net/aktuell/politik/ausland/whistleblowerin-chelsea-manning-aus-haft-entlassen-15020248.html [last viewed 03.02.2022].

[19] Daniel Ellsberg made public in 1971 the so-called Pentagon Papers, which revealed numerous untruths that the American public had heard about the Vietnam War and the war aims of various US governments. Ellsberg, economist and peace activist, is now 90 years old. See: https://www.youtube.com/watch?v=eGYLxyLh8d8 [last viewed 03.02.2022].

[20] Miroslav Strecker revealed in 2007 that certain beef of lower standard than was allowed for consumption had been relabeled and declared as food. During the scandal it was discovered that the company, which was later closed down, had sold 105 whole tons of waste meat to Döner (meat kebab) manufacturers in Berlin. See: https://www.sueddeutsche.de/bayern/ekelfleisch-prozess-nicht-zustaendig-zeuge-kritisiert-behoerden-1.1099136 [last viewed 03.02.2022].

private life and even health. Even in situations where the whistleblower acts in good faith, he or she runs the risk of being publicly judged and having his or her reputation tarnished by lack of legal protection. He or she may even be driven to complete isolation, have his or her life ruined, and pay with his or her own life or that of his or her family. In view of this, the European Union has attempted in the new Directive to establish better protection for whistleblowers through the implementation of a trilateral whistleblower system.

This work analyses the major changes affecting whistleblowers in international companies, including personal and legal scope of the new European directive, obligation to establish internal and external whistleblower reporting channels and its equal use, confidentiality and specific whistleblower protection measures. The procedure for receiving and handling internal whistleblower complaints is also considered in the current paper. An outlook and last considerations are provided at the conclusion of the article.

International and doctrinal (black-letter law) as well as legal interdisciplinary research in the field were the major types of legal research used in this work. Regarding jurisprudence, when it comes to case law, the research output is reduced to a minimum. The reason for this may be associated with the fact that the directive has not yet been implemented in all EU countries. The lack of legislative regulation prevents the existence of judgments.

Regarding the other European Union Member States, which have transposed the directive into local law, the author believes that the new local law in force is still too new to lead to the appearance of judicial decisions.

1. Content of the Directive

The main objective of the Directive is to protect whistleblowers who report violations in good faith. To achieve this objective, the Directive provides for the following safeguards (i) ensuring the protection of the identity of the whistleblower; (ii) if the identity of the whistleblower is known, the Directive provides measures to protect the whistleblower in such a way that he or she should not fear reprisals in his or her professional environment; and (iii) the Directive protects the whistleblower from liability or punishment.[21]

1.1. Personal scope

The European legislature has demonstrated its commitment to ensuring the broadest possible protection for whistleblowers.

According to the European standard, almost any type of natural person can fall under the legal definition of Art. 5 (7), provided they satisfy the prerequisite of an employment relationship with a company or the state.[22] The effective application of Union law requires that protection be granted to the broadest possible range of categories of persons, regardless of whether they are citizens of the Union or third-country nationals, who by virtue of their professional activities, regardless of the nature of such activities and whether they are remunerated or not, have privileged

[21] *Garden, F., Hiéramente, M.* Die neue Whistleblowing-Richtlinie der EU – Handlungsbedarf für Unternehmen und Gesetzgeber [The new Whistleblowing Directive of the EU – need for action for companies and legislators]. BB, 2019, pp. 963–965.

[22] European Directive on the protection of whistleblowers, Art. 5. Definitions, 7) "Whistleblower" means a natural person who reports or publicly discloses information on breaches acquired in the context of his or her work-related activities.

access to information on violations, whose reporting is in the public interest and who may suffer acts of retaliation, if they report them.[23]

As far as personal treatment is concerned, in accordance with Art. 4 (2) of the Directive, the Directive also protects whistleblowers who, in the public or private sector, report or divulge information about breaches they have become aware of during the course of a working relationship that has since ended. The Directive also applies to those whistleblowers whose employment relationship has not yet begun, in cases where information about violations has been obtained during the recruitment process or other stages of pre-contractual negotiations.

Personal scope is not limited to active employees, according to Art. 45 of the Treaty of the Functioning of the European Union (TFEU), but also encompasses atypical working conditions such as that of temporary workers, self-employed persons, holders of shareholdings, persons belonging to the administrative, management or supervisory bodies of undertakings, including non-executive members, as well as volunteers, applicants for vacancies, trainees whether paid or unpaid, any persons working under the supervision and direction of contractors, subcontractors and suppliers. Also included in this list are facilitators (natural person who assists a reporting person in the reporting process in a work-related context, and whose assistance should be confidential), third parties who are connected to whistleblowers and who could be subject to retaliation in a professional context, such as colleagues or family members of whistleblowers, as well as legal entities that are owned by whistleblowers, for whom the latter work or with whom they are connected in any way in a professional context. In situations where married persons work for the same employer and confirm that one of them is a whistleblower, the other person also enjoys legal protection if the whistleblower is fired or otherwise harmed by the employer.[24] Thus, the Explanatory Memorandum of EU Directive No. 81 clearly states that persons who directly make a public disclosure should also benefit from protection if they have reasonable grounds for believing that, in the case of external whistleblowing, there is a risk of retaliation or a low prospect that evidence may be concealed or destroyed or that an authority may be in collusion with the offender of the breach or involved in the violation itself.

The Directive also provides protection in Art. 4 (4) (a) to the facilitator, who is defined as a natural person who assists a whistleblower in the complaint procedure in a professional context, and whose assistance must be confidential. The European norm also provides protection in Art. 4 (4) (c) to legal entities that are owned by whistleblowers, for which they work or with which they are in any way connected in a professional context.

1.2. Legal scope of application

With regard to legal application, the Directive lists in an enumerative manner the legal areas in which the protection of whistleblowers is guaranteed, thus not fully harmonizing the protection of whistleblowers.[25] The legal application of the Directive covers infringements within the scope of the EU acts listed in Art. 2 (1) (a), which concern the following areas: public procurement, services, financial products and

[23] Exposition of reasons to the European Directive on the protection of whistleblowers, 2019, pp. 23 (37).
[24] European Directive on the protection of whistleblowers, Art. 4.
[25] *Dzida, B., Granetzny, T.* Die neue EU-Whistleblowing-Richtlinie und ihre Auswirkungen auf Unternehmen [The new EU Whistleblowing Directive and its impact on companies]. NZA, 35(18), 2021, p. 2.

markets and prevention of money laundering and terrorist financing, product safety and compliance, transport safety, environmental protection, radiation protection and nuclear safety, food and feed safety, animal health and welfare, public health, consumer protection, protection of privacy and personal data, and network and information systems security. In addition, paragraph (b) provides protection in the case of offenses resulting from violations against the financial interests of the European Union, as referred to in Art. 325 TFEU and specified in applicable Union measures. In addition, also listed under (c) are violations relating to the internal market, referred to in Art. 26 (2) TFEU, including violations of Union competition and state aid rules, as well as violations relating to the internal market with respect to acts in violation of corporate tax rules or practices whose purpose is to obtain tax advantages contrary to the object or purpose of corporate tax law.

There is no whistleblower protection for complaints made about ethical issues or general breaches of contracts, nor about internal corporate guidelines, unless the breaches also constitute violations of laws listed in the Directive.[26]

EU member states are permitted to extend protection under national law to areas or acts not covered by Art. 2 of the Directive. This can be done by creating a national whistleblower protection law, which can also apply to internal reporting of violations.

2. Reporting whistleblower channels and their operating principles

2.1. Obligation to establish internal whistleblower reporting channels

The main novelty that has been introduced with the effective date of the Directive is the obligation to establish internal whistleblower reporting channels. According to Art. 8 of the Directive, legal entities in the public and private sectors with at least 50 or more employees are legally required to establish internal whistleblower reporting channels. The national legislators are free to require entities employing even fewer than 50 employees to establish such reporting channels. In view of the costs[27] and the complex administrative apparatus that whistleblowing reporting channels bring with them, the decision whether or not to follow the provisions of the Directive in the private sector should be proportionate to the size of the company and the risks that its activity presents to the public interest.[28] While Member States may encourage private sector legal entities with fewer than 50 employees to establish less prescriptive reporting channels than those set out in the Directive, the same channels should be able to ensure confidentiality and diligent investigation and follow-up of the initial complaint.

As far as the public sector is concerned, Member States may exempt municipalities with fewer than 10 000 inhabitants or fewer than 50 employees working in the public sector from the obligation to establish reporting channels. In addition, it is also possible to provide at the national level that whistleblowing reporting channels may be shared by common authorities, provided that the internally shared whistleblowing

[26] *Inter alia*, *Bachmann, G., Kremer, T.* Deutscher Corporate Governance Kodex (DCGK) [German Corporate Governance Code (DCGK)]. 8th ed., 2021, Margin No. 28.

[27] Directive, 2018, p. 8: The costs of implementing whistleblowing channels for the private sector (medium and large enterprises) are expected to amount to 542.9 million euros one-time costs and 1 016.5 million euros in annual operating costs. As for the public sector, implementation costs are expected to amount to 204.9 million euros one-time costs and 319.9 million euros in annual operating costs.

[28] Exposition of reasons to the European Directive on the protection of whistleblowers, 2019, pp. 25 (48).

reporting channels are distinct and autonomous from the externally applicable whistleblowing reporting channels.

Empirical studies show that most whistleblowers tend to report internally, within the organization in which they work.[29] Internal whistleblowing is also the best way to get information to the persons who can contribute to the early and effective resolution of risks to the public interest.[30]

2.2. Obligation to establish external whistleblower reporting channels

The Directive in Art. 10 authorises creation of external whistleblowing reporting channels by the European Member States. The latter have to designate competent authorities to receive, provide feedback and follow-up on complaints, and equip those authorities with adequate resources to accomplish those ends. The rule is silent on what "adequate resources" means. But fulfilment of the requirements referred to in the rule is only possible through the creation of an independent and autonomous organizational form within the organization through the separation in the organization of the authorities' general information channels, ensuring the integrity and confidential treatment of the reports received, including their secure storage, as well as the creation of a comprehensive public information function with regard to the legal framework and general procedural references.[31] Additionally, it is necessary for the competent authorities to designate specially trained personnel to deal with the handling of allegations, and in particular for the latter to be technically able to provide all persons concerned with information about the complaints procedures, receive and follow up on allegations, maintain contact with the whistleblower (for the purposes of providing feedback) and request additional information if necessary.[32]

2.3. Equal internal and external reporting channels

The Directive provides for equal use of internal and external whistleblowing reporting channels. The so-called third whistleblowing level - reporting to the public (e.g., to the press) – remains subsidiary to the two previously mentioned channels. The origin of this lies in the case law of the European Court of Human Rights (ECHR) on the protection of sources in the press. According to the ECHR, journalistic source protection is not simply a privilege, but an essential component of a free press. The protection of sources and the protection of whistleblowers are closely linked.[33] Thus, the Directive continues the ECHR's reasoning by weakening the need to initially offer the complaint to an internal channel.[34]

According to Art. 10 of the Directive, whistleblowers can report information about violations directly to the authorities without having first reported facts internally, for example in companies where they work or have worked. However, in accordance with Art. 7 of the Directive, the rule is that the report should first be made to the internal channel, before proceeding to report through external channels, in all cases where the violation can be effectively resolved internally and where the whistleblower

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[29] Exposition of reasons to the European Directive on the protection of whistleblowers, 2019, p. 23 (35).

[30] Ibid.

[31] *Dzida, B., Granetzny, T.* Die neue EU-Whistleblowing-Richtlinie, p. 3.

[32] Exposition of reasons to the European Directive on the protection of whistleblowers, 2019, pp. 29 (74): Staff members of the competent authorities who are responsible for handling reports should be professionally trained, including on applicable data protection rules, in order to handle reports and to ensure communication with the reporting person, as well as to follow up on the report in a suitable manner.

[33] EGMR, de 21.07.2011 – 28274/08.

[34] Jahn, NWJ-aktuell 20/2019, p. 20.

considers that there is no risk of retaliation. It is therefore up to Member States to encourage reporting through internal reporting channels.[35]

One unresolved issue is how to harmonize the requirement to use an internal channel as a priority where there is no legal duty to do so. Legally, one could argue for the creation of legal standards of confidentiality of an even higher degree than those already in place at the European level for whistleblowers, as well as the extension through the insertion of an amnesty rule in the paragraph of the Criminal Code regulating the effects of the application of the sentence with regard to the contribution to the discovery of serious crimes, in the German law provided for in the Criminal Code (StGB) in Section 46b.[36] Taking Germany as an example, and without prejudice to other rules in other European legal systems, it would be necessary to compare the crimes covered by the Directive on the protection of whistleblowers and third parties with those provided for in Section 100 of the German Procedural Code (StPO), which are considered serious crimes, and ensure that these crimes also benefit from the guarantees provided by the new Guidelines.

As for business practice, it is of the utmost importance that whistleblower reporting channels be publicized throughout the company or business group (in the case of business conglomerates) and to all employees, regardless of their position, in a clear and simple manner. Its use and rules must be available not only in internal company guidelines, but also on the intranet, on a dedicated internal page. In addition, the legitimacy and acceptance of the whistleblowing reporting channel starts with the "tone from the top", in which the general management recognize the channel and promote it within the company in a positive and credible manner. Additionally, it is the duty of the compliance officer or the compliance area specialist to address the issue in employee training, but also through newsletters, internal competitions, tests, risk assessments, internal communication measures, and in the annual evaluation of employees as a condition for receiving part of the bonus, among other measures. Above all, it is necessary to make clear to the employees the confidential nature of the internal reporting channel, creating confidence in its use, as well as in the treatment of the allegations.[37] The greater their confidence in the confidentiality of the reporting channel and the thoroughness of the investigation, the greater the chance that it will be used. This may lead employees to prefer using the internal reporting channel before turning to external agencies.

There is an understanding in the literature that offering a financial advantage to the whistleblower may encourage him to "break the wall of silence" in favour of using the internal reporting channel.[38] However, this form of offering an advantage can

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[35] This compromise formula stems from the fact that some Member States, such as Germany and France, were in favour of a mandatory priority for internal denunciation, but were not able to assert themselves in the formation of the agreement. See *Dzida, B., Granetzny, T.* Die neue EU-Whistleblowing-Richtlinie, p. 4.

[36] Compare *Hiéramente, M. Ullrich, U.* jurisPR-StrafR 25/2019 Anm. 1; zum Spannungsverhältnis zwischen DS-GVO-Auskunftsrechten und Whistleblowerschutz: Dzida, BB 2019, 3060, P. 3066 mit Verweis auf LAG Baden-Württemberg de 20.12.2018 – 17 Sa 11/18, NZA-RR, 2019, p. 242 = NZA, 2019, p. 711 Ls;

[37] For more information regarding the implementation of whistleblower systems in European companies, see the Swiss study on the practice of developing whistleblower protection procedures at: www.whistleblowingreport.de.

[38] *Granetzny, T., Krause, M.* Was kostet ein gutes Gewissen? – Förderung von Whistleblowing durch Prämien nach US-Vorbild? [How much does a clear conscience cost? – Promotion of whistleblowing through US-style bonuses?]. CCZ, 2020, p. 29; *Schmolke, U.* Die neue Whistleblower-Richtlinie ist da! Und nun? Zur Umsetzung der EU-Richtlinie zum Schutz von Hinweisgeber in das deutsche Recht [The new whistleblower policy is here! And now? Implementing the EU directive on the protection of whistleblowers into German law]. NZG, 2020, pp. 5–11; *Dzida, B.* NZA Editorial 23/2012.

create an atmosphere of mistrust, and is not very focused on business success, which is why it should not be followed.[39]

Articles 13 and 15 of the Guidelines regulate the protection of whistleblowers when they report to the public authorities and the press only as a last resort. According to what is prescribed, the person who makes a public allegation to the press benefits from protection if it turns out that he or she initially made an internal or external denunciation, without appropriate action having been taken as a consequence of the allegation within the legal time limit. In addition, information about the violation must be published when there is reason to believe that the violation constitutes imminent or manifest danger to the public interest (in an emergency situation) or an irreversible risk, or that there is a risk of retaliation, diminished prospect that the violation will be resolved effectively, or in situations where evidence may be concealed or destroyed, or where an authority may be in collusion with or involved in the violation.

It is indisputable that with the insertion of the trilateral whistleblower system at the European level, the possibility of the whistleblower turning to the public body before reporting to the company brings enormous risks to the reputation of the latter. It appears to be doubtful whether the unconditional external possibility that the offering of allegations directly to public authorities will adequately balance the conflicting interests of the public interest in the process and the whistleblower's freedom of expression, on the one hand, and *pars pro toto*, the economic interests of the company, on the other.[40] In this sense, the lesson for the national legislator is, without a doubt, to ensure that there is sufficient support for internal whistleblowing reporting channels.

2.4. Confidentiality

The Directive requires Member States to establish reporting channels in such a way that they do not allow access by unauthorized personnel to receive the reports and they must ensure the confidentiality of the reporting person and third parties mentioned in the report.

As far as internal reporting channels are concerned, confidentiality is mandated and is directed mainly to the identity of the whistleblower and third parties mentioned in the complaint, in order to prevent access by unauthorized personnel, according to Art. 9 of the European rule.

As for external channels, Art. 12 states that they need to be designed, installed and operated so as to ensure the completeness, integrity and confidentiality of the information and also to prevent access by unauthorized personnel. Thus, both internal and external channels offer whistleblowers and third parties the same protection regarding their identity.

It is still questionable whether the protection of personal data referred to in the Directive is absolute or whether whistleblowers or third parties may in certain cases have their data disclosed under certain circumstances.

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[39] In Germany, there is no legal incentive to reward whistleblowers. The positive aspect generated by the financial aspect is the whistleblower's attempt and motivaiton to use the internal whistleblowing channel instead of turning to the external channel first. Another approach – through the motivation of whistleblowers who no longer work for the company and whose violation of an internal rule or law came to their attention during the period of their employment contract.

[40] *Dzida, B., Granetzny, T.* Die neue EU-Whistleblowing-Richtlinie, p. 5.

The intent of Art. 16 of the Directive is that Member States need to ensure that without the whistleblower's explicit consent, none of his or her personal data, whether or not derived from his or her identity, is disclosed to a person other than the person responsible for processing the complaint. However, para. 2 of the same Article provides that the identity of the whistleblower is to be disclosed if a necessary and proportionate obligation under Union or national law exists in the context of an investigation by national authorities or judicial proceedings, including with a view to safeguarding the rights of defence of the person concerned. In having his or her identity or data disclosed, the whistleblower must be informed before the disclosure takes place.

In this context the first decision of the LAG (Stuttgart Labour Court) of 20 December 2018, which ruled that employees must have the right to inspect files in complaints made by third parties which concern them,[41] is relevant. The mere promise to keep the identity secret is not in itself a sufficient reason for a permissible withholding of information about the whistleblower.[42]

The protection of the identity and other personal data of whistleblowers is not absolute. On the contrary, the whistleblower has to reckon with the fact that his or her identity may be revealed if he or she puts it in the report.

This position reflects current German legal practice. The safest way for a whistleblower to reveal his or her identity is to turn to a lawyer who acts as ombudsman in resolving the complaint. However, the Bochum Regional Court ruled in the appeal court that the documents that a lawyer receives, prepares and stores as ombudsman about the references or facts received from the whistleblower are not free from seizure under Section 97, (1) No. 3 StPO (German Code of Criminal Procedure), since the ombudsman's mandate relationship exists only towards the company and the whistleblower is not considered an accused, but simply a witness.[43]

In the Jones Day decision, the *Bundesverfassungsgericht* (German Federal Constitutional Court. Hereinafter, Federal Supreme Court) also stated that the prohibition of seizure under Art. 97 (1) No. 3 of the StPO (German Code of Criminal Procedure) presupposes a relationship of trust between the person subject to professional secrecy and the accused person.[44] Section 160 a (1) No. 1 of the same law prohibits investigative measures against lawyers who would presumably produce conclusions or evidence about which they would be authorized to refuse to witness.[45] However, according to Section 160 a (5) of the StPO, this provision is considered an accessory rule in relation to Section 97 of the Code of Criminal Procedure,

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41 LAG Stuttgart 20.12.2018 – 17 Sa 11/18.

42 *Altenbach, T., Dierkes, K.* EU-Whistleblowing-Richtlinie und DSGVO [EU Whistleblowing Directive and GDPR]. CCZ, 2020, p. 129. The present article does not discuss specific rules of data protection law or labour law, which may be related to the EU Directive.

43 *Vitorino Clarindo dos Santos, J.* Lecture "Internal Investigations" at ICRio, 2020. Available: *https://youtu.be/j8fAUKlizhU;* LG Bochum NStZ 2016, p. 500; Criticised by *Tido, P.* Durchsuchung und Beschlagnahme [Search and seizure]. C. H. Beck, München, 4. Aufl. 2018, Rn. 545 et seq.; Vogel, A. P., *Poth, C. N.,* pp. 45, 48; LG Hamburg NJW 2011, p. 942 (HSH Nordbank).

44 BVerfG NJW 2018, p. 2385, especially p. 2388, Rn. 83 ff; Criticized by *Xylander, K.-J., Kiefner, A., Bahlinger, S.* Durchsuchung und Beschlagnahme in der Sphäre des Unternehmens Anwalts im Zuge von internen Ermittlungen [Search and seizure in the sphere of the company law in the course of internal investigations]. BB, 2018, pp. 2953, 2954.

