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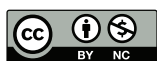
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Psychosocial Risk Factors and Their Legal Consequences in Labour Relations: National Regulations and Practice in Estonia

Dr. iur. Gaabriel Tavits

School of Law, University of Tartu

Professor of Social Law at the Department of Private Law

E-mail: gaabriel.tavits@ut.ee

Psychosocial risk factors in the workplace lead to employees' illness. These risk factors, such as overly stressful work, short deadlines, etc., result in work accidents and occupational diseases (e.g., post-traumatic stress). The question of who is responsible for psychosocial risks and their harmful consequences is important. Although the employer must prepare a risk analysis of the work environment, this does not always help to prevent the consequences caused by psychosocial risk factors. According to Estonian case law, the employee's behaviour is also important. Psychosocial risk factors can only be mitigated if the employee himself/herself reports their presence to the employer.

Keywords: work environment, occupational health and safety, psycho-social risks, legal responsibility, work accident, occupational disease.

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Introduction

In the workplace, psychosocial risk factors affect the mental health of employees, and the impact thereof on health is manifested as a stress reaction. This stress reaction can be detrimental to the physical and mental health of employees. These are significant risks occurring in the work environment that directly affect the employees' ability to work. In addition, psychosocial risk factors are also harmful to the employer, who loses an employee with capacity to work and is obliged to pay compensation to the employee if certain prerequisites are met.

The concept of psychosocial risk factors and the regulations concerning them were established in Estonian law a few years ago, which is why more and more new questions and litigation are raised in connection with them. The Occupational Health and Safety Act (hereinafter – TTOS) provides for the necessary standards for the protection of employees' health, but despite this, employees are diagnosed with various work-related illnesses caused by psychosocial risk factors.

The aim of the present article is to analyse the responsibilities of employers and employees in order to avoid psychosocial risk factors at the workplace. In addition, the legal consequences in violating those obligations according to the Estonian legislation and case law will be explored.

This article is divided into two chapters. The first chapter focuses on protecting employee's health from damage caused by psychosocial risk factors in accordance with current law, examining the concept of risk factors and the development of legal regulation. The specific aspects of telework are discussed separately. The second chapter of the article outlines the main health damage caused by psychosocial risk factors and their causes. In addition, the legal consequences of the health damage that has occurred are discussed.

1. Psychosocial risk factors and occupational health and safety requirements

1.1. Legal significance

Psychosocial risk factors represent a potential source of risk to employees' health, the prevention of which is primarily the responsibility of the employer. First of all, the Employment Contracts Act (hereinafter – ECA) stipulates in § 28(2) 6) that the employer is obliged to ensure working conditions that meet the requirements of occupational health and safety.¹ The latter includes the employer's general obligation to ensure a safe working environment, which also includes mitigating the risk arising from psychosocial hazards.

The concept of psychosocial hazard in Estonian law is embodied in § 9¹(1) of TTOS, according to which psychosocial hazard factors are work with a risk of accident or violence, unequal treatment, bullying and harassment at work, the work that does not meet the employee's abilities, long-term work alone, monotonous work and other factors related to management, work organization and the work environment that may affect the employee's mental or physical health, including causing work-related stress. This regulation primarily concerns the employee's mental health, but the wording of the referred provision leaves open the possibility that the risk factors in question may also affect the employee's physical health.

¹ Töölepingu seadus [Employment Contracts Act].RT I, 02.05.2024, 28.

The direct obligation of the employer to prevent health damage caused by psychosocial risk factors arises from § 9¹(2) of TTOS. Section 9¹(2) of TTOS states that the employer must implement measures to prevent health damage caused by psychosocial risk factors, including adjusting the work organization and workplace to suit the employee, optimizing the employee's workload, providing the employee with breaks that are included in working time during the working day or work shift, and improving the company's psychosocial work environment.

The concept of psychosocial risk factor was established in Estonian law in 2019, when a draft amendment to TTOS was adopted. This draft replaced the previously used term "psychological risk factors" with the term "psychosocial risk factors".²

The aforementioned amendment added the previously referred to Section 9¹ to TTOS³ to specifically regulate psychosocial risk factors. The first paragraph of the respective section defined psychosocial risk factors as work with a risk of accident or violence, unequal treatment, bullying and harassment at work, the work that is incompatible with employee's abilities, long-term working alone and monotonous work, and other factors related to management, work organisation and the work environment that may affect the mental or physical health of employees, including causing work-related stress. Compared to the current approach to psychological risk factors, the approach to psychosocial risk factors is broader and includes social aspects of the work environment to a significant extent. This includes relationships with co-workers, managers and third parties, unequal treatment of employees (including race, skin colour, gender, age, religious, political or other beliefs, sexual orientation, national or ethnic origin, disability or other circumstances, such as reduced work capacity, chronic diseases or other health-related characteristics of the employee), as well as workplace bullying, harassment (including sexual harassment) and violence at work. Section 9¹(2) of TTOS established the employer's obligation to implement measures to prevent health damage resulting from psychosocial risk factors.

Although the definition of psychosocial risk factors was established in TTOS 2019, occupational diseases caused by psychosocial risk factors were added to the list of occupational diseases by amending Regulation No. 66 of the Minister of Social Affairs of 9 May 2005 "List of Occupational Diseases", which entered into force on 01.01.2023.⁴ With the amendment to the respective regulation, Section 4¹ was added to the list of occupational diseases, according to Subsection 1 whereof, an occupational disease caused by a psychosocial risk factor is post-traumatic stress disorder, and according to Subsection 2 – other diseases caused by psychosocial risk factors in the working environment. The need to amend the regulation was justified primarily by the fact that the previously valid list of occupational diseases did not include the illnesses caused by psychosocial risk factors, therefore the current law did not allow a disease caused by a psychosocial risk factor to be considered an occupational disease.

1.2. Telework and psychosocial risk factors

Telework differs from other forms of work primarily in that the employee is not subject to the usual control by the employer. The latter also means that the employer

² Töötervishoiu ja tööohutuse seaduse ning töölepingu seaduse muutmise seaduse eelnõu 615 SE seletuskiri [Explanatory report to amendments in TTOS and ECA]. Available: <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/f0b486f3-ca13-464a-93b7-5b7163400c32/Töötervishoiu+ja+tööohutuse+seaduse+ning+töölepingu+seaduse+muutmise+seadus/> [last viewed 02.04.2025].

³ Töötervishoiu ja tööohutuse seadus [Occupational Health and Safety Act]. RT I, 02.05.2024, 29.

⁴ Sotsiaalministri 09.05.2005. a määrus nr 66 „Kutsehaiguste loetelu“ [List of occupational diseases]. RT I, 26.03.2024, 17.

does not have the opportunity to objectively control and assess all risks related to the workplace.⁵ Since teleworkers often work from home, in this case, the employer's access to the workplace is prevented by the employee's fundamental right to the inviolability of his or her home. Due to the aforementioned circumstances, the factors that may endanger the employee's health in the case of telework may be the factors that the employer is not even aware of, or cannot be aware of, and is therefore less able to prevent them.⁶

Section 13⁵(1) 1) of TTOS stipulates that the employer is obliged to reflect the potential risks arising from the nature of the work in the risk analysis of the work environment and, taking into account the specifics of teleworking, to implement measures to prevent or reduce the health risks of the employee. This provision directly refers to the risk analysis of the work environment, which is the obligation of the employer to conduct under Section 13(1) 3) of TTOS.

The employer's obligation to instruct the employee before starting work is also important. The latter is regulated more generally by Section 13(1) 13) of TTOS, according to which the employer is obliged to organize the instruction and training of the employee. The obligation to instruct is specified in more detail in Section 13³ of TTOS. Section 13⁵(1) 2) of TTOS, which regulates teleworking, also stipulates separately that the employer must instruct the employee before allowing him to telework and regularly as necessary, based on the provisions of the above-mentioned Section 13³ of TTOS. The employer can conduct the corresponding instruction based on the mapped risks.

According to Section 14(1) 1) of TTOS, an employee is obliged to participate in creating a safe working environment, complying with occupational health and safety requirements. Since in the case of telework, preparing a risk analysis is inevitably more complicated for the employer than in the case of a regular form of work, the referred provision obliges the employee to cooperate with the employer. The employer can identify possible risks in the working environment associated with telework, for example, by talking to the employee. Thus, as a result of cooperation between the employer and the employee, all known work environment hazards could be mapped in the risk analysis.

Furthermore, a separate obligation is imposed on the employee regarding telework. Section 14(1) 11) of TTOS states that the employee is obliged to design a safe workplace and working conditions for telework based on the instructions given by the employer. Since in the case of telework, the employer has limited opportunities to ensure occupational safety at the place where the telework is performed and to control it, the employee has a greater responsibility for ensuring safety. This could mean that in order to effectively protect the health of the employee, the employer must also follow the appropriate standard of care when preparing the instructions to be given to employee. According to the above, the source of the instructions should primarily be a risk analysis of the work environment, which maps all possible risk factors in the work environment and their prevention strategies. If the instructions given to the employee do not cover all important risk factors occurring in the work environment, then it does not appear from the above-mentioned regulation that

⁵ Erikson, M., Rosin, A. Protection of the occupational health and safety of teleworkers. *European Labour Law Journal*, 2025.

⁶ Messenger, J. Conclusions and recommendations for policy and practice. *Telework in the 21st Century*. Edward Elgar, 2019. Available: <https://www.elgaronline.com/edcollbook-oa/edcoll/9781789903744/9781789903744.xml> [last viewed 02.04.2025].

the employee could be directly obliged to prevent these risk factors independently. In addition, it is possible that the employee is not able to discover the factors that threaten their health on their own. In such a case, the employee's health would remain unprotected in any case, since the prevention of risk factors requires, first of all, their mapping and identification.

In the case of telework, it is also important to consider Section 14(4) of TTOS, according to which the employee's occupational health and safety obligations do not release the employer from the relevant liability, except in the case where the work tasks are performed as telework and the employer has fulfilled all the obligations specified in Section 13⁵ of TTOS. Thus, the employer has the opportunity to be released from liability in a situation where an accident occurs to an employee during telework and the employer manages to prove that he has fulfilled all the obligations arising from the law to ensure the safety and health of the employee and the accident was caused by the employee's violation of occupational safety requirements.

The European Agency for Safety and Health at Work has identified a number of risk factors affecting mental health.⁷ Risk factors related to the environment and equipment include insufficient reliability, availability, suitability, maintenance or repair of tools or equipment. Work content includes lack of variety or short work cycles, fragmented or meaningless work and occupational exploitation. Workload and pace include, in particular, overload or underload, machine-driven work pace, and constant application of deadlines. Problems also occur in working time planning. In addition, poor communication and lack of support for problem solving and development are considered risk factors. Career stagnation and uncertainty, under- or over-promotion, and low pay are related risk factors related to career development. In addition, low participation in decision-making and lack of control over work are risk factors. Interpersonal relationships at work include social or physical isolation, poor relationships with superiors, interpersonal conflicts, and lack of social support. Conflicting demands of work and home, lack of support at home, and dual career problems are considered risk factors for home-work contact.

More specifically, in the case of remote work, isolation is considered a risk factor – when people work remotely, they do not necessarily participate in physical meetings. Although technology allows for regular communication between colleagues, it cannot replace more informal so-called coffee corner conversations. The latter are the basis for casual social interaction in the workplace and help people feel connected to their workplace and colleagues.

In addition, the blurring of work and private life boundaries among employees who regularly work from home is considered a psychosocial risk. This is primarily because such work is made more difficult by the obligation to care for children or other family members. Secondly, the location of the work can be a risk, as people may not have a separate space to work at home and therefore work is done in a central place in the home, such as the kitchen or living room. In this case, work interferes with people's private lives. Working hours can also pose a risk, as it is easier to continue working in the home environment in the evenings or at weekends. The described blurring of work-life boundaries can lead to work-life conflicts, which are primarily due to the greater presence of work at home.

⁷ Psychosocial risks in Europe: Prevalence and strategies for prevention. Luxembourg: Publications Office of the European Union, 2014. Available: <https://osha.europa.eu/sites/default/files/Report%20co-branded%20EUROFOUND%20and%20EU-OSHA.pdf> [last viewed 02.04.2025].

The Eurofound analysis also pays special attention to the employee's right to be unavailable.⁸ There is no specific concept for the latter, but it is noted that it can be described as the right of employees to switch off their technological devices after work without negative consequences for them – in particular, if employees do not respond to emails, phone calls or text messages.

1.3. Risk analysis of the work environment

According to Section 13⁵(1) 1) of TTOS, the employer is obliged to reflect the risks arising from the nature of the work in the risk analysis of the work environment in the case of telework and, taking into account the specifics of telework, the employer must implement various measures to protect the health of the employee. Risk analysis is specified in Section 13⁴ of TTOS, according to which, when preparing a risk analysis of the work environment, the employer shall identify the risk factors of the work environment, measure their parameters, if necessary, and assess the risks to the health and safety of the employee. During the risk analysis, the employer must identify possible psychosocial risk factors and their causes in the work team. Section 13⁵(3) of TTOS the employer's obligation to take into account the subjective characteristics of the employee and the risks related to the use of workplaces and work equipment and work organization in the risk analysis. Therefore, the preparation of a risk analysis requires the employer to take a personal approach to each employee in relation to the specific workplace.

The above provisions show that, in the case of telework, the risk analysis is the main source that can be used as a basis for implementing measures to protect the employee's health. In order for the risk analysis to fulfil its purpose, it assumes that the employer has exercised sufficient diligence in its preparation and has been able to identify all factors that threaten the employee's health.

The decision of the Tallinn Administrative Court of 20.01.2023 in case 3-22-328⁹ is relevant here. In the cited case, worker, who was doing telework, had suffered health damage due to psychosocial risk factors. More specifically, the plaintiff was diagnosed with burnout, severe depression and other physical and mental stress related to work. In this regard, the plaintiff was found to have been unable to work for two years. In the same case, it was found that the employer did not implement sufficient preventive measures to prevent psychosocial risk factors, in particular, the defendant did not prepare a risk analysis that met the requirements. The employer also lacked adequate monitoring of psychosocial health risks and an action plan to prevent such risk factors. In doing so, the employer violated the requirements set out in § 9¹(2), § 13(1) 3) and § 13⁴(1) of TTOS. From the cited decision, it is possible to conclude that, had the employer followed the requirements set out in TTOS, the employee's health would probably not have been damaged due to the respective risk factors, or at least the damage to health would have been less severe.

In the cited case, however, the fact that the employee himself did not behave in a manner that was reasonably expected in order to prevent or reduce the damage that occurred, cannot be ignored. In the court's opinion, the employee could have prevented the occurrence of mental health damage or prevented its increase. In particular, the employee could have informed the employer about the excessive

⁸ Right to disconnect: Exploring company practices. Luxembourg: Publications Office of the European Union, 2021. Available: <https://www.eurofound.europa.eu/en/publications/2021/right-disconnect-exploring-company-practices> [last viewed 02.04.2025].

⁹ TlnHKo 3-22-328.

workload and responsibility. In addition, the court also refers to the materials of the case, which show that the employee himself agreed to the greater workload. In the opinion of the court, the consent to a greater workload was expressed in the employee's consent to be promoted, where the employee was aware of the greater workload this promotion entailed.

The above case is an example of the consequences of not reflecting psychosocial risk factors in the risk analysis. Risk analysis is seemingly the only source through which it is possible to objectively identify and reflect risk factors related to a specific job. Among other things, risk analysis is a source on the basis of which the employer can introduce measures to prevent or reduce risk factors and also instruct employees. In the case of remote workers, the preparation of a risk analysis requires cooperation between the employer and the employee, in which both must contribute to the mapping of all risk factors occurring in the work environment.

2. Consequences caused by psychosocial risk factors and their prevention

2.1. Definition of occupational accident

The definition of occupational accident is contained in Section 22(1) of TTOS, according to which an occupational accident is an injury to the health or death of an employee that has occurred while performing a job assigned by the employer, or during other work performed with his permission, during a break included in working time, or during other activities in the interests of the employer. The following are not considered an occupational accident: an injury to health or death that has occurred in the listed cases, but which are not causally related to the employee's work or work environment.

In the Eurostat methodology for recording and investigating accidents at work (ESAW)¹⁰, an occupational accident is defined as a specific incident in the course of work that leads to physical or mental harm. For the purposes of this definition, it is considered important that the incident occurs in the course of work, i.e., during the employee's professional activities or time spent at work. In other words, the damage caused according to the above approach must also be causally related to work. Unlike the provisions of Estonian TTOS, it is separately stated that damage may have been caused to the employee's mental health.

Since the definition of an accident at work includes the designation "accident", this assumes that the corresponding event occurred unexpectedly and unforeseeably. According to the Labour Inspectorate, an accident at work is a sudden health injury usually caused by a physical incident, which is why occupational accidents encompass only few health injuries caused by psychosocial risk factors. Such cases include the instances where employees have developed a state of shock.

2.2. Definition of occupational disease and work-related disease

The definition of an occupational disease in Estonian law is defined in TTOS § 23(1), according to which an occupational disease is a disease caused by a risk factor in the working environment or the nature of the work specified in the list of

¹⁰ Eurostat. European Statistics on Accidents at Work (ESAW). Luxembourg: Publications Office of the European Union, 2013. Available: <https://ec.europa.eu/eurostat/documents/3859598/5926181/KS-RA-12-102-EN.PDF/56cd35ba-1e8a-4af3-9f9a-b3c47611ff1c> [last viewed 02.04.2025].

occupational diseases. An occupational disease is inherently a health injury. Already in 1999¹¹, the Supreme Court has also defined an occupational disease as a disease that may occur because of working conditions that are harmful to the human body when working in a profession or specialty listed in law. An occupational disease can also occur under normal working conditions.

According to Section 23(5) of TTOS, an occupational disease or a disease caused by work is diagnosed by an occupational health physician, who determines the employee's health status and collects data on the employee's current and previous working conditions and the nature of the work, involving other health service providers if necessary. According to Section 23(1), in order to diagnose an occupational disease, an occupational health physician requires employers to provide data on the employee's previous health examinations and the results of the work environment risk analysis or, in the absence of a risk analysis, an explanatory note on the employee's working conditions and the nature of the work.

The definition of a work-related disease is provided in Section 23(2) of TTOS, according to which a work-related disease is an occupational disease or a disease caused by work. According to Section 23(3) of the same section, a work-related disease is a disease caused by a hazard factor in the work environment that is not considered an occupational disease. A work-related disease is described as a disease that is not established in the "List of Occupational Diseases" Regulation, but is caused by a hazard factor or type of work specified in the List of Occupational Diseases.

According to Section 4¹ of the List of Occupational Diseases, occupational diseases caused by psychosocial hazard factors in the working environment are post-traumatic stress disorder and other diseases caused by psychosocial hazard factors in the working environment. Post-traumatic stress disorder (PTSD) is a mental health disorder that can occur after a person has experienced or witnessed a traumatic event.¹²

The legislator has left the list of occupational diseases caused by psychosocial hazard factors in the working environment open. More specifically, Section 4¹(2) of the List of Occupational Diseases has been left open, hence, any disease caused by psychosocial hazard factors may be considered an occupational disease. According to the Labour Inspectorate, occupational diseases caused by psychosocial risk factors have not yet been diagnosed, because it has not been possible to establish unequivocally and scientifically that the illness is caused by work. Therefore, it is not currently possible to define health damage caused by psychosocial risk factors as occupational diseases, because the corresponding period for the duration of the health damage has not yet been established.

2.3. Health damage caused by psychosocial risk factors

In general, health risks caused by psychosocial risk factors are primarily associated with the mental health of the employee. Mental health is affected by psychosocial risk factors, the health impact of which is manifested through a stress reaction. The concept of psychosocial risk factors has been clarified as aspects of work organization, management and the social context of the work environment that can

¹¹ RKTko 3-2-1-45-99.

¹² What is workplace PTSD. CBH Staff, 07.31.2023. Available: <https://compassionbehavioralhealth.com/what-is-workplace-ptsd/> [last viewed 02.04.2025].

cause psychological and physical harm to the employee.¹³ Therefore, it is considered possible that damage may also occur to the employee's physical health.

In order for health damage caused by psychosocial risk factors to be considered an occupational disease within the meaning of the "List of Occupational Diseases" Regulation, the employee must have been diagnosed with either post-traumatic stress disorder or another disease caused by psychosocial risk factors in the work environment.

The most common term for health damage caused by psychosocial risk factors is work-related stress. Work-related stress is considered a state of tension that occurs when a person perceives a contradiction between the challenges presented by the work environment and their own coping abilities. Stress is not a disease in itself, but prolonged exposure to a stressful environment can lead to mental or physical health problems. For instance, stress can be one of the main causes of burnout.¹⁴ Although stress is not an independent disease, but a condition, it is consistently treated together with some more specific risk factors, such as overload or stress and even workplace bullying. Stress is referred to as a risk factor that is a cause of damage in itself.

Depression is a mood disorder characterized by a decrease in mood, loss of interest and joy in life, and a decrease in energy. In the context of work, depression primarily occurs as concentration problems and being easily distracted. Depression can occur as a single episode or be recurrent. For diagnosis, the duration of these episodes is required to be at least two weeks. According to the Labour Inspectorate, in 2024, two employees were diagnosed with F32.11 – moderate depression with somatic symptoms.

Earlier, reference was made to the decision of the Tallinn Administrative Court of 20.01.2023. No. 3-22-328, where the employee was diagnosed with work-related illness F32.2 – severe depression.¹⁵ This is a work-related illness within the meaning of Section 23(2) of the Occupational Health and Safety Act, which was caused by long-term overload and stress. The latter could have arisen primarily because the employer did not prepare a proper risk analysis and an action plan based on it, and did not apply preventive measures to protect the employee's health. References to the depression diagnosed in the employee can also be found in the decision of the Tartu Circuit Court No. 2-21-3380.¹⁶ In the said case, it was established that the employee had worked overtime for an extensive period. In one month, the employee worked 121.5 overtime hours. The court established that due to stress caused by overtime, the employee turned to work environment specialists on three different occasions, but did not receive help from them. As a result of the failure to comply with occupational health and safety requirements, the employee was eventually diagnosed with F32.11 – depression caused by long-term work stress. The court concluded that the stress could have arisen from the aforementioned overload.

Burnout is a condition that occurs in response to long-term adverse working conditions. Burnout includes emotional exhaustion, decreased personal achievements and depersonalization. Causes of burnout include, for example, constant work

¹³ *Kuuskmann, A. V. Tee test ja saa teada, kas oled läbipõlenud* [Make the test to clarify burn-out]. Äripäev, 03.02.2024. Available: <https://www.aripaev.ee/uudised/2024/01/31/tee-test-ja-saad-teada-kas-oled-labipolenud> [last viewed 02.04.2025].

¹⁴ *Psychosocial risks in Europe: Prevalence and strategies for prevention*. Luxembourg: Publications Office of the European Union, 2014. Available: <https://osha.europa.eu/sites/default/files/Report%20co-branded%20EUROFOUND%20and%20EU-OSHA.pdf> [last viewed 02.04.2025].