45 *Dilling, J.* Der Schutz von Hinweisgebern und betroffenen Personen nach der EU-Whistleblower-Richtlinie [The protection of whistleblowers and data subjects under the EU Whistleblower Directive]. CCZ, 2019, p. 6.

considered *lex specialis*, in the case of seizure.[46] Furthermore, the interest of the State in the Criminal Procedure prevails over the interest of the client with regard to secrecy.[47] Thus, a whistleblower (who is not also an accused) who seeks a lawyer as ombudsman (and not as a defence attorney) must fear, *de lege lata*, that his or her identity will be revealed, in case the law firm he or she has hired suffers the consequences of a search and seizure warrant (e.g., if the law firm is the object of a search and seizure on the matter reported by the whistleblower).[48] It should be noted, with regard to the confidentiality of the attorney-client relationship, that the Federal Supreme Court, in its constant jurisprudence, generally sets high standards for search and seizure in law firms, which is why it fortunately does not constitute a daily practice in the country.[49]

The same cannot be said about the companies, which cannot invoke the provision of Section 160 a, of the Code of Criminal Procedure, which is likely to be applicable in any cases where the search is not also intended for a seizure.[50]

Therefore, the claim that internet or intranet-based whistleblowing systems protect the confidentiality of information and the anonymity of whistleblowers better than the use of attorneys as o*mbudsmänner/ombudsleute*[51] is not correct. This is because companies receiving whistleblowers' allegations or reports cannot invoke the confidentiality of attorney-client communication, which is also in the public interest, and thus possibly attack the lack of proportionality of a search warrant.[52]

Moreover, in the case of a search of a lawyer's office, there is less concern that the investigating authorities may use their discretion and, pursuant to Section 110, Subsection 1, Code of Criminal Procedure, "examine" the entire database and, in addition, also the documents and information of clients and whistleblowers who are not directly affected by the complaint made by the whistleblower, which is not necessarily true of companies.[53] It therefore makes more sense to combine the technical possibilities offered by internet-based whistleblower systems and existing legal privileges for lawyers in order to provide the greatest possible protection for whistleblowers, so that the information they securely transmit can be received by their

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[46] BVerfG NJW 2018, p. 2385, especially 2387, Rn. 73 et seq.

[47] Ibid., especially p. 2389, Rn. 90.

[48] *Dilling, J.* Der Schutz von Hinweisgebern, Rn. 218.

[49] BVerfG NJW, 2018, pp. 2385, 2386, Rn. 68; Park, Beschlagnahme und Durchsuchung, 4. Aufl. 2018, Rn. 828: "In this respect, the Federal Supreme Court requires a "special constitutional justification for the seizure of professional secrets." The correlating prohibition on the "excessive" acquisition of evidence and data rarely plays a role in procedural reality. Investigators very often in this case proceed with the "vacuum cleaner method". This has a particularly severe effect when fundamental rights of uninvolved third parties are affected."

[50] *Xylander, K.-J., Kiefner, A., Bahlinger, S.* Durchsuchung, p. 2954; *Dilling, J.* Der Schutz von Hinweisgebern, p. 6, Rn. 218.

[51] *Wiedmann, M., Seyfert, S.* Richtlinienentwurf der EU-Kommission zum Whistleblowing [Draft directive of the EU Commission on whistleblowing]. CCZ, 2019, pp. 12, 17; *Dilling, J.* Der Schutz von Hinweisgebern, p. 6.

[52] *Dilling, J.* Der Schutz von Hinweisgebern, p. 6.

[53] *Dilling, J.* Der Schutz von Hinweisgebern, p. 6; *Peters, A.-K.* Anwesenheitsrechte bei der Durchsicht gem. § 110 StPO: Bekämpfung der Risiken und Nebenwirkungen einer übermächtigen Ermittlungsmaßnahme [Rights to be present during the review according to § 110 StPO: Combating the risks and side effects of an overpowering investigative measure]. NZWiST, 2017, pp. 465, 467; *Heinrich*, W., 2017, pp. 219, 223; *Basar, E., Hiéramente, M.* Datenbeschlagnahme in Wirtschaftsstrafverfahren und die Frage der Datenlöschung [Data confiscation in economic criminal proceedings and the question of data deletion]. NStZ, 2018, p. 681.

attorneys in the same way.[54] They may also make themselves available for face-to-face meetings as referred to in Art. 9 (2) of the Directive.

In addition, according to its Art. 3 (3) (b), the Directive does not affect the application of Union or national law with respect to the protection of the confidentiality obligations of attorneys and doctors.[55]

At the same time, it can often happen in the course of internal investigations – if necessary following internal notifications under Art. 8 of the Directive – that law enforcement authorities "step in"[56] and seize company documents, which may lead to the identity of the whistleblower being revealed.[57]

The confidentiality of the whistleblower's identity is thus protected only to a very limited extent by Art. 16 of the Directive. It is therefore particularly alarming that Art. 5 (2) of the Directive leaves it to Member States to decide whether or not to accept anonymous reports and follow up on them. However, if the whistleblower cannot be sure that his or her identity will be protected, he or she may submit his or her report anonymously, if in doubt. If such an anonymous denunciation is not received and followed up as it should be, it will fail.[58]

Nevertheless, and according to Art. 25, (1) of the Directive, Member States may introduce or maintain provisions that are more favourable to the rights of whistleblowers than those laid down in the European rule. As safeguarding the identity of the whistleblower is a central concern of the Directive, this must be absolutely protected in practice so that the objectives sought by the whistleblower can be carried out.[59] Thus, the conflict between law enforcement interests on the one hand and the confidentiality of the whistleblower's personal data on the other must be resolved in accordance with the objectives of the Directive, so that the latter are free from discovery.[60] For while it is true that whistleblowing often fails due to the existing lack of trust on the part of whistleblowers, the elimination of this distrust can only be successful if the whistleblower's identity and personal data are protected and the whistleblower can be sure that they will remain so in any case.[61]

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54 *Dilling, J.* Der Schutz von Hinweisgebern, p. 6.

55 Ibid.

56 Ibid.; *Xylander, K.-J., Kiefner, A., Bahlinger, S.* Durchsuchung, pp. 2953, 2956.

57 *Dilling, J.* Der Schutz von Hinweisgebern, p. 6; *Rieder, M., Menne, J.* CCZ, pp. 203, 205.

58 *Dilling, J.* Der Schutz von Hinweisgebern, p. 6; *Bittmann, F., Brockhaus, M., Von Coelln, S., Heuking, C.* Regelungsbedürftige Materien in einem zukünftigen „Gesetz über interne Ermittlungen" [Matters requiring regulation in a future "Law on Internal Investigations"], NZWiSt, 2019, pp. 1, 5.

59 *Dilling, J.* Der Schutz von Hinweisgeber, p. 6.

60 *Vogel, A. P., Poth, C. N.,* pp. 45, 47. Free translation of the authors' comment: "The seizure of whistleblower reports disrupts the architecture of an effective and functional whistleblower system."

61 *Vogel, A. P., Poth, C. N.,* pp. 45, 47. Free translation of the authors' comment: "Whistleblowers who cannot rely on preserving their anonymity will rarely report violations of law for fear of reprisals, regardless of the level of legal protection, in order not to expose themselves to whistleblowing charges (wall of silence)." *Dilling, J.* Der Schutz von Hinweisgebern, p. 6. *Bittmann, F., Brockhaus, M., Von Coelln, S., Heuking, C.* Regelungsbedürftige Materien, pp. 1, 5. Free translation of the authors' comment: "However, in the context of whistleblowing, there is an urgent need to recognize the right of *ombudsmänner/ ombudsleute* to silence and freedom to seize their documents, as the effectiveness of a whistleblowing system depends on the anonymity of whistleblowers."

3. Whistleblower protection measures

3.1. Protection from reprisals and liability and punishment

The lack of adequate protection from the provisions of the Directive regarding the identity of the whistleblower has already been thoroughly addressed in section 6 of this article.

According to the provisions of Art. 19 of the Directive, Member States shall prohibit any form of retaliation against whistleblowers.

The definition of retaliation is provided in Art. 3, para. 12 of the Proposal for a Directive of the European Parliament and of the Council on the protection of persons who report breaches of Union law. According to this, "retaliation" is any threatened or actual act or omission prompted by the internal or external reporting which occurs in a work-related context and causes or may cause unjustified detriment to the reporting person.

The damages are also listed by the legislature in Art. 19 of the Directive, including particularly suspension, lay-off, dismissal, demotion or withholding of promotion, transfer of duties, change of location of place of work, reduction in wages and change in working hours, withholding of training, negative performance assessment or negative reference for employment purposes, imposition or administering of any disciplinary measure, reprimand or other penalty, (including financial) coercion, intimidation, harassment or ostracism. Further it includes discrimination, disadvantage or unfair treatment, failure to convert a temporary employment contract into a permanent one, where the employee has legitimate expectations that he or she would be offered permanent employment, non-renewal or early termination of a temporary employment contract, harm, including to reputation, particularly in social media, or financial loss, including loss of business and loss of income, blacklisting, based on formal or informal industry-wide agreement, which may result in the complainants being unable to find future employment in the industry or sector. Additionally, also early termination or cancellation of a contract for the supply of goods or provision of services, revocation of a license or permit, as well as referrals for psychiatric medical treatment are part of the damage catalogue of the Directive, Art. 19.

A causal link between the listed measures and the whistleblower's complaint is indispensable, i.e., a close connection between the complaint and the unfavourable treatment suffered, directly or indirectly by the whistleblower, so that this unfavourable treatment is considered an act of retaliation and, consequently, the whistleblower may benefit from legal protection in this context.[62]

Protection against retaliation as a means of safeguarding freedom of expression and freedom and pluralism of the media is granted both to persons who report information about acts or omissions within an organization (through internal whistleblowing) or to an external authority (through external whistleblowing) and to persons who make such information available in the public sphere, for example, directly to the public through online platforms or social media, or to the media, elected representatives, civil society organizations, trade unions or business and professional organizations.[63]

With regard to imputation of liability, this is regulated in Art. 21, No. 2 of the Directive, according to which whistleblowers shall not incur any type of liability, provided that they have reasonable grounds to believe that the reporting or

[62] Exposition of reasons to the European Directive on the protection of whistleblowers, 2019, p. 25 (44).
[63] Ibid., p. 25 (45).

public disclosure of such information was necessary for revealing a violation under the Directive, especially in matters provided for in Art. 21, para. 7, namely, in legal proceedings for defamation, copyright infringement, breach of secrecy, breach of data protection rules, disclosure of trade secrets, or for claims for damages based on private, public law or collective bargaining agreements.

The high legal costs arising from litigation through the courts are a topic that can scare off whistleblowers, as foreseen in Explanatory Memorandum No. 99 of the Directive. Thus, companies committed to keeping them quiet will try to prove their bad faith, intending to remove them from the cloak of legal protection, thus imputing liability to them.[64] It is then up to the whistleblower to claim that his complaint is based on the provisions of Art. 99 of the Directive's Explanatory Memorandum, and it is up to the current or former employer to prove otherwise.[65]

The criticism made in this context by Dilling, however, is that there is little support in the Guidelines for the solution to the problem arising from Art. 21 (7), since it is the whistleblower himself or herself who has to prove the reasonable grounds on which the whistleblower's disclosure or public disclosure of the violation is based, and not the employer or former employer.[66] This is not an easy matter to prove as a defendant, highlighting here the lack of regulation of the reversal of the burden of proof.[67] Depending on the whistleblower's financial and emotional condition and health, the consequences of a liability lawsuit may dissuade him or her from offering denunciations.

Finally, with regard to protection against reprisals other than those mentioned above, the European Directive provides in its Art. 21 (8) that Member States shall take the necessary measures to ensure that remedies and full compensation are available for the damage suffered by the persons protected under Art. 4 who meet the requirements of Art. 5 (1), i.e., having reported in good faith. These guarantee measures include financial assistance and support measures, including psychological support for whistleblowers in legal proceedings.[68]

3.2. Reversal of burden of proof

Under the Directive, it is likely that in order to justify acts of reprisal, it will be difficult for the whistleblower to prove the existence of the causality relationship between the complaint and the retaliation, the offenders of the latter possibly having more power and resources to document the measures taken as well as their substantiation. Therefore, once the whistleblower demonstrates *prima facie* that they have reported violations or made a public disclosure under the Directive and have suffered harm, there should be a reversal of the burden of proof to the person taking the harmful measures who will be compelled to demonstrate that those measures were in no way connected to the complaint or the public disclosure.[69]

With regard to the reversal of the burden of proof, there is a doctrinal understanding that this position of the Guidelines carries a risk of abuse, since employees may claim that by offering an "alleged complaint" they will not be fired.[70] This is especially true in European countries, where the whistleblower protection system

[64] *Dilling, J.* Der Schutz von Hinweisgebern, p. 9.
[65] Ibid.
[66] Ibid.
[67] Regarding the reversal of the burden of proof, see item 7.2.
[68] The recognition of the provision of such guarantees is provided in Art. 20, para. 2 of the Directive.
[69] Exposition of reasons to the European Directive on the protection of whistleblowers, 2019, p. 31 (93).
[70] *Dzida, B., Granetzny, T.* Die neue EU-Whistleblowing-Richtlinie, p. 5.

is deeply rooted, citing Great Britain as an example. Thus, it is not uncommon for the number of whistleblowers to rise in England when a company is about to make staff cuts.[71] In order to combat this practice, the employer must produce extensive documentation to be able to prove, if necessary, in a subsequent dismissal action, that the measures were not related to the complaint made by the employee.[72]

Another aspect to be reported is that, according to Art. 21 No. 1 of the Directive, Member States must take the necessary measures to ensure protection from acts of retaliation for persons who enjoy the protection of the Directive. Accordingly, Art. 21 para. 6 thereof provides that persons referred to in Art. 4 must have access to remedies against acts of victimization, where appropriate, including precautionary measures pending the outcome of judicial proceedings, in accordance with national law.

Art. 21 (5) regulates that in proceedings before a court or other authority, concerning damage suffered by a whistleblower, and subject to the whistleblower's demonstration that he or she has made a report or public disclosure and suffered damage, it shall be presumed that the damage corresponds to retaliation for having made the report or public disclosure. In such cases, it is incumbent on the person who has taken the adverse measure to demonstrate that such measure was based on duly justified grounds. In the Explanatory Memorandum to Directive No. 95, it is recognized that while the types of legal action may vary according to legal systems, they should ensure that compensation or reparation is real and effective, proportionate to the harm suffered, and dissuasive.

However, the protection afforded to the whistleblower in practice is quite limited. It is not be too difficult for the employer to prove the absence of a causal connection between the whistleblower and, for example, the dismissal, in cases where a written warning was given some time after the whistleblower's allegation was made.[73] Therefore, the reversal of the burden of proof only helps the whistleblower in part.[74] It is known that the lack of financial equality in the search for the right in court can lead companies to drag out lawsuits for years, which will make the whistleblower's situation very difficult. In countries where there is no Public Defender's Office, it is necessary that the whistleblower finds not only one, but several lawyers who are willing to act in his or her defence, receiving only predetermined amounts in minimum fee tables, which is not necessarily easy to find.[75] It should be emphasized that the complexity of the matter is such that the whistleblower will in fact need more than one suitably qualified professional to defend him.[76] It is of little use, therefore, "to have or to be with the Law", if he lacks resources in the execution of his claim.[77]

The author recommends in this context that companies in particular thoroughly document their employees' evaluations, bonus systems, career developments, issue

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[71] *Dzida, B., Granetzny, T.* Die neue EU-Whistleblowing-Richtlinie, p. 5.

[72] Ibid.

[73] *Dilling, J.* Der Schutz von Hinweisgebern, p. 8.

[74] Ibid.

[75] Moreover, the court's agreement to offer gratuitous justice refers only to a single retained attorney.

[76] *Dilling, J.* Der Schutz von Hinweisgebern, p. 8.

[77] This difficulty is recognized in Explanatory Memorandum No. 99 of the European Directive, which states that legal costs may be a significant expense for whistleblowers who challenge their retaliatory measures through the courts. Although they may be able to recover these costs at the end of the procedure, they may not be able to afford them at the beginning of the procedure, especially if they are unemployed and blacklisted. In certain cases, legal aid in criminal proceedings, in particular when complainants meet the conditions set out in Directive (EU) 2017/1919 of the European Parliament and of the Council, and, more generally, support for persons in severe economic need, may be essential for the effective exercise of their rights to protection.

warnings, as well as problems and conflicts that have already been raised in isolation, in order to create a favourable evidence base for the company in the event of a legal dispute.[78]

3.3. Penalties

Art. 23, par. 2 of the Directive requires Member States to provide for effective, proportionate and dissuasive penalties applicable to natural or legal persons who prevent or attempt to prevent whistleblowing, engage in acts of retaliation against whistleblowers, bring vexatious proceedings or breach the duty to keep their identity or data confidential.

European law further provides – in addition to the express prohibition of retaliation imposed by law – that it is essential that whistleblowers who are subject to acts of retaliation have access to remedies and compensation. The appropriate remedy in each case should be determined according to the type of retaliation suffered, and compensation for the loss suffered should be in full accordance with national law. The appropriate remedy could take the form of action for reinstatement, for example, in the case of dismissal, transfer or demotion, as well as for refusal of training or promotion, or for restoration of a cancelled permit, license or a contract; for compensation for current and future financial loss, for example, for lost past wages, but also for future loss of income, additional costs to a change of occupation; and compensation for other economic damage, such as litigation expenses and health care costs, as well as for intangible damage such as pain and suffering.[79]

According to explanatory memorandum No. 102 of the Guidelines, criminal, civil or administrative sanctions are necessary to ensure the effectiveness of the rules on whistleblower protection. It is believed that imposing sanctions on persons who commit retaliatory or other harmful acts against whistleblowers may discourage them from committing them.

The sanction regarding the disclosure of false information made by the whistleblower when offering the denunciation (Art. 23, No. 2), will be addressed further below.

3.4. Truthfulness as a ground for whistleblower complaints

Whistleblowers benefit from the protection guaranteed by the European legislator if the information about the violations they reported was true at the time it was presented in the complaint and whose matters were covered by the scope of application of the Directive, according to its Art. 6 (1) (a).

Legal protection requires the truthfulness of the information presented by the whistleblower, and whistleblowers who, being aware, report facts or situations containing errors are not legally protected. Veracity as a criterion for motivating whistleblower reporting predates the directive itself and was already included in the work authored by the European Parliamentary Assembly No. 2300 of 2019.[80]

Irrelevant to the offering of a whistleblower complaint remains the motive that moved the whistleblower to report.[81]

According to the Directive's explanatory memorandum, truthfulness, as a whistleblower's motive requirement, is an essential safeguard against malicious, frivolous or abusive whistleblowing, as it ensures that persons who knowingly and deliberately

[78] *Dzida, B., Granetzny, T.* Die neue EU-Whistleblowing-Richtlinie, p. 5.
[79] Exposition of reasons to the European Directive on the protection of whistleblowers, 2019, p. 32 (94).
[80] Resolution 2300, 2019, Improving the protection of whistleblowers all over Europe. Available: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=28150 [last viewed 03.02.2022].
[81] *Dzida, B., Granetzny, T.* Die neue EU-Whistleblowing-Richtlinie, p. 6.

report erroneous or misleading information at the time of whistleblowing do not enjoy protection. At the same time, the requirement ensures that protection does not cease if the whistleblower has reported inaccurate information about violations in good faith.[82] Similarly, whistleblowers should be entitled to protection under the Directive if they have reasonable grounds to believe that the information reported falls within its scope.[83]

One of the difficulties presented by the doctrine is in ensuring that the whistleblower is not acting in bad faith when he or she reports.[84] There will always be the risk that the opposing party will try to prove the inexistence of good faith, in order to deprive the whistleblower of the protection guaranteed by law.[85]

The European whistleblower protection order, when it comes to the veracity of information as a criterion for motivating whistleblowing, resembles § 93 Abs. 1, S. 2 of the German Stock Corporation Act (AktG), which codifies the so-called Business Judgement Rule. Under the AktG, the board of directors does not violate its duty to make a business decision based on adequate information, even if such decision later proves to be wrong, if it has acted in good faith.[86] In both whistleblower protection laws, as well as the Business Judgment Rule reference in the Corporations Act, a decision made in good faith based on valid facts is favoured.[87]

It is not an easy matter to assess in corporate practice whether good faith based on existing information exists on the part of the board of directors, which can, in this respect, rely on highly qualified and experienced lawyers in its defence.[88] Whether whistleblowers can afford the same technical armour in their favour, years of enforcement practice will demonstrate. Dilling adds that whistleblowers with a lack of knowledge in the legal field may find it difficult even to know whether the information they wish to disclose, falls within the matters that lies under the scope of the Directive.[89]

Business practice shows a great diversity of reasons why someone becomes a whistleblower, and the European legislator has been criticized for seeming to know of only two types: those who act in good faith and those who blow the whistle in bad faith. There is no doubt that the whistleblower who acts in good faith needs protection, regardless of whether the facts listed in the report are true or not - which already lack legal protection in the latter case. The fact is that the practice in the matter of investigation in corporate groups is frequently more complex than the case to which the law offers protection, as the Compliance Officer not rarely deals with whistleblowers who, in the overwhelming majority of cases, participated in some way in what they report, either as co-authors, or through acts of action or omission that compromise or even incriminate them. Co-authors and accessories do not, as a rule, report false information.[90] However, it is questionable whether the prohibition

[82] Exposition of reasons to the European Directive on the protection of whistleblowers, 2019, p. 23 (32).
[83] Ibid.
[84] *Garden, F., Hiéramente, M.* Die neue Whistleblowing-Richtlinie, p. 963, especially p. 964: "It is unclear what standard of care the whistleblower must apply when examining the requirements for a report"; *Vogel, A. P., Poth, C. N.*, pp. 45, 46.
[85] *Dilling, J.* Der Schutz von Hinweisgebern, p. 4.
[86] *Vitorino Clarindo dos Santos, J.* Rechtsfragen, p. 5.
[87] Exposition of reasons to the European Directive on the protection of whistleblowers, 2019, p. 23 (32).
[88] *Dilling, J.* Der Schutz von Hinweisgebern, p. 4.
[89] Ibid.
[90] *Hommel, U.* Die Zusammenarbeit mit Whistleblowern – Anmerkungen zu der EU-Whistleblower-Richtlinie [Working with Whistleblowers – Comments on the EU Whistleblower Directive]. CCZ, 2021, pp. 2, 3.

of reprisal will allow companies to punish whistleblowers disciplinarily in the labour field if their sphere of responsibility is proven. According to Hommel, this is necessary in order to achieve appropriate results, both with regard to personal liability and to ensure the general functioning and acceptance of a compliance management system in the company.[91]

The Directive provides in Art. 23 (2) that Member States should provide for effective, proportionate and dissuasive sanctions applicable to whistleblowers where the latter have knowingly communicated or publicly disclosed false information. States must also provide for measures to compensate for the damage resulting from such false reporting or public dissemination, in accordance with national law. It is unacceptable for the whistleblower to mobilize the internal apparatus of a company, as well as the state machine, if he knows beforehand that he is disclosing information that is not true. It is worth remembering that there is a feasible difficulty of proof in this case.

4. Procedure

Regarding the procedure for receiving and handling internal whistleblower complaints, the European Directive provides in its Art. 9 (1) (b) that an acknowledgement of receipt of the complaint must be sent to the whistleblower within seven days from the date of receipt.

In addition, it requires that an impartial person or service be designated, who will maintain communication with the whistleblower and, if necessary, request additional information and provide feedback to the reporting person.

Additionally, the Directive requires that a reasonable time limit be established for providing feedback to the whistleblower, not to exceed three months from the acknowledgment of receipt. In cases where the acknowledgement of receipt has not been sent to the whistleblower, the time limit of three months from the seven days after the submission of the offer of complaint applies.

Even for companies that already have a whistleblower system in place, the Directive brings with it the need to adapt their system, either through the new rule of a specific deadline for acknowledgment of receipt of the complaint, or in relation to the period of time regarding the return to be given to the whistleblower, within 3 months. It is important to note that these 3 months do not necessarily include the specific time to end the investigation, since, depending on the subject and concrete case, as well as the actors involved in it during the examination of the facts and new information that may arise during the process, the investigation time can be extended.[92] Efforts must always be made to guarantee a quick response, in respect to the trust of the whistleblower in the Compliance system and to other deadlines provided in other legislations for the conclusion of the investigation, especially with regard to Labour Law.

As for the deadline for processing complaints through external whistleblowing channels, the Directive refers the law enforcer to Articles 11 and 12, which establish the rules regarding the application of internal whistleblowing channel deadlines,

[91] *Hommel, U.* Die Zusammenarbeit, p. 3.

[92] Art. 11, para. 5 EU Directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law: Member States may provide that, in the event of a high inflows of reports, competent authorities may deal with reports of serious breaches or breaches of essential provisions falling within the scope of this Directive as a matter of priority, without prejudice to the timeframe as set out in point (d) of para. 2.

recommending first the use of the latter before filing a complaint through the external channel.[93]

With regard to public whistleblowing, understood as reporting to the press, a whistleblower who discloses information is entitled to protection under the Directive if any of the following conditions are met: He or she has initially reported internally and externally or directly externally in accordance with Chapters II and III, but no appropriate action has been taken on his report within the timeframe set out in Article 9(1)(f) or Article 11(2)(d); or the whistleblower has reasonable grounds to believe that:

- the breach may pose an immediate or obvious threat to the public interest, for example in an emergency situation or where there is a risk of irreversible damage; or
- in the case of an external report, there is a risk of reprisals or, because of the particular circumstances of the case, there is little prospect of effective action being taken against the breach, for example because evidence may be suppressed or destroyed or where there may be collusion between a public authority and the perpetrator of the breach or the public authority may be involved in the breach.

It is worth highlighting that Art. 15 does not apply in cases where a person discloses information directly to the press on the basis of specific national provisions which constitute a system of protection for freedom of expression and information.

The Guidelines are silent as to the validity of the time limits for filing a public accusation.[94]

Summary

The Directive puts additional burdens and responsibilities on small and medium-sized companies with at least 50 employees, which do not yet have a properly installed whistleblowing reporting channel. Companies that currently already have a whistleblower system in place need to review it, adapting it to the new rules that have come into effect with the Directive. This adaptation concerns both the technical parts of the Directive and the procedure to be observed for the proper treatment of the whistleblower, as well as the necessary qualifications for personnel to deal both with the processing of a whistleblower complaint and with the whistleblowers, whether or not the latter wish to make their identity public.

As an essential element of the compliance system, the good functioning of the whistleblowing reporting channel depends on the guarantee of confidentiality of the whistleblower, related to his or her identity and to the data contained in his or her reports, as well as those of third parties, by the whistleblower reported.

Confidentiality is not absolute in all European Union countries today. There is greater protection in the judicial seizure of data in law firms than in companies, whether or not the latter have a legal department or compliance system properly in place. The role of the lawyer as ombudsman is of paramount importance in this matter.

The protection of the confidentiality of the whistleblower is essential in the success of the whistleblower system. Otherwise, a potential whistleblower will remain silent, behaviour that can permit the continuation of internal or legal infractions.

[93] See the above discussion regarding equal internal and external reporting channels.
[94] Ibid.

The continued development of the compliance system also depends on the whistleblower. Therefore, it is the task of each member state, before incorporating the rules contained in the Directive into its national legal system, to analyse related national laws (e.g., criminal law, labour law) and adapt them to ensure that companies and law firms are prohibited from seizing information submitted by the whistleblower.

As the Directive allows the whistleblower to approach the public body before reporting possible violations in companies he or she works or has worked for, it is necessary that companies create or adapt whistleblowing reporting channels in such a way that they motivate the whistleblower to report. Here, too, ensuring the absolute confidentiality of his or her identity and data and that of third parties plays an extremely important role. Otherwise, companies run the risk of seeing flaws in their internal processes taken to public agencies, without first being aware of it, including possible risks to their reputation.

In some European countries, the establishment of internal reporting channels requires the approval of the employee body (e.g., works council or unions), which must be obtained as soon as possible. Approval is not only a legal requirement; it also increases the credibility of the whistleblower's reporting system.

Another pivotal factor in increasing trust by whistleblowers in whistleblowing systems, is the prohibition of reprisals. It is essential that the legal treatment to be offered by Member States strengthens the whistleblower on this point. In addition, financial support must be guaranteed, and so must a comprehensive personal support (including costs for medical assistance expenses, as well as for moral damages such as pain and suffering), in order to support the whistleblower in dealing with the consequences of the facts he or she reports, even during the investigation phase.

As far as the costs of implementing and operating whistleblowing channels in companies are concerned, they will be much higher than those estimated by the Guidelines, both for the whistleblower and for the companies that need to have an apparatus to process the reported information and process it properly. And these costs only make sense if companies do not have to fear having their internal information taken public, even before they can be informed about it. Small and medium-sized European companies need to be guaranteed the ability to process whistleblowing, so that they can effectively enforce the legality principle. Whistleblowers here run the risk of being financially unable to afford competent technical defence, should they become victims of reprisals.

Concerning the employees and officials assigned to receive and handle the complaint, it is necessary that they are qualified for this purpose, receive adequate training, and that they know and have the technical conditions to properly process the complaint. Lawyers, investigators and compliance officers are the most suitable people to perform this function. Training must also be offered to all employees and officers of the company, at all levels of the hierarchy, regarding the use and its safeguards related to the offering of internal whistleblowing. This includes confirmation that a complaint has been made within one week and a response to the whistleblower within no more than three months.

With regard to the reversal of the burden of proof by European companies, caution will be required more than ever in future documentation with employees and officials, since there is a danger here that the whistleblower will take advantage of the national norm introduced in incorporation of the Directive in order to "dig" for protection in cases where he or she is about to have his or her employment relationship terminated by his or her employer.

In general, the creation of the Directive will have a positive impact on companies in Member States, having to emphasize the existence of its chances and above all many challenges to whistleblowers, companies, especially small and medium-sized ones, as well as to the Member States of the European Union.

Sources

Bibliography

1. *Altenbach, T., Dierkes, K.* EU-Whistleblowing-Richtlinie und DSGVO [EU Whistleblowing Directive and GDPR]. CCZ, 2020.
2. *Bachmann, G., Kremer, T.* Deutscher Corporate Governance Kodex (DCGK) [German Corporate Governance Code (DCGK)]. 8th ed., 2021.
3. *Basar, E., Hiéramente, M.* Datenbeschlagnahme in Wirtschaftsstrafverfahren und die Frage der Datenlöschung [Data confiscation in economic criminal proceedings and the question of data deletion]. NStZ, 2018.
4. *Bittmann, F., Brockhaus, M., Von Coelln, S., Heuking, C.* Regelungsbedürftige Materien in einem zukünftigen „Gesetz über interne Ermittlungen" [Matters requiring regulation in a future "Law on Internal Investigations"], NZWiSt, 2019.
5. *Deiseroth, D., Derleder, P.* Whistleblower und Denunziatoren [Whistleblowers and Denunciators]. ZRP, 2008.
6. *Dilling, J.* Der Schutz von Hinweisgebern und betroffenen Personen nach der EU-Whistleblower-Richtlinie [The protection of whistleblowers and data subjects under the EU Whistleblower Directive]. CCZ, 2019.
7. *Dzida, B., Granetzny, T.* Die neue EU-Whistleblowing-Richtlinie und ihre Auswirkungen auf Unternehmen [The new EU Whistleblowing Directive and its impact on companies]. NZA, 35(18), 2021.
8. *Dzida, B.* Neue datenschutzrechtliche Herausforderungen für das Personalmanagement [New data protection challenges for HR management]. BB, 2019.
9. *Garden, F., Hiéramente, M.* Die neue Whistleblowing-Richtlinie der EU – Handlungsbedarf für Unternehmen und Gesetzgeber [The new Whistleblowing Directive of the EU – need for action for companies and legislators]. BB, 2019.
10. *Granetzny, T., Krause, M.* Was kostet ein gutes Gewissen? – Förderung von Whistleblowing durch Prämien nach US-Vorbild? [How much does a clear conscience cost? – Promotion of whistleblowing through US-style bonuses?]. CCZ, 2020.
11. *Hommel, U.* Die Zusammenarbeit mit Whistleblowern – Anmerkungen zu der EU-Whistleblower-Richtlinie [Working with Whistleblowers – Comments on the EU Whistleblower Directive]. CCZ, 2021.
12. *Kremer, T.* Compliance-Programm in Industriekonzernen [Compliance programme in industrial groups]. ZGR, 2010.
13. *Mahnhold, T.* „Global Whistle" oder „deutsche Pfeife" – Whistleblower-Systeme im Jurisdiktionskonflikt ["Global whistle" or "German whistle" – whistleblower systems in jurisdictional conflicts]. NZA, 2008.
14. *Peters, A.-K.* Anwesenheitsrechte bei der Durchsicht gem. § 110 StPO: Bekämpfung der Risiken und Nebenwirkungen einer übermächtigen Ermittlungsmaßnahme [Rights to be present during the review according to § 110 StPO: Combating the risks and side effects of an overpowering investigative measure]. NZWiST, 2017.
15. *Schmolke, U.* Die neue Whistleblower-Richtlinie ist da! Und nun? Zur Umsetzung der EU-Richtlinie zum Schutz von Hinweisgeber in das deutsche Recht [The new whistleblower policy is here! And now? Implementing the EU directive on the protection of whistleblowers into German law]. NZG, 2020.
16. *Tido, P.* Durchsuchung und Beschlagnahme [Search and seizure]. C. H. Beck, München, 4. Aufl. 2018.
17. *Vitorino Clarindo dos Santos, J.* Rechtsfragen der Compliance in der Internationalen Unternehmensgruppe [Legal issues of compliance in the international group of companies]. Lohmar, 2013.
18. *Vitorino Clarindo dos Santos, J.* Internal investigations. ICRio, 2020. Available: https://youtu.be/j8fAUKlizhU [last viewed 03.02.2022].
19. *Wiedmann, M., Seyfert, S.* Richtlinienentwurf der EU-Kommission zum Whistleblowing [Draft directive of the EU Commission on whistleblowing]. CCZ, 2019.
20. *Xylander, K.-J., Kiefner, A., Bahlinger, S.* Durchsuchung und Beschlagnahme in der Sphäre des Unternehmens Anwalts im Zuge von internen Ermittlungen [Search and seizure in the sphere of the company law in the course of internal investigations]. BB, 2018.

Normative acts

1. Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L1937&from=pt [last viewed 03.02.2022].

Case law

1. BVerfG (3. Kammer des Zweiten Senats) – Beschluss vom 27.6.2018 - 2 BvR 1405/17, 2 BvR 1780/17.
2. BVerfG NJW 2018, p. 2385.
3. EGMR, de 21.07.2011 – 28274/08.
4. LAG Baden-Württemberg de 20.12.2018 – 17 Sa 11/18, NZA-RR 2019, p. 242 = NZA 2019, p. 711 Ls.
5. LG Bochum NStZ 2016, p. 50.
6. LG Hamburg NJW 2011, p. 942 (HSH Nordbank).
7. LAG Stuttgart 20.12.2018 – 17 Sa 11/18. Available: http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=27411 [last viewed 03.02.2022].

Other sources

1. Arte. Der Gefährlichste Mann in Amerika. Daniel Ellsberg und die Pentagon-Papiere [The Most Dangerous Man in America. Daniel Ellsberg and the Pentagon Papers]. Available: https://www.youtube.com/watch?v=eGYLxyLh8d8 [last viewed 03.02.2022].
2. Chelsea Manning aus Haft entlassen [Chelsea Manning released from prison]. Available: https://www.faz.net/aktuell/politik/ausland/whistleblowerin-chelsea-manning-aus-haft-entlassen-15020248.html [last viewed 03.02.2022].
3. *Fernandes, M., McGuinn, J., Rossi, L.* Estimating the economic benefits of whistleblower protection in public procurement. Milieu Ltd., 2017. Available: https://op.europa.eu/pt/search-results?p_p_id=eu_europa_publications_portlet_search_executor_SearchExecutorPortlet_INSTANCE_q8EzsBteHybf&p_p_lifecycle=1&p_p_state=normal&queryText=Estimating+the+economic+benefits+of+whistleblower+protection+in+public+procurement+:+final+report.&facet.collection=EULex,EUPub,EUDir,EUWebPage,EUSummariesOfLegislation&startRow=1&resultsPerPage=10&SEARCH_TYPE=SIMPLE [last viewed 03.02.2022].
4. *Herbst, M.* Ehemals Tierärztin im Schlachthof Bad Braustet [Former veterinarian at the Bad Braustet slaughterhouse]. Available: https://www.anstageslicht.de/menschen-dahinter/dr-margrit-herbst/ [last viewed 03.02.2022].
5. Resolution 2300, Improving the protection of whistleblowers all over Europe. 2019. Available: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=28150 [last viewed 03.02.2022].
6. spiegel.de. US-Bundesgericht: Von Snowden enthülltes Überwachungsprogramm war illegal [US Federal Court: Surveillance program revealed by Snowden was illegal]. Available: https://www.spiegel.de/netzwelt/netzpolitik/edward-snowden-enthuelltes-ueberwachungsprogramm-war-illegal-a-1e08c392-aec9-4149-94f1-cd8a6ad535fb [last viewed 03.02.2022].
7. Süddeutsche-Zeitung. „Nicht-Zuständig": Zeuge kritisiert Behörden ["Not responsible": Witness criticizes authorities]. Available: https://www.sueddeutsche.de/bayern/ekelfleisch-prozess-nicht-zustaendig-zeuge-kritisiert-behoerden-1.1099136 [last viewed 03.02.2022].
8. tagesschau.de. Ausbreitung des Corona-Virus: Kritik an chinesischen Behörden [Spread of the corona virus: Criticism of the Chinese authorities]. Available: https://www.tagesschau.de/thema/coronavirus/ [last viewed 20.05.2021].
9. U.S. Department of Justice, Criminal Division. Evaluation of Corporate Compliance Programs. 2020. Available: https://www.justice.gov/criminal-fraud/page/file/937501/download [last viewed 03.02.2022].
10. Whistleblowing Report 2019. Available: https://whistleblowingreport.eqs.com [last viewed 03.02.2022].

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Permissibility of the Reverse Burden of Proof and its Limits in Criminal Proceedings in the Context of the Presumption of Innocence

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This publication explores the limits of admissibility of the reverse burden of proof in criminal proceedings. To determine these limits, the reverse burden of proof is tested *vis-à-vis* the fundamental principle of the presumption of innocence in criminal proceedings. In searching for answers to the advanced question, the Latvian criminal procedural regulation is analysed in the context of the findings made in the Latvian and foreign theory of criminal procedure law, fundamental rights enshrined in the *Satversme* [Constitution] of the Republic of Latvia and the case law of the Constitutional Court of the Republic of Latvia, as well as international legal regulation and case law of the European Court of Human Rights.

Keywords: criminal procedure, reverse burden of proof, presumption of innocence, right to a fair trial.

Contents

Introduction

Since ancient times, the burden of proving a person's guilt in criminal proceedings has been laid upon the State, and no person with the right to defence must be engaged in proving their innocence. Quite often, the provision, included in the Code of Justinian, is mentioned as a striking historical proof of the presumption of innocence, it provides that all accusers must understand that accusations should be based on evidence, the totality of which is incontestable and clear as daylight[1].

At the same time, currently, both in Latvia and in the European legal space, as well as elsewhere in the world, all rights of persons that are derived from the presumption of innocence are not granted absolute nature. Various legal instruments are used to create, through the legislative process, such legal institutions that *prima facie* are in conflict with the presumption of innocence or, at least, in some cases provide for exemptions to the application of this presumption. The establishment of the reverse burden of proof (hereafter also – the reverse onus clause) with respect to a certain range of issues in the procedural legal norms should be mentioned as one of the most obvious examples.

The aim of this publication is to determine the criteria for permissibility of reverse burden of proof in a criminal proceeding. To assess, whether such reverse burden of proof is a permissible exception to the presumption of innocence, first of all, the purpose of presumption must be clarified to determine whether the permission of exemptions does not cause risks of error in criminal legal proceedings. Following that, criteria may be sought that could be used to assess whether the establishment of the reverse burden of proof does not violate persons' rights that follow from the presumption of innocence to the extent that jeopardises criminal legal proceedings. And, finally, it would be possible to explore how the provisions of the Criminal Procedure Law, currently valid in Latvia and comprising elements of the reverse burden of proof, comply with these criteria.

1. Purpose of the presumption of innocence

This classical fundamental principle of criminal procedural law has been enshrined not only in the first and the second part of Section 19 of the Criminal Procedure Law[2] but also in the second sentence of Article 92 of the *Satversme* [Constitution] of the Republic of Latvia[3], Article 11 of the UN Universal Declaration of Human Rights[4], the second part of Article 14 of the International Covenant on Civil and Political Rights[5], the second part of Article 6 of the European Convention for the Protection

[1] *Stumer, A.* The Presumption of Innocence. Evidential and Human Right Perspectives. Oxford: Hart Publishing Ltd, 2000, p. 1.

[2] Latvijas Republikas Saeimas 21.04.2005. likums "Kriminālprocesa likums" ar grozījumiem ["Criminal Procedure Law" of the *Saeima* of the Republic of Latvia of 21.04.2005., as amended] Available: https://likumi.lv/ta/id/107820-kriminalprocesa-likums [last viewed 10.04.2022].

[3] Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922). Available: https://likumi.lv/ta/id/57980-latvijas-republikas-satversme [last viewed 10.04.2022].

[4] UN Universal Declaration of Human Rights (10.12.1948). Available: https://www.un.org/en/about-us/universal-declaration-of-human-rights [last viewed 10.04.2022].

[5] UN International Covenant on Civil and Political Rights (16.12.1966). Available: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights [last viewed 10.04.2022].

of Human Rights and Fundamental Freedoms[6], and Article 48 of the Charter of Fundamental Rights of the European Union[7].

Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings[8] can also be mentioned here as one of the legal acts of the European Union. Sometimes the findings consolidated in the Directive are narrower compared to the ones accepted by the European Court of Human Rights and the Court of Justice of the European Union, therefore, the Member States, including Latvia, in respecting the requirements of this Directive, must keep in mind that already now broader perspective is required and the provisions, included in the Directive, do not give grounds for derogating from those standards that already have been recognised in the case law of the European Court of Human Rights and the Court of Justice of the European Union.[9]

It is beyond doubt that all criminal proceedings must be concluded by a fair outcome. The guilt of those persons, who have committed a criminal offence, of the charges brought against them must be established in a legally correct way, and they must receive just punishment, whereas innocent persons should not be brought before the court but, if they have ended up in court due to an error, they should be acquitted.

Therefore, public safety requires criminal proceedings to be effective and law enforcement institutions to be able to detect crimes and prove the guilt of perpetrators thereof. Naturally, this includes the need to establish such criminal procedure that would not unfoundedly complicate the tasks of law enforcement institutions and would not render detection of crimes and proving of guilt impossible.

However, at this point another aspect intervenes – wrongful conviction of innocent persons cannot be in public interests either. This problem affects not only the person at risk of unfounded conviction but the entire society, because, in the case of wrongful conviction of a person, the perpetrator remains unpunished, which, in turn, increases the public safety risks. A saying has been heard in society that it is better to acquit ten guilty persons than to convict one that is innocent. Although, to a large extent, one can subscribe to it, nevertheless, it should be kept in mind that, in such a case, the ten ungroundedly acquitted persons still continue posing a threat to society. This presents a complicated task for lawyers to solve, namely, finding the balance between the presumption of innocence and the need to combat crime effectively.

Therefore, one of the overarching tasks of a criminal procedural legal act is to establish such procedure that limits to minimum these two risks of criminal proceedings – mistaken acquittal and wrongful conviction.

As noted in foreign legal literature, the primary aim governing burdens and standards of proof is to minimize the expected cost of error. This goal, which can be

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[6] Convention for the Protection of Human Rights and Fundamental Freedoms (04.11.1950). Available: https://echr.coe.int/Documents/Convention_ENG.pdf [last viewed 10.04.2022].

[7] Charter of Fundamental Rights of the European Union (26.10.2012.). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=LV [last viewed 10.04.2022].

[8] Directive (EU) 2016/343 of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (09.03.2016). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0343&from=LV [last viewed 10.04.2022].