¹⁵ TlnHKo 3-22-328.

¹⁶ TrtRnKo 2-21-3380.

overload, insecurity and little or no recognition. Burnout syndrome is characterized by three main symptom complexes, which are exhaustion, alienation and reduced work capacity. Exhaustion means that a person feels emotionally empty, can no longer cope with work and constantly feels tired and lacks energy. Alienation means being disappointed in their work, considering it devastating to themselves. Reduced work and activity capacity cause difficulties in concentration and lead to a lack of creativity.

The most common group of mental health disorders are anxiety disorders. In addition to the latter diagnosis, most people also have another mental and behavioural disorder, depression or addiction disorder.¹⁷ Although anxiety is a daily occurrence for many people, the anxiety associated with an anxiety disorder is either very strong or lasts a long time – it does not subside even after the stressful situation has passed. Anxiety disorders are not only related to mental health, but can also be accompanied by physical symptoms such as muscle tension, drowsiness, sweating and fatigue. Anxiety disorders can also have a negative impact on working life, for example, by rendering a person unable to leave the house due to their health condition and therefore not going to work.

In addition to the previously described mental health disorders, psychosocial risk factors can also affect the employee's physical health. It has been indicated in the professional literature that the main risk factors for musculoskeletal disorders among psychosocial risk factors can be work stress, high mental load, low decision-making freedom, lack of support from managers and colleagues, and low recognition. It has also been found that irregular working hours are associated with musculoskeletal disorders. Psychosocial risk factors at work, such as high mental workload associated with limited decision-making power, can create situations where the employee experiences work-related stress, which increases the risk of musculoskeletal disorders. Thus, musculoskeletal disorders occur due to psychosocial risk factors, primarily due to muscle tension, which has also been referred to previously in the case of anxiety disorders.

2.4. Claims for compensation for damage and their main prerequisites

An employee may suffer health damage primarily due to the violation of occupational health and safety requirements by the employer. In this case, the employer's act of violating its obligations may also consist of inaction. The Supreme Court has explained that, pursuant to § 1044(3) of LOA,¹⁸ an employee's claim for compensation for damage caused by the employer's inaction may be satisfied based on breach of contract, i.e., the basis for the claim pursuant to § 115 (1) of LOA, or on the employer's unlawful act, i.e., § 1043 of LOA.

In order to file a claim, the employer must have suffered some damage, in this case – primarily damage to health. Although the case law on compensation for damage caused by psychosocial risk factors is still developing, a specific pattern emerges from the current court decisions. Namely, it is evident from the court decisions that a work-related illness diagnosed by an occupational health doctor leads to the award of compensation for damage.

Secondly, the causal connection between the damage and the employer's act is important. Generally, the presumption of a causal connection in the case of damage

¹⁷ *Roquelaure, Y.* Musculoskeletal disorders and psychosocial factors at work. The European Trade Union Institute, 2018. Available: <https://www.etui.org/sites/default/files/EN-Report-142-MSD-Roquelaure-WEB.pdf> [last viewed 02. 04.2025].

¹⁸ *Võlaõigusseadus* [Law of Obligations Act]. RT I, 04.07.2024, 18.

claims arises from § 127(4) of LOA. The causal connection between the employees' health damage and the workplace can also be confirmed by an occupational health doctor, as referred to in decision No. 3-22-328.¹⁹ The Tallinn Circuit Court has found that there is no causal connection between the health damage and the work or the environment thereof in a situation where a normal development discussion takes place between the employer and the employee, which does not exceed the boundaries of normal work-related communication, and the employee receives an emotional shock there, after which he is diagnosed with an acute stress reaction.

When clarifying damages, it is also important to take into account the employee's own participation in the occurrence of the health damage. The Tallinn Administrative Court dismissed the employee's claim for non-pecuniary damage because the employee could have prevented the damage from occurring or prevented its increase if he had informed the employer about the excessive workload.²⁰ On the other hand, the employee expressed satisfaction with the employer regarding both the work and the work organization. For these reasons, the court dismissed the employee's claim for non-pecuniary damage. Therefore, it is important to establish that the employer's actions were the cause of the damage and that the employee had done everything possible to prevent the damage.

2.5. Possibilities for mitigating the risk of psychosocial risk factors

Successful management of occupational health and safety can significantly contribute to the well-being of employees, hence, it is appropriate to analyse the possibilities for mitigating risk factors primarily from the employer's perspective. According to the current Estonian law, the employer must first take steps to protect the employee's health, primarily through a risk assessment. In order to assess the risks, the employer must prepare a risk analysis of the working environment. The risk analysis must include an action plan for mitigating risks. Theoretically, this legal obligation could mean having identified the risk factors in the working environment and developed action plans to mitigate them.

Mitigating risks is difficult, as many employers lack the relevant skills and knowledge on how to help employees with mental health problems. The problem could be effectively mitigated primarily by raising employers' awareness of the seriousness of this issue, which could probably be organised through relevant campaigns. Specific training for employers aimed at identifying psychosocial risk factors and also preventive measures would also help to mitigate the problem.

Another problem is a lack of resources. Small and medium-sized enterprises are less likely to carry out written risk assessments. This is mainly because the resources of smaller enterprises are limited compared to larger ones. On the other hand, high labour turnover is considered a problem in large enterprises. The latter makes it difficult to fulfil the employer's legal obligation to assess risks personally.

One solution is to develop a methodology for monitoring psychosocial risk factors, which would help to address these risk factors systematically. In this regard, the development of a control questionnaire that would help to identify possible employer deficiencies in risk management may be an option.

¹⁹ TlnHKo 3-22-328.

²⁰ Ibid.

Summary

According to current Estonian law, one of the main obligations of an employer is to assess the risks of the working environment, for which the employer must prepare a risk analysis of the working environment. The risk analysis is stipulated in Section 13⁴ of TTOS. According to the respective section, when preparing a risk analysis, the employer must identify the risk factors of the working environment, assess risks to the health and safety of the employee and prepare an action plan to prevent and reduce the health risk of the employees. The risk analysis of the working environment can be considered the topmost priority, while also presenting an indispensable source for mapping and preventing the risk factors of the working environment. It could also be the first step on the part of the employer to protect the health of the employee.

A pattern emerges from the analysed sources and current case law, according to which the main reason for the health damage caused to the employee by psychosocial risk factors, is either an incomplete or non-compliant risk analysis of the working environment. At this point, it is possible to conclude that if a risk that poses a potential threat to the health of an employee has not been reflected in the risk analysis, then the mitigation or prevention of this risk has not been addressed.

Preparing a risk analysis of the work environment is important in protecting the health of employees working remotely. Since the employer does not have clear control and an overview of the compliance with occupational safety and health standards by the remote worker, preparing a proper risk analysis is extremely important in such a situation. The latter requires reciprocity and constructive cooperation between the employer and the employee.

In general, it can be stated that this represents a complex problem of why the health of employees often remains unprotected from psychosocial risk factors. On the one hand, an important cause of the aforementioned problem is incomplete or improper risk analyses of the work environment, but the latter are, in turn, caused by several aspects. There are various reasons for inadequate workplace risk assessments. One reason is the lacking or insufficient knowledge of employer in the field of mental health problems. Another problem is the shortage of resources, as preparing risk assessments entails additional costs for employers.

Since the above-mentioned lack of knowledge in the field of mental health can be considered one of the problems, the author believes that it can be solved by informing and training employers. Information and training of employers could be organized by the state. Another possibility for alleviating this problem would be to strengthen the Labour Inspectorate's advisory service, which would consist of informing and consulting employers about psychosocial risk factors and related matters. Secondly, the situation would be improved by involving occupational health doctors in making the working environment safer, based on whose knowledge it could be possible to improve compliance with occupational health standards.

If employers had sufficient knowledge of psychosocial risk factors, fewer resources would probably be spent on risk assessment. Additionally, in the event of a lack of funds, it is always possible to seek state support, however, this may not be possible in the current economic situation. One option is to more actively sanction the area of risk assessment, especially the assessment of psychosocial risk factors. For this purpose, for example, regulations should be developed that would permit issuing fines to employers for improper risk assessments. The establishment of effective sanctions,

i.e., fines, can lead to proper risk assessments, which help to ensure the preservation of employees' health.

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Russification and Legal Policy of Alexander II in the Baltic Region¹

Dr. iur. Jānis Lazdiņš

Faculty of Law, University of Latvia
Professor at the Department of Legal Theory, History and Philosophy
E-mail: janis.lazdins@lu.lv

Mg. iur. Signe Skutele

Faculty of Law, University of Latvia
PhD student of legal history
E-mail: signe.skutele@lu.lv

The authors of the current article offer analysis of the russification policy and legal reforms in the Baltic provinces of the Russian Empire during the reign of Alexander II (1855–1881). The legal reforms were based on the fact that the rights and privileges of the Baltic provinces were in inevitable conflict with the implementation of the Russian Empire’s principle of “one country, one language” in the Baltic provinces. The implementation of this principle would have meant the russification of the Baltic provinces. The research concludes that, unlike radical Slavophiles who demanded that the Russian language should be imposed as the only language of communication in public institutions, Alexander II did not rush to impose the Russian language on the Baltics. He preferred a gradual “crumbling” of the rights and privileges of the Balts, with an ever-expanding framework for the use of Russian. Although the reforms initiated by Alexander II remained unfinished, especially the reform of the judiciary and procedural law, these reforms initiated in the 1860s–1870s became a precondition for the russification of the Baltic provinces during the reign of Alexander III (1881–1894). Therefore, the implementation of the policy of russification and justice reform in the Baltic governorates cannot be viewed in isolation from the reign of Alexander III and the reign of Alexander II.

Keywords: russification, legal policy of Alexander II, Baltic region in the 19th century, judicial reform.

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Introduction

The reform of the judiciary and procedural law of the Russian Empire of 20 November 1864² (hereinafter – the Judicial Reform) in connection with the extension of the Judicial Reform of 9 July 1889³ to the provinces of Estonia, Livonia and Courland (hereinafter – also the Baltic provinces or Baltic region) during the reign of Alexander III Romanov (1845–1894), from 1881 to 1894, has been extensively analysed in Latvian legal scholarship⁴ so far. While not calling into question the positive role of the judicial reform in the process of building a civil society, Article 2 of the Judicial Statute explicitly referred to another objective of the reform, namely: “In the courts of Livonia, Estonia and Courland, both written and oral proceedings shall be conducted in Russian. Requests, complaints and revocations of private persons in criminal and civil cases shall also be presented in Russian.”⁵ Thus, Russian was to become the language of proceedings in the courts of peace/justice of peace and the general courts (i.e., the regional courts, the chamber and the Governing Senate).

Unlike the justice of peace and the general courts, the peasant courts were provisionally allowed to use the languages of the majority of the inhabitants of the municipality district or the municipality court area – Latvian, Estonian or Swedish. The temporary nature of the use of minority languages in the Russian Empire was, however, underscored by the condition that the final decision of the peasant municipality court had to be formalized in Russian. This meant that, even in the peasant courts, the transition to Russian language was only a matter of time. Thus, Latvian legal scholarship has justifiably recognised that the judicial reform in the Baltic provinces involved not only the introduction of a new judicial system and procedural law, but also the implementation of the russification policy.⁶ The Russification of the Baltic region by Alexander III was not limited to the judiciary

² See also:

1) *Uchrezhdeniya sudebnykh ustanovleniy* [Establishments of judicial institutions]. (20.11.1864.) *Polnoye sobraniye zakonov Rossiyskoy imperii* (hereinafter – PSZ), Sob. 2., Vol. 39, No. 41475. Available: https://nlr.ru/e-res/law_r/search.php [last viewed 15.04.2025] (The internet address of the PSZ will no longer be provided);

2) *Ustav ugolovnoho sudoproizvodstva* [Statute of Criminal Procedure] (20.11.1864). PSZ, Sob. 2., Vol. 39, No. 41476;

3) *Ustav grazhdanskogo sudoproizvodstva* [Statute of Civil Procedure]. (20.11.1864). PSZ, Sob. 2., Vol. 39, No. 41477.

³ I. O preobrazovanii sudebnoy chasti v Pribaltiyskikh guberniyakh [I. On the transformation of the judiciary in the Baltic provinces] i II. O reorganizatsii krest'yanskikh prisutstvennykh mest v Pribaltiyskikh guberniyakh [II. On the reorganisation of peasant attendance places in the Baltic provinces]. (09.07.1889.) PSZ, Sob. 2., Vol. 9, No. 6188.

⁴ See *Ducmanis, K. Iz Baltijas provinču tiesībām* [From the Law of the Baltic Provinces]. Rīgā: [publishing house] P. Bērziņa pārdošanas apgādībā, 1913, pp. 229–367; *Kalniņš, V., Apsītis, R. Latvijas PSR valsts un tiesību vēsture. II daļa.* [The History of the State and Law of the Latvian SSR. II.] Rīga: [Publishing house] Zvaigzne, 1980, pp. 43–52; *Ziemele, I., Osipova, S.* (eds.). *Publiskās tiesības. Ievads* [Public law. Introduction]. Rīga: [publishing house] Tiesu namu aģentūra, pp. 52–65 etc.

⁵ I. O preobrazovanii sudebnoy chasti v Pribaltiyskikh guberniyakh [I. On the transformation of the judiciary in the Baltic provinces], Art. 2.

⁶ See, e.g., *Ziemele, I.; Osipova, S.* (eds.). *Publiskās tiesības. Ievads* [Public law. Introduction], pp. 59–62.

but also included the state education system. The culmination of this process was symbolised by the transition of Dorpat (Yur'yev) University to the studies in Russian-language.⁷

While the policy of russification of the Baltic region and the law of Alexander III has attracted the attention of researchers, the analysis of the preconditions for this process during the reign of Alexander II Romanov (1818–1881), from 1855 to 1881, until now has remained largely outside the scope of legal scholarship. The lack of such a study prevents a substantive understanding of the Russian Empire's Baltic regional legal policy in the 1880s. The relevance of the topic is also determined by the need to broaden the framework of historical interpretation of the russification policy by focusing on the process of its formation already during the reign of Alexander II, which has been less studied in historiography than the reign of Alexander III.

The aim of the article, as defined by the authors, is to analyse the russification policy during the reign of Alexander II and the related legal reforms in the context of the preparation for judicial and procedural law reforms in the Baltic provinces.

1. Slavophiles' visions and the practice of russification in the Russian Empire

During the reign of Nicholas I Romanov (1796–1855), from 1825 to 1855, a regulation issued on 3 January 1850 stipulated that as of 1 January 1858, all state officials involved in document preparation were required to know the Russian language.⁸ In the Baltic region, however, this decision had done little to improve the overall knowledge of Russian. There was still an insufficient number of educated individuals with adequate knowledge of Russian language who were willing to enter the state service. The rights and privileges of the nobility of the Livonian, Estonian and Courland provinces, as well as of the island of Saaremaa (German: Ösel, Russian: – Ezel'), approved by Alexander II on 17 February 1856, were also not conducive to learning Russian, although they were approved with the reservation: “insofar as they are in accordance with the general decisions and laws of our country”.⁹ One of these

⁷ Ob izmenenii v ustroistve iuridicheskogo fakul'teta Derptskego Universiteta [On changes in the organization of the Faculty of Law of the University of Dorpat]. (04.02.1889.) PSZ, Sob. 3, Vol. 9, No. 3755.

Ob objazatelnom obuchenii Rysskomy jazyky v ychebnih zavedenijaz Derptskego ychebnogo okryga dlja vseh ryskih poddannih [On the compulsory teaching of the Russian language in educational institutions of the Dorpat educational district for all Russian subjects]. (27.02.1895.) PSZ, Sob. 3, Vol. 5, No. 2780.

⁸ O vvedenii v korronnykh prisutstvennykh mestakh Ostzeyskikh gubernij deloproizvodstva na russkom yazyke [On the introduction of the Russian-language office work in the crown [state] offices of the Ostsee provinces]. (03.01.1850). PSZ, Sob. 2, Vol. 25, No. 23796.

⁹ See also:

1) O podtverzhenii Lifljandskomu dvorjanstvu preznih prav, privilegii i preimushcestva [On confirmation of the former rights, privileges and advantages of the Livonian nobility]. (17.02.1856.) PSZ, Sob. 2, Vol. 31, Part 1, No. 30185, p. 90.

2) O podtverzhenii Estljanskomy dvorjanstvu preznih prav, privilegii i preimushcestva [On confirmation of the former rights, privileges and advantages of the Estonian nobility]. (17.02.1856.) PSZ, Sob. 2, Vol. 31, Part 1, No. 30186, p. 90.

3) O podtverzhenii Kurljanskomy dvorjanstvu preznih prav, privilegii i preimushcestva [On confirmation of the former rights, privileges and advantages of the Courland nobility]. (17.02.1856.) PSZ, Sob. 2, Vol. 31, Part 1, No. 30187, pp. 90–91.

4) O podtverzhenii Ezeljskhome dvorjanstvu preznih prav, privilegii i preimushcestva [On confirmation of the former rights, privileges and advantages of the Esel nobility]. (17.02.1856.) PSZ, Sob. 2, Vol. 31, Part 1, No. 30188, p. 91.

privileges was the right to use the German language in the local institutions, courts and education system of the Baltic provinces,¹⁰ but the formula in the “reservation” referred to the right of the legislator to change existing legal relations on the basis of a decision or law. Although the status of the German language in the Baltic region did not formally contradict the laws of the Russian Empire, it was a hindrance to the implementation of the principle of “one country, one language”. This meant that the imposition of the Russian language upon the Baltic population in public communication was only a matter of time.

Two approaches can be identified in the implementation of the Russification Plan of the Baltic provinces. One can be called the unofficial approach, represented by the so-called Slavophiles, the other the official approach, defined by Alexander II and implemented by the government.

Among the most prominent Slavophiles who took an active part in shaping public opinion on the “Baltic Question in the Russian Empire” were Ivan Aksakov (1823–1886), Mikhail Katkov (1818–1887) and Yuriy Samarin (1819–1876).¹¹ They considered the European culture of the Baltic provinces, rooted in German traditions, as foreign to the Russian people and even as a threat to Orthodoxy and the political identity of Russia.¹² Particularly strong animosity was directed toward the German language, laws, and privileges, which were seen as a basis for distinguishing the Baltic provinces from the general order of the Russian Empire.¹³ Of course, their aversion also extended to other nationalities, who managed to preserve a national culture distinct from that of the Russians. For example, M. Katkov wrote: “Yes, they will say, a state can consist of many nations. It can – when it has not yet been formed or when it is falling apart. Where there are many nations in a state, there are always multiple separate state organisations – either tending to disperse in their own direction or seeking unification. If there is an element in a country which carries with it the power of unification, then, however diverse its population may be, they merge into one nation, and in such a country there is life. If such element is absent, then the country can exist only due to external circumstances and is condemned to a constant struggle against internal disintegration.”¹⁴

The Slavophiles clearly regarded the Russian language as this unifying element, on the basis of which other nations were expected to gradually integrate into a united Russian nation, forgetting their national identity or former state affiliations.¹⁵ For example, regarding the Baltic provinces, M. Katkov wrote: “The Baltic provinces are inextricably linked with Russia; they form a unity with it, and the future of

¹⁰ Estonian and Latvian languages were allowed to be used in the parish administration, court and school.

¹¹ *Fursova, E.* Slavjanskij vzgljad na Pribaltiiskij kraj. [Slavophile view of the Baltic region]. *Vestnik YMC*. Vol. 2 (31), 2021, pp. 53–54; *Argun, A.* Diskussija ob Ostzejskih gybernijah v russkoj obschecvennoj mihsli seredinhi XIX veka [Discussion of the Ostsee provinces in Russian public thought in the mid-19th century]. *Gosudarstvennaja sluzhba*, Vol. 1, Iss. 147, 2024, 110–118; *Ijabs, I.* Another Baltic Postcolonialism: Young Latvians, Baltic Germans, and the emergence of Latvian National Movement. *The Journal of Nationalism and Ethnicity, Nationalities Papers*, Vol. 42, No. 1, 2014, pp. 100–102.

¹² *Samarin, J.* Sochinenija. Tom sedmoj. Pisma iz Rigi I istorija Rigi [Works. Volume Seven. Letters from Riga and History of Riga]. Moscow: [publishing house] D. Samarina, 1889, pp. 33–34.; *Megi, A.* Eiropas tautu hronika. [Chronicle of the peoples of Europe]. Riga: [publishing house] Zvaigzne ABC, 1995, pp. 126–128.

¹³ *Fursova, E.* Slavjanskij vzgljad, pp. 110–118; *Ijabs, I.* Another Baltic Postcolonialism, pp. 100–102; *Kasekamp, A.* A History of the Baltic States. New York: Palgrave Macmillan, 2010, p. 83

¹⁴ *Katkov, M. N.* Sobranie peredovih statei Moskovskih Vedomstei. 1867 god [Collection of advanced articles of the Moscow Vedomosti. 1867]. Moscow: [publishing house] S. N. Katkovoij, 1897, p. 423.

¹⁵ *Kasekamp, A.* A History of the Baltic States, p. 83.

the inhabitants of these provinces, the future of their [i.e., these inhabitants'] upper classes, depends on the extent to which their [i.e., the Baltic provinces'] inhabitants become conscious of themselves as children and citizens of the Russian land, and the extent to which they are able to forget this imaginary *belonging to Germany*.”¹⁶

Another well-known Slavophile, I. Aksakov, also addressed the problem of the unity of the state in his works. Based on his analysis of the political system of the Austrian Empire, he, like M. Katkov, concluded that the weakness of the state was based on the lack of a unifying element of the nation. However, unlike radical Slavophiles, I. Aksakov rejected the idea of achieving national unity “at any price” or through coercion. In his view, it was not necessary to forcibly russify the borderland peoples of the Russian Empire, but rather to allow for their self-russification.¹⁷ Although these reflections did not contain a concrete plan of action, it is likely that the views of M. Katkov and other like-minded Slavophiles had influenced the policy of Alexander II in the Baltic region. This is evident from the memoirs of Pyotr Albedinsky (1866–1870), Governor-General of the Baltic provinces: “[I] was guided by single thought: not to impose Russification at any cost, overnight, as imagined by those who would arrogate to themselves the title of true patriots, but rather the complete administrative unification of the Baltic provinces with the rest of the empire; for if Russification of the people were ever to occur, it would be a very natural consequence of this unification.”¹⁸

The Slavophiles generally expressed a viewpoint desirable to the government, calling for the unity of the country to be based on the knowledge of the Russian language. However, it was difficult, if not impossible, to ensure national unity on the basis of the Russian language in regions where the majority of the population did not know, or barely knew, Russian. In order to improve the Russian language proficiency among the Baltic population, on 1 June 1867 Alexander II approved the decision of the Committee of Ministers to establish a Russian Gymnasium in Riga, with a reference to the need to explore further possibilities for improving the Russian language in the Baltic region.¹⁹ The Governor General P. Albedinsky immediately informed the Governors of Estonia and Courland about the decision taken by Alexander II.²⁰

Thus, it can be concluded that the goals of the Slavophiles and Alexander II regarding the Russification of the Baltic region were aligned. The difference lay only in their tactics. The radical Slavophiles called for the immediate implementation of the principle of “one country, one language”, while Alexander II preferred the gradual “absorption” of the Balts into Russian society based on increasingly strong

¹⁶ Katkov, M. N. *Sobranie peredovih statei Moskovskih Vedomstev*, p. 353.