[9] *Strada-Rozenberga, K.* Juridisko personu nevainīguma prezumpcija kriminālprocesā [Presumption of innocence of legal persons in criminal proceedings]. Autoru kolektīvs, Juridisko personu publiski tiesiskā atbildība: aktualitātes, problēmas un iespējamie risinājumi [Public Legal Liability of Legal Entities: Current Issues, Problems and Possible Solutions]. Riga, University of Latvia Press, 2018, p. 44.

understood probabilistically, provides an explanation for the levels at which general standards of proof are set, and the general allocation of burdens of proof to prosecution. Variations from the general presumptions position, achieved through presumptions, and affirmative defences, can also be understood as directed towards this goal.[10]

Stringent requirements regarding the presumption of innocence, which place the entire burden of proof upon the prosecution, basically, are aimed at preventing conviction of innocent persons. Because it can be validly assumed that, often, it might be quite difficult for persons to prove their innocence. At the same time, if the legislator establishes that such absolute burden of proof for public prosecutions, in some aspects, is detrimental for reaching the purposes of criminal proceedings, demands incommensurate effort or even renders obtaining of evidence impossible, the legislator may consider and establish narrowly defined derogations from the presumption of innocence, where one of the instruments would be shifting the burden of proof with respect to some particular matters upon the suspect or the accused, if such reversal helps to balance the attainment of the two aims referred to above and does not cause serious risks of wrongful conviction of a person or other adverse consequences.

The presumption is not solely concerned with wrongful convictions. It is in the business of error management more broadly. It weighs up the probability and harm of both wrongful convictions and mistaken acquittals, and adopts a rule on proof that minimizes the expected cost of errors. Ordinarily, the expected cost is minimized by giving the prosecution a heavy burden of proof. At times, however, a recalibration of the error harms or probabilities will suggest the need for lesser stringency. Reversing the persuasive burden in respect of one of the matters pertaining to guilt may provide an effective means of adjustment.[11]

2. Understanding of reverse burden of proof

Occasionally, rather critical opinions regarding the place of the reverse burden of proof within the system of criminal law are encountered in legal literature. Thus, Professor of the University of Otago (New Zealand) K. E. Dawkins once wrote that we have allowed statutory exceptions to grow on the back of the presumption of innocence for too long. Many of them are unsubtle devices that promote prosecutorial convenience and procedural economy at the expense of the fundamental principle that the prosecutor must prove a person's guilt beyond reasonable doubt. Mandatory presumptions and reverse onus clauses are especially unpalatable. They give prosecutor an unwarranted short-cut to proof and rob a person of the benefit of reasonable doubt.[12]

However, the prevailing current opinion is that the reverse burden of proof within the system of criminal law is acceptable in some cases, and research of this issue rather focuses on the limits to such reverse burden of proof and the admissible criteria for application thereof.

What exactly is designated as the reverse burden of proof in criminal procedure, and what is the relationship between this reverse burden of proof and the presumption of innocence?

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[10] *Hamer, D.* Presumptions, standards and burdens: managing the cost of error. Law, Probability and Risk, Vol. 13, Issue 3-4, September–December, 2014, p. 239.

[11] *Hamer, D.* A Dynamic Reconstruction of the Presumption of Innocence. Oxford Journal of Legal Studies, Vol. 31, No. 2, 2011, p. 434.

[12] *Dawkins, K. E.* Statutory Presumptions and Reverse Onus Clauses in the Criminal Law: In Search of Rationality. Canterbury Law Review, Vol. 3, No. 2, 1987, p. 238.

The nature of the relationship between the presumption of innocence and reverse burdens is a contentious subject among criminal lawyers. Some see the presumption of innocence as prohibiting reverse burdens only with respect to the formal elements of an offence, with anything labelled as a defence being beyond the scope of the presumption's protection. Conversely, others interpret the presumption of innocence as prohibiting reverse burdens outright, on the grounds that they allow for an accused to be convicted in spite of reasonable doubt as to guilt. Between these two positions, a series of intermediate views also exists, each with different interpretations of how reverse burdens can be compatible with the presumption of innocence.[13] In no system of human or constitutional rights is the presumption of innocence regarded as absolute. There is some variation in the ways by which different constitutional or human rights documents allow for dilution of the presumption, but one might say that the South African, Canadian and European human rights laws are broadly concordant in the result.[14]

A preliminary question is one of statutory interpretation. Does the legislation impose any burden on the defendant and, if so, is the burden evidential or persuasive? Reverse evidential burdens merely require the defendant to raise the exculpatory matter as a genuine issue. It is still up to the prosecution to negate the defendant's claim and prove guilt beyond reasonable doubt, and compatibility with the presumption is not viewed as problematic. Reverse persuasive burdens, however, require the defendant to prove innocence on the balance of probabilities.[15] Thus, reverse onus clauses have come to be classified by the type of burden placed on the accused. If the presumption can be rebutted simply by evidence raising reasonable doubt as to the presumed fact's existence, the reverse onus clause is characterized as evidential. If, on the other hand, the accused must actually prove, on a balance of probabilities, the non-existence of the presumed fact, the reverse onus clause is classified as persuasive.[16]

It has even been noted in literature that it is wrong to use, in designating this burden of proof, such concepts that link it to proving because, actually, as the result of performing this duty nothing is proven, only an issue is raised for review. Thus, such cases are possible where the persuasive burden remains with the prosecution, whereas to initiate examination of some matters, the burden of submitting evidence lies upon the defence. This means that if the defence has submitted sufficient evidence for reviewing a matter, then the prosecution is obliged to rebut it.[17]

While the persuasive burden could be defined as the obligation to convince the court of the truth of a fact, important for the disputed matter, within the limits of the required standard of proof,[18] sometimes this obligation is also called the ultimate burden, and also the designation "the risk of non-persuasion" is used in relation to it.[19]

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[13] *Allen, J.* Rethinking the relationship between reverse burdens and the presumption of innocence. The International Journal of Evidence & Proof, Vol. 25(2), 2021, pp. 116–117.

[14] *Ashworth, A.* Four threats to the presumption of innocence. The International Journal of Evidence and Proof, No. 10, 2006, p. 257.

[15] *Hamer, D.* A Dynamic Reconstruction, p. 418.

[16] *Sheldrick, B. M.* Shifting Burdens and Required Inferences: The Constitutionality of Reverse Onus Clauses. University of Toronto Faculty of Law Review, Vol. 44, No. 2, Fall 1986, p. 182.

[17] *Strada-Rozenberga, K.* Pierādīšanas teorija kriminālprocesā, vispārīgā daļa [Theory of proof in criminal proceedings, general part]. Riga, Biznesa augstskola Turība, 2002, pp. 129–130.

[18] *Murphy, P.* Murphy to Evidence. 5th edition. London, Blackstone Press, 1995, p. 86.

[19] *Strada-Rozenberga, K.* Pierādīšanas teorija kriminālprocesā, pp. 123–124.

3. Limits of permissibility of the reverse burden of proof

Exceptions to the presumption of innocence have been discussed as one of the main threats to the presumption of innocence. The possibility that a legislature may neutralise or even emasculate the practical impact of the presumption of innocence by manipulating the definitions of criminal offences remains. If the burden of disproving a particular defence to a crime is required (by the presumption) to fall on the prosecution, might the legislature eliminate that defence entirely, or deem a matter to be proved in law in the absence of proof in fact? This does not affect the defendant's procedural right to require the prosecution to prove guilt, but by redefining what constitutes guilt, it empties the presumption of much significance.[20]

The presumption of innocence balances the defendant's right to avoid mistaken conviction against the community's interest in law enforcement, taking account of the practicalities of proof. The balance ordinarily favours the defendant, and the burden of proof carried by the prosecution is heavy, but not absolute. The reverse persuasive burden requires the defendant to prove his innocence. It strongly shifts the balance in favour of law enforcement. It can be expected to bring more convictions, but also increase the number of the erroneous convictions. To be compatible with the presumption of innocence, this readjustment must be justified. In determining whether a reverse burden is compatible with the presumption of innocence, the pragmatics of proof should also be considered. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden?[21] In some cases, the prosecution may face extraordinary difficulties in proving the guilt of a guilty defendant, while an innocent defendant could easily prove his innocence. In such cases, a reverse burden would reduce the risk of mistaken acquittal without unduly increasing the risk of a wrongful conviction.[22] The extent to which the burden on the accused relates to facts which, if they exist, are readily provable by him as matters within his own knowledge or to which he has ready access would also be relevant to proportionality analysis. From ancient times, when the presumption of innocence was crafted, it was known that it could be applied in situations where it would be relatively easy for the defendant to present evidence disproving their guilt. However, we have never insisted that they do so,[23] because it is kept in mind that rebuttal of presumptions, rather than being a mandatory duty, is the right of the accused person.

Most probably, such pragmatic considerations are the ones that the legislator must weigh every time, when an issue related to introducing current derogation from the presumption of innocence into the Criminal Procedure Law is placed on the agenda. Society's interest in effective combatting of crime and fair punishment of perpetrators within the framework of criminal law must be weighed in the balance with the interest of society and each individual addressee of law to prevent imposing unjustified and difficult to discharge obligations upon persons, which might lead to unjustified convictions or other unjustified criminal law or adverse financial consequences.

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[20] *Ashworth, A.* Four threats, pp. 276–277.

[21] *Hamer, D.* The presumption of innocence and reverse burdens: a balance act. Cambridge Law Journal, 66(1), 2007, pp. 170–171.

[22] *Hamer, D.* A Dynamic Reconstruction, p. 427.

[23] *Grey, A. D.* The presumption of innocence under attack. New Criminal Law Review: An International and Interdisciplinary Journal, Vol. 20, No. 4, Fall 2017, p. 611.

According to Professor Victor Tadros, it has often been claimed that, in assessing interference with the presumption of innocence, it has been important to strike a fair balance between "the rights of the individual and the wider interests of the community". What constitutes interference with the rights of the individual, on one side of this balance, is very poorly understood. What constitutes the wider interests of the community is almost entirely unexamined. The wider interests of the community, it is supposed, will be served by conviction on an insecure epistemic basis. Why would the wider community have an interest in convicting people of criminal offences where it has not been proven beyond reasonable doubt that they have been the intended targets of such criminal offences? Statements about the interests of victims, or the interests of the wider community, when unexamined, can be very dangerous in the context of criminal justice.[24]

Associate Professor of law Dr. Federico Pinicali differentiates between "*substantivist"* and "*proceduralist" approach to defining the limits of reverse burden of proof in the context of the presumption of innocence*. According to the *substantivist approach,* the presumption of innocence does not merely govern the proof of facts at trial; it also has implications for criminalisation. *The presumption is violated, when a person is convicted of conduct that should not be subject to punishment, whether or not a reverse burden is involved. As* a result, a reverse burden on a particular fact is compatible with the presumption only if the prohibited behaviour, considered without (the negative of) that fact, would be deserving of punishment. In contrast, according to the *proceduralist approach,* the presumption of innocence only concerns the proof of facts at trial. *The proceduralist maintains that the presumption of innocence is violated when a person is convicted notwithstanding that an element of the crime is not proven.* Whether the conduct, with or without this element, is deserving of punishment is irrelevant to determining whether the presumption has been breached. Proceduralism contends that only reverse burdens regarding the negative of an element of the crime conflict with the presumption of innocence.[25]

Concerning the approach of the European human rights law, we should consider that the Convention does not *prima facie* allow for any exception from the presumption. The Strasbourg Court has decided that the presumption of innocence is not so invariable as to prohibit all presumptions of fact or law in criminal cases. However, States are required, according to the leading decision in *Salabiaku v. France*[26], to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.[27]

Para. 22 of the Preamble to Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings notes, *inter alia*, that the use of such presumptions should be confined within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence, and the means employed should be reasonably

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[24] *Tadros, V.* Rethinking the presumption of innocence. Criminal Law and Philosophy, Vol. 1 (2), 2007, p. 193.

[25] *Picinali, F.* Innocence and burdens of proof in English criminal law. Law, Probability and Risk, Vol. 13 (3–4), 2014, pp. 8–9.

[26] Decision in case Salabiaku v. France, 07.10.1988, application No. 10519/83. Available: https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22ENG%22],%22appno%22:[%2210519/83%22],%22documentcollectionid2%22:[%22CHAMBER%22],%22itemid%22:[%22001-57570%22]} [last viewed 10.04.2022], para. 28.

[27] *Ashworth, A*. Four threats, p. 257.

proportionate to the legitimate aim pursued. Such presumptions should be rebuttable and, in any event, should be used only where the rights of the defence are respected.

It has been recognised in the case law of the European Court of Human Rights that the presumptions of fact and law exist in all systems of criminal law and, as a matter of principle, the existence thereof is not contrary to the second part of Article 6 of the European Human Rights Convention (Falk v. the Netherlands (dec.)); however, in the application of such presumptions, reasonable balance should be maintained between the interests of society (for the ensuring of which such presumptions are applied) and an individual's interests (who is directly affected by this presumption). In other words, the measures used should be commensurate with the legitimate aim pursued. Implementation of fair proceedings also falls within society's interests, therefore, in those cases where it is easier for the person with the right to defence to prove certain circumstances, it is fairer to shift the burden of proof upon this person.[28]

The Constitutional Court of the Republic of Latvia has noted that one of the circumstances to be examined in order to establish whether application of the legal presumption of a fact is permissible is the issue whether a person's interests are balanced, i.e., whether a person, with respect to who the legal presumption of a fact is applied, has been at the same time ensured also the possibility to rebut this presumption by the evidence already at their disposal or by such that can be readily obtained[29].

To summarise, it can be concluded that the inclusion of the reverse burden of proof in the criminal procedural legal provisions will be justifiable and will not violate the presumption of innocence, if two conditions are met.

Firstly, an objective need to facilitate the work of investigative authorities should be present. It should be established that proving of certain facts usually causes disproportionate complications for the investigative authorities, or that it is even impossible, and these complications seriously jeopardise crime prevention in a certain area.

Secondly, it is easy for the person, upon whom this burden of proof has been placed, to discharge it. Namely, the person is informed of precisely what they should indicate and the facts, regarding which the information should be provided. Moreover, this information should be readily accessible to the person, and they should have the possibility to submit it.

4. Manifestations of the reverse burden of proof in the Latvian Criminal Procedure Law

The Latvian Criminal Procedure Law also provides for several instances, when the obligation to prove something or to indicate something has been imposed upon a person. Here, several exceptions regarding the burden of proof can be noted.

[28] *Gribonika, Ē.* Pierādīšanas standarts un pienākums noziedzīgi iegūtu līdzekļu legalizācijas lietās [Standard of proof and burden of proof in money laundering cases]. Jurista Vārds, No. 5 (1167), 2021, 15.–23. lpp., *Roberts, P., Hunter, J.* Criminal Evidence and Human Rights. Reimagining Common Law Procedural Traditions. Oxford: Hart Publishing, 2013, p. 262.

[29] See Satversmes tiesas 15.11.2016. spriedums lietā Nr. 2015-25-01 [15.11.2016. Judgement of the Constitutional Court of the Republic of Latvia in case No. 2015-25-01]. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2015/12/2015-25-01_Spriedums.pdf#search= [last viewed 10.04.2022], para.19, see also Satversmes tiesas 28.03.2013. spriedums lietā Nr. 2012-15-01 [28.03.2013. Judgement of the Constitutional Court of the Republic of Latvia in case No. 2012-15-01]. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2012-15-01_Spriedums.pdf#search= [last viewed 10.04.2022], para. 15.1., 15.2.

4.1. Duty to indicate the alibi

Para. 6 of Section 67 (1) of the Criminal Procedure Law, regarding the suspect's obligations, provides that the suspect also has the obligation to indicate the fact that, at the time when the criminal offence was committed, the respective person had been in another place (hereafter – the alibi), or the conditions provided for in the Criminal Law that exclude criminal liability.

Likewise, Section 126 (4) of the Criminal Procedure Law (Subjects of Evidence and the Duty of Proving) provides that a person who has the right to defence must indicate circumstances that exclude criminal liability, as well as indicate the alibi. I.e., the official in charge of the proceedings does not have the right to ignore information about a person's alibi or circumstances that exclude criminal liability, but, at the same time, if the person does not indicate such circumstances or the alibi, the prosecution is not obliged to prove that such do not exist. The term of Latin origin "alibi" in criminal law is understood as information that, at the time when the criminal offence was committed, the person had been in another place. Circumstances that exclude criminal liability, in turn, are listed exhaustively in Chapter III of the Criminal Law – necessary self-defence, detention causing personal harm, extreme necessity, justifiable professional risk, and execution of a criminal command or criminal order.

The third and the fourth part of Section 126 of the Criminal Procedure Law provide that a person must indicate the alibi and circumstances that exclude criminal liability, as well as the proof that rebuts the legal presumption of a fact, envisaged in Section 125. It is important to pay attention to the fact that, in this case, the legislator has chosen to use the word "indicate" rather than the word "prove", which clearly shows that, in this case, a person has not been imposed the burden of final or persuasive proof but only an obligation to inform about a fact, encouraging verification of it. However, it would be reasonable to recognise that an unconfirmed or vague statement would not be sufficient and would be systemically pointless; hence, the finding, enshrined in judicature, that the indication should be specific should be upheld[30]. It can be established that a person who has the right to defence is not obliged to provide final proof of their alibi or the existence of circumstances that exclude criminal liability; however, they are obliged to indicate it, as well as provide indications regarding verifiable information confirming this.

As regards the obligation to indicate the alibi or the circumstances that exclude criminal liability, or circumstances presumed in Section 125 (1) of the Criminal Procedure Law, the person who has the right to defence should be able to infer from the procedural decision that defines a person's procedural status (decision by which a person is recognised as being a suspect, decision on making a person criminally liable) the essence of criminal allegations directed at them. If these decisions comply with the requirements set out in Section 398^1 or Section 405 of the Criminal Procedure Law then these decisions should comprise the facts of the alleged criminal offence, which determine the legal qualification, and the amount of this information, usually, should be sufficient to make it clear to the person what event is being investigated and what the circumstances could be, about which the person should inform the person directing the proceedings. For example, if a person is suspected of having inflicted

[30] See Decision of 17.12.2013. of the Senate of the Supreme Court in case No. 16870000208 (SKK-0216-1). Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/138975.pdf [last viewed 10.04.2022], see also Decision of 07.01.2015. of the Senate of the Supreme Court in case No. 11521045809 (SKK-J-0022-15). Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/198393.pdf. [last viewed 10.04.2022].

bodily harm at a particular time and in a particular place, then it is rather easy for a person to indicate their being in another place at this time.

It has been recognised also in the case law of ECtHR that the right to not self-incriminate is not absolute because not providing any kind of explanation regarding the evidence collected by the prosecution may be taken into account in assessing the prosecution's evidence and it cannot be argued that the silence of a person with the right to defence throughout the course of criminal proceedings will not have an impact upon the assessment in court of the evidence collected by the person directing the proceedings[31].

Assessment of this regulation, included in the Latvian Criminal Procedure Law, allows concluding that there are no grounds to believe that the obligation, imposed upon the suspect, to indicate these circumstances would in any way violate the presumption of innocence, the right to remain silent and to not self-incriminate because the obligation to indicate circumstances that exclude guilt or exculpatory circumstances cannot be equalled to self-accusation or deteriorating one's standing in criminal proceedings. Assessment of this regulation also in the light of the criteria referred to above allows concluding that it might be rather burdensome for investigative authorities to establish that a person had been in another place at the time when the crime was committed or to obtain information about circumstances that exclude criminal liability unless persons themselves inform the investigative authority about such circumstances. Moreover, providing indications about one's alibi or the existence of circumstances excluding criminal liability might not require special effort from the person himself or herself. Also, as regards this obligation, it is more persuasive to argue not that proving of a particular fact is very difficult for a prosecutor, but that such proof is conspicuously easy for the defendant.[32] Hence, it appears that, in such cases, reasonable balance between the society's interests and a person's rights is respect because, usually, it should be neither complicated nor burdensome to provide such indications.

4.2. Legal presumptions of a fact

A reverse onus clause consists of two important elements. First, it contains a required inference or presumptive element. Second, the clause shifts the normal burden of proof and requires the accused to disprove the presumed element of the offence. If the accused successfully meets this onus, the required inference need no longer be drawn, and the issue is decided by the trier of fact based on the natural weight of the evidence and the normal allocation of burdens.[33]

Section 125 of the Criminal Procedure Law (Legal Presumption of a Fact) includes nine assumptions that are considered to be proven without performing additional procedural actions, unless the opposite is proven during the course of criminal proceedings. In all of these nine cases, the person whose legal interests are affected by these assumptions must prove the opposite, i.e., must rebut the assumption that follows from this presumption, which they consider to not be true, as it is stated *expresis verbis* also in Parts 3, 3^1 and 4 of Section 126 of the Criminal Procedure Law.

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[31] Decision in case John Murray v. The United Kingdom, 08.2.1996., application No. 18731/91. Available: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22John%20Murray%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57980%22]} [last viewed 10.04.2022], para. 47.

[32] *Ashworth, A.* Four threats, p. 266.

[33] *Sheldrick, B. M.* Shifting Burdens, p. 182.

Some aspects of these legal presumptions of a fact may be viewed critically. Most probably, all these assumptions, included in Section 125 of the Criminal Procedure Law, are applicable to circumstances where proving might make the work of investigative authorities disproportionally difficult. At the same time, the other aspect may lead to reflections on whether the person who has the right to defence will always understand exactly what facts they are obliged to prove. Due to the limited scope of this research, we shall proceed by examining in detail only one of these presumptions, applicable to the origin of property.

4.3. Presumption of the criminal origin of property

One of the legal presumptions of a fact, defined in Section 125 of the Criminal Procedure Law, deserves special attention, having gained relevance also in the practice of applying law of the recent years, i.e., the presumption of the criminal origin of property and the owner's duty to prove the legal origin of property. Such presumption is included in Section 125 (3) of the Criminal Procedure Law (it is considered proven that the property with which laundering activities have been performed is criminally acquired if a person involved in criminal proceedings is not able to believably explain the legality of origin of the relevant property and the totality of evidence provides grounds for the person directing the proceedings to assume that a property is, most likely, of criminal origin). Furthermore, Section 126 (3^1) of the Criminal Procedure Law (Subjects of Evidence and Duty of Proving) additionally provides that, if a person affirms that the property is not to be considered as criminally acquired, such person has the duty to prove the legality of the origin of the relevant property.

It is indicated in the annotation[34] to the amendments to the Criminal Procedure Law, adopted on 22.06.2017[35], regarding this case of reverse burden of proof, introduced to the Criminal Procedure Law, that this norm provides for a person's duty to prove the legal origin of property in those cases where the person directing the proceedings holds that there are grounds for recognising the property as being criminally acquired. Here, the authors of the draft law have expressed an assumption that in case, where the origin of property is legal, the owner should encounter no difficulties in proving it (for example, requesting information from the State Revenue Service regarding income, submitting other documents that prove the origin of the property). At the same time, the fifth part of Section 356 has been added to the Criminal Procedure Law, determining the moment as of which the person (including the owner of property affected in criminal proceedings) has the right to start proving the legal origin of property, i.e., the moment of arrest or seizure of property. This provision, however, was altered by the amendments adopted on 21.11.2019 to Section 356 (5)[36] of the Criminal Procedure Law, which now stipulates that the burden of proof sets it by a special notification to the owner of property – if an assumption is expressed that the property is criminally acquired or related to a criminal offence, the person directing the proceedings notifies the person that such person may, within 45 days

[34] Preliminary Impact Assessment Report (annotation) of the 12th *Saeima* Draft Law No. 630 / Lp12 "Amendments to the Criminal Procedure Law". Available: http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/AB2871419A747C7FC2258011002DD2FA?OpenDocument [last viewed 10.04.2022].

[35] Latvijas Republikas Saeimas 22.06.2017. likums "Grozījumi Kriminālprocesa likumā" [Amendments to Criminal Procedure Law of the *Saeima* of the Republic of Latvia of 22.06.2017]. Available: https://likumi.lv/ta/id/292018-grozijumi-kriminalprocesa-likuma [last viewed 10.04.2022].

[36] Latvijas Republikas Saeimas 21.11.2019. likums "Grozījumi Kriminālprocesa likumā" [Amendments to Criminal Procedure Law of the *Saeima* of the Republic of Latvia of 21.11.2019]. Available: https://likumi.lv/ta/id/311271-grozijumi-kriminalprocesa-likuma [last viewed 10.04.2022].

from the moment of notification, submit information on the legality of the origin of the relevant property.

To proceed, it should be explored whether such burden of proof related to the criminal origin of property is proportional and justified. Let us examine whether the regulation, included in Part 3, 3^1 and 4 of Section 126 of the Criminal Procedure Law, complies with these criteria.

The designation "a duty to prove the legality of the origin of the relevant property" is used in Section 126 (3^1) of the Criminal Procedure Law with respect to the criminal origin of property, which leads to the conclusion that, in this case, the owner of property is expected, in order to rebut the assumption regarding unlawful origin of property, to submit full proof rather than only indications regarding the existence of such proof.

In order to rebut this presumption, a person first of all should be precisely informed, what exactly they have to prove or rebut, i.e., the owner of arrested property should receive from the person directing the proceedings sufficiently precise information about presumed fact. If such sufficiently clear information is lacking, the person, most often, objectively will be unable to discharge their burden of proof.

In this respect, the wording of Section 125 (3) of the Criminal Procedure Law must be taken into account, as it follows from it that the origin of property is regarded as criminal, if the totality of evidence provides grounds for the person directing the proceedings to assume, on the balance of probability, that the property is of criminal origin. Hence, actually, here we are not dealing with classical presumption, when the truthfulness of a fact is assumed without evidence justifying this fact, but with evidence with a lower standard of proof, provided by the person directing the proceedings. Thus, for this presumption to become operational, the person directing the proceedings should have at their disposal some evidence, which, on the balance probability, could be used to substantiate the criminal origin of property. Accordingly, if the person directing the proceedings has such evidence at their disposal, then the person directing the proceedings is able to provide sufficiently precise information to the owner of arrested assets about the facts, on the basis of which this presumption can be applied. The duty of the person directing the proceedings, set out in Section 356 (5) of the Criminal Procedure Law (Recognition of Property as Criminally Acquired), to inform the person that this person, within 45 days of the date of notification, may submit information regarding the legal origin of the respective property, actually, does not regulate directly the amount of information that the person directing the proceedings should include in such a notification. Also, in the practice of applying law, usually these notifications by the person directing the proceedings do not include any indication about the scope of information that had allowed the person directing the proceedings to arrive at the conclusion regarding the possible criminal origin of property.

Hence, neither the legal provision, nor the practice of application currently ensures that the persons, who have the burden of proof, are informed in sufficient detail about the exact actual circumstances that they are expected to prove. Usually, owners of property are informed only about the scope, in which the property has been arrested, and that persons must prove legal origins of the arrested property.

In this respect, it can be argued that this amount of information regarding the duty to prove the legal origin of property may be sufficient to allow a person to discharge their burden of proof effectively and without complications. Therefore, the assumption, included in the annotation to the amendments to the Criminal Procedure Law, adopted on 22.06.2017, that in the case of legal origin of property the owner should

be able to prove it without difficulty, seems to be too simplistic. Namely, it could function in the most ordinary cases, i.e., with respect to natural persons, whose only income for a long period of time has been a salary for work. Whatever the balance of the arrested account is, a person can submit a statement from the employer regarding the existence of employment relations and salary for work, a statement from the State Revenue Service regarding the taxes paid, account statements showing how this person received and spent their salary.

However, in practice, when the presumption of the criminal origin of property is applied, cases as simple as that are rather rare. Usually, this burden of proof applies to legal entities, merchants who have operated for a long time and had been purchasing goods for many decades from tens or hundreds of suppliers, who have sold goods to tens or hundreds of clients all over the world. What does proving the legal origin of arrested assets mean in such a case? In the case of such a merchant who had been trading for a long time, how to determine, at all, which transactions have resulted in the balance arrested in the account, if the current account constantly has larger or smaller balance and each day there are incoming payments for goods that are sold, as well as outgoing payments for purchased goods or raw materials and other expenditure relates to economic activity. If the movement of financial assets in the merchant's account could be compared to a barrel of water, from which every day several jugs are taken and several jugs of water are poured in, it would be rather impossible, at a certain point of time, to answer the question, which jugs of water, poured into barrel, constitute the water remaining in the barrel, because this amount of water is being constantly increased and decreased, moreover, every day the amount of water in the barrel gets mixed with the water that is poured in.

Therefore, to ensure, with respect to the duty to prove the legal origin of property, the balance between the interests of society and a person, and to ensure to the person, to whom this legal presumption of a fact is applied, the possibility to rebut this presumption by the evidence already at their disposal or the evidence that can be readily obtained, it would be necessary that the persons directing legal proceedings would indicate in the notifications, sent according to the procedure set out in Section 356 (5) of the Criminal Procedure Law, not only an abstract phrase that the person is obliged to submit information within 45 days regarding legality of the origin of the respective property but would also provide sufficiently detailed indications regarding the grounds why suspicions regarding unlawful origin of property had been expressed. Moreover, this substantiation should be sufficiently accurate to allow the addressee to understand which particular transactions with which business partner and in which particular period are the ones that have caused suspicions, as well as to establish the legal content of this suspicions, i.e., what kind of criminal activities are suspected. Only in the case of receiving such sufficiently detailed information the owner of the property will have the possibility to defend his/her financial interests effectively and to discharge his/her procedural duty to prove the origin of property and absence of particular criminal activities in the process of acquiring property in a precise and targeted way.

To summarise, it can be concluded that both the existing criminal procedural law regulation and the current practice of applying law with respect to the presumption of criminal origin of property and the reverse burden of proof following from it could cause a violation of persons' right to a fair trial. Firstly, persons are not provided with a sufficiently detailed and timely information about what exactly they have to prove. This, in turn, impedes discharging the reverse burden of proof or even renders it impossible.

Summary

1. As a result of the study, the aim of the research has been achieved – the criteria for permissibility of reverse burden of proof in a criminal proceeding have been identified.
2. The presumption of innocence is not absolute in its nature, and the rights derived from the presumption of innocence, in some of their aspects, may be restricted by shifting the burden of proof to the person, if these restrictions comply with the two criteria indicated below.
3. First of all, inclusion of the reverse burden of proof in the criminal procedural legal provisions will be justified and will not violate the presumption of innocence if proving of some facts causes disproportional difficulties for law enforcement institutions or is even impossible. These complications seriously jeopardise crime prevention in a certain area. Secondly, the burden of proof imposed upon a person should be easy to discharge.
4. For the burden of proof to be easy to discharge, a person should be informed as accurately as possible about the facts that he/she is expected to prove. Moreover, information needed for proving these facts should be readily accessible to a person and an objective possibility to submit this information should be present.
5. The obligation, set out in the Latvian Criminal Procedure Law, to indicate the alibi or circumstances that exclude criminal liability meet these two criteria, hence, usually, in this respect an unjustified violation of the presumption of innocence cannot be found.
6. As regards the presumption of criminal origin of property, included in the Latvian Criminal Procedure Law, and the obligation derived from it to prove the lawful origin of property, it can be concluded that this regulation, as well as the practice of applying the law may cause a violation of persons' right to a fair trial, since, usually, a sufficiently detailed information is not ensured to persons regarding the circumstances that must be proven, which, consequently, impedes discharging of this reverse burden of proof, or even renders it impossible.

Sources

Bibliography

1. *Gribonika, Ē.* Pierādīšanas standarts un pienākums noziedzīgi iegūtu līdzekļu legalizācijas lietās [Standard of proof and burden of proof in money laundering cases]. Jurista Vārds, No. 5 (1167), 2021.
2. *Strada-Rozenberga, K.* Juridisko personu nevainīguma prezumpcija kriminālprocesā [Presumption of innocence of legal persons in criminal proceedings]. Autoru kolektīvs, Juridisko personu publiski tiesiskā atbildība: aktualitātes, problēmas un iespējamie risinājumi [Public Legal Liability of Legal Entities: Current Issues, Problems and Possible Solutions]. Riga, University of Latvia Press, 2018.
3. *Strada-Rozenberga, K.* Pierādīšanas teorija kriminālprocesā, vispārīgā daļa [Theory of proof in criminal proceedings, general part]. Riga, Biznesa augstskola Turība, 2002.
4. *Allen, J.* Rethinking the relationship between reverse burdens and the presumption of innocence. The International Journal of Evidence & Proof. Vol. 25(2), 2021.
5. *Ashworth, A.* Four threats to the presumption of innocence. The International Journal of Evidence and Proof, No. 10, 2006.
6. *Dawkins, K. E.* Statutory Presumptions and Reverse Onus Clauses in the Criminal Law: In Search of Rationality. Canterbury Law Review, Vol. 3, No. 2, 1987.
7. *Grey, A. D.* The presumption of innocence under attack. New Criminal Law Review: An International and Interdisciplinary Journal, Vol. 20, No. 4, Fall 2017.
8. *Hamer, D.* Presumptions, standards and burdens: managing the cost of error. Law, Probability and Risk, Vol. 13, issue 3–4, September–December, 2014.

9. *Hamer, D.* A Dynamic Reconstruction of the Presumption of Innocence. Oxford Journal of Legal Studies, Vol. 31, No. 2, 2011.
10. *Hamer, D.* The presumption of innocence and reverse burdens: A balance act. Cambridge Law Journal, 66(1), 2007.
11. *Murphy, P.* Murphy to Evidence. 5th edition. London, Blackstone Press, 1995.
12. *Picinali, F.* Innocence and burdens of proof in English criminal law. Law, Probability and Risk, Vol.13 (3–4), 2014.
13. *Roberts, P., Hunter, J.* Criminal Evidence and Human Rights. Reimagining Common Law Procedural Traditions. Oxford: Hart Publishing, 2013.
14. *Sheldrick, B. M.* Shifting Burdens and Required Inferences: The Constitutionality of Reverse Onus Clauses. University of Toronto Faculty of Law Review, Vol. 44, No. 2, Fall 1986.
15. *Stumer, A.* The Presumption of Innocence. Evidential and Human Right Perspectives. Oxford: Hart Publishing Ltd, 2000.
16. *Tadros, V.* Rethinking the presumption of innocence. Criminal Law and Philosophy, Vol. 1 (2), 2007.

Normative acts

1. Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922). Available: https://likumi.lv/ta/id/57980-latvijas-republikas-satversme [last viewed 10.04.2022].
2. UN Universal Declaration of Human Rights (10.12.1948). Available: https://www.un.org/en/about-us/universal-declaration-of-human-rights [last viewed 10.04.2022].
3. UN International Covenant on Civil and Political Rights (16.12.1966). Available: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights [last viewed 10.04.2022].
4. Convention for the Protection of Human Rights and Fundamental Freedoms (04.11.1950). Available: https://echr.coe.int/Documents/Convention_ENG.pdf [last viewed 10.04.2022].
5. Charter of Fundamental Rights of the European Union (26.10.2012.). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=LV [last viewed 10.04.2022].
6. Directive (EU) 2016/343 of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (09.03.2016). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0343&from=LV [last viewed 10.04.2022].
7. Latvijas Republikas Saeimas 21.04.2005. likums "Kriminālprocesa likums" ar grozījumiem ["Criminal Procedure Law" of the *Saeima* of the Republic of Latvia of 21.04.2005, as amended]. Available: https://likumi.lv/ta/id/107820-kriminalprocesa-likums [last viewed 10.04.2022.]
8. Latvijas Republikas Saeimas 22.06.2017. likums "Grozījumi Kriminālprocesa likumā" [Amendments to Criminal Procedure Law of the *Saeima* of the Republic of Latvia of 22.06.2017]. Available: https://likumi.lv/ta/id/292018-grozijumi-kriminalprocesa-likuma [last viewed 10.04.2022].
9. Latvijas Republikas Saeimas 21.11.2019. likums "Grozījumi Kriminālprocesa likumā" [Amendments to Criminal Procedure Law of the *Saeima* of the Republic of Latvia of 21.11.2019]. Available: https://likumi.lv/ta/id/311271-grozijumi-kriminalprocesa-likuma [last viewed 10.04.2022].

Case law

European Court of Human Rights

1. Decision in case Salabiaku v. France, 07.10.1988., application No. 10519/83. Available: https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22ENG%22],%22appno%22:[%2210519/83%22],%22documentcollectionid2%22:[%22CHAMBER%22],%22itemid%22:[%22001-57570%22]} [last viewed 10.04.2022].
2. Decision in case John Murray v. The United Kingdom, 08.2.1996., application No. 18731/91. Available: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22John%20Murray%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57980%22]} [last viewed 10.04.2022].

Decisions of Constitutional Court of the Republic of Latvia

1. Satversmes tiesas 15.11.2016. spriedums lietā Nr. 2015-25-01 [15.11.2016. Judgement of the Constitutional Court of the Republic of Latvia in case No. 2015-25-01]. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2015/12/2015-25-01_Spriedums.pdf#search= [last viewed 10.04.2022].

2. Satversmes tiesas 28.03.2013. spriedums lietā Nr. 2012-15-01 [28.03.2013. Judgement of the Constitutional Court of the Republic of Latvia in case No. 2012-15-01]. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2012-15-01_Spriedums.pdf#search= [last viewed 10.04.2022].

Decisions of Supreme Court of the Republic of Latvia

1. Decision of 17.12.2013. of the Senate of the Supreme Court in case No. 16870000208 (SKK-0216-1). Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/138975.pdf [last viewed 10.04.2022].
2. Decision of 07.01.2015. of the Senate of the Supreme Court in case No. 11521045809 (SKK-J-0022-15). Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/198393.pdf. [last viewed 10.04.2022].

Other sources

1. Preliminary Impact Assessment Report (annotation) of the 12th *Saeima* Draft Law No. 630 / Lp12 "Amendments to the Criminal Procedure Law". Available: http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/AB2871419A747C7FC2258011002DD2FA?OpenDocument [last viewed 10.04.2022].

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The Concept of Public-Private Partnership in Poland

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The paper concentrates on the concept of public-private partnership in Poland. In particular, the issues concerning the legal basis and the principles of implementing PPP projects were raised. Moreover, the paper explores the procedures of the private partners' selection and important provisions of the PPP contracts. The institutional environment, such as PPP policy and the role of the PPP Central Unit were also discussed. At the conclusion, the analysis of PPP market in Poland is provided.

Keywords: public-private partnership, concession for works or services, public procurement law, Poland.

Contents

Introduction

In Poland, public-private partnership (PPP) is still a relatively new concept with regard to carrying out public tasks. The introduction of the democratic system after 1989, based on the principles of market economy, did not automatically generate interest in PPP as an organized form of public-private cooperation. Despite the transactions

carried out on the basis of principles similar to PPP[1], the first legislative attempt in this regard (actually unsuccessful) was made only in 2005. In fact, PPP *sensu stricto* can be talked about only since 2009, when the provisions of the Act of 8 December 2008 on public-private partnership[2] and the Act of 9 January 2009 on concession for construction works or services[3], later replaced by the Act of 21 October 2016 on the concession agreement for construction works or services[4], entered into force. In broad terms, PPP in Poland is treated as various concepts and types of public-private cooperation, while in narrower terms it is limited to the provisions of the PPP Act and Concessions Act[5]. The problem of lack of coordination between the offices responsible for the development of the two acts is recognized in the Polish science[6], which results in numerous practical problems in the process of applying the law.

In this article, I will focus on discussing the concept of PPP in Poland from a narrow perspective and limited to the most important legal act normalizing public-private cooperation – the PPP Act. It should be emphasized that every undertaking being a concession for construction works or services, regulated by the Concessions Act, can be successfully implemented also under the PPP Act. This is so, *inter alia*, because the broad definition of PPP, contained in the PPP Act, enables applying it also to concessions. This problem occurs not only on the substantive level, but also on the procedural level, which will be discussed later in this article.

At the beginning, it should be emphasized that the PPP Act has the nature of a framework regulation, so it can be applied to various PPP structures, which should be considered as a positive solution. After the PPP reform carried out in 2018[7], the legislative barriers to the implementation of PPP have been largely removed. The relatively small number of PPP projects implemented in Poland[8] is therefore not due to legal restrictions, and in any case – they are no longer the primary ones. The discussion on the implementation of the Government Policy for the Development of PPPs of 2017[9] and development of the PPP market in Poland will also complement the arguments of legal nature.

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1 Several sections of motorways have been built in Poland under the PPP or concession rules; there have also been numerous transactions at the local government level based on public-private partnerships or lease agreements. However, these concepts were usually not based on the system of public procurement and concessions, which is now the foundation of public-private partnership, but on separate regulations for public roads and toll motorways, municipal economy and real estate management.

2 Dziennik Ustaw, 2022, item 407 (consolidated text), as amended; hereinafter referred as to: the PPP Act.

3 Dziennik Ustaw, 2016, item 113 (consolidated text), as amended, repealed.

4 Dziennik Ustaw, 2021, item 541 (consolidated text), as amended; hereinafter referred as to: the Concessions Act.

5 See "Wytyczne PPP, Tom II: Postępowanie PPP", Ministry of Development Funds and Regional Policy, Warsaw: 2021, version 2:0, p. 28, www.ppp.gov.pl [last viewed 30.04.2022].

6 See Piotr Bogdanowicz in Piotr Bogdanowicz, Roberto Caranta, Pedro Telles, Public-Private Partnerships and Concessions in the EU. An unifinished leglislative framework. Elgar: 2020, p. 115.

7 See ustawa z dnia 5 lipca 2018 r. o zmianie ustawy o partnerstwie publiczno-prywatnym oraz niektórych innych ustaw, Dziennik Ustaw 2018, item 1693.

8 According to the latest raports of the Ministry of Development Funds and Regional Policy, until 31.12.2021, there were 164 PPP and concession contracts concluded, see: https://www.ppp.gov.pl/file.php?i=przegladarka-plikow/Raport-roczny-z-rynku-PPP-2021.pdf [last viewed 30.04.2022].

9 Adopted by the Council of Ministers on 26 July 2017. English version available at: https://www.ppp.gov.pl/file.php?i=przegladarka-plikow/PPP-Policy.pdf [last viewed 30.04.2022].

1. Scope of the PPP Act

1.1. Definition and key features of PPP

According to Article 1(2) of the PPP Act, the public-private partnership consists of joint implementation of the project based on a division of tasks and risks between the public entity and the private partner. Such a broad definition of PPP favours various public-private structures. The public entity is identified here (in simplified terms) with the contracting authority under the public procurement law, while the private partner is defined as an entrepreneur (including foreign entrepreneurs).

However, the definition of a project is the key to understanding the essence of PPP. Article 2(4), provides the definition of a project:

(a) construction or refurbishment of a building or structure, or
(b) provision of services, or
(c) performance of a work, in particular equipping an asset with devices increasing its value and use, or
(d) other consideration (service) – combined with maintenance or management of the asset that is used for implementation of the public-private partnership project or related to it.

As can be seen from the above, the definition of a project is very general and open. This definition includes any public-private cooperation, as long as it is based on the division of tasks and risks, consisting of various services of the parties to a PPP agreement. However, the basic factor distinguishing PPP from other public contracts is the private partner's obligation to actively participate in operating public infrastructure. Lack of the maintenance or management of the asset that is used for implementation of the PPP project (or at least is related to it) eliminates the undertaking from the PPP definition[10]. This rule is also supported by the construction of the remuneration of the private partner, included in Article 7, according to which the private partner commits to implement the project at a remuneration and to cover in whole or in part the expenditure for project implementation or to have them covered by a third party[11]. Moreover, the remuneration of the private partner shall primarily depend on the actual use or actual availability of the subject of project, which determines even more the rule of active cooperation during the exploitation stage of the asset.

To complete the picture, the public party's own contribution to the PPP project must be noted. Pursuant to the aforementioned Article 7, the public entity must also participate in the project, in particular by making its own contribution[12]. This contribution can be financial or in-kind. In the former case, it can consist of co-financing part of the construction of infrastructure or making subsidies for services provided by the private partner at the stage of operation. The in-kind contribution usually takes the form of making the investment property available to the private partner. Interestingly, the PPP Act allows for making such contribution in any legally permissible form (e.g., lease, lending, or even sale)[13].

[10] That is why public contracts based on long-term performance guarantees issued by the contractor or minimal scope of the private partner's serviced during the exploitation period, cannot be considered as PPP projects.

[11] By a third party, the PPP Act understands banks and other financial institution, including investment funds, investors, sponsors or shareholders.

[12] The PPP Act obliges public entity to cooperate with the aim of achieving the project objective.

[13] It is worth to note that, according to the Article 9(2) if an asset contributed by a public entity is used by the private partner in a way obviously contrary to its intended use specified in the public-private partnership agreement, the private partner shall transfer that asset to the public entity according to the principles specified in the public-private partnership agreement.