¹⁷ Aksakov, I. *Pochemu Rossiya tak nesposobna rusifitsirovat' svoi okrainy?* [Why is Russia so incapable of Russifying its outskirts?]. In: *Slavyanofil'stvo i vesternizatsiya. 1860–1886. Stat'i iz "Diyeny", "Moskvy", "Moskvicha" i "Rusi"* [Slavophilism and Westernization. 1860–1886. Articles from 'Day', 'Moscow', 'Moskvich' and 'Rus.']. Vol. 2. *Vtoroye izdaniye*. S.-Peterburg: Tipografiya A. S. Suvorina, 1891, pp. 373–381.

¹⁸ Private letter from Albedinsky to Alexander II. Latvian National Archives, Latvian State Historical Archive, 7474 fonds (fund), 1. apraksts (description), 1. lieta (file), pp. 4.

¹⁹ *O merah dlja uchenija prepodovaniya russkogo jazika v derptskom ychebnom okryge* [On Measures to Strengthen the Teaching of the Russian Language in the Derpentsk Educational District]. (01.(13).06.1867.) PSZ, Sob. 2, Vol. 42, No. 44651, pp. 845–846.

²⁰ Private letter to Governor of Estonia Ivan Kristoforovich. Latvian National Archives, Latvian State Historical Archive, fund 7474, description 1, file 13, pp. 1–2.

Private letter to Courland's Governor Vasylii Kornilovich. Latvian National Archives, Latvian State Historical Archive, fund 7474, description 1, file 13, p. 3.

knowledge of the Russian language. For example, in June 1867 Alexander II called on the Balts to become an integral part of the Russian “family” and to participate in the implementation of the state reform policy.²¹ However, the unity of the state was also given a decisive role in the framework of Alexander II’s apparently liberal policy. This is evidenced by the political testament of Alexander II to the heir to the throne, Alexander III, in 1879. It stressed that the unity of the state was the foundation of everything “[...] therefore anything that may tend to shake its unity through the different development of different nationalities is fatal to it and must not be tolerated.”²² Thus, during the reign of Alexander II, the foundations of the russification policy in the Baltic region were laid, and under Alexander III this process was only formally completed with the introduction of Russian into the judiciary and state educational institutions.

2. Preparatory legal governance and the early phase of Baltic Judicial Reform

A special place among the Slavophiles in the context of the Baltic question must be assigned to Yuri Samarin, who was not only a publicist on the issues concerning the Russian people, but also a scholar with an academic perspective – particularly regarding the history, law, and culture of the Riga and Livonian provinces.²³ Abstracting from the criticism of Y. Samarin’s works, it should be noted that he was able to identify the weak point of the rights and privileges of the Baltic region, i.e. they were outdated and did not form a unified, self-sufficient legal system. For example, when describing the functioning of the Riga City Courts, Y. Samarin wrote: “[T]he sad state of the law in particular is demonstrated by the rulings on litigation cases. Rarely, rarely in any of them will you find a reference to the law, but it is not strange when there is no law. All cases therefore have the character of some kind of argumentation on the subject at hand, or, more precisely, of disputation. [O]ne refers to local law, another to Roman law, another to the writings of another lawyer; while the judges, hearing both sides, decide the case on abstract principles of pure reason.”²⁴

The absence of laws in the Baltic provinces that corresponded to the spirit of the time – particularly at the beginning of Alexander II’s reign is easily explained.²⁵ Already during the period of Polish-Swedish rule (16th–18th centuries), obstacles were placed in the way of the development of local legal systems. This was especially true under the Swedes’ governance, where attempts were made to impose Swedish law, and newly drafted Baltic legal proposals based on Roman-German sources were

²¹ Thaden, E. C. Russification in the Baltic Provinces and Finland, 1855–1914. Princeton: Princeton University Press, 1981, p. 33; Švābe, A. Latvijas vēsture 1800–1914 [The History of Latvia 1800–1914]. Uppsala: [Publishing house] Daugava, 1958, p. 348; *Krodznieks, J.* Vidzemes muižnieku un zemnieku adreses ķeizaram Alexander II [Addresses of the nobles and peasants of Vidzeme to Emperor Alexander II]. Rīga: [publishing house] Valsts Arhīva izdevums, 1924, p. 15.

²² Quoted from *Zemītis, G.* Drošības aspekti Latvijas vēsturē. No vissenākajiem laikiem līdz mūsu dienām [Security aspects in Latvian history. From the earliest times to our days]. Rīga: [publishing house] LU Akadēmiskais apgāds, 2023, p. 235.

²³ See *Samarin, J.* Okraini Rosii [Russia’s peripheries]. Praha: [publishing house] F. Skrejšovskogo, 1868; Samarin, J. Sochinenija. Tom sedmoj. Pisma iz Rigi I istorija Rigi [Works. Volume Seven. Letters from Riga and History of Riga].

²⁴ *Samarin, J.* Sochinenija. Tom sedmoj, pp. 115–119.

²⁵ The exception was the “Regulation on Criminal and Correctional Punishments” (15.08.1845), which entered into force on 1 May 1846. See *Uložheniye o nakazaniyakh ugovolnykh i ispravitel’nykh* [Criminal and Correctional Penalties Statute] (15.08.1846). PSZ, Sob. 2, Vol. 20, No. 19283.

denied legal force.²⁶ In the 18th century, after the Baltic regions were incorporated into the Russian Empire, its emperors merely confirmed the validity of local rights and privileges. For a good reason, Y. Samarin described Riga and the Livonian province as “an edge which in the 17th century stopped developing [law] and got stuck in medieval notions”.²⁷ By analogy, the same could be said of the legal situation in the province of Courland. It was therefore clear that the Baltic provinces needed new laws aligned with the spirit of the times. In this context, two opposing interests collided: on the one hand, the government’s efforts to extend the use of the Russian language in the Baltic region through legal reforms, and on the other, the desperate efforts of the Balts to maintain their rights-based cultural autonomy within the Russian Empire.

The imposition of Russian law had already begun during the reign of Nicholas I, when the “Criminal and Correctional Penalties Statute” came into force on 1 May 1846.²⁸ Alexander II continued his predecessor’s legal policy, but with considerably greater determination. In this regard, one cannot agree with Prof. Arveds Švābe’s thesis that Alexander II was easily influenced and hesitant in his decisions.²⁹ Any reasonable legislator implements the will of the people, not his own power.³⁰ This principle is not confined to the 21st century legislation. Alexander II also had to take into account not only Russian interests, but also Polish, German, Ukrainian and other interests. Therefore, it should come as no surprise, that in certain cases the government made concessions to the demands of specific national minorities within the Russian Empire, without abandoning its overall state policy. This may explain some of the successes of the Balts in their struggle to preserve their right to autonomy.

Of special importance for the Baltic region and later also for the Latvian Republic was the Part III of the Compendium of Local Baltic laws: Civil Law Statutes (hereinafter – Civil Law Statutes), which was approved as law by Alexander II on 12 November 1864.³¹ These laws were drafted in the spirit of the German historical school of jurisprudence.³² However, also in this case the claimants of the Russification of the Baltic provinces had a certain advantage. The Civil Law Laws had German and Russian versions. If the German and Russian texts of the law differed in content, the Russian text was preferred.³³ The Governing Senate (or Court of Cassation) also heard cases from the Baltic region in Russian.

After some “concessions” on the civil law issue, the “Statute of the Cities” of the Russian Empire, originally enacted on 10 June 1870,³⁴ was extended to the cities

²⁶ See *Ziemele, I., Osipova, S.* (eds.) *Publiskās tiesības* [Public law], pp. 32–49.

²⁷ *Samarin, J.* *Sochinenija*. Tom sedmoj, p. 40.

²⁸ *Ulozheniye o nakazaniyakh ugovolnykh i ispravitel'nykh* [Criminal and Correctional Penalties Statute] (15.08.1846). *PSZ, Sob. 2, Vol. 20, No. 19283*.

²⁹ *Švābe, A.* *Latvijas vēsture, 1800–1914* [The History of Latvia. 1800–1914]. Uppsala: [publishing house] Daugava, 1958, p. 267.

³⁰ *Osipova, S.* “The Borders” of the Legislator’s Freedom in the Legislation. In: *Chmielcki, P., Sulikowski, A.* *New perspectives on legislation. A comparative approach*. Berlin: Peter Lang GmbH, Vol. 14, 2020, pp. 190–191.

³¹ *Svod mestnykh zakonieniy guberniy Ostzeyskikh. Chast’ tretiya. Zakony grazhdanskiye* [Collection of local laws of the Ostsee provinces. Part three. Civil laws]. Sanktpeterburg: V Tipografii Vtorago Otdeleniya Sobstvennoy Ye. I. V. Kantselyarii, 1864.

³² *Schlosser, H.* *Grundzüge der Neuere Privatrechtsgeschichte. Rechtentwicklungen im europäischen Kontext*. 9. Auflage [Fundamentals of modern private law history. Legal developments in the European context. 9th edition]. Heidelberg: C. F. Müller, 2001, p. 165.

³³ *O poryadke otchuzhdeniya zemel’ dlya Pribaltiyskoy zheleznoy dorog* [On the order of alienation of lands for the Baltic railway] (16.11.1871). *PSZ, Sob. 2, Vol. 45, No. 48921*.

³⁴ *Gorodovoye polozheniye* [Law on cities] (10.06.1870). *PSZ, Sob. 2, Vol. 45, No. 48498*.

of the Baltic provinces by the provision of 26 March 1877.³⁵ The town councils (Rat) established in the Middle Ages lost their role as self-governing bodies.³⁶ The entry into force of the “Statute of the Cities” cannot be viewed negatively, as it even introduced some elements of democracy. From now on, the town council was elected. However, the elections were not universal. The right to vote was granted to persons who paid a fee to the city treasury (budget). However, neither “Criminal and Correctional Penalties Statute” nor the “City Rules” played as important a role in the implementation of the Russification policy as the planned reform of the courts and the closely related procedural law.

On 29 September 1862, the law titled “The main provisions of the transformation of the judiciary in Russia” was adopted (hereinafter – the Basic Principles Law).³⁷ The Basic Principles Law laid down the methodology for the development of the Judicial Statute, the Criminal Procedure and the Civil Procedure (hereinafter also referred to as the Judicial Reform Laws) and established the fundamental principles of legal proceedings. These foundational principles included judicial independence, publicity of proceedings, adversarial procedure, and others, which were later integrated into the Judicial Reform of 20 November 1864. They served as a structural and ideological foundation for the new judicial system in the Russian Empire.

The Basic Principles Law did not contain any reference to the preservation of regional specificities (i.e., differentiation of provinces). In the authors’ opinion, this indicates the government’s intention from the very beginning – to implement judicial reform throughout the entire territory of the Russian Empire. This is further supported by the obligation of the Secretary of State under Article 8: 1) to inform the leadership of the governorates and districts that are not governed by the general rules about the basic principles of the judicial reform laws; and 2) to request the opinion of the leadership of these governorates and districts on the applicability of these principles within their territories, taking into account local and regional legal specificities.³⁸

The unity of purpose and basic principles did not mean that the implementation of judicial reform throughout the Russian Empire was planned at the same time. The law of 11 October 1865³⁹ specified that in Poland, the Caucasus and Transcaucasia, the Don Military District, the Ural and Astrakhan provinces, Siberia, Central Asia and the Baltic provinces, the implementation of the judicial reform was postponed until a later date.

³⁵ Polozheniye o primeneniі Gorodovogo polozheniya 16 iyunya 1870 goda, utverzhennogo Vysochayshim Sudom, k gorodam Pribaltiyskikh guberniy [Rules for the application of the City Regulations approved by the highest authority on 16 June 1870, to the cities of the Baltic provinces] (16.06.1870). PSZ, Sob. 2, Vol. 52, No. 57101.

³⁶ Straubergs, J. Rigas vēsture. XII–XX gadsimts [History of Riga. XII–XX century]. Rīgā: [publishing house] Latvijas mediji, 2019, p. 577.

³⁷ Osnovnije položenija preobrazovanija subenoj chastji v Rossii [The main provisions of the transformation of the judiciary in Russia] (29.09.1862). PSZ, Sob. 2, Vol. 37, Part 2, No. 38761.

³⁸ Osnovnije položenija preobrazovanija subenoj chastji v Rossii [The main provisions of the transformation of the judiciary in Russia]. Article 8.

³⁹ Ob izmenenii i dopolnenii statei Svoda Zakonov, kasajushchih sudoproizvodstva i deloproizvodstva v nine deistvujuschih sydebnih mestah [On amendments and additions to the articles of the Code of Laws concerning judicial proceedings and record-keeping in current judicial institutions] (11.10.1865). PSZ, Sob. 2, Vol. 40, Part 2, No. 42548.

The postponement of the judicial reform did not mean, in general, the abandonment of part of its implementation.⁴⁰ Between 1867 and 1874, the necessity of introducing the justice of peace in the Baltic provinces was widely discussed.⁴¹ This idea was particularly supported by the aforementioned P. Albedinsky.⁴² In the 1870s, a number of draft rules on justice of peace courts were drawn up, illustrating the urgency of the issue.⁴³ Finally, in March 1875, the State Council of the Russian Empire began discussing a draft law on justice of peace courts in the Baltic provinces, and on 28 May 1880 the draft was approved as a law entitled “On the introduction of justice of peace courts in the provinces: Livonia, Estonia, Courland” (hereinafter – The Justice of Peace Courts Law).⁴⁴

The justice of peace court law provided for the establishment of a two-instance court system – justice of peace court as a court of first instance, and assemblies of justices of the peace as courts of second instance. In terms of judicial structure, the law did not foresee any differences between the justice of peace court system in the Baltic province and that in the general-order governorates of the Russian Empire. However, certain features specific to the Baltic provinces were taken into account, particularly concerning language use and the procedure for electing justices of the peace. Not only Russian, but also German was recognised as official languages of the justice of peace courts. Estonian and Latvian would also be permitted during the court process.⁴⁵ Regardless of the language used during proceedings, court documentation in the justice of peace courts was to be conducted in either Russian or German. However, cassation or other types of complaints, as well as prosecutorial protests submitted to the Senate or Chambers, were strictly required to be written in Russian. The purpose of this law was apparently to gradually “accustom” the Balts to Russian as the language of the courts.

However, the long-developed “The Justice of Peace Courts Law” was never implemented, likely due to the recommendation of Senator Nikolay Manasein.

⁴⁰ Von Richter, A. Die Reform der Processgesetzgebung in den Ostseeprovinzen des russischen Reichs auf der Grundlage der Öffentlichkeit und Mündlichkeit [The reform of procedural legislation in the Baltic provinces of the Russian Empire on the basis of publicity and orality]. Riga: [publishing house] Verlag von Nicolai Kymmel, 1864, S. Vorwort; Faltin, A. Die Reform der Rechtspflege in den Ostseeprovinzen [The reform of the administration of justice in the Baltic provinces], S. 3.

⁴¹ O vvedenija mirovhih sydebnih ychrezhdenii v gubernijah Lifljiandskoj, Esthliandskoj i Kurljiandskoj [On the introduction of justices of peace in the provinces of Livonia, Estonia and Courland]. Sanktpeterburg: [unknown publisher], 1875, p. 1.

⁴² O vvedenija mirovhih sydebnih ychrezhdenii v gubernijah Lifljiandskoj, Esthliandskoj i Kurljiandskoj [On the introduction of justices of peace in the provinces of Livonia, Estonia and Courland]. Sanktpeterburg: [unknown publisher], 1875., p. 1.; *Bergtāls, T.* Miertiesas instituts [Institute of the Justice of Peace Courts]. [Journal] Tieslietu Ministrijas Vēstnesis, No. 1, 1939, p. 22.

⁴³ Pravila o porjadke vedenija mirovih sydebnih ystanovleniji v Pribaltiskih gybernijah [Rules on the procedure for introducing justice of peace courts in the Baltic provinces]. Sanktpeterburg: [unknown publisher], 1867; O vvedenii mirovih sydebnih ycherezhenii v gybernijah Lifljiandskoj, Esthliandskoj i Kurljiandskoj [On the introduction of justices of peace in the provinces of Livonia, Estonia and Courland]. Sanktpeterburg: [unknown publisher], 1875; Pravila o primenenii mirovih sydebnih ystanovlenii v gybernijah Lifljiandskoj, Esthliandskoj i Kurljiandskoj [Rules on the application of justices of peace in the provinces of Livonia, Estonia and Courland]. Sanktpeterburg: [unknown publisher], 1876.

⁴⁴ O vvedenii mirovih sydebnih ystanovlenii v gybernijah: Lifljiandskoj, Esthliandskoj i Kurljiandskoj [On the introduction of justice of peace courts in the provinces: Livonia, Estonia, Courland] (28.05.1880). PSZ, Sob. 2, Vol. 55, No. 60996.

⁴⁵ Art. 14. O vvedenii mirovih sydebnih ystanovlenii v gybernijah: Lifljiandskoj, Esthliandskoj i Kurljiandskoj [On the introduction of justice of peace courts in the provinces: Livonia, Estonia, Courland] (28.05.1880). PSZ, Sob. 2, Vol. 55, No. 60996.

The reason for this decision lay in the procedure for electing justice of the peace. According to the law, justice of the peace was to be elected by electoral assemblies composed of nobles, city councillors, and parish elders, since zemstvo (rural self-governance bodies) that existed in the general order governorates of the Russian Empire had not been introduced in the Baltic provinces. According to N. Manasein, such electoral assemblies would elect mostly Germans as justices of peace.⁴⁶ It seemed unlikely that a predominantly German judiciary, with the right to conduct proceedings and maintain court records in the German language, would contribute to the implementation of the Russification policy in the Baltic provinces. In other words, the introduction of such a justice of peace court model would clearly not support the government's political goals in the Baltic region. Therefore, unsurprisingly, the application of "The Justice of Peace Courts Law" was suspended.

As a result, under Alexander II, neither the Russification policy nor the reform of the judiciary and procedural law were completed in the Baltic region. Nevertheless, it was during the 1860–1870s that the foundations were laid for implementing judicial and procedural reforms and for launching a substantive Russification policy in the Baltic provinces in the 1880s.

Summary

The legal reforms initiated during the reign of Alexander II (1855–1881) were based on the fact that the rights and privileges of the Baltic governorates were in inevitable conflict with the implementation of the Russian Empire's principle of "one country, one language" in the Baltic governorates. The implementation of this principle would have meant the Russification of the Baltic provinces.

Unlike the radical Slavophiles, who demanded the immediate establishment of Russian as the sole language of communication in public institutions, Alexander II did not rush to impose the Russian language on the Baltic population. He preferred a gradual "erosion: of Baltic legal rights and privileges, focusing on expanding opportunities to learn Russian and slowly broadening the scope of its use.

The reforms initiated by Alexander II remained incomplete, particularly with regard to the reform of the judiciary and procedural law. However, the reforms begun in the 1860s and 1870s laid the groundwork for the Russification of the Baltic governorates carried out during the reign of Alexander III (1881–1894). Therefore, the implementation of Russification and legal reform in the Baltic governorates cannot be viewed in isolation from the policies of Alexander II.

The enforcement of Russification policies in the Baltic governorates was facilitated by the need to replace outdated local laws and privileges, which no longer reflected the spirit of the time. These had survived from the so-called German-Polish-Swedish period and largely dated back to the Middle Ages and the early modern period.

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⁴⁶ Švābe, A. *Latvijas vēsture 1800–1914*, pp. 491–492.

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Challenge of Trial Within a Reasonable Time in Civil Law Cases: Case of Kosovo in Light of ECtHR Jurisprudence

Dr. iur. Haxhi Gashi

Faculty of Law, University of Pristina
Professor at the Department of Civil Law
E-mail: haxhi.gashi@uni-pr.edu

LL. M. Armend Ahmeti

Faculty of Law, University of Pristina
PhD candidate at the Department of Civil Law
E-mail: armend.ahmeti2@student.uni-pr.edu

Kosovo declared independence on 17 February 2008, and on 9 April 2008, it adopted the Constitution as the highest legal and political act of the Republic. Since then, many laws and sub laws have been adopted and entered into force, regulating issues from various spheres of social life. The Constitution of the Republic of Kosovo provides for the direct application of several international agreements and instruments in the territory of the Republic of Kosovo and which have priority, in case of conflict, over the provisions of laws and other acts of public institutions. Among them is the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols. Kosovo has undertaken to provide its citizens with a fair and reasonable trial for all civil law cases that arise before the courts of Kosovo, also through the Rule of Law Strategy 2021–2026 published by the Ministry of Justice. However, in this regard, Kosovo has not issued a special legal or sub-legal act regarding the right to a fair and reasonable trial for civil cases. The authors of this article advance the following hypothesis: The excessive duration of the trial of civil cases constitutes a violation of the right to a fair and in a reasonable trial. The methods that were used during the drafting of this article are: the analysis method (of legislation, case law and legal theory), normative, empirical methods with national and case law of the ECtHR.

Keywords: European Convention on Human Rights, European Court of Human Rights, Constitution of Kosovo, fair trial, reasonable time, civil rights, civil law obligations, rule of law.

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Introduction

Trial within a reasonable time is a challenge for all countries in the world, including countries with advanced legal systems and ancient legal traditions. Judging cases is a challenge not only in the field of civil law but also in other branches of law, but the complexity, problems and challenges are encountered more in civil cases. Judiciary power bears the greatest responsibility for ensuring the speedy completion of proceedings, even when the parties have used all the procedural remedies available to them under domestic law. However, although the responsibility of the court is emphasized, it is the State that is responsible for all its organs, not just the courts. The European Court of Human Rights (hereafter – ECtHR) is not obliged to determine which State organ is responsible for the failure to comply with international obligations, as this depends on the internal organizational structure of the State.¹ The general notion of the right to a fair trial under the European Convention on Human Rights (hereafter – ECHR), in addition to a trial within a reasonable time, also implies the right to access to a court, the right to an independent and impartial court established by law, equality of arms and public procedure.² We must bear in mind the fact that decision-making bodies must equally consider the issue of efficiency and cost-effectiveness of the procedure but also the quality of the decisions they issue, which means that speed should not reduce legal protection nor its quality, since measures to speed up trials must not lead to a more superficial work of the judiciary.³

Article 6(1) of the ECHR⁴ does not guarantee the right to a fair trial in the determination of all rights and obligations which an individual might claim under domestic law. According to the wording in Article 6(1), the provision only applies to the determination of “civil rights and obligations”.⁵ The ECtHR recalls that it is for the Contracting States to organise their legal systems in such a way that their courts can guarantee everyone’s right to obtain a final decision on disputes relating to civil

¹ See Council of Europe/European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb), 2013. Available: <https://rm.coe.int/1680700aaf> [last viewed 03.02.2025]. See also *Zendeli, E.* E drejta e gjykimit brenda afati të arsyeshëm [The Right to Trial in a Reasonable Time]. Albanian Journal for Legal Studies, Vol. 3, No. 2, Tirana, 2009, p. 5.