1.2. Assessment of the effectiveness of project implementation

Until the 2018 amendment of the PPP Act, public entities were not required to adequately prepare PPP projects. From 2018, according to Article 3a, before initiating the selection procedure of the private partner, the public entity shall perform an assessment of the effectiveness of project implementation within the framework of public-private partnership in comparison with the effectiveness of its implementation in any other way, with the exclusive use of public funds. The public entity shall consider, in particular: the planned division of tasks and risks between the public entity and the private partner, the estimated costs of the project life cycle and the time necessary to implement the project and the amount of fees collected from users, if planned, and the conditions for amending them. Despite the general nature of this provision and emerging interpretive questions about its scope, government guidance has been made available to public entities to facilitate the development of the assessment of the effectiveness of project implementation[14]. It can be said that this solution has improved the quality of prepared projects, which has a direct impact on the effectiveness of procedures for the selection of private partners. Assessment of the effectiveness of project implementation must be developed for each type of project falling under the PPP Act. This means that even the smallest projects must be carefully and comprehensively considered and analysed. Unfortunately, this approach limits the application of PPP in small and very small projects, of which Poland has the largest number[15].

It should be added that, in accordance with the Article 3b(1,3), the public entity may request the minister competent for regional development to issue an opinion on the rationality of implementing the project within the framework of PPP. The opinion, which, to a certain extent is a support to the project, shall be issued within 60 days from the receipt date of the complete request.

Interestingly, the PPP Act does not provide for sanctions of nullity of the procedure or the concluded PPP agreement in case when the public entity does not fulfil the disposition of the Article 3a. In such a case, however, the project would certainly be exposed to increased inspections by authorized services. In practice, this obligation is respected by public entities preparing PPP projects.

1.3. Selection of the private partner

In the legal system of the European Union, a PPP is generally based on the concept of either a public procurement or a concession[16], therefore, from the procedural point of view, the selection of a private partner is based on the regulations of the "Classical Directive" and the "Concessions Directive"[17]. Regulation of the PPP Act does not generally provide for procedural provisions modifying the general rules for the award

[14] Wytyczne PPP Tom I: Przygotowanie projektów PPP, Ministerstwo Funduszy i Polityki Regionalnej, wersja 2:0 [PPP Guidelines Vol. 1: Preparation of PPP projects, Ministry of Development Funds and Regional Policy, version 2:0], 2021. Available: www.ppp.gov.pl [last viewed 30.04.2022].

[15] See more in section 4 of this article.

[16] See *Korbus, B.* In: *Cieślak, R.* (ed.). Partnerstwo publiczno-prywatne: 100 pytań, wyjaśnień, interpretacji. Wolters Kluwer: 2014, pp. 20–22.

[17] 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, OJ L 94, 28.03.2014, p. 65 and Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.03.2014, p. 1.

of public procurements and concessions[18]. The Article 4 stipulates that the provisions of the Act of 11 September 2019 – Public Procurement Law[19], shall apply to the selection procedure of the private partner and the agreement on public-private partnership in any matters not regulated in the PPP Act. A specific manifestation of confusion between the regulations of the PPP Act and the Concessions Act is the possibility to apply the procedure specified in the Concessions Act to select a private partner, if the planned undertaking falls within the definition of a concession[20]. In practice, the distinction between the concessions based on the PPP Act and based on the Concessions Act comes down to a slightly different assessment of the allocation of risk within the project [21]. Such a "mixed" procedure creates a lot of problems in practice. Therefore, in the vast majority of cases, the private partner's selection is based on the regulation of the PPL Act. As in certain cases contracts awarded as PPPs are exempt under the PPL Act and the Concessions Act, the PPP Act provides for the possibility of selecting a private partner in a way which guarantees fair and free competition and the principles of equal treatment, transparency and proportionality.

When the PPL Act applies, the private partner is usually selected by means of a competitive dialogue; when the Concessions Act applies, negotiations, similar in their essence to a competitive dialogue, will be the appropriate mode. Obviously, the PPP Act does not oblige public entity to choose a competitive dialogue, however, the PPP Guidelines refer to two-step procedures based on the dialogue or negotiations as preferred modes, recommended in such a complex and long-term project as PPPs[22].

1.4. The PPP agreement

The PPP agreement shall be governed by the PPP Act, and to the extent not regulated by the PPL Act[23]. Matters not regulated by the aforementioned legal acts fall under other generally applicable regulations, particularly the civil law regulations.

As noted before, the PPP agreements may apply to the variety of PPP models and sectors and the PPP Act leaves a lot of room to both parties in order to negotiate and

[18] The exception includes facultative award criteria (e.g., the division of tasks and risks; the effectiveness of project implementation, including the effectiveness of asset use; the ratio of public entity contribution to private partner contribution – see Article 6(3) of the PPP Act; another procedural exception is that the public entity may express its consent to conclude and implement the agreement on public-private partnership with a one-person company established by the private partner to implement the project upon the selection of the advantageous offer or with a capital company which the private partners are the only shareholders of – see the Article 7a.

[19] Dziennik Ustaw, 2021, item 1129 (consolidated text), as amended; hereinafter referred to as the PPL Act.

[20] According to the Article 3 of the Concessions Act, "Based on the concession contract the contracting authority entrusts the concessionare the execusion of works or the provision and the management of services for remuneration. […] In the case of entrusting the economic operator: 1) the execution of works – where the consideration for the works to be carried out consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment (concession contract for works); 2) the provision and the management of services – where the consideration for the services to be provided consists either solely in the right to exploit the services that are subject of the contract, or in that right together with payment (concession contract for services). […] The concessionaire bears the economic risk related to the exploitation of a work or a service and the risks related to demand and supply.

[21] See *Cieślak, R.* In: *Cieślak, R.* (ed.). Ustawa o umowie koncesji na roboty budowlane lub usługi. Komentarz. C.H. Beck: 2018, p. 6.

[22] See Wytyczne PPP Tom II: Postępowanie PPP, Ministerstwo Funduszy i Polityki Regionalnej, wersja 2:0 [PPP Guidelines Vol. 2: PPP proceedings, Ministry of Development Funds and Regional Policy, version 2:0], 2021. Available: www.ppp.gov.pl [last viewed 30.04.2022].

[23] Or the Concessions Act, if the PPP contract has been concluded on the basis of the Concessions Act.

prepare the PPP agreement. However, there are a few rules and obligations that should be introduced to every PPP agreement in Poland.

According to the Article 7, both parties are obliged to contribute to the project. Usually, the public entity makes a land contribution and private partner is responsible for designing, performing construction works, delivery of financing, management or maintenance of the infrastructure. Nonetheless, the definition of the common undertaking is very broad and flexible.

The remuneration of the private partner shall primarily depend on the actual use or actual availability of the subject of project. The source of the remuneration may be combined. The agreement on PPP, as every public contract, shall define the consequences of undue performance or non-performance of the commitment, in particular the contractual penalties or a decrease in the remuneration of the private partner. Usually, due to the requirements of financial institutions, the remuneration is subject to assignment to banks. In case of projects based on fees from users, the PPP contract shall define the maximum amount of such fees and the conditions for amending them.

Under the Article 8, the public entity shall have the right to current control of project implementation by the private partner and to control the asset used by the private partner for implementing the project. The principles and detailed procedure of conducting the controls shall be specified in the agreement on PPP. Protection of public assets requires implementation of the rule under which an incorrect usage of the asset by the private partner shall lead the public entity to call on the private partner to take appropriate measures, in particular, to make expenditures to restore the correct technical state of the asset. The agreement on PPP shall define the consequences of not taking appropriate measures to restore the correct technical state of the asset. The private partner is obliged to report to the public entity on the project implementation progress and the technical state of the asset used by the private partner for implementing the project on an ongoing basis.

The PPP Act, after the 2018 reform, introduced the "step-in right" procedure. Pursuant to the Article 10a, the public entity may conclude a contract with a third party financing the project as a whole or in part, based on which it will be able to transfer the obligations of the private partner entirely or in part, as well as the related rights, onto the third party, in case of a severe threat to the project implementation. The third party may entrust another entity or entities with the project implementation solely with the consent of the public entity. However, it may be noticed that no financial institution would be willing to take over the private partner's obligations, – in practice the Article 10a is a basis for a transfer of assets, rights and obligations of the special purpose vehicle company to a new private partner.

Among other additional or facultative provisions, Article 7b is noteworthy. This regulation excludes the liability of the public entity playing the role of the investor (under the Polish construction law regulation) for the remuneration due to the subcontractor of the private partner. Consequently, the availability payment is secured in a long-term perspective and the public entity is not subject to any claims of the subcontractors.

Finally, it should be noted that the PPP Act does not contain any regulation concerning the minimum or maximum duration of a PPP agreement. Usually, the PPP agreements are concluded for no longer than 30 years[24].

[24] In case of operation and management PPPs or a concession, the minimal identified period was 24 months. On the other hand, there are agreements, which have been concluded for the term of 69 years.

Last but not least, the regulations of the PPP Act provide for the possibility of realizing the so-called institutional PPP, i.e., PPP in the form of a company of a public entity and a private partner. In practice, due to the complicated nature of this structure, in particular the problem of transferring the risk from the company to the partners (in case of termination of the PPP agreement), this form of realizing a PPP agreement has not yet been applied.

1.5. Impact of the PPP on public debt

In Poland, one of the most important motivations for public entities to reach for PPPs is the issue of public debt. As most of the projects are being concluded by local government units, for many years there had been a strong debate over the impact of PPPs on public debt. It wouldn't be risky to observe, that other advantages obtained through PPPs implementation are not as required as "off-balance" treatment of PPP contracts. In the period of 2009–2012, there were extensive problems with indication a proper legal basis for local governments to determine which rules apply to their "on-" or "off-balance" position.

In 2012, the amendment to the PPP Act addressed this problem. According to the Article 18a, the obligations arising from PPP agreements do not affect the level of state public debt of a public finance deficit in a situation where the private partner bears most of the risk of building and most of the availability or demand risk, taking into account the influence of factors such as guarantees of financing by the public entity and allocation of assets when the agreement expires on the above risks[25]. In addition, a regulation was issued, which stipulated taking into account particular types of risks and factors. On the level of local government, the obligations arising from the PPP agreement are thus treated as a debt title only if they do not meet the criteria indicated in the Article 18a[26]. In case of the central government projects, the methodology introduced by the Eurostat obviously is the proper one to apply[27].

2. The PPP Policy and institutional framework

The Government Policy for the Development of PPPs of 2017 concluded the discussion on PPP problems in Poland. The identified barriers in PPPs development[28] had been partly overcome by the novelization of the PPP Act of 2018, establishment of the institutional structure[29], issuing the PPP Guidelines, creating data base of planned and realized projects, education and promotion of the PPP model in general.

Under the Article 16a of the PPP Act, the minister responsible for regional development shall hold the competency regarding any matters pertaining to public-private

[25] Clearly, the Article 18a is very similar to the decision of the Eurostat of 2004, related to the discussed issue.

[26] In practice, these regulations have not fully resolved the problem of impact of PPPs on public debt and deficit. Instead, the burden has been transferred to financial supervision units, which have to analyse the provisions of PPP agreements in depth and try to apply the Article 18a rules.

[27] See, e.g. A Guide to the Statistical Treatment of PPPs. 2016, Eurostat.

[28] Which were: lack of a clear institutional structure and coordinated PPP development policy; lack of optimal legal solutions; absence of database of PPP investment plans; few large projects; no standardization of legal models or documentation for PPP and concession contracts; gaps in the dissemination and examination of good practice for PPP projects; limited knowledge of PPP and the principles of PPP implementation; lack of dedicated project teams and experience in implementing PPP projects in the public sector; difficulties in preparing PPP projects and lack of diligent project preparation; insufficient information for the public; problems with project financing.

[29] Central coordinating and management unit for public-private partnership (PPP Unit) in Poland – the Ministry of Development Funds and Regional Policy.

partnerships[30]. The minister fulfils this task through the Public-Private Partnership Department under the Ministry of Development Funds and Regional Development. His authority extends to the following tasks:

1) Issuing opinions on the rationality of implementing the projects within the framework of PPP (the so-called "certification");
2) Issuing non-binding opinions on the method of realizing the public investments financed by the central budget, of a total value over 300 000,00 PLN;
3) disseminating and promoting best practices in relation to PPP, including the so-called hybrid projects;
4) preparing and disseminating examples of template agreements on PPP, guidelines and other documents to be used for planning and performing public-private partnerships;
5) keeping a database of public-private partnerships;
6) providing professional support to the public entities implementing projects;
7) performing analyses and assessments of the functioning of PPPs, including the status and perspectives for the financial engagement of the private sector.
8) The PPP Unit offers support for the public entities. All of its activities may be followed at: www.ppp.gov.pl. In terms of the Concessions Act, partly competent is also the President of the Public Procurement Office (www.uzp.gov.pl).

The Government Policy for the Development of PPPs stated that the principal indicators, according to which the effectiveness of the policy's activities will be assessed by 2020 include:

- increase in the number of implemented PPP investment projects – conclusion of at least 100 new PPP agreements,
- increased share of the value of signed PPP agreements, in terms of percentage of investment outlays in national economy in the public sector to the level of 5%,
- increase in the number of tenders initiated by the government/state sector to select the private partner – the implementation of the activities provided for in this document is expected to result in the initiation of at least 10 such procedures,
- increase in the number of signed PPP agreements in relation to the number of tender opportunities announced to 40%.
- Unfortunately, none of the abovementioned has been achieved. The evaluation of the policy should be completed until the first half of 2022.

3. PPP market in Poland

Polish PPP market is probably one of the most developed in the whole of Central and Eastern Europe,[31] however, it still remains very, very far from the mature European PPP markets[32]. The complete data presented by the PPP Unit, covering the market from 2009 to 2021, leads to the following conclusions[33].

[30] Currently, this is the Minister of Development Funds and Regional Development.

[31] However, a great deal of caution should be exercised in this assessment, as there has been no in-depth comparative research in this area to date.

[32] See, e.g., the reports of the European PPP Expertise Centre. Available: https://www.eib.org/epec/what-we-do/index [last viewed 30.04.2022].

[33] See Raport rynku PPP 2009 – 2021, Ministerstwo Funduszy i Polityki Regionalnej [PPP Market Report 2009–2021, Ministry of Funds and Regional Policy], 2022. Available: www.ppp.gov.pl [last viewed 30.04.2022].

In the last 13 years, from the beginning of 2009 to the end of 2021, a total of 624 PPP proceedings were initiated in Poland. In the same period, the number of PPP agreements amounted to 164 (this number includes the total of ongoing and completed agreements). The average number of concluded agreements in the period from 2009 to 2021 amounts to 13 agreements per year, i.e., slightly more than 1 agreement per month. It is not an impressive result. The total value of concluded agreements amounts to 8.6 billion PLN, which is a margin of the value of public investments realized in this period.

PPPs are implemented in at least a dozen sectors, such as waste management, water and sewage management, sports and recreation, energy efficiency, transport, education, health care, housing, revitalization, telecommunication; in the vast majority of cases, these are the tasks of local government units.

The largest number of PPP agreements as of the end of 2021 was concluded in the following sectors: energy efficiency (25), transport infrastructure and sports (24 each), and water and sewage management (22). The waste management sector remains the dominant one with the highest value of projects (2.6 billion PLN in total), and this value results from the implementation of three very large projects in Poznan, Olsztyn and Gdansk. However, the market of Polish PPP projects is dominated by agreements whose value does not exceed 40 million PLN. Such agreements constitute 79% of all PPP contracts. The average of the above gives the value of one agreement concluded in the period 2009–2021 at the level of 54 million PLN.

As far as the legal basis for selection a private partner, since 2009 most agreements (38%) were concluded after conducting proceedings in the form of concession for services, and slightly fewer (36%) agreements – after conducting proceedings in the PPP mode based on the PPL Act. It should be noted that currently the tendency is changing towards an even wider use of the provisions of the PPL Act (for example, in 2021 a partner was selected primarily in the PPP mode based on the PPL).

As it was mentioned before, PPP is formed mainly by local governments, which have so far concluded (directly or through their units) 148 agreements (90%). The majority of agreements that entered the implementation phase were signed by urban (51 agreements), rural (38 agreements) and urban-rural municipalities (25 agreements). 16 PPP agreements were concluded by entities not connected with local governments, of which in 8 cases the institutions of central government administration were parties to the agreement. In the latter case, only one project concerns the construction of a cubature facility, the others are concessions for services.

Some projects, including case studies, are available at of the PPP Unit[34], as well as the pipeline of projects in various stages of preparation.

Conclusion

The principles of public-private cooperation in Poland were included in a separate legal regulation – the PPP Act. The regulation is of a framework nature. A wide definition of PPP enables realization on its basis of various projects, the common feature of which is the division of tasks and risks, as well as maintenance or management of the asset at the stage of infrastructure operation. Preparing a PPP project requires carrying out an assessment of the effectiveness of project implementation. The procedure of selecting a private partner is based on regulations proper for public procurement, or (in rather rare cases) – for concessions. The PPP

[34] See https://www.ppp.gov.pl/projects/ [last viewed 30.04.2020].

Act (especially after the amendment of 2018) to a large extent takes into account the specificity of implementing PPP projects. It seems that the regulation of the PPP Act has enabled a significant reduction of legal barriers to the implementation of public-private cooperation.

The image of the Polish PPP market appears to be still in its nascent stage, without a significant number of large infrastructure projects, fragmented, dominated by smaller undertakings implemented mainly at the local government level. At the same time, it is impossible not to notice some efforts of the PPP Unit aimed at promoting the use of PPP as a form of realizing public tasks.

Summary

In Poland, the concept of public-private partnership has been developing steadily since 2005.

On the regulatory side, it should be stated that the PPP Act of 2008 to a large extent takes into account the specifics of PPP. The regulation is of a framework nature and a wide definition of PPP enables realization on its basis of various projects, the common feature of which is the division of tasks and risks, as well as maintenance or management of the asset at the stage of infrastructure operation.

The effective implementation of a PPP project requires the preparation of an assessment of the effectiveness of the implementation of the project and the conduct of a private partner selection procedure, which is usually based on the provisions of the PPL Act. In the case of projects where the economic risk is borne by the private party and the remuneration comes from infrastructure user charges, the selection of the private party is based on the provisions of the Concessions Act.

Unlike Western Europe, the Polish PPP market is dominated by small projects. This is due to the fact that more than 90 percent of projects are carried out by local government units, while there is a lack of large PPP investments by central government.

Sources

Bibliography

1. *Bogdanowicz, P.* In: *Bogdanowicz, P., Caranta, R., Telles, P.* (eds). Public-Private Partnerships and Concessions in the EU. An unifinished leglislative framework. Elgar: 2020.
2. *Cieślak, R.* In: *Cieślak R.* (ed.), Ustawa o umowie koncesji na roboty budowlane lub usługi. Komentarz [Act on concession contract for works or services. Commentary]. C. H. Beck, 2018.
3. *Korbus, B.* In: *Cieślak, R.* (ed.). Partnerstwo publiczno-prywatne: 100 pytań, wyjaśnień, interpretacji [Public-private partnership: 100 questions, explanations, interpretations]. Wolters Kluwer, 2014.

Normative acts

1. 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, OJ L 94, 28.03.2014, p. 65.
2. Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.03.2014, p. 1.
3. Act of 28 July 2005 on public-private partnership, Dziennik Ustaw, 2005, No. 169, item 1420 (repealed).
4. Act of 8 December 2008 on public-private partnership, Dziennik Ustaw, 2022, item 407 (consolidated text).
5. Act of 9 January 2009 on concession for construction works or services, Dziennik Ustaw, 2016, item 113 (consolidated text; repealed).
6. Act of 21 October 2016 on the concession agreement for construction works or services, Dziennik Ustaw, 2021, item 541 (consolidated text).

7. Act of 5 July 2018 on amending the Public-Private Partnership Act and certain other acts, Dziennik Ustaw, 2018, item 1693.
8. Act of 11 September 2019 – Public Procurement Law, Dziennik Ustaw, 2021, item 1129 (consolidated text).

Other sources

1. Polityka Rządu w zakresie rozwoju partnerstwa publiczno-prywatnego 2017, przyjęta uchwałą Rady Ministrów z dnia 26 lipca 2017 r. [Government Policy for the Development of PPPs of 2017, Adopted by the Council of Ministers on 26 July 2017]. Available: https://www.ppp.gov.pl/polityka-zarzadu/ [last viewed 30.04.2022].
2. Wytyczne PPP Tom I: Przygotowanie projektów PPP, Ministerstwo Funduszy i Polityki Regionalnej, 2021, wersja 2:0 [PPP Guidelines Vol. 1: Preparation of PPP projects, Ministry of Development Funds and Regional Policy, version 2:0, 2021]. Available: www.ppp.gov.pl [last viewed 30.04.2022].
3. Wytyczne PPP Tom II: Postępowanie PPP, Ministerstwo Funduszy i Polityki Regionalnej, wersja 2:0, 2021 [PPP Guidelines Vol. 2: PPP proceedings, Ministry of Development Funds and Regional Policy, version 2:0, 2021]. Available: www.ppp.gov.pl [last viewed 30.04.2022].
4. A Guide to the Statistical Treatment of PPPs, 2016, Eurostat.
5. Reports of the European PPP Expertise Centre. Available: https://www.eib.org/epec/what-we-do/index [last viewed 30.04.2022].
6. Raport rynku PPP 2009–2021, Ministerstwo Funduszy i Polityki Regionalnej [Market reports of PPP 2009–2021, Ministry of Development Funds and Regional Policy], 2022. Available: https://www.ppp.gov.pl/file.php?i=przegladarka-plikow/Raport-roczny-z-rynku-PPP-2021.pdf [last viewed 30.04.2022].

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The Doctrine of *"in Loco Parentis"* in Anglo-Saxon Legal Systems and in the Republic of Latvia

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This publication analyses the "in loco parentis" doctrine of Anglo-Saxon law, which means "in place of parents". In particular, the authors seek to reveal the content, historical aspects of this concept and its expression in the Latvian legal system. This can be applied, for example, to the duty of employees of an educational institution who are required as part of their role to exercise a duty of care, as well as to enforce discipline, as aspects of cooperation between parents and the school. The practice of the European Court of Human Rights (ECHR) in connection with the "*in loco parentis*" doctrine is highlighted. The authors conduct a study using methods of interpreting the rules of law adopted in legal science: grammatical, historical, comparative, teleological method. An educational institution as a structure authorized by the state *per se* can be viewed as having an equivalent responsibility to that of a child's parents. That is, the school, like parents, has an obligation to take care of the child, especially in relation to the child's psycho-emotional well-being and physical safety. So, should the school staff take care of the child the same way the parents do? In the case of the Republic of Latvia, this is most clearly reflected in the scientific knowledge of pedagogy and in the practice of daily education.

Keywords: *in loco parentis*, education law, parents' rights and duties, liability, schooling, *parens patriae*.

Contents

Introduction

The Latin term "*in loco parentis*" means "instead of parents"[1]. That is, "*in loco*"[2] means "in the place of ", (instead of that – that instead)[3]. Thus, in understanding this concept, the term can be applied, when someone else, who is not the biological parent of the child – for example, a teacher or an educational institution – takes on the role of a parent representing the child, taking on a kind of parental responsibility. This means that the child is not formally adopted. The use of the words "*parentis loco*" is found already in Roman law. For example, in The Digest of Justinian" it is stated: "I cannot marry my sister's great-granddaughter because, in relation to her, I occupy a parental position[...]."[4] (in Latin: "*Sororis proneptem non poneptem non possum ucere uxorem, quoniam parentis loco ei sum*").[5] As you can see, the Latin words "parentis loco" indicate that someone takes the place of the elder or takes the parental position. In this case, marriage is impossible, since there is both a close relationship and the fact that the person is acting as a parent.[6] One of the renown orators of ancient Rome, Marcus Fabius Quintilianus, who was the most distinguished lawyer of his time, in his book "Institutio oratoria" notes that the teacher should take a parental role in relation to his students, and students should love their teachers as much as they love their parents.[7] This implies that already two millennia ago the idea was developed that not only the biological parents of the child are responsible for the upbringing and education of the child, but also other adults. For example, teachers can and should be responsible for the children entrusted to them. Taking into account the above, this article examines the extent to which the doctrine found in the Anglo-Saxon legal system of rights applies to the branches of education and parties *in loco* in the Republic of Latvia.

1. *In loco parentis* in the system of Anglo-Saxon law

In the Anglo-Saxon legal system, the term "*in loco parentis*" acquires the status of a legal precedent. This means that it begins to apply to court-protected individuals who have obtained legal status in the field of education.[8] The term means that person or organization takes on some of the functions and responsibilities of apparent i.e., rights and duties can be delegated to either a teacher or a mentor (in British – a tutor).

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[1] *Garner, B. A*. (ed.). Black, Henry Campbell, 1860–1927. Law Dictionary. St. Paul, MN: Thomson Reuters, 5th ed., 2016. *Stuart, S.* In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change. Available: https://scholar.valpo.edu/cgi/viewcontent.cgi?article=1173&context=law_fac_pubs [last viewed 20.02.2022].

[2] Latinskie juridicheskie izrechenija [Latin legal sayings] sost. *Temnov, E. I*., Moskva: Jurist, 1996. 398 c.

[3] Latinsko-russkij slovar' juridicheskih terminov i vyrazhenij dlja specialistov i perevodchikov anglijskogo jazyka [Latin-Russian dictionary of legal terms and expressions for specialists and translators of the English language]. Avt.-sost. *Gamzatov, M.* Sankt-Peterburgskij gosudarstvennyj universitet. Sankt-Peterburg: Izdatel'stvo Sankt-Peterburgskogo universiteta, 2002.

[4] *Garner, B. A*. (ed.). Black, Henry Campbell, 1860–1927. Law Dictionary. St. Paul, MN: Thomson Reuters, 5th ed., 2016.

[5] Digesty Justiniana. [Digests of Justinian]. Available: https://www.gumer.info/bibliotek_Buks/Pravo/digest/23 [last viewed 20.02.2022].

[6] Iustiniani Digesta Recognovit Theodorus Mommsen / Retractavit Paulus Krueger, Corpus Iuris Civilis, Vol. I. Available: https://droitromain.univ-grenoble-alpes.fr/Corpus/d-23.htm [last viewed 20.02.2022].

[7] *M. F. Quintilianus*. Cambridge, Massachusetts : Harvard UP1996. Vol. 1, Books 1–3. *Butler, H. E.* (Engl. transl.). XIV, 1996, 544 p. Available: https://archive.org/stream/institutioorator00quin/institutioorator00quin_djvu.txts [last viewed 20.02.2022].

[8] *Garner, B. A*. Black, Henry Campbell.

Thereby, the teacher or mentor enters the parental place (*in loco parentis*). At the moment when the teacher enters the parental position (*in loco parentis*), he/she receives a certain degree of the rights and duties in the sphere of raising a child. For example, the teacher has the right and duty to keep the child away from illegal or unacceptable activities, or to punish or correct the child's behaviour. Alan F. Edwards points out that the concept of *loco parentis* in England originally developed as a principle of tort law. Thus, in this case, it indicates what constitutes an unlawful act or tort and in what situations the person taking the place of the parents should prevent any unauthorized act.

In describing the operation of a general education institution[9], an example of a prohibited activity could be the so-called bullying, mobbing between children. In this context, the question arises as to whether the learner's parents can trust the educational institution, i.e., the teachers, the management of the educational institution, and support staff that they will be able to provide a psycho-emotional and physical environment, and maintain safety and supervision of the system. The educational institution should provide both preventive and intervention measures to stop violence against children at an early stage, and prevent children from engaging in violence against each other as effectively as possible. This means providing effective support and treatment measures for both the abuser and the victim, the perpetrators and witnesses or bystanders. It is the concept of *loco parentis* that is important in this respect, because it justifies the requirement, for example, for the teacher to take action to prevent any illegal activity, such as violence. In other words, educators, managers and others acting on behalf of parents' duty to ensure that parents and learners trust them.[10]

It should be emphasized that, for example, one of the responsibilities of a learner is not to endanger his or her own health and safety or life[11], while the head of the educational institution is responsible for planning and organizing educational events dedicated to learners' safety, including violence and injury prevention.[12] It is in the doctrine of *in loco parentis* that it is emphasized that learners as minors do not have the same scope of rights as adults. Namely, it is the employees of an educational institution, such as the management and teachers who represent the state in the exercise of the state-guaranteed right to education, who act on behalf of the state and, in the performance of tasks and responsibilities delegated by the state, take the place of parents. In the United States (US), although an educational institution is a government's representative, it is implied that there is an agreement between the parents that the educational institution will protect the child from any malice or abuse. [13]

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[9] *Keiss, M.* In loco parentis. 08.08.2007. Available: https://www.delfi.lv/news/versijas/marks-keiss-in-loco-parentis.d?id=18661344 [last viewed 20.02.2022].

[10] *Johnson, D. E.* Schools We Trust? Leadership in Loco Parentis and the Failure to Protect Students from Bullying and Harassment In: *Samier, E. A., Schmidt, M.* (eds). Trust and Betrayal in Educational Administration and Leadership. New York, London: Routledge, 2010, p. 143.

[11] Izglītības likums [Education Law]. 17.11.1998. Available: https://likumi.lv/ta/en/en/id/50759-education-law [last viewed 20.02.2022].

[12] Kārtība, kādā nodrošināma izglītojamo drošība izglītības iestādēs un to organizētajos pasākumos [Procedures for Ensuring Safety of Educatees in Educational Institutions and at Events Organized by Them]. Cabinet of Ministers Regulation No. 1338 of 27.11.2009. Available: https://likumi.lv/ta/en/en/id/201106-procedures-for-ensuring-safety-of-educatees-in-educational-institutions-and-at-events-organized-by-them [last viewed 20.02.2022].

[13] *Johnson, D. E.* Schools We Trust? p. 143.

New Zealand law scholars Allan Hall and Margaret Manins take a slightly different view, arguing that *in loco parentis* is considered an anachronism today.[14] At the same time, it has its share of influence in non-formal and informal learning.[15] In 1837, the U.S. Supreme Court of North Carolina ruled in State v. Pendergrass that: "... it is not easy to determine with precision the power delegated to school principals and teachers to punish (correct) pupils".[16] In the context of this case, the North Carolina Supreme Court heard that a school teacher had been physically abused by a seven-year-old girl. The teacher used corporal punishment to discipline the student. This judgment argues that the right to punish a child is equivalent to that of a parent, that caution must be exercised with hasty inferences that a disproportionate sentence has been used, i.e., the physical punishment of a child in order to achieve discipline. The judge pointed out that the power of teachers is analogous to that of parents, and the authority of teachers is assessed from the point of view that the parents have delegated their powers to the teacher. Among other things, the same court stated that one of the parent's responsibilities is to teach and raise a child to become a useful and virtuous member of society, but this is not possible without the ability to command, control obedience and stubbornness, promote the love of work and prevent harmful habits. Consequently, the pupil is subject to the teacher's favour, who has some authority to make a proportionate correction of the child's behaviour, if he or she deems it necessary and fair. It was also stated by the US court: "…the teacher is the substitute of the parent; is charged in part with the performance of his duties, and in the exercise of these delegated duties, is invested with his power."[17] Evidently, the court upheld in this case the use of corporal punishment for the purpose of supporting a child's upbringing. Today, of course, this judgment has only a historical significance. Namely, it reflects the values of early 19th century American society and possibly the personal prejudice of a judge.[18] However, the authors of this article consider that the substantive aspect of the doctrine *in loco parentis* is revealed in this judgment. Respectively, in the field of education, the content of this concept indicates[19] the powers or authority of the teacher, which are equivalent to the power of the child's parents. This leads to a conclusion that the responsibilities and rights of a teacher and parents in the upbringing and education of a child at some point overlap. In other words, they could even be identical. This raises the question of whether, for example, the duties and rights of a teacher and a parent in the field of education are really identical. Thus, an in-depth historical insight into the Anglo-Saxon legal doctrine is needed in this regard.

In 1855, an English school for orphaned children, i.e., children who had lost their fathers, chose "*In loco parentis*" as their motto. The aim of the school was to help those children whose fathers had died. In the 19th century England, the father had sole responsibility and control over the child. With the loss of the father, the child was

[14] Anachronism: The erroneous attribution of events and phenomena of a historical era to another era. An outdated belief, a thing of the past. Available: https://www.vardnica.lv/svesvardu-vardnica/a/anahronisms [last viewed 20.02.2022].

[15] *Hall, A. J., Manins, M.* In Loco Parentis and the Professional Responsibilities of Teachers. Waikato Journal of Education, 7, 2001, pp. 117–128.

[16] Supreme Court of North Carolina State v. Pendergrass19 N.C. 365 (N.C. 1837) Passed June 1, 1837. Available: https://casetext.com/case/state-v-pendergrass-22 [last viewed 20.02.2022].

[17] Ibid.

[18] Case Briefings Law and Society. Available: https://quizlet.com/51022729/case-briefings-law-and-society-flash-cards/ [last viewed 20.02.2022].

[19] The authors define different approaches to what is called *in loco parentis*. For example, there are authors who see it as a doctrine, others – as a concept, still others – as a principle.

considered an orphan. The school adopted this motto, thus confirming its willingness to help and educate its dependents. R. M Merrick in his 2016 dissertation "Is it dead or alive? An analysis of the doctrine and policy of loco parentis at American universities" describes how since the late 1880s and early 1960s, the relationship between the college and its students has been similar to that between parents and children. Consequently, this doctrine has played an important role, at least in the US education system, especially in higher education.[20] He emphasizes that colleges were responsible for the safety, well-being, health and morals of students, and at the time students had the opportunity to sue on the basis of their sovereignty or other beliefs. The doctrine of *loco parentis* in its heyday was the responsibility of universities, not of general jurisdiction.[21] Consequently, this doctrine had a very strong impact on the U.S. education system, especially at the college and university level. The ethical dimension of *loco parentis* has not lost its relevance today. That is, Alan Hall and Margaret Hanin point out that this concept remains important from an ethical point of view, as it emphasizes the duty of care. Respectively, the teacher's professional duty is to take care of his students or those under his supervision.[22] US professor Susan Stuart points out that one of the biggest anomalies in the development of law is the viability of the doctrine of *loco parentis* in educational law. She writes: "In applying this concept to public schools, most courts focus almost always on the disciplinary aspect of this principle, but not on the accompanying rights of defence."[23] Namely, S. Stewart believes that the application of this concept is related not only to substantiating the right of schools to make decisions regarding students' discipline issues, but also to the fact that the application of this concept emphasizes the caring aspect, that the teacher also acts as a caring parent, i.e., in the place of the parent and act as a caring parent would. She also points out that there are signs of anachronism in the application of this concept. The author refers to the above-mentioned judgment of the US Supreme Court of North Carolina in State v. Pendergrass[24], emphasizing that in this case the court recognized a great deal of discretion for teachers and that at the same time it refused to interfere in the child-family relationship.[25] R. M. Merrick emphasizes that *in loco parentis* is rather an evolving concept. It is the case that such an approach to this doctrine puts the institution in a difficult position, as it forces it to balance parental expectations with societal expectations based on different laws, such as freedom of expression or personal beliefs, which must not be forgotten. Although *in loco parentis* is not used directly in university or college programmes, it also plays a role in the relationship between learners and educational institutions. It also reveals a different perspective on this relationship.[26] It can be seen here that the application of *in loco parentis* in the Anglo-Saxon school of thought implies that teachers, as well as parents, have a legal duty to take care of the child's well-being, but in order to do so, both the teacher and the parent need to have the appropriate authority. For example,

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[20] *Merrick, R. M.* "Is it dead or alive?" An Analysis of the Doctrine and Policy of in Loco Parentis at American universities. Available: https://www.jstor.org/stable/20403397?seq=1 [last viewed 20.02.2022].

[21] Ibid., p. 7

[22] *Hall, A. J., Manins, M.* In Loco Parentis, pp. 117–128.

[23] *Stuart, S.* In Loco Parentis.

[24] Supreme Court of North Carolina State v. Pendergrass, 19 N.C. 365 (N.C. 1837) Decided on June 1, 1837. Available: https://casetext.com/case/state-v-pendergrass-22 [last viewed 20.02.2022].

[25] *Stuart, S.* In Loco Parentis.

[26] *Merrick, R. M.* "Is it dead or alive?"

a teacher needs to discipline students but, in order to achieve discipline, a teacher needs to be endowed with some power.

What constitutes this power and wherefrom does it derive its legitimacy? The authors of this article will try to clarify these issues below. It should be noted that the candidate for a doctorate in psychology at the University of South Africa, M. J. Van Breda, [27]also understands the concept *in loco parentis* as the ability of a teacher to be a parent of a pupil while they are in school. As a result, the teacher acts as the parent of the pupil, for example, to prevent absenteeism.[28] It is now clear that *in loco parentis* is closely linked to aspects of parenting, such as discipline and care. This means that the child's parents have the right to delegate part of their power or responsibilities and rights to an educational institution or any other legal entity that will act on behalf of the parents. Namely, John Dayton points out that under the influence of the doctrine of *loco parentis*, a school may exercise a reasonable quasi-parental authority when the child is in the care of school, but this power is exercisable on the basis of the best interests of the child. Acting *in loco parentis*, the school has a duty to supervise and protect children as a reasonable parent would in certain circumstances. The child has a duty to follow reasonable instructions from the school in the same way that they follow reasonable instructions from parents.[29] In the context of US college education and universities, this concept is understood as the supervision of the administration over students or young people, i.e. the university supervises its students.[30] That is to say, in the Anglo-Saxon legal system, *in loco parentis* in the context of education actually means that teachers must become the parents of pupils or students. As the Latvian legal scientist Kristīne Jarinovska admits: "[...] In the Anglo-Saxon lands, there is a legal concept *in loco parentis* –a legal fiction, where the institution, most often the educational institution, has parental authority and disciplinary duty." [31] Robyn Michele Merrick, on the other hand, believes that the doctrine of *loco parentis* was widely used in disputes between students and higher education in the 1960s, leading to decades of controversy. At the same time, he points out that the phrase *in loco parentis* is not often heard, but still this doctrine is really "healthy" nowadays and strongly influences the activities of colleges and universities. [32] Namely, both society and parents expect the educational institution to support the notion that there is a need for a certain parental supervision over the learners, i.e., that the educational institution will perform some kind of parental responsibilities in caring for their subordinates.[33] Briton White also points out that the history of the doctrine of *in loco parentis* in American higher education can be divided into three stages of development. The beginnings of the first stage can be found in the most influential court judgments from 1913 to the 1960s. During this period, the courts upheld a large margin of discretion for universities and colleges in their dealings with their students. The second phase begins in the 1960s and lasted until the 1980s.

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[27] *Van Breda, M. J.* Guidelines for empowering secondary school educators, in loco parentis, in addressing truancy among early adolescent leaners. University of South Africa. Theses, 2006, pp. 285.

[28] Ibid., p. 284.

[29] *Dayton, J.* Education Law: Principles, policies, and Practice. Wisdom Builders Press, 2012, pp. 465.

[30] *White, B.* Student Rights: From In Loco Parentis to Sine Parentibus and Back Again? Understanding the Family Educational Rights and Privacy Act in Higher Education, 2007. BYU Educ. & L.J. 321, 2007. Available: https://digitalcommons.law.byu.edu/elj/vol2007/iss2/6 [last viewed 20.02.2022].

[31] *Jarinovska, K.* Ne vien uzdrošināšanās, bet arī centība un paklausība ir tikumi [Not Only Courage, but also Diligence and Obedience are Virtues]. Available: https://lvportals.lv/viedokli/259980-kristine-jarinovska-ne-vien-uzdrosinasanas-bet-ari-centiba-un-paklausiba-ir-tikumi-2013 [last viewed 20.02.2022].

[32] *Merrick, R. M.* "Is it dead or alive?"

[33] *White, B.* Student Rights.

This time was full of unrest and litigation, which ended in a change *in loco parentis*. The third stage began in the 1980s and continues to this day. This is characterized by changing legal precedents regarding rights of parents and learners.

2. The case law of the European Court of Human Rights – the concepts of *in loco parentis and parens patriae*

The doctrine of *loco parentis* also had an impact on the case law of the European Court of Human Rights (ECtHR), allowing the authors to identify some aspects of the doctrine of *loco parentis* and *parens patriae*. For example, the 1993 judgment in Costelle-Roberts v. The United Kingdom.[34] The essence of this case was, as follows. In 1985, a pupil who was seven years old entered a private school in England. After a while, the school principal used corporal punishment as a method of discipline. The child's mother brought an action before the ECtHR alleging that the school head's actions against her son violated Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which prohibits torture or cruel, degrading treatment or punishment, and Article 8 of the ECHR, which respects privacy and an important part of which is the right to physical integrity. In the present case, the ECtHR concluded that there had been no violation of the ECHR. One of the arguments in this case is that the teacher has the right to punish the pupil because he is *in loco parentis*. Namely, the teacher is authorized to act on behalf of the parents, which means that corporal punishment may also be applied. Although the ECtHR did not find violations of Articles 3 and 8 of the ECHR, at the same time, the ECtHR stated for the first time that the state could be held liable for violations of ECHR norms found in the private sphere.[35] This precedent took place in a private school and not in a public school. The ECtHR emphasized that the state must be responsible. In reaching this conclusion, the ECtHR paid particular attention to the educational context of the dispute, recalling the state's obligation to guarantee the child the right to education under Article 2 of Protocol No. 1 to the ECHR, which sets out the right to education.[36] The ECtHR in its judgment pointed out that the United Kingdom had acceded to the UN Convention on the Rights of the Child..[37] This means that a country which has ratified the ECHR, including the United Kingdom, has an obligation to comply with the Convention on the Rights of the Child. It is necessary to address in detail this judgment of the ECtHR, because the principle in loco parentis cannot be considered in isolation from the specific situation and cannot be directly translated. Respectively, it follows that it is not enough for the state to create an education system and declare the right to education, but the state has an obligation to take responsibility for not violating either national or

[34] Case of Costello Roberts v. the United Kingdom, App. No(s). 13134/87. Available: https://hudoc.echr.coe.int/eng?i=001-57804 [last viewed 20.02.2022].

[35] *Kilkelly, U.* The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child. Human Rights Quarterly Johns Hopkins University Press, Vol. 23, No. 2, May 2001, pp. 308–326.

[36] Ibid., p. 316

[37] "…that a school's disciplinary system falls within the ambit of the right to education has also been recognised, more recently, in Article 28 of the United Nations Convention on the Rights of the Child of 20 November 1989 which entered into force on 2 September 1990 and was ratified by the United Kingdom on 16 December 1991. This Article, in the context of the right of the child to education, provides as follows…" From: Case of Costello Roberts v. The United Kingdom, App. No(s). 13134/87. Available: https://hudoc.echr.coe.int/eng?i=001-57804 [last viewed 20.02.2022].

international law, for example, under the pretext that the state does not interfere in private law transactions.

In this case, the judges of the ECtHR – R. Ryssdal, Thór Vilhjálmsson, F. Matscher, L. Wildhaber – expressed their separate thoughts. In particular, the judges stated that they agreed that the United Kingdom was responsible for complying with the provisions of the ECHR with regard to the application of disciplinary sanctions in private schools. They emphasized the need for Britain to control private schools in order to protect the rights enshrined in the ECHR. Judges pointed out that, for example, the state cannot leave prisons under the control of the private sphere, thus allowing corporal punishment in them, thereby promoting lawlessness. The same would be true of private schools, if they were managed in a similar way. That would be a violation of the human rights guaranteed by the ECHR. Otherwise, it is considered that the ECHR is not applicable as such to all private law relationships. The question arises as to whether private schools must respect the guarantees laid down in the ECHR, in particular Articles 3 and 8 of the ECHR. It is this statement that is noteworthy. Namely, Judges R. Ryssdal, Thór Vilhjálmsson, F. Matscher, L. Wildhaber emphasized: "…a spanking on the spur of the moment might have been permissible, but in our view, the official and formalised nature of the punishment meted out, without adequate consent of the mother, was degrading to the applicant and violated Article 3."[38] We might add that the child's rights under Article 3 are not diminished by balancing them against the mother's rights. The parents of the boarders in Barnstaple were not adequately informed that corporal punishment was used in order to maintain discipline."[39] It can therefore be concluded that *in loco parentis* (in place of parents) is not an argument that human rights are being violated. In other words, the school head cannot claim that the school is a body governed by private law and is not directly covered by the guarantees of ECHR law. Just as the state oversees prisons, so the state must take responsibility for what happens in educational institutions. It would be absurd, for example, for children's rights to education and privacy to be violated on the grounds that the child is a subordinate of a private school or that the state should not interfere in private law transactions. It would be just as absurd if, for example, prisoners had a wider range of rights than children. In the opinion of the authors, the opinion expressed by the judges of the EctHR stating that the methods of disciplining the child and even corporal punishment should receive the consent of the child's parents deserves attention. This aspect must be assessed in the light of the extent of parental rights and responsibilities. It follows from the above that the opinion of parents is important but, in the opinion of the authors, such an argument that parental punishment should be coordinated with parents is indeed an anachronism from a modern point of view. In this regard, it is emphasized that parents need to know what is happening to their child at school, i.e., the teacher or school head needs to be informed about what has happened at school, what decisions are being made about the child, etc.