² See *Hirvela, P., Heikkilä, S.* Right to a Fair Trial A Practical Guide to the Article 6 Case-Law of the European Court of Human Rights, Intersentia: Cambridge, Antwerp, Chicago, pp. 1–3; *Hetemi, M.* Obligimi i shtetit që të sigurojë gjykim në afat të kuptueshëm, në pajtim me Konventën e Evropës për të Drejtat e Njeriut (Procedura civile) [The Obligation of the State to secure trial in a reasonable time, according to the European Convention on Human Rights (Procedural Law)], Review for legal and social issues “E DREJTA”, No. 3-4/2008, Pristina, p. 35.

³ See also *Hetemi, M.* *ibid.*, p. 36.

⁴ Available: https://www.echr.coe.int/documents/d/echr/convention_ENG [last viewed 03.02.2025].

⁵ *Kloth, M.* Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights, Martinus Nijhoff Publishers, 2010, p. 6

rights and obligations within a reasonable time.⁶ It is not an acceptable practice when trials in civil cases stretch over years and require a long time, which can also violate the human rights to a fair trial and a reasonable time.⁷ In the case of *Sailing Club of Chalkidiki "I Kelyfos" v. Greece*⁸ before the ECtHR, it is reiterated that failure to resolve the applicant's case within a reasonable time limit, except to being an unjustified prolongation of the proceedings, can also be considered a denial of justice. Regarding the national law of Kosovo, there are many cases that, in terms of duration, can exceed the time required for a reasonable time.⁹ The following section offers the discussion of the aspects of Kosovo's positive legislation regarding the right to a fair trial within a reasonable time, the challenges of realizing this right in the Kosovo context, the mechanisms in place that guarantee these rights, as well as the findings from the research of cases presented before the ECtHR and the Constitutional Court of Kosovo, and the lessons to be learned from these cases.

1. Positive law of Kosovo regarding the right to trial within reasonable time

In this regard, Article 10.1 of the Civil Procedure Act (CPA) No. 03/L-006¹⁰ provides: "The court shall be bound to carry out proceedings without delay and minimize costs as well as to make impossible any misuse of the procedural rights set for the parties according to this law."¹¹ Based on this principle, within Article 12 of this Act, it is stipulated: "The first instance procedure is composed of two court sessions: a) preliminary hearing; b) principle process." Also, Article 7.2 of the Law No. 06/L – 054 on Courts states: "2. Every person shall have equal access to the courts, and no one shall be denied due process of law or equal protection of the law. Every natural or legal person has the right to a fair trial within a reasonable timeframe." Meanwhile, para. 5 of the same Article stipulates: "All courts should function in an expeditious

⁶ Case of *Atanasovic and others v. The Former Yugoslav Republic of Macedonia*, application No. 13886/02, of 22.12.2005, para. 6. Also see, among others, *Muti v. Italy*, judgment of 23 March 1994, Series A, No. 281C, para. 15; *Horvat v. Croatia*, application No. 51585/99, para. 59; *Mikulic v. Croatia*, application No. 53176/99; *Van den Kerkhof v. Belgium*, application No. 13630/19 Judgment 5.9.2023 [Section II]; *Zimmerman and Steiner v. Switzerland*, application No. 8737/70, judgement 13.07.1983, para. 29; *Kaynar and others v. Turkey* (applications No. 21104/06, 51103/06 and 18809/07). See, regarding fair and reasonable trial, *Sokolova, M. The Right to a Fair Trial of Legal Persons throughout the Case Law of the ECHR and the CJEU*, LEXONOMICA Vol. 15, No. 1, June 2023, Maribor, pp. 77–98.

⁷ European Commission for the Efficiency of Justice (CEPEJ), Length of judicial proceedings in the member states of the Council of Europe based on the case-law of the European Court of Human Rights (31 July 2012), 2nd ed., updated on 26.03.2012, Strasbourg Available (in Albanian): <https://rm.coe.int/kohezgjtja-e-proceseve-gjyqesore-ne-shtete-antare/16809ebb24> [last viewed 23.01.2025].

⁸ Case of *Sailing Club of Halkidiki "I Kelyfos" v. Greece* (applications No. 6978/18 and 8547/18). Available: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-198474%22%5D> [last viewed 23.01.2025].

⁹ In the domestic aspect, the average duration of cases resolved only in the first instance is 1415 days or 3.8 years, while the average duration of resolving cases by the Court of Appeal is 638 days or 1.7 years, according to the report of the Kosovo Institute for Justice, Civil Justice 2022, Pristina, p. 4. Available: https://kli-ks.org/wp-content/uploads/2023/08/Raporti-final-Drejtesia-civile_2022-final.pdf [last viewed 23.01.2025].

¹⁰ Official Gazette of the Republic of Kosovo, Pristina: Year III, No. 38, 20 September 2008. See the commentary of this article at *Morina, I., Nikqi, S. Komentar – Ligji per proceduren kontestimore* (Commentary – Civil Procedure Act), published by "GIZ", Pristina, 2012, pp. 39–41.

¹¹ Compare Article 10.1 of the Law on Contested Procedure of the Republic of North Macedonia, Official Gazette of the Republic of North Macedonia, No. 79/2005.

and efficient manner to ensure the prompt resolution of cases.”¹² Reasonable time means the time within which the court is obliged to decide the case on its merits, taking into account the specific circumstances of the case, its material and procedural complexity, the behaviour of the plaintiff and the defendant during the procedure, the importance of the subject matter of the dispute for the parties and the action of the court before which the procedure is conducted.¹³ The complexity of the facts that must be proven in the procedure in each specific case depends on the number of claims to be decided, the number of parties, the number of witnesses to be heard, the number and types of expertise for the purpose of proving the facts, the volume of evidentiary material, and so on. In addition to the complexity of the issues that must be proven, the determination of a reasonable time limit also depends on the legal complexity of the case. Some cases are, by their nature, complicated,¹⁴ so that their processing and deciding requires more time. Therefore, even though Kosovo lacks a special law or sub-legal act that regulates in detail the adjudication of civil cases within a reasonable time that are presented before the Courts, we cannot say that it is an area not covered by legal provisions. This issue is regulated by the provisions of the Law on Courts and the provisions of the Civil Procedure Act.¹⁵

Meanwhile, the question of whether states should enact a special law regarding the trial of civil cases within a reasonable time or whether these provisions that materialize this matter should be included as part of some other law, is an issue that different states have made different solutions in this regard. Most states in the region have a special law for the protection of the right to a trial within a reasonable time. However, there are exceptions, as a number of states have regulated this matter through other laws.

The list of countries that have regulated the issue of adjudicating civil cases within a reasonable time with a special law includes, among others: the Republic of Slovenia¹⁶, since 2006 with the law that entered into force on 01.01.2007, the Republic

¹² The same provision was also in the Law on Courts of 2010. Official Gazette of the Republic of Kosovo, Pristina: Year V, No. 79, 24 August, 2010.

¹³ Case of *Atanasovic and others v. The Former Yugoslav Republic of Macedonia*, application No. 13886/02, judgement 22.12.2005, final 12.04.2006. (see, among many other authorities, *Frydlander v. France* [GC], No. 30979/96, § 43, ECHR 2000-VII; *Humen v. Poland* [GC], No. 26614/95, § 60; *Comingersoll S. A. v. Portugal* [GC], No. 35382/97, ECHR 2000-IV; *Philis v. Greece* (No. 2), judgment of 27 June 1997, Reports of Judgments and Decisions 1997IV, § 35, *Buchholz v. Germany* 06.05.1981, para. 49.

¹⁴ Case of *Rajak v. Croatia* para. 42; *Horvat v. Croatia*, para. 55.

¹⁵ Article 10, para. 1 of the Civil Procedure Act No. 03/L-006 and Article 7, para. 2 and 5 of the Law No. 06/L – 054 on Courts of the Republic of Kosovo.

¹⁶ In accordance with Article 23 of the Slovenian Constitution, everyone is entitled to judicial review without undue delay by an independent, impartial court established by law. The problem of court backlogs in Slovenia was already assessed by the ECtHR in 2005, when Slovenia was convicted due to the excessive length of proceedings in pilot judgment (Case of *Lukenda v. Slovenia*, No. 23032 / 02, 6 October 2005). The ECtHR established the existence of a systemic problem in the judicial system and violations of Articles 6 § 1 (the right to a fair hearing within reasonable time) and 13 of the ECHR (the right to an effective remedy). Slovenia improved the system by ensuring more resources (especially professional assistants to the judges) within the “Lukenda project” (2005–2014); more effective case management and monitoring of resolved matters by departments, judges; introducing a higher level of informatisation of procedures, etc. See *Sever, T., Danić, A., Kovač, P. Effective Legal Protection against the Excessive Length of Administrative Decision-Making: The Cases of Slovenia and Croatia*, The NISPAce Journal of Public Administration and Policy, Vol. IX, No. 1, summer, 2016, pp. 146–147. Available: <https://sciendo.com/article/10.1515/nispa-2016-0007> [last viewed 23.01.2025].

of Montenegro since 2007 with a special law¹⁷, the Republic of Serbia¹⁸ with the law of 2015. Meanwhile, the list of countries that have regulated the issue of adjudicating civil cases within a reasonable time with provisions in various laws includes: the Republic of Croatia through provisions in the Law on Courts¹⁹ and the Republic of North Macedonia through the provisions of the Law on Courts.²⁰

The question is raised, how (by which legal remedy) the right to adjudicate civil cases within a reasonable time can be protected in Kosovo? In the opinion of the authors, in Kosovo this matter should be regulated by provisions of a general legal act. The reason why the authors believe that this issue should be the subject of a law and not a sub-legal act is because the provisions that regulate issues of trial within a reasonable time and the relevant legal and procedural means regarding the protection of this right are themselves general provisions, which are addressed to an indefinite number of people. Therefore, viewed *stricto sensu*, these matters cannot be regulated by provisions of the sub-law. In the case of *Atanasović and others v. the Republic of Macedonia* No. 13886/02 of 22.12.2005, the ECtHR informed the Republic of Macedonia on the lack of an effective procedural remedy for the protection of the right to a trial within a reasonable time within the legal system of the Republic of Macedonia.

In this regard, the Ministry of Justice of Kosovo has published for public consultation the Draft Law on the Realization of the Right to Trial within a Reasonable Time.²¹ The main objective of this Draft Law is the protection of the right to a trial within a reasonable time frame. Within this goal it is included the provision of legal remedies for the realization of this right. The drafting of the Draft Law derives from the Legislative Agenda of the Government of the Republic of Kosovo, respectively from the Legislative Program of the Ministry of Justice for 2024.

In Kosovo, there are critical voices regarding this draft law in the form in which it is presented and with this content. In this regard, at the meeting of 16.07.2024, the Assembly of Presidents of Courts and Supervisory Judges discussed the realization of the right to trial within a reasonable time, in which case the Assembly recommended the Kosovo Judicial Council to address the problems that may arise if the initiated law for the realization of the right to trial within a reasonable time is approved, since it is considered that there will be no results intended by this law. This is because it is not possible to set a strict deadline for the trial of a civil case for objective reasons meaning different reasonable circumstance. In case of approval, it would have the opposite effect on the completion of cases within deadlines.²²

In addition to the Assembly of Presidents of Courts and Supervisory Judges, which has an Advisory role for the Kosovo Judicial Council and which functions based

¹⁷ Službeni list Crne Gore (Official Gazette of Montenegro), No. 011/07 of 13.12.2007.

¹⁸ Zakon o zaštiti prava na suđenje u razumnom roku Srbije [Law on protecting right to trial in a reasonable time]. "Sl. glasnik RS", br. 40/2015 i 92/2023.

¹⁹ Zakon o sudovima Hrvatske [Law on Courts of Croatia]. NN 28/13, 33/15, 82/15, 82/16, 67/18, 126/19, 130/20, 21/22, 60/22, 16/23, 155/23, 36/24.

²⁰ Sluzben B. na R.M. (Official Gazette of North Macedonia), No. 58/2006 of 11.05.2006 and the Law on Amendments and Supplements to the Law on Courts, Official Gazette of the Republic of North Macedonia No. 35/2008.

²¹ Draft Law on the Realization of the Right to Trial within a Reasonable Time of the Republic of Kosovo, Public Consultation. Available: <https://konsultimet.rks-gov.net/viewConsult.php?ConsultationID=42476> [last viewed 23.01.2025].

²² Meeting of the Assembly of Presidents of Courts and Supervisory Judges of 16.07.2024. Available: <https://www.gjyqesori-rks.org/2024/07/16/mbahet-takimi-i-asamblese-se-kryetareve-te-gjykatave-dhe-gjyqtareve-mbikeqyres-5/> [last viewed 23.01.2025].

on Regulation No. 07/2017 on the Organization and Functioning of the Assembly of Presidents of Courts and Supervisory Judges, as well as Regulation No. 05/2022 on Supplementing and Amending Regulation No. 07/2017 on the Organization and Functioning of the Assembly of Presidents of Courts and Supervisory Judges, there are also discussions by civil society regarding the submitted draft law.

The Kosovo Law Institute (KLI) on 05.07.2024 presented the analysis “Trial within a reasonable time (Constitutional issues of the Current Draft Law)”.²³ In this situation, the goal of building mechanisms to address this violation is extremely legitimate. Such mechanisms aim to hold institutions accountable for protecting human rights, guaranteed by the Constitution and international instruments. However, above all, these mechanisms must be adequate and in line with the specific context of Kosovo to be effective and efficient. In this analysis, KLI finds that, due to these criteria, it is this Draft Law that violates the right to a trial within a reasonable timeframe, even though it aims for the opposite. There will be no violation of the reasonable timeframe for trials even in cases where, objectively, trials could be completed more quickly (e.g., cases in the Special Department) if the time determined in the Draft Law has not elapsed. KLI has given special criticism of the Draft law, which in Article 5²⁴ has decided trial time limits, which are considered reasonable: three years in first instance and two years in second instance. This is owing to the fact that the ECtHR has decisively determined that there cannot be a uniform criterion regarding the assessment of the reasonableness of the time limit, but this must be assessed case by case, according to the criteria established by the ECtHR. Even in the opinion of the authors, there cannot be a uniform criterion regarding the assessment of the reasonableness of the time limit.²⁵

2. Findings from research of ECtHR case law and lessons to be learned

The ECtHR, since its establishment on 21 January 1959, based on Article 19 of the ECHR, when its first members were elected by the Parliamentary Assembly of the Council of Europe, has dealt with various issues related to the right to a trial within a reasonable time in civil matters. Clearly, addressing cases by Kosovo citizens as Kosovar citizens in the ECtHR is impossible on the grounds that Kosovo is not a member state of the Council of Europe. However, according to Article 53 of the Constitution of Kosovo, human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistently with the court decisions of the ECtHR. Therefore, the Court itself will depart from its prior case law only if there are “cogent reasons” for doing so. After the Court has pronounced on a specific question of interpretation, or applied an ECHR right in a specific manner, this judgment therefore constitutes the natural starting point for the interpretive exercise if a subsequent complaint raises a question of interpretation or application which is

²³ Available: <https://kli-ks.org/gjykimi-brenda-afatit-te-arsyeshem/> [last viewed 23.01.2025].

²⁴ In a series of cases, in which the plaintiffs for damages against hospitals were hemophiliacs infected with the AIDS virus in the blood transfusion procedure, the ECtHR has found a violation of the right to a trial within a reasonable time in all cases in which the trial lasted over two years. See the case of *ECHR X v. France, Karakaya v. France*, 1994, as well as *others v. Denmark*, 1996, *M.A. and others (81) v. Italy*, 2001, cited according to *Hetemi, M. op. cit.*, footnote No. 7, p. 38.

²⁵ The case of *Comingsoll S.A. v. Portugal* (application No. 35382/97)”, para. 19; 06.04.2000

similar to the question raised by the former complaint.²⁶ Meanwhile, the ECtHR in the case of *Scordino v. Italy* (No. 1)²⁷, observes that it has stated on many occasions that Article 6 § 1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time. Where the judicial system is deficient in this respect, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation, since it also prevents a finding of successive violations in respect to the same set of proceedings and does not merely repair the breach a posteriori, as does, for example, a compensatory remedy of the type provided for under Italian law.

In the case of *Atanasović and others v. the Republic of Macedonia* No. 13886/02 of 22.12.2005, the ECtHR informed the Republic of Macedonia about the lack of an effective procedural remedy for the protection of the right to a trial within a reasonable time within the legal system of the Republic of Macedonia.²⁸ However, the ECtHR itself stressed that the means to be chosen must be adapted to the specific context of the situation of the Judiciary in a given State. The ECtHR emphasised that it is clear that for countries where there are already problems of the length of proceedings, a remedy designed to speed up proceedings – although desirable for the future – may not be appropriate to remedy a situation in which proceedings are already clearly too long. This position of the ECtHR was upheld in several cases.²⁹ The ECtHR has, in several cases, found violations of Article 13 of the ECHR, as applicants did not have an effective national remedy where they could enforce their right to a “trial within a reasonable time”, as guaranteed by Article 6.1 of ECHR.³⁰ The remedies available to a litigant at domestic level for raising a complaint about the length of proceedings are “effective”, within the meaning of Article 13 of the Convention if they “[prevent] the alleged violation or its continuation, or [provide] adequate redress for any violation that [has] already occurred”³¹. Therefore, Article 13 offers an alternative: a remedy is “effective” if it can be used either to expedite a decision by the courts

²⁶ *Settem, J. O.* Applications of the ‘Fair Hearing’ Norm in ECHR Article 6(1) to Civil Proceedings with special emphasis on the balance between procedural safeguards and efficiency. Springer International Publishing, Switzerland 2016, p. 38. For the ‘precedence value’ of prior case law, see the case of *Cossey v. The United Kingdom* [PS], (application No. 10843/84), para. 35.

²⁷ Application No. 36813/07, judgement 29.03.2006 the ECtHR. (see, among many, *Süßmann v. Germany*, 16 September 1996, § 55, Reports 1996-IV, and *Bottazzi v. Italy*, application No. 34884/97, § 22). However, ECHR, when it decided to dismiss the case of *Paulino Tomas v. Portugal* of 27.03.2003, stated, for the first time, that the legislative decree of 21 November 1967, on the non-contractual liability of the State, was an effective means of challenging the length of the process, cited according to European Commission for the Efficiency of Justice (CEPEJ), Length of judicial proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights (31 July 2012), 2nd edition, updated on 26.03.2012, Strasbourg, p. 16. Available: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22002-4906%22%5D%7D> [last viewed 23.01.2025].

²⁸ In the case of *Kudła v. Poland* (GC), application No. 30210/96, para. 156, ECHR 2000-XI. The ECtHR considered that the correct application of Article 13 of the ECHR is that this provision guarantees an effective remedy before the national authority for an alleged violation of the requirement under Article 6 § 1 of ECHR to have the matter heard within a reasonable time.

²⁹ Case of *Scordino v. Italy* (No. 1), para. 185; 29.03.2006; *Tomazic v. Slovenia* (application No. 38350/02)”, para. 37; Strasbourg, 13.12.2007; *Finger v. Bulgaria* (application No. 37346/05)”, para. 127; Strasbourg, 10.05.2011; *Robert Lesjak v. Slovenia* (application No. 33946/03)”, para. 36; Strasbourg, 21.07.2009; cited according to KLI, op. cit., p. 13

³⁰ See, among others, the case of *Atanasovic and others v. The Former Yugoslav Republic of Macedonia*, application No. 13886/02, para. 47.

³¹ *Ibid.*, para. 158.

dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred.³² In this regard, the urgency of expediting the procedure addressed to the President of the Municipal Court or the Ministry of Justice cannot be considered as a means of respecting the extension of the civil procedure but represents a hierarchical appeal.³³ It should be noted that the Contracting States may choose the steps they will take to adapt their judicial systems to meet the legal requirement of a reasonable time. However, if the authorities fail to take adequate measures, the States must accept responsibility, as it has been held in case law that the chronic backlog of cases before a court does not constitute a valid justification for the length of proceedings.³⁴ The lessons to be learned from the mentioned cases are that the tools to be chosen must be adapted to the specific context of the situation of the Judiciary in a certain country and the remedies available to a litigant at domestic level for raising a complaint about the length of proceedings are “effective”, within the meaning of Article 13 of the Convention, if they prevent the alleged violation or its continuation, or provide adequate redress for any violation that [has] already occurred.

3. Findings from research into case law of Constitutional Court of Kosovo and lessons to be learned

The Constitutional Court of Kosovo has a relatively consolidated case law concerning the timely adjudication of civil law cases. That said, the Court’s cases through which it has affirmed the principles established by the ECtHR and applied them to the cases before it includes, but are not limited to, (i) KI. 64/23, Applicant Mejrem Qehaja Rexha, Judgment of 31 August 2023; (ii) KI 06/21, Applicant Dragan Mihajlovic, Judgment of 22 December 2022; (iii) KI. 19/21, Applicant Sadik Pllana, Judgment of 18 July 2022; (iv) KI.117/19, Applicant NNT “Sokoli”, Judgment of 29 March 2021; (v) KI. 183/21, Applicant Ejup Koci, Decision on Inadmissibility of 30 March 2022; and (vi) KI. 19/17, Applicant Fatos Dervishaj, Decision on Inadmissibility of 20 February 2018.³⁵

While the ECtHR has specific authority to award just satisfaction or compensation for non-pecuniary damage under Article 41 of the ECHR, given that this Article refers to the competences of the ECtHR and Article 60 of its Rules of Procedure, the Constitutional Court of Kosovo is bound and limited by its internal procedural regulations.³⁶ Unfortunately, none of the documents that regulate the scope of activity and procedures before this court and the actions that the latter may undertake provide for an equivalent authorization to award just compensation.³⁷

³² Ibid., para. 159.

³³ See the case of *Horvat v. Croatia*, application No. 51585/99, judgement of 26.07.2001, final 26.10.2001, para. 64. See, *mutatis mutandis*, *Karrer and Others v. Austria*, No. 7464/76, Commission decision of 5 December 1978, DR 14.

³⁴ See, *inter alia*, the case of *Dumont v. Belgium*, of 28.04.2005, cited according to European Commission for the Efficiency of Justice (CEPEJ), Length of judicial proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights (31 July 2012), 2nd edition, updated on 26.03.2012, Strasbourg, p. 22.

³⁵ The Right to a Trial Within a Reasonable Time, Thematic Summary of the Case-Law of the Constitutional Court of the Republic of Kosovo. Available: <https://api.webgjk-ks.org/Custom/6c1811a6-ab64-4009-bf56-7ac011cf7bee.pdf> [last viewed 02.05.2025].