A similar situation was assessed in 1978. Namely, the EctHR decision in Tyrer v. The United Kingdom. In the context of this case, the ECtHR assessed and accordingly found a violation of Article 3 of the ECHR. It was concluded from the circumstances of the case that the United Kingdom had violated Article 3 of the ECHR by considering a situation in which the police used beatings as a punishment. The beating was given

[38] The Case of Costello Roberts v. The United Kingdom, App. No(s). 13134/87. Available: https://hudoc.echr.coe.int/eng?i=001-57804 [last viewed 20.02.2022].

[39] Ibid.

to a 15-year-old who brought beer to school. After another student told the school management about the incident, the teenager, along with three other schoolmates, took revenge on the student. A British court ruled that corporal punishment was applicable, which at the time was one of the most legitimate forms of punishment in the country. Without going into all the legal nuances of this case, it should be noted that in this case, too, one of the judges of the ECtHR expressed the opinion that the state, to some extent, becomes *in loco parentis* when implementing institutionalised sanctions.[40]

From the point of view of such a judge, it could be presumed that, if for some reason a parent is unable or unwilling to perform his or her duties, the state performs them on his or her behalf. This approach is very much in line with the so-called "*parens patriae*" doctrine, which in Latin means "father of the country" or "parent of one's country".[41] The doctrine of *parens patriae* is also widely used in the Anglo-Saxon legal system, but its origins can be traced back to ancient Sparta and Rome. In ancient Rome, only the father of the child had absolute control over the child, but over time, both the father's and the state's power over the child diminished. *Parens patriae* has historically meant the so-called "royal prerogative". It should be noted briefly that this concept implies that, for example, the court may decide on custody, maintenance, etc., regardless of the parents' views. Namely, the state has the right to stand up for those who are unable to take care of themselves, especially children, the elderly, the disabled, the mentally ill, in short, the state is like a "caring father" who takes care of the weakest members of society, including children. The court, on the other hand, directly represents the state. However, over time, the absolute power of the state or the father over the child weakens, i.e., within the framework of this doctrine, the state becomes more of a protector who also takes care to protect the child from the child's parents, if necessary.[42] Thus, the state performs activities similar to those of parents but, according to the legal scholar George B. Curtis, using the doctrine of *parens patriae* without precaution, the state can easily become a tyrant from a parent.[43] It should be noted that the *parens patriae* doctrine allows for a situation where the state may intervene in exceptional cases, for example, to provide medical care to a child who is ill, in a situation where the child's parents have not been vaccinated for religious or other reasons. Namely, the state has the right to intervene and provide the necessary assistance to save the child's life.[44] This doctrine is also closely related to the institutionalization of children. Namely, as early as the 19th century, a U.S. court in Pennsylvania ruled that the institutionalisation of children of concern is permissible precisely because the child's natural parents are incomparable in terms of educational tasks or unworthy of being involved in the child's upbringing, and are therefore substitutable for *parens patriae*, which would mean that the public has a primary interest over its members, i.e., that it is in the public interest for its members to receive a proper education and a good upbringing.[45]

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[40] Case of Tyrer v. The United Kingdom, App. No(s). 5856/72. Available: https://hudoc.echr.coe.int/eng?i=001-57587 [last viewed 20.02.2022].

[41] *Smiltēna, A. Parens patriae* doktrīna – valsts intervence bērna labākajās interesēs [The Doctrine of *Parens Patriae* – State Intervention in the Best Interests of the Child]. Jurista Vārds, 30.03.2021.

[42] *Dayton, J.* Education Law, p. 465.

[43] *Curtis, G. B.* The Checkered Career of *Parens Patriae*: The State as Parent or Tyrant? 25 DePaul L. Rev. 895, 1976. Available: http://via.library.depaul.edu/law-review/vol25/iss4/5 [last viewed 20.02.2022].

[44] *Dayton, J.* Education Law, p. 465.

[45] *Curtis, G. B.* The Checkered Career of *Parens Patriae*.

In general, the doctrine of both *parens patriae* and *in loco parentis* includes an aspect of caring, as they both emphasize the need to care for the child in the same way as a caring parent, whether the child's natural parents or the state. Two judgments of the ECtHR, Scozzari and Giunta v. Italy, deserve attention in this regard. [46] ("the Scozzari case") and O'Keeffe v. Ireland ("the O'Keeffe case").[47] In the Scozzari case, the ECtHR found that in September 1997 two of the applicants' children, one born in 1987 and the other in 1994, had been placed in a childcare centre following the judgment of an Italian court. Sometime later, the national court learned that two of the leaders of the childcare centre, the head and co-founder of the centre, had previously been convicted of sexual abuse of children in their care. According to the applicant, her son was a victim of sexual abuse by a paedophile social worker while the boy was in the centre. The ECtHR stated in its judgment that there had been a violation of Article 8 of the ECHR, as both employees of the childcare centre were involved in "very active" direct contact with both children. Although the ECtHR was not asked to comment on the childcare centre or the quality of the overall care, nor was it necessary for the ECtHR to take part in the debate between supporters and opponents of the childcare centre, both childcare leaders were convicted and childcare cannot be considered insignificant. Respectively, it was necessary to analyse in detail the specific situation of the children complained about in the applicant's national court. Judge B. Zupančič, on the other hand, expressed some views in this case. He emphasized that, in the Scozzari case, it was clear that the state had to balance its decision to interfere in family life with its *parens patriae* responsibility. According to him, the door of the court should be wide open, especially in cases concerning family law.[48] In the O'Keeffe case[49], the ECtHR also stated that regardless of how education is organized or who is responsible for the day-to-day running of the school, the state has a duty to protect the child from cruel treatment at school. It follows that the doctrines of *in loco parentis* and *parens patriae* are somewhat similar, because the essence of both is the care of the child.

3. Latvian context and *in loco parentis*

In loco parentis attracts attention in connection with the Latvian educational context. The opinion of the authors holds that it is worth noting that there are parallels between the situation in the United States and Latvia in the sense of this doctrine. For example, in Latvia in 2013, in a general education school, it was found that several fifth-graders (aged around 11–12) attacked a first-grader (aged around 7–8) and he suffered a severe beating. This incident raised reflections on whether the legal framework is effective and whether the public, including the parents of the learners can trust the state or state power, and, finally, the educational institution.[50] One of the authors of the article also gave his opinion on this case – Dr. iur. J. I. Mihailovs. In particular, he pointed out that the legislation and mechanisms in force in 2015

[46] Case of Scozzari and Giunta v. Italy. App. No(s). 39221/98; 41963/98. Available: https://hudoc.echr.coe.int/eng?i=001-58752 [last viewed 20.02.2022].

[47] O'Keeffe v. Ireland. App. No(s). 35810/09 Available: https://hudoc.echr.coe.int/eng?i=001-140235 [last viewed 20.02.2022].

[48] Scozzari and Giunta v. Italy. App. No(s). 39221/98; 41963/98 Available: https://hudoc.echr.coe.int/eng?i=001-58752 [last viewed 20.02.2022].

[49] O'Keeffe v. Ireland. App. No(s). 35810/09 Available: https://hudoc.echr.coe.int/eng?i=001-140235 [last viewed 20.02.2022].

[50] *Gailīte, D.* Piekāst likumu [To hell with the law]. Jurista Vārds, Nr. 22 (773), 04.06.2013.

were incomplete. They are complicated because, when applying them, the heads of an educational institution need legal knowledge, other competencies, as well as the fact that the following: health or life, does not fully achieve its purpose and is transparent in the search for new ways (including pedagogical and legal ones) to ensure the safety of learners and to prevent disciplinary breaches in the educational institution.[51] Also in 2013, the competent authority for the protection of children's rights – the State Inspectorate for the Protection of the Rights of the Child – indicated that the educational institution, in cooperation with other institutions, failed to find suitable solutions to prevent learners from ending violence against other learners and therefore an improvement in the legal framework was required.[52] Such an approach refers, *inter alia*, to administrative legal procedures in relation to the parents of the child or learner. At the same time, I. J. Mihailovs expressed the opinion that a more effective way of disciplining a child, including cessation of violent behaviour, would be a contractual relationship. In his view, the promotion of a contract for the education of a child in an educational institution would achieve an objective which the state seeks or does not seek to achieve by administrative legal means.[53] Respectively, the agreement would address various administrative and civil law issues between the educational institution and the learner's parents / adult learner. In this context, it should be noted that the situation in Latvian educational institutions has not improved, which is also the basis for reducing the spread of bullying in the educational environment.[54] Namely, these aspects deserve a separate study. Thus, it can be concluded that, in the Latvian legal system, there are administrative methods in the legal relationship between parents and the educational institution, i.e. cooperation between the learner's parents and the educational institution in preventing child abuse is in the institution's competence to act, where it does not develop or proves to be ineffective, or it is necessary to immediately stop the violent behaviour of a particular learner – involving other competent institutions. However, the introduction of other methods of reducing violence is still at the stage of development and requires further discussion. Another study should be devoted to their review. Latvian pedagogical scientist Professor Dita Nīmante, describing the work and responsibilities of a teacher, points out: "a teacher in an educational institution conditionally takes the place of parents (in loco parentis) and assumes the functions related to supporting the child's behaviour, correction, improvement of social skills"[55], recognizing at the same time that, of course, a teacher cannot take on full parenthood or take a place of

[51] *Mihailovs, I. J.* Līgums par bērna izglītošanu izglītības iestādē un disciplīnas pārkāpumu novēršana [Agreement on the Education of a Child in an Educational Institution and Prevention of Violation of Discipline]. Socrates RSU Elektroniskais juridisko zinātnisko rakstu žurnāls, Nr. 1(1), 2015. Available: https://dspace.rsu.lv/jspui/bitstream/ [last viewed 20.02.2022].

[52] Ministru kabineta noteikumu projekta "Grozījumi Ministru kabineta 2009. gada 24. novembra noteikumos Nr. 1338 "Kārtība, kādā nodrošināma izglītojamo drošība izglītības iestādēs un to organizētajos pasākumos"" sākotnējās ietekmes novērtējuma ziņojums (anotācija) [Preliminary Impact Assessment Report of the Draft Cabinet Regulation "Amendments to Cabinet Regulation No. 1338 of 24 November 2009" Procedures for Ensuring the Safety of Learners in Educational Institutions and Events Organized by Them" (annotation)]. Available: http://tap.mk.gov.lv/lv/mk/tap/?pid=40258146&mode=mk&date=2013-05-21 [last viewed 20.02.2022].

[53] *Mihailovs, I. J.* Līgums par bērna izglītošanu.

[54] Konceptuālais ziņojums "Par ņirgāšanās izplatības mazināšanu izglītības vidē".[Conceptual report "On reducing the spread of bullying in the educational environment"]. Available: https://www.vm.gov.lv/lv/jaunums/publiskai-apspriesanai-lidz-13augustam-nodots-konceptualais-zinojums-par-nirgasanas-izplatibas-mazinasanu-izglitibas-vide [last viewed 20.02.2022].

[55] *Nīmante, D.* Klasvadība. Rokasgrāmata skolotājiem [Class management. A guide for teachers]. Rīga: Zvaigzne ABC, 2008, 27. lpp.

the parent (*in loco parentis*), although a teacher can still do a great deal."[56] Clearly, the Anglo-Saxon doctrine "*in loco parentis*" can also be applied in principle within the framework of the Romano-Germanic legal system, i.e., in the context of Latvian educational law.

Summary

The doctrine of *loco parentis* is understood in two respects. Namely, this concept applies to the legal liability of a person or institution from the moment it exercises parental rights and obligations. For example, the educational institution acts in such a way as to protect its subordinate – children, pupils, students, etc. – acting in their best interests. The second aspect, on the other hand, means that non-biological parent substitutes for biological parents have the same rights and obligations as biological parents in a given situation, subject to delegation or authorization. In addition, the doctrine of *loco parentis* allows an educator or other employee of an educational institution to understand their activities and their scope by interpreting the duties set out in law or in the job description to act in the best interests of the child, even if they do not become adopters or "parents". At the same time, it should be noted that, for example, a boarding school or foster parents take on the status of *loco parentis*, i.e., taking the place of the parents, by assuming parental rights and responsibilities. As already mentioned, this doctrine is widely applied in the Anglo-Saxon legal system, describing a certain scope of rights and obligations assigned to persons who are not the child's biological parents. In the case of an educational establishment as a public authority, responsibilities which are *per se* equivalent to parental responsibility are delegated to it. The school thus has a duty to care for the child, in particular, his or her psycho-emotional well-being and physical safety, as it would be done by caring parents. In the case of the Republic of Latvia, this finding is most clearly reflected in the scientific findings of pedagogy and daily educational practice.

Sources

Bibliography

1. Garner, B. A., (ed.). Black, Henry Campbell, 1860–1927. Law Dictionary. St. Paul, MN: Thomson Reuters, 5th ed., 2016, 890 pages.
2. Case briefings "Law and Society". Available: https://quizlet.com/51022729/case-briefings-law-and-society-flash-cards/ [last viewed 20.02.2022].
3. *Curtis, G. B.* The Checkered Career of Parens Patriae: The State as Parent or Tyrant? 25 DePaul L. Rev. 895, 1976. Available: http://via.library.depaul.edu/law-review/vol25/iss4/5 [last viewed 20.02.2022].
4. *Dayton, J.* Education Law: Principles, Policies, and Practice. Wisdom Builders Press, 2012.
5. *Gailīte, D.* Piekāst likumu [To hell with the law]. Jurista Vārds Nr. 22 (773), 04.06.2013.
6. *Hall, A. J., Manins, M.* In Loco Parentis and the Professional Responsibilities of Teachers. Waikato Journal of Education, 7, 2001, pp. 117–128.
7. *Jarinovska K.* Ne vien uzdrošināšanās, bet arī centība un paklausība ir tikumi [Not Only Daring, but Also Diligence and Obedience are Virtues]. Available: https://lvportals.lv/viedokli/259980-kristine-jarinovska-ne-vien-uzdrosinasanas-bet-ari-centiba-un-paklausiba-ir-tikumi-2013 [last viewed 20.02.2022].
8. *Johnson, D. E.* Schools We Trust? Leadership in Loco Parentis and the Failure to Protect Students from Bullying and Harassment. In: *Samier, E. A., Schmidt, M.* (eds). Trust and Betrayal in Educational Administration and Leadership. New York, London: Routledge, 2010, p. 143.

[56] *Nīmante, D.* Klasvadība. Rokasgrāmata skolotājiem [Class management. A guide for teachers]. Rīga: Zvaigzne ABC, 2008, 29. lpp.

9. *Keiss, M.* In Loco Parentis. 08.08.2007. Available: https://www.delfi.lv/news/versijas/marks-keiss-in-loco-parentis.d?id=18661344 [last viewed 20.02.2022].
10. *Kilkelly, U.* The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child. Human Rights Quarterly Johns Hopkins University Press, Vol. 23, No. 2, May 2001, pp. 308–326.
11. Konceptuālais ziņojums "Par ņirgāšanās izplatības mazināšanu izglītības vidē" [Conceptual report "Reducing Prevalence of Mockery in the Educational Environment"]. Available: https://www.vm.gov.lv/lv/jaunums/publiskai-apspriesanai-lidz-13augustam-nodots-konceptualais-zinojums-par-nirgasanas-izplatibas-mazinasanu-izglitibas-vide [last viewed 20.02.2022].
12. *Merrick, R. M.* "Is it dead or alive?" An Analysis of the Doctrine and Policy of in Loco Parentis at American universities. Available: https://www.jstor.org/stable/20403397?seq=1 [last viewed 20.02.2022].
13. *Mihailovs, I. J.* Līgums par bērna izglītošanu izglītības iestādē un disciplīnas pārkāpumu novēršana [Agreement on the Education of a Child in an Educational Institution and Prevention of Violation of Discipline]. Socrates RSU Elektroniskais juridisko zinātnisko rakstu žurnāls Nr. 1(1), 2015. Available: https://dspace.rsu.lv/jspui/bitstream/ [last viewed 20.02.2022].
14. *Nīmante, D.* Klasvadība. Rokasgrāmata skolotājiem [Class management. A Guide for Teachers]. Rīga: Zvaigzne ABC, 2008.
15. *Smiltēna, A.* Parens patriae doktrīna – valsts intervence bērna labākajās interesēs [The Doctrine of Parens Patriae – State Intervention in the Best Interests of the Child. Jurista Vārds, 30.03.2021.
16. *Stuart, S.* In Loco Parentis in the Public Schools: Abused, Confused and in Need of Change University of Cincinnati Law Review, Forthcoming; Valparaiso University Legal Studies Research Paper No. 10–03, February 5, 2010. Available: https://scholar.valpo.edu/law_fac_pubs/174/ [last viewed 20.02.2022].
17. *M. F. Quintilianus.* Cambridge, Massachusetts: Harvard UP1996. Vol. 1: Books 1–3, *Butler, H. E.* (Engl. transl.), XIV, 1996. Available: https://archive.org/stream/institutioorator00quin/institutioorator00quin_djvu.txts [last viewed 20.02.2022].
18. *Van Breda, M. J.* Guidelines for Empowering Secondary School Educators, in Loco Parentis, in Addressing Truancy Among Early Adolescent Leaners. University of South Africa. Theses, 2006, 285 pp.
19. *White, B.* Student Rights: From In Loco Parentis to Sine Parentibus and Back Again? Understanding the Family Educational Rights and Privacy Act in Higher Education. BYU Educ. & L.J. 321, 2007. Available: https://digitalcommons.law.byu.edu/elj/vol2007/iss2/6 [last viewed 20.02.2022].
20. Latinskie juridicheskie izrechenija [Latin legal sayings] sost. E. I. Temnov. Moskva : Jurist, 1996, 398 s.
21. Latinsko-russkij slovar' juridicheskih terminov i vyrazhenij dlja specialistov i perevodchikov anglijskogo jazyka [Latin-Russian dictionary of legal terms and expressions for specialists and translators of the English language]. *Gamzatov, M.* (Avt.-sost.). Sankt-Peterburgskij gosudarstvennyj universitet. Sankt-Peterburg : Izdatel'stvo Sankt-Peterburgskogo universiteta, 2002, 505 s.

Normative acts

1. Bērnu tiesību konvencija: Apvienoto Nāciju Organizācijas konvencija [Convention on the Rights of the Child]. Available: https://likumi.lv/legislation/lv/lv/treaties/id/1150 [last viewed 20.02.2022].
2. Izglītības likums [Education Law]. 17.11.1998. Available: https://likumi.lv/ta/en/en/id/50759-education-law [last viewed 20.02.2022].
3. Iustiniani Digesta Recognovit Theodorus Mommsen / Retractavit Paulus Krueger. Corpus Iuris Civilis, Vol. I. Available: https://droitromain.univ-grenoble-alpes.fr/Corpus/d-23.htm [last viewed 20.02.2022].
4. Kārtība, kādā nodrošināma izglītojamo drošība izglītības iestādēs un to organizētajos pasākumos: Ministru kabineta 24.11.2009. noteikumi Nr. 1338 [Procedures for Ensuring Safety of Educatees in Educational Institutions and at Events Organized by Them]. 27.11.2009. Available: https://likumi.lv/ta/en/en/id/201106-procedures-for-ensuring-safety-of-educatees-in-educational-institutions-and-at-events-organized-by-them [last viewed 20.02.2022].
5. Ministru kabineta noteikumu projekta "Grozījumi Ministru kabineta 2009. gada 24. novembra noteikumos Nr.1338 "Kārtība, kādā nodrošināma izglītojamo drošība izglītības iestādēs un to organizētajos pasākumos"" sākotnējās ietekmes novērtējuma ziņojums (anotācija) [Preliminary Impact Assessment Report of the Draft Cabinet Regulation "Amendments to Cabinet Regulation No. 1338 of 24 November 2009 "Procedures for Ensuring the Safety of Learners in Educational

Institutions and Events Organized by Them" (annotation)]. Available: ttp://tap.mk.gov.lv/lv/mk/tap/?pid=40258146&mode=mk&date=2013-05-21 [last viewed 20.02.2022].

6. Digesty Justiniana [Digests of Justinian]. Available: https://www.gumer.info/bibliotek_Buks/Pravo/digest/23. [last viewed 20.02.2022].

Case law

1. Supreme Court of North Carolina State v. Pendergrass19 N.C. 365 (N.C. 1837) Decided Jun 1, 1837. Available: https://casetext.com/case/state-v-pendergrass-22 [last viewed 20.02.2022].

The European Court of Human Rights

1. Case of Costello Roberts v. The United Kingdom, App. No(s). 13134/87. Available: https://hudoc.echr.coe.int/eng?i=001-57804 [last viewed 20.02.2022].
2. Case of Tyrer v. the United Kingdom App. No(s). 5856/72. Available: https://hudoc.echr.coe.int/eng?i=001-57587 [last viewed 20.02.2022].
3. Case of Scozzari and Giunta v. Italy. App. No(s). 39221/98; 41963/98. Available: https://hudoc.echr.coe.int/eng?i=001-58752 [last viewed 20.02.2022].
4. Case of O'Keeffe v. Ireland App. No(s). 35810/09 Available: https://hudoc.echr.coe.int/eng?i= 001-140235 [last viewed 20.02.2022].

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