³⁶ See Rules of Procedure of the Constitutional Court of the Republic of Kosovo No. 01/2023, Act. No. GJK-Nr. 01/2023-RR. Available in English: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=78221> [last viewed 03.07.2025].

³⁷ See the case of *Gavrilita v. Moldavia*, application No. 22741/06, judgement of 22.07.2014.

The Constitutional Court has emphasized that individuals have the right to claim through the initiation of separate proceedings compensation from public authorities in case of finding violations of their rights and freedoms based on the laws applicable in the Republic of Kosovo.³⁸ The authors of the current article consider that the Constitutional Court should declare the procedures unconstitutional, ascertain the violations, and then it is created legal basis for the parties to seek compensation from state bodies.

4. The positions of regular courts on respecting fair and timely trials

As stated above, Kosovo lacks a specific law addressing the issue of fair and timely trial in civil cases. This is also a highly controversial matter regarding delays in the trial of civil cases. However, it should be noted that the Kosovo Judicial Council, as a constitutional body, considering the heavy caseload of the Kosovo judiciary, has taken steps to its constitutional and legal obligations, by taking several urgent steps in order to organize several recruitment processes for judges and court staff. From 2021 onwards, several recruitment processes have also developed for professional associates and legal officers. Over 400 judges now work and operate in the Republic of Kosovo. This initiative aims to reduce the caseload and reduce trial time. *Inter alia*, the Kosovo Judicial Council has also provided its electronic website and the Mechanism for monitoring the status of individual cases in the Court, as well as the Open Data Platform which offers the public and every internet user access to judicial statistics related to the work of courts and judges in Kosovo and which enables users to obtain and analyse non-personal and anonymized data from the Case Management Information System (CMIS).

The Supreme Court of Kosovo, according to Article 26, para. 1.4 of the Law on Courts of Kosovo, is responsible to define principled attitudes and issues legal opinions and guidelines for unique application of laws by the courts in the territory of Kosovo, meanwhile, in Article 27, para. 1 of the same law, it is stipulated: “The Supreme Court may convene a general Session of all its judges for issuing principled positions, legal opinions and guides that promote unique application of laws”. The Supreme Court of Kosovo has been very active in issuing legal opinions and guides that promote unique application of laws in recent years.³⁹

³⁸ See the case No. KI06/21, applicant Dragan Mihajlović, judgement of 02.02.2023, para. 85, KI64/23, applicant Mejrem Qehaja Rexha, judgement of 31.08.2023, KI19/21, applicant Sadik Pllana, judgement of 18.07.2022.

³⁹ See Supreme Court of Kosovo, legal opinion No. 214/2023 of 09.10.2023, issued by unanimous vote, regarding the requests of teachers for compensation based on qualification (licensing, for compensation according to inflation and the time period in which the Collective Agreement on Education, No. 105, of 22.01.2021 is applied); legal opinion No. 213/2023 of 09.10.2023, issued by majority vote, regarding the payment of daily meals, the 13th salary, salary supplements for educational qualifications and the jubilee salary in the Kosovo Police; See legal opinion No. 212/2023 of 09.10.2023, issued by majority vote, regarding the implementation of the Sectoral Collective Agreement regarding the 13th salary requirements of healthcare workers; Principled Position of the Supreme Court of Kosovo, No. 152/2023 of 26.07.2023, issued by majority vote, regarding disputes arising from employment relationships that arose after 01.01.2015 regarding the issue of when an employment contract concluded for a fixed period is considered a contract concluded for an indefinite period; legal opinion No. 42/2023 of 27.02.2023, issued by unanimous vote, regarding the applicable law, the status of public officials, directors, deputy directors and secretaries of primary and secondary schools, as well as the subject matter jurisdiction of the courts; legal opinion No. 40/2023 of 27.02.2023, issued by unanimous vote, regarding the applicable law, the general collective agreement and sectoral contracts, as well as the conditions for obtaining the right to the jubilee bonus, etc.

The Kosovo Judicial Council with Regulation No. 01/2022 has established the Advisory Committee on Judicial Ethics, which on 13.04.2022 on its own initiative has issued Advisory Opinion KKEGJ No.1/2022 on applicable ethical standards, in the case of equality of parties, treatment of judicial cases according to priority and order of their registration in the court. With this step, we consider that it has acted in accordance with the case law of the ECtHR, in the case *Union Alimentaria Sanders SA v. Spain*, application No. 11681/85, judgment of 07.07.1989, which is mandatory within the scope of the Article 53 of the Constitution of Kosovo. In the instant case it appears from the evidence that the applicant company showed diligence and that on 10 July 1983 it complained to the relevant court. This was the only ordinary procedure available to it under Spanish legislation. The *recurso de amparo* of 21 October 1983 was brought mainly in order to obtain a finding that there had been a violation of the Constitution, and it was dismissed on 23 January 1985. That being so, even if in this case it indirectly helped to expedite the proceedings, it cannot on that account be regarded as an ordinary procedure for achieving that end. As far as the appeal proceedings are concerned, it is understandable that Unión Alimentaria Sanders SA did not lodge a second constitutional appeal seeing that its first one had failed.⁴⁰ In the light of all the circumstances of the case, the Court considers the length of the impugned proceedings excessive. The undeniable difficulties encountered in Spain could not deprive the applicant company of its right to have its case heard within a “reasonable time”. There was therefore a breach of Article 6 para. 1 (Art. 6-1).⁴¹

However, there is still a large number of civil cases awaiting trial, especially cases involving property issues. Thus, most often in cases where civil proceedings concerning a property right lasted for an excessively long time, it is sufficient for the Court to find a breach of Article 6 of the Convention.⁴² Furthermore, a concern that remains is the frequent return of cases for retrial and repetition of procedures that take a long time to adjudicate. The mandate of the Court of Appeal should be changed to take over the trial itself when there is a continuous repetition of the procedure.⁴³ This could be done with the law on contested civil procedure or the Code of Civil Procedure which is in the process of drafting.⁴⁴ Kosovo has an initiative to adopt a Civil Code which has been approved twice by the Government but has not yet been approved by the Assembly. The government of the Republic of Kosovo on 14.01.2022 approved the Final Draft of the Civil Code of the Republic of Kosovo, which contains 1630 articles and is divided into 5 books. However, this Draft Code has not yet been approved by the Assembly of Kosovo. This initiative harmonizes the substantive civil law and makes the trial easier. Nevertheless, in the procedural aspect and for the issue of trial in a reasonable time, the Civil Procedure Code is much more important, which would also address the issue of trial in a reasonable time. These legal initiatives

⁴⁰ Case of *Union Alimentaria Sanders. SA. v. Spain* (application No. 11681/85), para. 35.

⁴¹ *Ibid.*, para. 42.

⁴² Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights, Protection of property, updated on 31 August 2022, Council of Europe/European Court of Human Rights, para. 241, p. 47 and cases cited there.

⁴³ The Court has emphasized that regular courts have a constitutional and legal obligation to finalize cases within a reasonable time frame and therefore cannot allow a case to be transferred indefinitely from one judicial instance to another. Otherwise, public trust in the entire legal order would be jeopardized. The case of KI. 64/23 before the Constitutional Court of Kosovo, applicant Mejrem Qehaja Rexha, para. 73.

⁴⁴ Announcement of the Ministry of Justice “The Civil Procedure Act of the Republic of Kosovo near finalization”. Available: <https://md.rks-gov.net/lajmet/kodi-i-procedures-civile-drejt-finalizimit/> [last viewed 27.01.2025].

that clearly provides criteria for a trial within reasonable time will prevent delays in ensuring a trial within a reasonable time and avoid also violations of Article 6 of the ECHR, as civil law cases could potentially be submitted to the ECtHR in the near future, once Kosovo becomes a member of the Council of Europe.

Summary

The legal system of Kosovo encompasses a series of laws and sub-laws that regulate various issues and topics that affect the rights of all its citizens regardless of ethnicity, gender, race, religion, nation, nationality, etc. However, Kosovo lacks a special law or sub-law that regulates the trial of civil cases in reasonable time.

Several cases have been filed before the Constitutional Court of Kosovo where individuals have complained about the excessive length of civil court proceedings. In this regard, the Constitutional Court of Kosovo has taken the position that individuals have the right to seek compensation from public authorities through the initiation of a separate civil procedure in the event of a violation of their rights and freedoms based on the laws applicable in the Republic of Kosovo. But according to our opinion, also based on the case law of the ECtHR, namely the case *Comingersoll s.a. v. Portugal*, application No. 35382/97, judgment of 06.04.2000, compensation for material and non-material damage should be judged, not only to natural persons, but also to legal persons.

The government of Kosovo, which at its meeting of 23.08.2023 approved the concept document for the Civil Procedure Code as a step towards reforming the procedural justice system. However, the authors of the current article recommend that prompt and concrete steps should be taken towards drafting the final draft of the Civil Procedure Code, in close cooperation with all relevant judicial stakeholders, as well as other professions related to the judiciary, including academic staff who can provide valuable contribution. One of the main goals of the Civil Procedure Code should be the regulation of the duration of judicial proceedings, and the guaranty of a trial within a reasonable time. In order to simplify the procedure, the issue of electronic communication should be regulated, including but not limited to the introduction of digital/electronic certificates and signatures, establishing the legal validity of digital documents, and regulating electronic communication of courts. The system for delivering court summonses should also be assessed, with particular as emphasised on the case of Sweden,⁴⁵ where, in order to improve the service of court summonses, national authorities have relied on private companies, whose services are paid for only if court summonses are successfully delivered to the addressee. As part of the legal initiatives, the adoption of the Civil Code as a substantive harmonized law is also necessary to avoid legal ambiguities that may affect the delays in the trial of more complex cases.

Increasing human and technical resources (especially judges, professional associates, legal officers, clerks, translators, etc.), are other necessary actions to solve the problem of prolonged court proceedings. In this regard, institutional support should also be provided for arbitration and mediation, as an alternative means of resolving disputes that could relieve the courts from the large number of cases.

⁴⁵ See Report of the Special Working Group "Time management in justice systems: a study of Northern Europe" (CEPEJ(2006)14), cited according to European Commission for the Efficiency of Justice (CEPEJ), Length of judicial proceedings in the member states of the Council of Europe based on the case-law of the European Court of Human Rights (31 July 2012), 2nd edition, updated on 26.03.2012, Strasbourg, p. 47.

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Legal opinion No. 212/2023 of 09.10.2023 of the Supreme Court of Kosovo, issued by majority vote, regarding the implementation of the Sectoral Collective Agreement regarding the 13th salary requirements of healthcare workers; principled position No. 152/2023 of 26.07.2023, issued by majority vote, regarding disputes arising from employment relationships that arose after 01.01.2015 regarding the issue of when an employment contract concluded for a fixed period is considered a contract concluded for an indefinite period.

Legal opinion No. 213/2023 of 09.10.2023 of the Supreme Court of Kosovo, issued by majority vote, regarding the payment of daily meals, the 13th salary, salary supplements for educational qualifications and the jubilee salary in the Kosovo Police.

Legal opinion No. 42/2023 of 27.02.2023 of the Supreme Court of Kosovo, issued by unanimous vote, regarding the applicable law, the status of public officials, directors, deputy directors and secretaries of primary and secondary schools, as well as the subject matter jurisdiction of the courts.

Legal opinion No. 40/2023 of 27.02.2023, issued by unanimous vote, regarding the applicable law, the general collective agreement and sectoral contracts, as well as the conditions for obtaining the right to the jubilee bonus etc.

Legal opinion No. 214/2023 of 09.10.2023 of the Supreme Court of Kosovo, issued by unanimous vote, regarding the requests of teachers for compensation based on qualification (licensing, for compensation according to inflation and the time period in which the Collective Agreement on Education, No. 105 of 22.01.2021 is applied).

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Right to Private Life and Revenge Porn

Dr. iur. **Valentija Liholaja**

Faculty of Law, University of Latvia
Professor at the Department of Criminal Law
E-mail: valentija.liholaja@lu.lv

Mg. iur. **Elina Zivtiņa**

Faculty of Law, University of Latvia
Dr. iur. cand., Criminal Law
E-mail: elinazivtina@gmail.com

The article aims to highlight sexual inviolability as an integral part of the right to private life and to reveal the core and interdisciplinary nature of revenge porn as a criminal offence. Furthermore, the authors emphasize the importance of recognizing vulnerable groups in society as potential victims of revenge porn. To achieve this aim, the authors have analysed international and national regulation, case law, as well as the doctrine of law, criminology and psychology.

Keywords: right to private life, privacy, pornography, internet pornography, revenge porn.

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Introduction

The right to private life is one of the fundamental rights, the aim of which is to ensure a person's internal autonomy so that they would be able to develop one's will as freely as possible and act according to it. The right to private life has been enshrined in international and the European Union's human rights documents, on the basis of which it has been included also in Article 96 of the Constitution of the Republic of Latvia.

Since the concept of "private life" is broad in scope and comprises different aspects of a person's physical and social identity, it has not been defined in any of the human rights documents and is analysed, revealing its aspects or elements, distinguishing

such aspects as personal data protection, personal images and information about a person in mass media, a person's name, sexual behaviour and change of gender, family life and other aspects of private life. Explanations of the concept "private life" and its elements are found in the doctrine, the case law of the European Court of Human Rights and the Constitutional Court of the Republic of Latvia, the summary of which leads to the conclusion that the concept of "private life" comprises a person's right to one's private space, physical and mental integrity, honour, dignity, identity, as well as the right to data protection.

If the right to private life is infringed upon the perpetrator can be made administratively or criminally liable, however, alongside the development of digitalisation, evolution of criminality can be observed and new, unprecedented criminal offences appear, which determine the need for adequate protection against such threats. One among such types of infringements on privacy is the so-called revenge porn, i.e., distribution of material of sexual nature without the consent of the involved parties, which may jeopardize a person's identity, intimacy, honour and dignity.

The aim of the article is to analyse the concept and content of the right to private life, as well as features, manifestations and risks of one of its elements – revenge porn. To reach this aim, legal regulation, findings in the doctrine, case law of the European Court of Human Rights and the Constitutional Court of the Republic of Latvia will be examined.

1. The concept and content of the right to private life

The right to private life is one of the human rights that historically has been included in the group of civil rights and freedoms. Ineta Ziemele has noted that "six dimensions of privacy are conceptualised in the doctrine, i.e., 1) the right to be alone; 2) limited access to what characterises a person's essence; 3) secret; 4) personal data; 5) protection of a person; 6) intimacy".¹

The right to privacy was specified in the Universal Declaration of Human Rights of the United Nations (hereafter – UN), adopted on 10 December 1948, which is characterised as a turning point in the history of human rights. Article 12 of the Declaration sets out that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".² Similarly, Article 17 of the UN International Covenant on Civil and Political Rights, adopted on 16 December 1966, provides: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks".³

The issue of privacy protection was dealt with also in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 7 November 1950, pointing out in the first part of its Article 8 that "everyone has the right to respect for his private and family life, his home and his correspondence." It follows from

¹ Ziemele, I. Tiesības uz privāto dzīvi [Right to private life]. Available: <https://enciklpedija.lv/skrklis/176593-tiesibas-uz-privato-dzivi> [last viewed 31.03.2025].

² Universal Declaration of Human Rights. Available: <https://www.un.org/en/about-us/universal-declaration-of-human-rights> [last viewed 31.03.2025].

³ International Covenant on Civil and Political Rights. Available: <https://www.ohchr.org/en/instruments-mehnisms/instrumnts/international-covenant-on-civil-and-political-rights> [last viewed 31.03.2025].

its second part that public authorities may not interfere with anyone's enjoyment of this right, except in cases envisaged in law and necessary in a democratic society to defend the interests of national security, public safety or the economic well-being of the country, for the protection of health and morals, or for the protection of the rights and freedoms of others.⁴

To protect human rights that are ensured to persons in the European Union, the Charter of Fundamental Rights of the European Union was adopted on 7 December 2000, which is characterised as a modern and comprehensive legal instrument of the European Union for the protection and promotion of human rights and freedoms, taking into account the changes in society, as well as social, scientific and technological development. Article 7 of the Charter "Respect for private and family life" sets out: "Everyone has the right to respect for his or her private and family life, home and communications". Whereas the first part of Article 8 provides that "everyone has the right to the protection of personal data concerning him or her", pointing out in the second part that "such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law". It is also pointed out that "everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified."⁵

Article 96 of the Constitution of the Republic of Latvia, which declares that "Everyone has the right to inviolability of his or her private life, home and correspondence"⁶ corresponds with the international and the European Union's legal regulation.

Irēna Barkāne, researching the significance of human rights in the age of artificial intelligence, has validly concluded that "none of the human rights documents, which comprise the right to privacy, explains what privacy is and why it deserves protection." She recognises that "defining privacy is not an easy task because opinions on the significance of this concept, its value and area of application differ. Although there are many critical views, predominantly, scholars of law uphold privacy as an important concept".⁷ Having analysed various definitions of privacy, the aforementioned author has concluded that "privacy in its traditional aspect has been viewed as a person's interest not to be subject to unwelcome attention of the State or a third person. Presently, privacy is primarily examined as the right to control information about oneself. Privacy is substantiated as a person's ability to determine when, in what way and how much information about oneself to reveal to others".⁸

Ineta Ziemele views "privacy as an essential element of human dignity. It is a necessary part of a person's self-determination, which is one of the features that drive human evolution. Thus, privacy, by granting to us our private space, as well as

⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms. Available: https://www.echr.coe.int/documents/d/echr/convention_ENG [last viewed 01.04.2025].

⁵ Eiropas Savienības Pamattiesību harta [Charter of Fundamental Rights of the European Union]. Available: <https://eur-lex.europa.eu/legal-content/LV/All/?uriserv:133501> [last viewed 01.04.2025].

⁶ Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922.). Available: <https://likumi.lv/ta/id/57980-latvijas-republikas-satversme> [last viewed 15.05.2025].

⁷ *Barkāne, I.* Cilvēktiesību nozīme mākslīgā intelekta laikmetā. Privātums, datu aizsardzība un regulējums masveida novērošanas novēršanai [The Importance of Human Rights in the Age of Artificial Intelligence. Privacy, Data Protection and Regulation to Prevent Mass Surveillance]. Rīga: LU Akadēmiskais apgāds, 2023, pp. 93–94.

⁸ *Barkāne, I.* Cilvēktiesību nozīme, p. 96.

allowing to express our freedom of choice and free will, is closely linked to human dignity”.⁹

Similarly, Sanita Osipova has emphasized that “a human being is a value and he is vested with inseparable dignity, which, first and foremost, needs to be legally protected from the State’s arbitrariness. The state should create the protection of a person’s identity and guarantee the individual the right to self-determination. This is closely related to every person’s right to decide about himself”.¹⁰

In his essay “Privacy”, Saulvedis Vārpiņš, on the basis of findings made by the European Court of Human Rights, states that the guarantee of privacy primarily has been envisaged to ensure the development of an individual’s personality without external interference by other persons. He holds that privacy comprises such categories of cases as “the right to image and photos; protection of reputation; defamation; data protection; the right to access personal information; health information; collection of data by security services or other public authorities; police custody, the rights of police to stop and search; entering a place of residence, search and seizure; the lawyer-client relationship; privacy in places of detention and imprisonment”.¹¹

The Constitutional Court of the Republic of Latvia also has dealt with the issue of the understanding of private life in its case law, stating that “the concept of “private life”, used in Article 96 of the Constitution, is broad and includes, *inter alia*, family life, as well as inviolability of home and correspondence. Moreover, the right to inviolability of private life comprises also the right to establish and develop relationships with other persons”.¹²

The following findings have been made in the judgements delivered on 5 December 2019 and 18 September 2020: “The rights, specified in Article 96 of the Constitution, are indissolubly linked to the constitutional axiom, included in the first sentence of the fourth paragraph in the Preamble to the Constitution: Latvia, as a democratic state governed by the rule of law, is based on human dignity and freedom. A person’s private life is that sphere of human existence, in which an individual, as a reasonable being and the supreme value of a democratic state governed by the rule of law, exercises his or her freedom. The exercise of this freedom is the manifestation of a person’s autonomy and self-determination, which constitute the private life of the respective person.”¹³

Specifying the right to inviolability of private life, included in Article 96 of the Constitution, the Constitutional Court has also noted that “the right to privacy means that an individual has the right to his or her private space, suffering minimum interference by the State or others. It protects the physical and mental integrity, honour

⁹ Ziemele, I. Opening of the Judicial Year Seminar. The European Convention on Human Rights: Living instrument at 70 – Science and Technology (31 January 2020). Available: https://chr.coe.int/?Document/Speech-20200/3/-Ziemele-JY_ENG.pdf [last viewed 03.04.2025].

¹⁰ Osipova, S. Bioethics in Correlation with the Principle of Human Dignity. Journal of the University of Latvia, No. 13. Law, 2020, p. 133.

¹¹ Vārpiņš, S. Privātums [Privacy]. Jurista Vārds, 15.02.2022., No. 7, p. 48.

¹² Judgement of the Constitutional Court of the Republic of Latvia of 15 January 2021 in case No. 2020-21-01, para. 9.1. Available: <https://www.satv.tiesa.gov.lv/cases/?search%5Bnumber%5D=2020-21-01> [last viewed 15.05.2025].

¹³ Judgement of the Constitutional Court of the Republic of Latvia of 5 December 2019, in case No. 2019-01-01, para. 16.1. Available: <https://www.satv.tiesa.gov.lv/cases/?search%5Bnumber%5D=2019-01-01> [last viewed 15.05.2025.]; Judgement of the Constitutional Court of the Republic of Latvia of 18 September 2019, in case No. 2019-32-01, para. 12. Available: <https://www.satv.tiesa.gov.lv/cases/?search%5Bnumber%5D=2019-32-01> [last viewed 15.05.2025].

and dignity, identity and personal data of individuals. Information on a person is included in the content of the above concept”.¹⁴

Following the doctrine and the case law of the Constitutional Court, commentaries on Article 96 of the Constitution of the Republic of Latvia comprise the finding that “the concept of private life is the central concept of the Article. It protects the physical and mental integrity of an individual, honour and dignity, personal data. The right to private life means that each individual has the right to their private space, the right to live as one wishes, in accordance with one’s essence and wishes to develop and improve one’s personality, suffering minimum interference by the State or other persons. This right comprises an individual’s right to be different, to maintain and develop the features that differentiate them from others and individualise them”.¹⁵

Thus, it follows from the above that the concept “of private life” has a broad scope, which, as explained by the European Court of Human Rights, comprises various aspects of a person’s physical and social identity and cannot be defined exhaustively.¹⁶ Hence, the concept of private life should be analysed, by revealing its aspects or elements. Sexual behaviour has been pointed out as one of the elements of private life, which might be linked to the so-called revenge porn, analysed in the following part of the article, which might endanger a person’s intimacy, identity, honour and dignity.

2. Revenge porn

Alongside societal development also new *corpora delicti* evolve, which must be included in the national criminal laws. Increasing attention is paid to offences that infringe upon a person’s right to privacy, in various forms that this interest is expressed. One of the types of infringement on privacy, which is linked also to infringements upon other interests, is the so-called revenge porn or distribution of materials of sexual nature without the consent of the involved parties. Since the term “revenge porn” is most frequently used in society to designate this offence, this designation will be used within this article.

The concept of “revenge porn” is used to designate cases where visual materials of intimate nature, e.g., nude photos or videos showing sexual activities are distributed without the consent of the person or persons depicted. This material is either 1) recorded against the will of the depicted person; or 2) initially has been created for the private use of the person or persons depicted in the material of for private use of addressees chosen by the depicted person or persons, however, it is later distributed, e.g., in revenge or for other personal purposes, aimed at causing adverse consequences to one or several of the persons depicted in the material (e.g., emotional suffering, humiliation, shame, condemnation by society in general or some societal groups, etc.).

¹⁴ Judgement of the Constitutional Court of the Republic of Latvia of 11 October 2018, in case No. 2017-30-01, para. 11.2. Available: <https://www.satv.tiesa.gov.lv/cases/?search%5Bnumber%5D=2017-30-01> [last viewed 15.05.2025].

¹⁵ Danovskis, E., Ruķers, M., Libiņa-Egnere, I. Latvijas Republikas Satversmes 96. panta komentārs [Commentary on Article 96 of the Constitution of the Republic of Latvia]. In: Latvijas Republikas Satversmes komentāri, VIII nodaļa Cilvēka pamattiesības. Zin. vad. R. Balodis. Rīga: Latvijas Vēstnesis, 2011, p. 238.

¹⁶ Judgment of the Grand Chamber of the European Court of Human Right of 16 February 2000 in case No. 27798, *Amann v. Switzerland*, para. 65. Available: <https://hudoc.echr.coe.int/fre#%7B%22fulltext%22:%5B%22Amann%20v.%20Switzerland%22%22%22documentcollectionid%22:%5B%222GRANDCHAMBER%22%22CHAMBER%22%22%22itemid%22:%5B%222001-58497%22%22%22%7D> [last viewed 15.05.2025].

Pursuant to the explanations provided in para. 1 of Section 1 of the Law on Restriction on Pornography, material of a pornographic nature is a composition, printed matter, image, computer programme, film, video or sound recording, television programme or radio programme, other material in any form or type which has no educational or informative, scientific, or artistic value to the public and in which directly, specifically and openly in a naturalistic manner: a) genitals are completely or partially depicted; b) a sexual act or a sexual gratification in an unnatural way, a sexual gratification by masturbation, or any other sexual activities, including imitation of the abovementioned activities, are depicted or described; c) a sexual gratification in a violent manner, brutality in sexual activities (sadistic and masochistic activities), a sexual gratification with animals, or necrophilia are depicted or described.¹⁷

Revenge porn and unlawful handling of materials of sexual nature has been focused on also at the European Union's level, i.e., Article 5 of the Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence¹⁸ (hereafter – the Directive on Combating Violence) provides that Member States must envisage liability for non-consensual sharing of intimate or manipulated material. Thus, pursuant to Article 5 of the Directive on Combating Violence, liability should be envisaged for:

- (a) making accessible to the public, by means of information and communication technologies (hereafter – ICT), images, videos or similar materials depicting sexually explicit activities or the intimate parts of a person, without that person's consent, where such conduct is likely to cause serious harm to that person;
- (b) producing, manipulating or altering and subsequently making accessible to the public, by means of ICT, images, videos or similar material making it appear as though a person is engaged in sexually explicit activities, without a person's consent, where such conduct is likely to cause serious harm to that person;
- (c) threatening to engage in the conduct referred to in point (a) or (b) in order to coerce a person to do, acquiesce to or refrain from a certain act.

Thus, features of revenge porn can be discerned in Article 5 of the Directive on Combating Violence. Likewise, it is set out that liability should be envisaged also in cases where threats to engage in the described activities are made.

Although liability for violating some restrictions on distribution of pornography is defined in Section 166 of the Criminal Law, currently, this provision of the Criminal Law does not establish liability for cases where revenge porn is distributed. Hence, the Latvian legislator should envisage liability at least for those manifestations of revenge porn that are envisaged in the Directive on Combating Violence.

One of the most significant features of the revenge porn offence is that in the cases of revenge porn the consent of one or several persons depicted in the material to distribute this material to other persons is lacking.¹⁹ It could be argued that revenge

¹⁷ Pornogrāfijas ierobežošanas likums [Law on the Restriction of Pornography] (22.01.2008). Available: <https://likumi.lv/ta/en/en/id/157638-law-on-the-restriction-of-pornography> [last viewed 15.05.2025].

¹⁸ Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence. OV L series, 24.5.2024. Available: <https://eur-lex.europa.eu/eli/dir/2024/1385/oj/eng> [last viewed 15.05.2025].

¹⁹ *Citron, D. K., Franks, M. A.* Criminalizing Revenge Porn. *Wake Forest Law Review*, Vol. 49, 2014, p. 346. Available: https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2424&context=fac_pubs [last viewed 05.04.2025].

porn as an offence infringes upon several interests. Namely, in cases of revenge porn, the person who is distributing the respective materials of intimate nature seeks to have adverse consequences for the person or persons depicted therein. To ensure that such consequences set in, such materials that allow identifying the depicted person are distributed. As soon as a person can be identified (by the person's face, name or another identifiable feature), one can claim that personal data had been infringed upon and the person's identity, which has been explained as "the totality of personal data, physical features and indicators of a natural person that allow distinguishing precisely this person from another person"²⁰, has been jeopardised.

Thus, publication of any photos or videos, including intimate materials, without the consent of persons visible in them, is to be assessed as an infringement upon a person's physical integrity, personal secret and the right to one's own image, interference with their private life. The following finding can be upheld, namely, "to break into the privacy of a person there is no need to enter physically a certain territory, an object or have direct contact with that person's body. To violate the limits of privacy, it is enough to obtain unlawfully information of personal nature or to distribute it undistorted, using photos without consent, etc."²¹

Thus, on the one hand, in cases of revenge porn, the issue of violation of privacy and data protection in a broader sense can be discussed. On the other hand, in view of the nature of distributed materials, definitely this is also a case of infringement upon sexual inviolability, morals and dignity. In cases of revenge porn, either all involved persons have made the images or video materials voluntarily, or this recording had been done against the will of some of the involved parties. In those cases where this has happened voluntarily, the consent to the recording of such materials is one form in which a person's sexual inviolability is manifested. Sexual inviolability in a broader sense and the sexual freedom that follows from it mean that a person has the right to decide not only with whom to enter into sexual relationships but also to decide on one's participation in sexually explicit activities, *inter alia*, recording and distributing materials of sexual nature. This expression of freedom is not without potential risks, which is proven by the revenge porn as offence. In those cases where the recording and/ or distribution of materials has happened without the consent of any of the involved parties, however, a violation of a person's sexual freedom can be identified. Namely, this lack of will indicates that an individual's right to decide whether to record or not to record the material of sexual nature, whether to distribute or not distribute such material to another person, etc. is restricted.

As mentioned above, the aim of revenge porn can be retaliation or another intention aimed at causing adverse consequences for persons depicted in the respective materials (e.g., emotional suffering, humiliation, shame, condemnation by society in general or separate societal groups, etc.). Expressly, these materials are distributed to achieve this adverse situation for the person. Such tactics is particularly widespread among former partners; statistics show that the perpetrators of this offence are predominantly men. One explanation for this trend, i.e., that most often women become victims of this offence, is society's attitude towards a woman's role in society and accepted norms of conduct. Namely, society condemns especially women who are depicted in materials of pornographic nature, whereas men face such condemnation

²⁰ Biometrijas datu apstrādes likums [Biometric Data Processing System Law] (21.05.2009). Available: <https://likumi.lv/ta/en/en/id/193111-biometric-data-processing-system-law> [last viewed 15.05.2025].

²¹ Andersone, Dž. Personas datu aizsardzības krimināltiesiskie aspekti [Criminal Aspects of Personal Data]. Promocijas darbs. Rīga, 2018, p. 88.

less frequently.²² This consideration points, in addition, to the interdisciplinary nature of revenge porn.

Although revenge porn usually is understood as materials that contain depiction of pornographic nature, these materials can be distributed in different ways – both in digital and printed format. Moreover, in view of the accessibility of modern digital tools, they can be distributed not only on different platforms but also in various contexts. The same applies to receiving these materials. A widespread form of exchanging materials of pornographic nature is sexting. Sexting is understood as exchanging messages of sexual nature for sexual gratification in the framework of electronic message exchange or chat.²³ Dissemination of such materials in digital environment means also increased risk that these materials could end up in the hands of third parties. Thus, for example, a study conducted in Australia found that at least in one case out of ten the distributed materials that had been intended for private use had been forwarded or distributed in a different way to third parties. Moreover, the results of study reflect only those cases where the victims knew that these materials had fallen into unwanted hands. Hence, it is plausible that the true data would reveal a higher indicator.²⁴

Following the trends in digital development, the circulation of such materials not only becomes more widespread but it has become a trend in the information sharing among children and teenagers. Namely, approximately two-thirds of teenagers have distributed, as part of electronic correspondence, materials in which they are depicted totally or partially naked with the purpose of initiating potential future sexual relationships or to retain the attention and interest of the other party.²⁵ This, in turn, indicates that the cases of revenge porn are not limited to persons who have already attained sexual freedom but also affect persons who are below the age of sixteen and deserve special protection. Taking into consideration that the respective materials can be recorded and distributed voluntarily also by persons who have not yet reached the age of sexual maturity, which in Latvia is the age of sixteen, in the future, special attention should be paid to cases where such persons distribute such materials, e.g., to persons of legal age in instances that are linked to a surprise moment. Namely, theoretically, such a situation might occur in those cases where a teenage boy or girl sends materials of such nature to an adult, however, the person of legal age had not engaged in correspondence of sexual nature or the correspondence had not had sexual tinge, however, the teenager, nevertheless, had wanted to send such material. Clearly, in such a case, all facts need to be assessed meticulously; however, in cases where an adult has received such materials from a teenager without demanding them or the correspondence lacked a sexual context, such an addressee could not be made liable, e.g., for leading to depravity, pursuant to Section 162 of the Criminal Law. Yet, the situation might develop differently, e.g., in the context of

²² Citron, D. K., Franks, M. A. *Criminalizing Revenge Porn*, p. 347.

²³ McKinley, T., Lavis, T. Why did she send it in the first place? Victim blame in the context of “revenge porn”. *Psychiatry, Psychology and Law*, Vol. 27, No. 3, 2020, p. 386. Available: https://pmc.ncbi.nlm.nih.gov/articles/PMC7534260/pdf/TPPL_27_1734977.pdf [last viewed 05.04.2025].

²⁴ Powell, A., Henry, N. *Digital harassment and abuse of adult Australians: A summary report*. Melbourne: RMIT University and La Trobe University. 2015. Available: <https://www.parliament.nsw.gov.au/lcdocs/other/7351/Tabled%20Document%20-Digital%20Harassment%20and%20Abuse%20of%20A.pdf> [last viewed 05.04.2025].

²⁵ Henderson, L., Morgan, E. *Sexting and Sexual Relationships Among Teens and Young Adults*. *McNair Scholars Research Journal*, Vol. 7, No. 1, 2011, pp. 31–39. Available: https://scholarworks.boisestate.edu/cgi/viewcontent.cgi?article=1091&context=mcnair_journal [last viewed 05.04.2025].

Section 166 of the Criminal Law that envisages liability for violating the provisions regarding demonstration of a pornographic performance or other provisions regarding the restriction of entertainment of intimate nature, or provisions regarding the handling of a material of pornographic nature, if the addressee would decide to continue storing this material; however, the authors will not elaborate on it in this article.

Another no less important aspect of revenge porn concerns the persons who have such mental health disorders that prevent them from understanding the meaning of the actions committed. These persons deserve special protection. Namely, in cases where such persons have voluntarily distributed materials of sexual nature, in which they are depicted, it is possible that, in the particular cases, the persons are unaware of the consequences that might set in if they distribute such materials. At the same time, it should be emphasized that mental disorders *per se* do not mean that a person is unable to understand the meaning of these specific actions. In instances where a person does not understand the consequences of distributing materials of such nature, the possibility that these materials might end up in hands of such persons who will re-distribute these materials intentionally is higher. This could be explained by the fact that the said disorders do not permit the person to assess objectively their relationship with the addressee of the respective materials. Hence, the person might assume erroneously that the relationship between the parties is closer and based on greater trust than it is in reality.²⁶

Likewise, research shows that victims of revenge porn often experience suicidal thoughts, post-traumatic stress syndrome, anxiety, depression, etc.²⁷ If the person already has mental health disorders then, in such cases, the consequences of revenge porn may be even more severe due to the person's state of vulnerability.

In view of the above, revenge porn is an offence that affects any victim's interests of privacy, dignity, sexual inviolability and sexual freedom. At the same time, special attention should be paid to societal groups in need of special protection, e.g., children, teenagers, persons with mental disorders, etc. It is this shame, the target emotion which the perpetrators of revenge porn want to inflict upon the victim, that most often discourages victims from seeking help. Revenge porn is an interdisciplinary phenomenon; hence, it calls for an appropriate solution. To decrease the number of victims, it is important to inform society about the content, manifestations, risks of this offence and ways for seeking help, if the offence already has been committed.

Summary

A person's right to private life is an internationally recognised fundamental human right, enshrined in the main human rights documents.

The concept of "private life" is broad in scope and comprises various aspects of a person's physical and social identity, therefore, a legal definition of it has not been elaborated.

²⁶ Fulford, C., Cobigo, V. Friendships and Intimate Relationships among People with Intellectual Disabilities: A Thematic Synthesis. *Journal of Applied Research in Intellectual Disabilities*, Vol. 31, No. 1, 2018, pp. 18–35. Available: <https://journals.sagepub.com/doi/10.1177/155708511665456> [last viewed 05.04.2025.]

²⁷ Bates, S. Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors. *Feminist Criminology*, Vol. 12, No. 1, 2016, pp. 22–42. Available: <https://journals.sagepub.com/doi/10.1177/1557085116654565> [last viewed 05.04.2025].

Explanations of the concept of “private life” and its elements are found in the doctrine, the case law of the European Court of Human Rights and the Constitutional Court of the Republic of Latvia, which, when summarised, allows concluding that the concept of “the right to private life” comprises a person’s right to one’s private space, physical and mental integrity, honour, dignity, as well as the right to data protection.

Revenge porn is one of those violations of privacy that directly affects also the interests of sexual inviolability, morals, as well as dignity.

The main feature of revenge porn is retaliation or another intent aimed at creating adverse consequences for the persons depicted in the respective materials. It is this intent that especially distinguishes revenge porn from distributing other materials of pornographic nature.

In view of the trends in the development of digitalisation, revenge porn also is particularly widespread in the digital environment; moreover, it is encountered among teenagers. This, in turn, indicates that states should develop such regulation that would protect children as an especially vulnerable group of victims.

In the context of revenge porn, persons with mental disorders constitute another societal group in need of special protection. In such cases, a person might not be fully aware of the possible consequences of distributing materials of sexual nature and/ or interpret incorrectly the nature of the relationship with the recipient of these materials. This increases the risk of becoming a victim of revenge porn. At the same time, the fact that a person has mental disorders does not automatically mean that the person is unable to understand the meaning and consequences of distributing pornographic materials.

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Impeachment Proceedings in Lithuania: Model, Problems of Implementation, and Possibilities of Improvement

Dr. iur. **Dovilė Pūraitė-Andrikienė**

Associate Professor at the Faculty of Law, Vilnius University

Senior Research Fellow at the Law Institute of the Lithuanian Centre for Social Sciences

E-mail: dovile.puraite-andrikiene@tf.vu.lt

 0000-0001-6964-1568

Lithuania has the highest number of impeachments in Europe. The Lithuanian Constitutional Court has adopted seven conclusions in impeachment cases and has been also involved in other impeachment proceedings. This extensive case law has enabled this court to develop a comprehensive constitutional doctrine on different impeachment issues. Nevertheless, the recent conclusions of the Constitutional Court in impeachment cases and the problems of their implementation raise questions regarding the optimality of the legal regulation of impeachment proceedings. This research has been aimed to discuss the need, preconditions, and possibilities for modifying the constitutionally consolidated and other legal regulation of impeachment proceedings in Lithuania. To achieve this aim, the following tasks are undertaken and dealt with: 1) to discuss the legal regulation of the impeachment process in Lithuania and the doctrine of the Constitutional Court on this issue; 2) to analyse the practice and problems of implementing the mechanism of impeachment in Lithuania; 3) to make proposals for improving the legal regulation of impeachment in Lithuania. These issues are, *inter alia*, examined in the context of legal regulation of impeachment procedure in other European states, to compare impeachment procedure in Lithuania and other states of this region in the area under discussion.

Keywords: constitutional court, impeachment, parliament, constitutional liability.

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Introduction

The power of parliament to remove the highest public officials from office when parliament accuses them of certain offenses and removes them from office dates back to 14th century England. It originated in the British Parliament in 1376 to combat perceived monarchical absolutism. It was borrowed by the British colonists and included in the United States Constitution of 1787 to remove officials who “commit, among other offenses, high crimes and misdemeanours”.¹ The procedure for removing top public officials from office has various names in different countries and is often called impeachment. The institution of impeachment has since spread all over the world along with the written constitutions. Later, parliaments in these countries began to exercise this power. The impeachment model, which started with the parliament itself making the accusations and making the decisions, has gradually been replaced by a model in which the highest judicial authorities are increasingly involved in impeachment proceedings.² They either issue opinions on the actions of the accused or, after examining the charges brought by the parliaments, take final decisions on the removal of the person from office. In this way, the impeachment process has become more regulated by law and has introduced many elements of a judicial process.

The Lithuanian impeachment model is in line with these trends. The Lithuanian Constitution³ (hereinafter – the Constitution) establishes an impeachment model in which the impeachment process involves two state institutions: the *Seimas* (the Parliament) and the Constitutional Court. The Constitution provides for the respective functions and powers of each of these institutions: the Constitutional Court decides (gives its conclusion) whether the specific actions of the public official or the Member of *Seimas* against whom impeachment proceedings have been initiated are contrary to the Constitution and whether these actions have grossly violated the Constitution, and the *Seimas*, through the impeachment process, decides whether to remove the person from office. The Constitution does not provide for any other public authorities or their officials to participate in the impeachment process.

Academic literature emphasizes: “on the one hand, impeachment represents a crucial mechanism of accountability for chief executives and a primary mechanism for removal. On the other hand, impeachment can be prone to abuse. Although it is used only sparingly in some countries, in other countries, impeachment talk is a regular feature of political discourse, and its deployment is routine”.⁴ Lithuania has the highest number of impeachments in Europe. At the time of writing this paper, the Constitutional Court has adopted seven conclusions in impeachment cases and

¹ Monaghan, C., Flinders, M., Huq, A. Z. (eds.). *Impeachment in a Global Context: Law, Politics, and Comparative Practice* (1st ed.). Routledge, 2024, foreword.

² Birmontienė, T. (et al.) *Lietuvos konstitucinė teisė* [Lithuanian constitutional law]. Vilnius: Mykolas Romeris universitetas, 2022, p. 482.

³ Constitution of the Republic of Lithuania (25.10.1992). Available: <https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=rivwzvpvg&documentId=TAIS.211295&category=TAD> [last viewed 25.01.2025].

⁴ Monaghan, C., Flinders, M., Huq, A. Z. (eds.). *Impeachment in a Global Context*, foreword.

refused to issue one conclusion on the constitutionality of the actions of a Member of *Seimas*.⁵ In other impeachment proceedings initiated in Lithuania, the Constitutional Court did not deliver its conclusions but was in its own way involved by adopting rulings on the constitutionality of the relevant resolutions of the *Seimas* or decrees of the President of the Republic. This extensive case law has enabled the Lithuanian Constitutional Court to develop a comprehensive constitutional doctrine on all impeachment issues, from the most serious human rights violations to the protection of state secrets, as well as on the impeachment process itself. Meanwhile, the recent conclusions of the Constitutional Court in impeachment cases and the problems of their implementation together with the ensuing public response create the need to more thoroughly examine the question of modifying the impeachment model consolidated in the Constitution and other legal acts.

However, apart from certain rarely occurring exceptions, there is little discussion in the Lithuanian legal community, political circles and society in general about the optimality of the Lithuanian impeachment model, created more than thirty years ago, in particular as to whether it meets the expectations of today's Lithuanian society and legal community, the capabilities of the legal system and constitutional justice tendencies in other European states. Although some academic works have addressed issues relevant to the context of this article, the respective studies were carried out a long time ago, when the practice of impeachment in Lithuania was not yet so extensive.⁶ There were also works that addressed only certain aspects of the legal regulation of impeachment, without proposing corrections to this regulation.⁷ Thus, the analysis of the impeachment process, however, has remained fragmented and there is still a lack of a coherent and comprehensive study of impeachment, especially in terms of assessing the Lithuanian model from a comparative point of view, looking at the experience of other countries, and in terms of consistently examining the practice of implementation of this institute.

Therefore, this research aims to discuss the need, preconditions, and possibilities for modifying the constitutionally consolidated and other legal regulation on impeachment proceedings in Lithuania. To achieve this aim, the following tasks are undertaken and dealt with: 1) to discuss the legal regulation of the impeachment proceedings in Lithuania and the doctrine of the Constitutional Court on this issue; 2) to analyse the practice and problems of implementing the mechanism of impeachment in Lithuania; 3) to make proposals for improving the legal regulation of impeachment in Lithuania. The structure of the paper (3 parts) reflects an analysis of these three aspects. These issues are, *inter alia*, examined in the context of legal regulation of impeachment procedure in other European states, to compare

⁵ These cases are presented in greater detail in part 2 of this paper.

⁶ *Bacevičius, J.* Apkaltos institutas ir konstitucinė atsakomybė: probleminiai aspektai [The Institute of Impeachment and Constitutional Liability: problematic aspects]. *Jurisprudencija*, Vol. 111, No. 9, 2008, pp. 95–104; *Jarašiūnas, E.* Lietuvos Respublikos Konstitucinis Teismas ir aukštųjų valstybės pareigūnų apkalta: kelios aktualios problemos [The Constitutional Court of the Republic of Lithuania and the impeachment of high-ranking public officials: Some topical issues]. Vol. 80, No. 2, 2006, pp. 34–49.

⁷ *Vecerskyte-Brosel, J.* Apkaltos konstitucinio reguliavimo kaita [Changes in the constitutional regulation of impeachment]. *Lietuvos teisė 2022: esminiai pokyčiai*, 2022, pp. 15–22; *Sinkevičius, V.* Ar galima pradėti apkaltą Seimo nariui už nusikaltimą, padarytą iki tampant Seimo nariu [Can a Member of the *Seimas* be impeached for a crime committed before becoming a Member of the *Seimas*?]. *Parliamentary Studies*, No. 20, 2016, pp. 21–40. *Neuman, G. L.* Impeachment, Disqualification, and Human Rights. *Columbia Human Rights Law Review*, Vol. 54, issue 2, 2023, pp. 627–678.

impeachment procedure in Lithuania and other states of this region in the area under discussion.

Lithuania's experience with impeachment cases also constitutes a compelling case study for the international legal community, offering both theoretical and practical insights into the design and operation of accountability mechanisms for high-ranking public officials. The Lithuanian model, which combines judicial review by the Constitutional Court with a final political decision by the *Seimas*, reflects a hybrid approach that differs significantly from both the purely parliamentary system of the United States and the judicially centred models of countries such as Germany, Austria, where constitutional courts are entrusted with the ultimate authority in impeachment cases. This dual-institutional arrangement has facilitated the development of an extensive constitutional doctrine, as the Lithuanian Constitutional Court has adjudicated more impeachment cases than any other European court, clarifying key concepts such as gross violations of the Constitution and breaches of the oath of office. At the same time, the Lithuanian experience underscores the challenges inherent in entrusting a political body with the final decision. Against this background, the Lithuanian case provides valuable comparative insights for jurisdictions seeking to reform their impeachment systems to ensure greater legal certainty, safeguard judicial independence, and preserve the integrity of democratic governance.

1. The impeachment model in Lithuania: Legal regulation of the impeachment proceedings and the doctrine of the Constitutional Court

The possibility of removing a person from office and revoking the mandate of a Member of *Seimas* by impeachment procedure was for the first time established in the 1992 Lithuanian Constitution. None of the previous Lithuanian Constitutions provided for such a method of constitutional liability of the highest state officials.⁸ The five most important elements of the Lithuanian impeachment process are discussed in more detail below: Legal provisions regulating the impeachment process, institutions participating in impeachment proceedings, grounds for impeachment, officials who may be removed from their positions by impeachment proceedings, and legal consequences of impeachment.

1.1. Legal provisions regulating the impeachment process

The procedure for impeachment proceedings is regulated by Articles 63, 74, 86, 88, 89, 108 and 116 of the Constitution. The main article regulating the institute of impeachment is Article 74 of the Constitution, which stipulates that the President of the Republic, the President and judges of the Constitutional Court, the President and judges of the Supreme Court, the President and judges of the Court of Appeal, and the Members of *Seimas* who have committed a serious violation of the Constitution or have broken their oath, or who have been found to have committed a criminal offense, may, by a majority of three-fifths of the total number of Members of *Seimas*, be removed from office or have the mandate as a Member of *Seimas* annulled. This shall be done by the impeachment procedure laid down in the Statute of *Seimas*. By a law adopted in 2022, the *Seimas* amended Article 74 of the Constitution and added a new second paragraph, which provides: "A person who has been removed

⁸ *Sinkevičius, V. Ar galima pradėti apkaltą, p. 3.*

from his office or had his mandate as a Member of *Seimas* revoked by the *Seimas* for a serious breach of the Constitution or for breaking his oath of office by impeachment proceedings may take up an office specified in the Constitution, the commencement of which, under the Constitution, is conditional on the taking of an oath provided for in the Constitution, if at least ten years have elapsed from the date on which the decision of the *Seimas* by which the person has been removed from office or his mandate as a Member of *Seimas* revoked.”⁹

As regards the powers of the Constitutional Court in impeachment proceedings, the Constitution stipulates that the Constitutional Court shall give its conclusions as to whether specific actions of the Members of *Seimas* and public officials subject to impeachment proceedings are unconstitutional (Art. 105(3) of the Constitution). Only the *Seimas* may request a conclusion from the Constitutional Court on this issue (Art. 106(5) of the Constitution). The *Seimas* shall finally decide on the basis of conclusion of the Constitutional Court (Art. 107(3) of the Constitution).

According to the Constitution, the procedure for impeachment proceedings is laid down in the Statute of the *Seimas*¹⁰ (Art. 74 of the Constitution). This procedure is regulated in Part VIII “Impeachment proceedings” of the Statute of *Seimas*. Article 239 of the Statute of *Seimas* contains provisions relating to the power of the *Seimas* to refer to the Constitutional Court for a conclusion on whether specific actions of the person subject to impeachment proceedings are unconstitutional, Article 240 of the Statute of *Seimas* regulates the follow-up of the impeachment procedure after the Constitutional Court’s conclusion has entered into force, and Article 241(3) and 242 of the Statute of *Seimas* regulate other matters relating to the Constitutional Court’s conclusions in impeachment proceedings.

The constitutional institute of impeachment has changed quite significantly over the decades: the list of subjects who can initiate impeachment has evolved, the concept of impeachment has evolved to include a fundamental aspect of parliamentary proceedings and a constitutional amendment has been adopted to shorten the constitutional effects of impeachment.¹¹ The constitutional amendment adopted by the Parliament took a very long time to prepare, even though it was already clear from the judgment of the Grand Chamber of the European Court of Human Rights of 6 January 2011¹² that this amendment had to be adopted.

Nevertheless, the Constitutional Court has played an equally important role in the development of the concept of impeachment in Lithuania, as it has had numerous opportunities to clarify and further explain the very laconic provisions of the Constitution on impeachment due to the numerous impeachment cases that have taken place in Lithuania. The Constitutional Court has stated that the institute of impeachment is a method of public democratic control over the activities of the President of the Republic and other public officials referred to in Article 74 of the Constitution and their accountability to the public, including, *inter alia*, the possibility of removing them from office if they fail to comply with their obligation to be guided solely by the Constitution and the law, place their personal

⁹ Law amending Article 74 of the Constitution of the Republic of Lithuania (21.04.2022).

¹⁰ Statute of the *Seimas* of the Republic of Lithuania (17.02.1994). Available: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/3f13e2b02fc611eb8c97e01ffe050e1c?jfwid=> [last viewed 25.01.2025].

¹¹ *Vecerskyte-Brosel, J.* Apkaltos konstitucinio, p. 19.

¹² Judgment of the European Court of Human Rights of 6 January 2011 in the case *Paksas v Lithuania*, petition No. 34932/04.

or group interests above the interests of the public, and discredit the authority of the State by their acts.¹³

1.2. Institutions participating in impeachment proceedings

It was also the Constitutional Court that stated that the Constitution establishes a legal regulation where the Constitutional Court decides whether a person's actions are contrary to the Constitution, and the *Seimas* decides whether to remove a person from office for actions contrary to the Constitution.¹⁴ In other words, the legal fact (a violation of the Constitution is always the subject of a legal assessment) is established by an institution of a legal nature – the Constitutional Court – and the constitutional liability for the established violation of the law is imposed by an institution of a political nature – the *Seimas*.¹⁵ Thus, the provision in Article 107(3) of the Constitution that “the *Seimas* shall, on the basis of the conclusions of the Constitutional Court, finally decide on the matters referred to in Article 105(3) of the Constitution” does not mean that the *Seimas* finally decides on whether a person's actions are contrary to the Constitution, but rather on whether to remove a person from office for actions which the Constitutional Court has found to be contrary to the Constitution. Since, according to Article 107(2) of the Constitution, “the decisions of the Constitutional Court on matters within its competence under the Constitution shall be final and not subject to appeal”, the *Seimas* does not have the power to decide whether the Constitutional Court's conclusion is reasonable and lawful, nor can the *Seimas* change, overrule or otherwise question the conclusion. The Constitutional Court has also emphasized that, under the Constitution, such a conclusion cannot be altered or overturned by referendum, election, or any other means.¹⁶

From a comparative perspective, impeachment is applied to a certain group of officials, usually those who are more protected because of their status (most often the President, judges, high-ranking members of the executive), it is only applied on the grounds laid down in the Constitution (high treason, violation of the constitution, violation of the oath, serious crime, etc.), and the penalty for impeachment is removal from office.¹⁷

1.3. Grounds for impeachment

Starting with the grounds for impeachment, Article 74 of the Constitution stipulates that impeachment is possible for a gross violation of the Constitution, for violation of the oath of office, and if it is established that a crime has been committed. This list of grounds on which the public officials referred to therein may be removed from office is exhaustive and may not be extended or narrowed by law. According to the Constitution, the persons referred to may be removed from office on at least one of the grounds provided for in Article 74 of the Constitution. The two grounds for impeachment, a gross violation of the Constitution and violation of the oath, are overlapping: a gross violation of the Constitution always implies a violation of the oath, while a violation of the oath constitutes a gross violation of the Constitution. The commission of a crime is an independent ground for impeachment. The Constitutional Court has clarified that impeachment proceedings may proceed

¹³ The ruling of the Constitutional Court of the Republic of Lithuania 25 May 2004. *Žin.*, 2004, No. 85-3094.

¹⁴ *Ibid.*

¹⁵ *Jarašiūnas, E.* Lietuvos Respublikos Konstitucinis, p. 41.

¹⁶ *Inter alia*, the ruling of Constitutional Court of the Republic of Lithuania, 25 May 2004.

¹⁷ *Jarašiūnas, E.* Lietuvos Respublikos Konstitucinis, p. 36.

on this ground even without a conclusion by the Constitutional Court, since the fact of the commission of a crime is established by other legal authorities.¹⁸ However, subsequent rulings of the Constitutional Court have stated that, once a conviction has become final against a person, the *Seimas* must ascertain whether the crime was committed in violation of the Constitution and the oath of office.¹⁹

Article 74 of the Constitution does not explicitly state when the acts for which the persons referred to in that Article may be impeached must be performed: whether only for acts performed while they were in office, or also for acts performed before they took office. The Constitutional Court, in its ruling of 24 February 2017,²⁰ has stated that a gross violation of the Constitution and a violation of the oath can only be committed by acts committed in the exercise of the functions referred to in Article 74 of the Constitution: before taking up the functions referred to in that Article, persons must swear to uphold the Constitution, which means that, unless they have taken the oath, they cannot break the oath and violate the Constitution. This is not the case when the grounds for impeachment arise from the discovery that a crime has been committed. Impeachment is not only possible for an offence committed during the performance of the duties referred to in Article 74 of the Constitution, but also for an offence committed before the person assumed the duties referred to in that Article, provided that the fact of the commission of the offence came to light during the performance of the duties.

Article 227 of the Statute of *Seimas* stipulated that the impeachment procedure is a parliamentary procedure applied by the *Seimas* to persons referred to in Article 74 of the Constitution for actions contrary to the Constitution committed by them in office. Thus, according to this provision of the Statute of *Seimas*, the commission of the offence must have taken place while the person concerned was in office and not before. The Constitutional Court, in its decision of 10 May 2016, refused to examine the *Seimas*'s inquiry on the constitutionality of the actions of the Member of *Seimas* V. Gapšis. In this decision, the Constitutional Court stated that the application of the impeachment ground "after it has become apparent that a crime has been committed" does not entail the power of the *Seimas* to refer to the Constitutional Court an inquiry as to whether the specific actions of the Member of *Seimas* who is subject to impeachment are unconstitutional in those cases where such actions might not constitute a gross violation of the Constitution and a violation of the oath of office, because they were carried out prior to the oath of office. Accordingly, the Constitutional Court does not have the power to assess the constitutionality of such relevant acts which could not be in flagrant violation of the Constitution and the oath of office by virtue of their having been carried out prior to the taking of the oath of office of a Member of Parliament. The decision states that the Constitutional Court is not seized of the matter. However, the Constitutional Court's ruling of 24 February 2017 held that Article 227 of the Statute of *Seimas*, in so far as it allows impeachment to be applied only in the event of the discovery of an offence committed in the exercise of an office referred to in Article 74 of the Constitution, was unconstitutional. The ruling states that impeachment may also be granted for a crime committed before the person took up the office in question.

¹⁸ The ruling of the Constitutional Court of the Republic of Lithuania of 25 January 2001. Žin., 2001, No. 10-295.

¹⁹ *Inter alia*, the ruling of Constitutional Court of the Republic of Lithuania of 25 May 2004.

²⁰ The ruling of the Constitutional Court of the Republic of Lithuania of 24 February 2017. TAR, 2017-02-24, No. 03068.

If a person referred to in Article 74 of the Constitution has seriously violated the Constitution, broken his oath of office, or committed an offence in the performance of his duties referred to in Article 74 of the Constitution, the *Seimas*, having decided to initiate impeachment proceedings, must refer the matter to the Constitutional Court for a conclusion as to whether the specific actions of the person who is subject to impeachment proceedings are contrary to the Constitution. If the impeachment is based on “the discovery of a crime” and the crime was committed before the person took the oath of office, the *Seimas* is not entitled to request the Constitutional Court to give a conclusion on whether the crime constitutes a gross violation of the Constitution and a violation of the oath of office, since a crime committed before the oath of office cannot be a violation of the oath of office, and cannot also be a gross violation of the Constitution. In such a case, the Constitutional Court cannot give a conclusion that a crime committed before a person takes the oath of office does not constitute a gross violation of the Constitution or a violation of the oath.

It should be noted that the most frequent grounds for impeachment in European countries are violations of the Constitution (Germany,²¹ Austria,²² Slovakia,²³ Bulgaria²⁴) and of the law (Germany, Slovenia²⁵), while impeachment can also be based on high treason (Italy,²⁶ Slovakia,²⁷ Bulgaria, Czech Republic²⁸) or on the intention to violate the Constitution (Italy).²⁹ In this context, the Lithuanian Constitution sets out a rather broad list of grounds for impeachment. It should be noted that in the works of Lithuanian scholars, the opinion has been put forward that these grounds should be merged and narrowed down. It has been suggested that, taking into account the official constitutional doctrine and the practical experience in Lithuania, it would be appropriate to adjust the constitutional provisions by providing for two independent grounds for impeachment instead of three ((a) – a gross violation of the Constitution; (b) – the commission of a crime).³⁰

1.4. Officials who may be removed from their positions by impeachment proceedings

All Central and Eastern European (CEE) Constitutions contain procedures by which at least some elected or appointed public officials can be removed from office. Although all constitutions (with an exception of Estonia) include provisions to impeach the president, they differ more widely regarding whether other officials can also be subject to impeachment.³¹ Lithuania, Poland, Hungary allow for impeachment of members of parliament.³² In CEE, judges may only be impeached

²¹ Article 61 of Basic Law for the Federal Republic of Germany. Full references to national constitutions are provided in the bibliography.

²² Article 142 of the Austrian Constitution.

²³ Article 107 of the Slovak Constitution.

²⁴ Article 103 of the Constitution of the Republic of Bulgaria.

²⁵ Article 109 of the Constitution of the Republic of Slovenia

²⁶ Article 90 of the Constitution of the Italian Republic.

²⁷ Article 107 of the Slovak Constitution.

²⁸ Article 65 of the Constitution of the Czech Republic.

²⁹ For more on this, see: *Navickaitė, J.* Europos konstitucinių teismų kompetencijų lyginamoji analizė [Comparative analysis of the competences of European constitutional courts]. Vilnius: Lietuvos edukologijos universitetas, 2011, p. 62.

³⁰ *Bacevičius, J.* Apkaltos institutas, p. 102.

³¹ *Koker, P.* Impeachment in Central and Eastern Europe. In *Monaghan, C., Flinders, M., Huq, A. Z.* (eds.). *Impeachment in a Global Context: Law, Politics, and Comparative Practice* (1st ed.). Routledge, 2024, p. 242.

³² *Ibid.*, p. 242

in Latvia and Lithuania.³³ The German Federal Constitutional Court also deals with the constitutional liability of judges,³⁴ and the Austrian³⁵ and Slovenian³⁶ constitutional courts – with the liability of government members. Thus, Article 74 of the Lithuanian Constitution also sets out a rather extensive list of officials who may be removed from their positions by impeachment proceedings: the President of the Republic, the President and judges of the Constitutional Court, the President and judges of the Supreme Court, the President and judges of the Court of Appeal, the Members of *Seimas*.³⁷ From a comparative perspective wide range of officials to impeachment is enshrined in Poland, Estonia represents another major exception as the Constitution does not include any provisions on impeachment in a narrower sense.³⁸

1.5. Consequences of impeachment

The legal regulation of impeachment under the Lithuanian Constitution is quite exceptional in that the public officials referred to in Article 74 of the Constitution are subject to special sanctions. They are special not only in that the persons concerned are removed from office, but also in that persons removed from office by impeachment proceedings for a serious violation of the Constitution or for breaking their oath of office are forbidden for a certain period of time to hold such offices as provided for in the Constitution, the commencement of which is linked to the taking of an oath under the Constitution – they may be elected President of the Republic, a Member of *Seimas*, appointed Prime Minister, minister, judge, State Controller, where at least ten years have elapsed since the decision of *Seimas* by which he or she was expelled from the office or his or her mandate as a Member of *Seimas* was revoked.

Where the persons referred to in Article 74 of the Constitution have been removed from office by impeachment proceedings, not for violation of the Constitution, or for breaking their oath, but for the commitment of a crime which does not constitute a gross violation of the Constitution or the breaking of an oath, they shall not be subject to the above-mentioned ten-year ban on the holding of any office provided for in the Constitution, which is linked to the taking of an oath as provided for by the Constitution. As mentioned before this constitutional regulation entered into force only in 2022 and has a long history of interference between the jurisprudence of the ECtHR and that of the Constitutional Court.

In its ruling of 25 May 2004, the Lithuanian Constitutional Court formulated the official constitutional doctrine on the prohibition for a person removed from office through impeachment proceedings to hold office that requires taking an oath; however, the ECtHR found that the permanent and irreversible prohibition preventing a person who was removed from office through impeachment proceedings for a gross

³³ Koker, P. Impeachment in Central and Eastern Europe, p. 245.

³⁴ Article 98 of the Basic Law for the Federal Republic of Germany.

³⁵ Article 142 of the Austrian Constitution.

³⁶ Article 119 of the Constitution of the Republic of Slovenia

³⁷ However, it should be considered whether the list of officials who can be removed from office by impeachment, as set out in the Constitution, could be extended to include the President of the Supreme Administrative Court and the judges of that court. Since the administrative courts in Lithuania began to operate in 1999 and the Supreme Administrative Court of Lithuania began to operate in 2001, the drafters of the 1992 Constitution could not have foreseen the need to include the judges of the Supreme Administrative Court in the list of officials who may be removed from their positions by impeachment proceedings. Judges of this court are certainly not inferior to judges of the Court of Appeal in terms of their status, and their inclusion in the list in question would therefore be logical.

³⁸ Koker, P. Impeachment in Central and Eastern Europe, p. 242.

violation of the Constitution and a breach of the oath from standing for election to the Seimas is disproportionate and in violation of the right to stand for election to the legislative authority under Article 3 of Protocol No. 1 to the Convention. Thus, the judgment of the ECtHR in the case *Paksas v. Lithuania* revealed the incompatibility of the provisions of the Constitution and the Convention. In its ruling of 5 September 2012, the Constitutional Court pointed out that, the judgment of the ECtHR in itself may not serve as a constitutional basis for the reinterpretation (correction) of the official constitutional doctrine if such reinterpretation, in the absence of the respective amendments to the Constitution, changes the overall constitutional regulation in essence, violates the system of the values consolidated in the Constitution, and diminishes the guarantees for the protection of the supremacy of the Constitution in the legal system. The Constitutional Court held that the constitutional institutions of impeachment, the oath, and electoral rights are closely interrelated and integrated; the change of any element of these institutions would result in the change of the content of other related institutions and in the system of values entrenched through these constitutional institutions. The Constitutional Court ruled that it stems from the principle of the supremacy of the Constitution that the sole way to remove the said incompatibility between the provisions of the Constitution and the Convention is to adopt the necessary amendments to the Constitution.

It should be noted that the Statute of *Seimas* also provides for the possibility of avoiding these additional consequences of the impeachment process. Article 243(1) of the Statute of *Seimas* provides that a person subject to impeachment shall have the right to resign from his/her office or to renounce his/her mandate as a Member of *Seimas* at any point during the impeachment proceedings, but only before the opening of the vote in *Seimas*, by submitting a written declaration to that effect. Such a declaration shall be granted without delay (Art. 243 (2)). Thus, even after the Constitutional Court has found that a Member of *Seimas* or other public official has violated the Constitution or broken his or her oath of office, such an official can resign and avoid one of the consequences of impeachment – the 10-year “cooling-off period” – and take part in the next elections, which may be held quite soon, as was the case in the last impeachment process in Lithuania.³⁹

Thus, the Lithuanian impeachment model can be described by these main features: 1) two institutions are involved in the impeachment process in Lithuania: the Constitutional Court decides whether a person's actions contradict (or do not contradict) the Constitution and whether these actions have violated the Constitution grossly, and the *Seimas* decides whether to remove a person from office for actions that contradict the Constitution; 2) compared to other European countries, the list of grounds for impeachment in Lithuania is quite broad: impeachment is possible for a serious violation of the Constitution, for violation of the oath of office, or if it is found that a crime has been committed; 3) in a comparative context, Lithuania also has a fairly wide list of officials who can be removed from their positions by impeachment proceedings: the President of the Republic, the President and judges of the Constitutional Court, the President and judges of the Supreme Court, the President and judges of the Court of Appeal, and the Members of *Seimas*; 4) Lithuania also provides for special sanctions in the impeachment process: in addition to being removed from office, persons removed from office by impeachment proceedings for a gross violation of the Constitution or for breaking their oaths of office are forbidden

³⁹ For more on this, see part 2 of this paper.

for a certain period of time to hold any office provided for in the Constitution, which is linked to the taking of an oath as provided for by the Constitution.

2. Practice and problems of the impeachment process in Lithuania

As mentioned above, Lithuania leads Europe in the number of impeachments. Globally, Lithuania is probably only behind the USA, which has had 21 impeachment proceedings so far.⁴⁰ It is difficult to give a clear answer as to what has led to these trends in Lithuania. In the opinion of the former President of the Constitutional Court, such tendencies may be due both to the provisions of the Constitution, which do not provide any other grounds for the termination of the mandate of a Member of *Seimas*, and to the political culture, where Lithuanian politicians involved in scandals avoid resigning from office themselves.⁴¹ Though some scholars emphasize that, too much impeachment is not a sign of “democratic health”.⁴² Comparative research studies state that, there is no evidence to date that impeachment or attempted impeachment generates immediate destabilizing consequences, or is correlated in practices with reductions in democratic quality.⁴³

Although, as mentioned above, the list of officials in Lithuania who can be removed from office by impeachment is wider, including judges at the highest levels, all impeachments have been carried out only against representatives of political institutions. To achieve the aim of the article, it is appropriate to discuss the conclusions of the Constitutional Court in impeachment cases and their final implications in more detail.

The first Constitutional Court conclusion of this kind was adopted on 31 March 2004,⁴⁴ in the case of the impeachment of the President of the Republic. In this case, the Constitutional Court has concluded that the President, R. Paksas, has grossly violated the Constitution by these actions: 1) by illegally granting Y. Borisov citizenship of the Republic of Lithuania in return for the financial and other substantial support he provided; 2) by knowingly letting Y. Borisov know that he was under investigation by the law enforcement authorities and that his telephone conversations were being monitored; 3) by instructing his advisor to use his official position to seek to influence, through law enforcement authorities, the decisions of the managers and shareholders of UAB “Žemaitijos keliai” regarding the transfer of shares to persons close to R. Paksas, and by influencing the decisions of the managers and shareholders of UAB “Žemaitijos keliai” regarding the transfer of shares to persons close to R. Paksas. After this conclusion, the *Seimas* on 6 April 2004 revoked

⁴⁰ From the first impeachment of Senator William Blount in 1797, to the first impeachment of President Andrew Johnson in 1868, to two impeachments of Donald Trump in 2019 and 2021. Historically, in the US, impeachment has most often been applied to judges, and four times to presidents (twice to the same person during the same term, but no president has been removed from office). *Večerskytė-Brosel, J.* Apkaltos evoliucija: Jungtinių Amerikos Valstijų atvejo analizė [The evolution of impeachment: a case study of the United States of America]. Konstitucinė ir teisinė sistema. Liber Amicorum Vytautui Sinkevičius. Vilnius: Mykolo Romerio universitetas, 2021, pp. 379–441.

⁴¹ *Beniušis, V.* Lietuva – apkaltų rekordininkė pasaulyje [Lithuania is the world’s impeachment record holder]. Delfi.lt 13 March 2018. Available: <https://www.delfi.lt/news/daily/lithuania/lietuva-apkaltu-rekordininke-pasaulyje-77402651> [last viewed 25.01.2025].

⁴² *Monaghan, C., Flinders, M., Huq, A. Z.* (eds.). Impeachment in a Global Context, foreword.

⁴³ *Ginsburg, T., Huq, A., Landau, D.* The Uses and Abuses of Presidential Impeachment, Public Law and Legal Theory Working Paper Series, No. 731, 2020, p. 58.

⁴⁴ The conclusion of Constitutional Court of the Republic of Lithuania of 31 December 2004. *Žin.*, 2004, No. 49-1600.

the mandate of the President. This was not only the first impeachment in Lithuania, but also the first impeachment of a President of the Republic in Europe. It is also emphasized by foreign researchers that it was the only attempt to impeach a president that was primarily based on valid legal arguments rather than (purely) political motives.⁴⁵ There have been at least nine attempts to impeach presidents in other parts of CEE (Romania, Czech Republic, Bulgaria), nevertheless, these were largely driven by ideological opposition to the president and often proceeded on the constitutionally questionable arguments.⁴⁶

It is stated in the academic literature that, based on a broad range of comparative evidence, the presidential impeachment in practice is about far more than removing criminals or other bad actors; it often serves as an exit from the deep structural crises that systems of government sometimes undergo.⁴⁷ The impeachment of R. Paksas perfectly reflects these trends.⁴⁸

Thus, one of the conclusions found that the actions of the President of the Republic were unconstitutional, and these actions constituted a gross violation of the Constitution. The other six conclusions found that the actions of the Members of *Seimas* were unconstitutional and that these actions constituted a violation of the oath and a gross violation of the Constitution. The Constitutional Court also refused to issue one conclusion on the constitutionality of the actions of a Member of *Seimas*.⁴⁹ This number of impeachments of members of parliament is relatively high in a comparative context. The only comparable example is Slovenia, where a large number of impeachments of members of the government were initiated, but they were unsuccessful.⁵⁰

The Constitutional Court's first conclusion on the constitutionality of the actions of Members of *Seimas* was adopted on 27 October 2010.⁵¹ The Constitutional Court found that the actions of 2 Members of *Seimas* had grossly violated the Constitution and their oath of office: 1) the actions of A. Sacharukas (the use of certificate of the other Member of *Seimas* in plenary sittings of the *Seimas* and deliberately voting on his behalf 8 times) contravened the Constitution; 2) the actions of the L. Karalius (his departure on a trip abroad and his consequent absence without a justifiable reason from plenary sittings of the *Seimas*, which were held in the *Seimas* Committee on Health Affairs) violated the Constitution. However, after the Constitutional Court delivered the conclusion that the actions of these two members of *Seimas* were in conflict with the Constitution, the *Seimas* revoked – through impeachment proceedings – the mandate of only one of those two members of *Seimas*. After the *Seimas* voting, A. Sacharukas retained his mandate as a Member of *Seimas*.

After several years, in its conclusion of 3 June 2014,⁵² the Constitutional Court recognised that by absenting herself from 64 plenary sittings of the *Seimas* and 25 sittings of the Committee on Law and Order of the *Seimas* in 2013 without

⁴⁵ Koker, P. Impeachment in Central and Eastern Europe, p. 247.

⁴⁶ Ibid., p. 249.

⁴⁷ Ginsburg, T., Huq, A., Landau, D. The Uses and Abuses of Presidential Impeachment, p. 58.

⁴⁸ For more on this case and its further consequences, see: Neuman, G. L. Impeachment, Disqualification.

⁴⁹ The decision of the Constitutional Court of the Republic of Lithuania of 10 December 2016 m. gegužės 10 d. No. KT13-S6/2016.

⁵⁰ Koker, P. Impeachment in Central and Eastern Europe, p. 251.

⁵¹ The conclusion of the Constitutional Court of the Republic of Lithuania of 27 October 2010 m. Žin., 2010, No. 128-6545.

⁵² The conclusion of the Constitutional Court of the Republic of Lithuania of 3 June 2014. TAR, 2014-06-05, No. 7164.

a justifiable reason, N. Venckienė (a Member of *Seimas*) had discredited the authority of the *Seimas* as the representative of the nation, broken her oath of office, and grossly violated the Constitution. Subsequently, the *Seimas* revoked the mandate of this Member of *Seimas* through impeachment proceedings.

In its conclusion of 19 December 2017,⁵³ the Constitutional Court investigated and assessed the actions of the Member of *Seimas*, K. Pūkas, which were referred to in the conclusion of the *Seimas* Special Investigation Commission and which demeaned the dignity of the persons holding the position of the Assistant Secretary of *Seimas* and the persons applying for this position and interfered with their private life, and which discriminated against them. Having assessed the actions of K. Pūkas, the Court concluded that his actions could be considered as harassment based on sex and sexual harassment. The conclusion stated that K. Pūkas had committed a gross violation of the Constitution and had broken his oath of office by his actions. Following this conclusion, this Member of *Seimas* resigned from the *Seimas* himself.

In the same year, the Constitutional Court also examined the constitutionality of the actions of another Member of *Seimas*. By its conclusion of 22 December 2017,⁵⁴ the Constitutional Court found that *Seimas* Member M. Bastys had grossly violated the Constitution and breached his oath. In this conclusion, the Constitutional Court held that one of the actions of a Member of *Seimas* M. Bastys was in conflict with the Constitution insofar as, in providing answers to the questionnaire for persons who are candidates to obtain authorization to handle or access classified information, specifically in replying to the question “Do you know (did you know) any persons who are working (worked) in the intelligence or security services or related institutions of other states? If so, provide information in this regard”, M. Bastys concealed his relationships with a former KGB official; in this way, having violated the requirement of the Law on State Secrets and Official Secrets not to conceal information about relationships affecting the decision to grant authorization to handle or access classified information, and acting in bad faith, he sought to obtain authorization to handle or access classified information; upon obtaining this authorization, due to his relationships, he could pose a threat to the security of state secrets. However, the *Seimas* failed to reach the necessary number of votes to revoke the mandate of *Seimas* member M. Bastys.

This decision of the *Seimas* was followed, on March 2018, by an outdoor rally attended by nearly 5000 people. The protesters submitted to the *Seimas* a list of requirements, which contained the demand that “the legal acts in force be amended so that, after the Constitutional Court gives a conclusion that a Member of *Seimas* has grossly violated the Constitution or breached the oath of a Member of *Seimas*, it would no longer be necessary for the *Seimas* to adopt a separate resolution for removing the person concerned from office or revoking the mandate of a Member of the *Seimas*”.⁵⁵ The highest state officials expressed their agreement with this demand. For example, after the events referred to above, the then Prime Minister S. Skvernelis

⁵³ The conclusion of the Constitutional Court of the Republic of Lithuania of 19 December 2017. TAR, 2017-12-19, No. 20413.

⁵⁴ The conclusion of Constitutional Court of the Republic of Lithuania of 22 December 2017. TAR, 2018-01-02, No. 60.

⁵⁵ *Pūkenė, R.* Peticijos reikalavimai atmetami vienas po kito: Seimas nepritarė siūlymui atvirai balsuoti per apkaltą [Petition demands are rejected one by one: the *Seimas* rejects the proposal for an open impeachment vote]. Delfi.lt 20 March 2018. Available: <https://www.delfi.lt/news/daily/lithuania/peticijos-reikalavimai-atmetami-vienas-po-kito-seimas-nepritare-siulymui-atvirai-balsuoti-per-apkalta-77482651> [last viewed 25.01.2025].

announced his intent to register constitutional amendments providing that “a Member of *Seimas* could be removed from the Parliament through impeachment proceedings by a decision of the Constitutional Court, without a vote by the members of *Seimas*”. He claimed then that such a constitutional amendment would allow similar disgraceful situations to be avoided in the future.⁵⁶ Following these events, this Member of Parliament himself resigned.

On 5 December 2023,⁵⁷ in another impeachment case, the Constitutional Court stated that the action of the Member of *Seimas* P. Gražulis – deliberately voting for another Member of *Seimas* – was contrary to the Constitution. By this action, P. Gražulis has grossly violated the Constitution and broken his oath of office. Subsequently, the *Seimas* revoked the mandate of this Member of *Seimas*.

And so far, the last Constitutional Court conclusion in the impeachment cases was issued on 25 April 2024.⁵⁸ This case and its subsequent consequences have caused perhaps the most significant public and international resonance and outrage and raised new questions about improving the legal regulation of the impeachment model established in Lithuania. The Constitutional Court gave the conclusion recognising the actions of Member of *Seimas* R. Žemaitaitis – his statements published on the Facebook social network and in the mass media by which the information of contemptuous and ridiculing content and, thus, degrading human dignity had been deliberately, purposefully, and systematically disseminated thereby demonstrating hatred towards persons on the grounds of their nationality – to be in conflict with the Constitution. By these actions R. Žemaitaitis had breached the oath and grossly violated the Constitution. The Constitutional Court noted that descriptions and quotations degrading human dignity, as well as statements of an intolerant nature between persons belonging to different national communities, as well as statements that undermine the tragedy of the Holocaust demonstrated hatred against a group of people who were singled out based on nationality.

Following this Constitutional Court’s conclusion, the Parliament had to vote on the revocation of R. Žemaitaitis mandate. If the *Seimas* had revoked his mandate, this Member of *Seimas* would not only have lost his mandate, but also would have been unable to hold any other position requiring an oath for 10 years after the revocation of the mandate (including the position of Member of *Seimas*). However, to avoid these consequences, R. Žemaitaitis submitted his resignation as a Member of *Seimas* before this voting.⁵⁹ He was thus able to take part in the *Seimas* elections in the autumn of the same year. R. Žemaitaitis founded a new political force, “Nemuno aušra”, which performed well in the *Seimas* elections and signed a coalition agreement with the Social Democratic Party of Lithuania and the Democratic Union “In the Name of Lithuania”. This coalition with the R. Žemaitaitis party caused a wave of resentment

⁵⁶ Po skandalingo sprendimo Skvernelis inicijuos Konstitucijos pataisas [Skvernelis to initiate amendments to the Constitution after scandalous decision]. Delfi.lt, 14 March 2018. Available: <https://www.delfi.lt/paieska> [last viewed 25.01.2025].

⁵⁷ The conclusion of the Constitutional Court of the Republic of Lithuania of 5 December 2023 No. KT100-11/2023.

⁵⁸ The conclusion of the Constitutional Court of the Republic of Lithuania of 25 April 2024, No. KT37-12/2024.

⁵⁹ R. Žemaitaitis atsiuntė VRK prašymą atsisakyti Seimo nario mandato [R. Žemaitaitis sends a request to resign as a Member of the *Seimas*]. 15min.lt, 29 April 2024. Available: https://www.15min.lt/naujiena/aktualu/lietuva/r-zemaitaitis-atsiunte-vrk-prasyma-atsisakyti-mandato-56-2232590?utm_medium=copied&utm_medium=copied [last viewed 25.01.2025].

in Lithuania, and was also criticised by Lithuania's foreign partners.⁶⁰ Two mass protests took place outside the *Seimas* against the participation of R. Žemaitaitis' party "Nemuno aušra", which is famous for its anti-Semitic statements, in the ruling coalition. People dissatisfied with the political turmoil also joined these protests in Kaunas and Tauragė stating: "We are gathering to show that there are people who believe that there must be red lines and criteria of decency in politics. One of them is zero tolerance of anti-Semitism."⁶¹

Thus, in all of these seven conclusions, the Constitutional Court ruled that the actions of the officials grossly violated the Constitution. In other impeachment proceedings initiated in Lithuania, the Constitutional Court did not deliver its conclusions but was in its own way involved by adopting rulings on the constitutionality of the relevant resolutions of the *Seimas* or decrees of the President of the Republic.⁶²

The examples discussed above show that the spectrum of actions declared unconstitutional by the Constitutional Court in impeachment cases is very wide, ranging from unlawful granting of citizenship, sexual harassment, demonstrating hatred towards persons on the basis of their nationality, to voting in the name of another Member of *Seimas* and absenting oneself from the *Seimas* plenary sessions without a justifiable reason. However, certain actions of officials have been found to be unconstitutional on more than one occasion: in two conclusions, the Constitutional Court has found that Members of *Seimas* have grossly violated the Constitution by absenting themselves from plenary sittings of the *Seimas* without a justifiable reason, and in two others by voting in the name of another Member of *Seimas*. These tendencies show that although the Constitutional Court has already qualified certain actions as a gross violation of the Constitution and a violation of the oath, Members of *Seimas* do not learn from these cases and repeat the same violations.

⁶⁰ Valionytė, M. Dėl Žemaitaičio pasisakė ir Izraelis [Israel has also expressed its position on Žemaitaitis]. Delfi.lt, 9 November 2024. Available: <https://www.delfi.lt/news/politics/del-zemaitaicio-pasisake-ir-izraelis-120063516> [last viewed 25.01.2025].

⁶¹ Platurytė, D. Žmonės protestavo prieš Žemaitaitį valdžioje, Paluckas gavo nuvytusią rožių [People protested against Žemaitaitis in power, Paluckas received wilted roses]. Lrt.lt, 21 November 2024. Available: <https://www.lrt.lt/naujienos/lietuvoje/2/2418975/zmones-protestavo-pries-zemaitaiti-valdzioje-paluckas-gavo-nuvelytusiu-roziu?srsId=AfmBOoowoC0VCTpJM7GC7khJlge32DKUCab84nRKOkgfmeO--yU9MN7%E2%80%93%20LRT> [last viewed 25.01.2025].

⁶² In October 1998, impeachment proceedings were initiated against *Seimas* member A. Butkevičius, but this motion was rejected. A group of Members of *Seimas* applied to the Constitutional Court regarding the constitutionality of a resolution of the *Seimas* which had refused to initiate impeachment proceedings on the grounds that the *Seimas* had already chosen one of the possible procedures – it had consented to apply criminal liability to *Seimas* member Butkevičius and, therefore, could not consider the question of initiating impeachment proceedings. In its ruling of 30 March 2000, the Constitutional Court held that the disputed resolutions of the *Seimas* had not been in conflict with the Constitution. The Constitutional Court stated that, having adopted a resolution for holding the *Seimas* member concerned criminally liable, the *Seimas* could not begin preparatory actions for impeachment proceedings until the question of the criminal liability of the said member of the *Seimas* had decided by the legal authorities – investigation bodies and the court. In November 1998, Butkevičius was convicted of large-scale fraud. In June 1999, impeachment against Butkevičius took place, but Butkevičius did not lose his mandate as a member of the *Seimas*.

In its ruling of 15 April 2004, the Constitutional Court assessed the constitutionality of a decree of the President of the Republic on a proposal to institute impeachment proceedings against *Seimas* member A. Paulauskas. The Constitutional Court ruled the said presidential decree unconstitutional as well as Article 230(1) of the Statute of the *Seimas*, to the extent that it granted the right to propose to the *Seimas* the initiation of impeachment proceedings against a concrete individual to the President of the Republic and also to the Judicial Court of Honor if the case concerns a justice of the Supreme Court or the president or judges of the Court of Appeal.

To summarise the final consequences of the cases discussed, it should be noted that in four of these cases, the *Seimas* revoked the mandates of the Members of *Seimas* and the mandate of the President of the Republic; one Member of *Seimas* retained his mandate; three Members of *Seimas* resigned of their own accord (two of them resigned before voting by the *Seimas* on revocation of his mandate; and one resigned after voting by the *Seimas* which did not achieve the required number of votes for revoking the mandate). It is important to note that there have been two cases where the *Seimas* took a decision other than that which follows from the respective conclusion of the Constitutional Court. It is difficult to identify the exact reasons that cause such a divergence of positions between the Constitutional Court and the *Seimas*. Such situations may occasionally be attributed to the nature of the *Seimas* as a political, rather than a strictly legal, institution, where decisions are primarily the result of political bargaining and compromise.

The aforementioned examples related to the implementation of conclusions given by the Constitutional Court in impeachment cases and the subsequent public resentment show that there are preconditions to speak about the amendment of existing constitutional legal regulation, according to which the Constitutional Court presents conclusions on issues specified in the Constitution and, on the basis of these conclusions, the *Seimas* takes a final decision, as well as changes to other related legal regulation.

3. Proposals for amending the legal regulation of the process of impeachment

Given Lithuania's current experience with impeachment cases, one might be tempted to criticize the drafters of the Constitution for their lack of foresight or the contradictory nature of the impeachment model, which involves two institutions of different natures. However, many of the problems could not have been foreseen at the time the Constitution was drafted. When the drafters of the 1992 Constitution designed the instrument of impeachment, they saw it primarily as a preventive measure, knowing how rarely such a procedure for removing officials from office for certain offences is used in the democratic world.⁶³ No one could have predicted that Lithuania would have such a wide range of impeachment cases.

The current legal reality in Lithuania is that in the event of a gross violation of the Constitution, it is the *Seimas* that decides, without any constraints, on the most important issue of all – whether to impose the constitutional sanction of removal from office, with all its consequences, or whether to allow a person to continue to hold office. In the latter case, one is immediately confronted with the strange reality that, even after having breached the Constitution, the person continues to exercise his or her authority in the most important matters of the state.⁶⁴

It should be noted that after the impeachment process of R. Žemaitaitis, the *Seimas* again heard initiatives to change the constitutional regulation of the impeachment. The Speaker of *Seimas*, S. Skvernelis, wants to go back to the idea that if the Constitutional Court were to find that a Member of *Seimas* or other official had seriously violated the Constitution or broken his oath of office, he would lose his

⁶³ Jarašiūnas, E. Lietuvos Respublikos Konstitucinis, p. 38.

⁶⁴ Vecerskyte-Brosel, J. Apkaltos konstitucinio, p. 16.

mandate without a vote in the *Seimas*.⁶⁵ Of course, this tendency is not a sufficient reason by itself to expand the powers of the Lithuanian Constitutional Court; there must be a set of need, preconditions and possibilities to justify such reform.

Traditionally, impeachment has been described in terms of “special parliamentary procedure”, “special legal procedure in parliament”, “parliament’s judicial (or quasi-judicial) function”, “political justice”.⁶⁶ This model of a purely parliamentary procedure originates in the USA, where only the House of Representatives has the exclusive right to initiate impeachment proceedings and only the Senate can consider all impeachment cases, and where the impeachment process can certainly be characterised as a “political justice” or a “parliamentary quasi-judicial process”.⁶⁷ While there were no major criticisms of this model in the 19th or the first half of the 20th century, in the second half of the 20th century its main flaw began to be apparent: the political institution is dealing with legal issues; members of parliament are not legal professionals, even though in this process they have to legally qualify the actions under investigation.⁶⁸

It is clear that a non-biased judicial investigation is superior to a political one. As early as 2006, after the impeachment of the President, Lithuanian constitutional scholars argued that impeachment is an exercise of constitutional liability, and therefore can only be performed most objectively and competently by a constitutional review institution, while a political institution (the *Seimas*) is best suited to play only one role in impeachment – that of accusing the person.⁶⁹

This is why the majority of European constitutional courts give the final decision in impeachment proceedings (Germany,⁷⁰ Austria,⁷¹ the Czech Republic,⁷² Slovenia,⁷³ Italy⁷⁴), while only Romania⁷⁵ is among the countries where the Constitutional Court gives only an advisory opinion on the issue. It is also stated in the academic literature that in the majority of CEE countries the final decision to remove the president from office is taken by the constitutional courts⁷⁶. Romania⁷⁷ and Slovakia⁷⁸ allow the removal of the president through referendum depending on charges presented.

An example of optimal constitutional regulation of impeachment is enshrined in the German Basic Law.⁷⁹ According to Article 61(1) of the German Basic Law, the Bundestag or the Bundesrat can refer the Federal Constitutional Court,

⁶⁵ *Jurčenkaitė, I.* Skvernelis nori atgaivinti seną idėją dėl apkaltos: nutaikyta – ne į Žemaitaitį [Skvernelis wants to revive an old idea for impeachment: not targeting Žemaitaitis]. Delfi.lt, 25 November 2024. Available: <https://www.delfi.lt/news/daily/politics/skvernelis-nori-atgaivinti-sena-ideja-del-apkaltos-nutaikyta-ne-i-zemaitaiti-120066521> [last viewed 25.01.2025].

⁶⁶ *Jarašiūnas, E.* Lietuvos Respublikos Konstitucinis, p. 36.

⁶⁷ *Večerskytė-Brosel, J.* Apkaltos evoliucija, p. 399.

⁶⁸ *Jarašiūnas, E.* Lietuvos Respublikos Konstitucinis, p. 37.

⁶⁹ *Ibid.*, p. 38.

⁷⁰ Article 61 of the Basic Law for the Federal Republic of Germany.

⁷¹ Article 142 of the Austrian Constitution.

⁷² Article 65 of the Constitution of the Czech Republic.

⁷³ Articles 109 and 119 of the Constitution of the Republic of Slovenia.

⁷⁴ Article 135 of the Italian Constitution.

⁷⁵ Article 95 of the Romanian Constitution.

⁷⁶ *Koker, P.* Impeachment in Central and Eastern Europe, p. 250.

⁷⁷ Article 95 of the Constitution of Romania.

⁷⁸ Articles 84, 89 of the Constitution of Slovak Republic.

⁷⁹ Basic Law for the Federal Republic of Germany.

charging the Federal President with a deliberate violation of the Basic Law or another federal law. Such an indictment may be brought if at least one-quarter of the members of the Bundestag or Bundesrat so request. A resolution on the indictment may be adopted by a two-thirds majority of the members of the Bundestag or two-thirds of the members of the Bundesrat. The prosecution shall be represented by a representative of the prosecuting authority. If the Federal Constitutional Court finds that the Federal President is guilty of wilful violation of the Basic Law or any other federal law, it may declare him to be out of office.

The Austrian Constitutional Court has similar powers. Under Article 142 of the Austrian Constitution,⁸⁰ it hears cases concerning charges brought against the officials listed in that article of the Constitution. The Constitutional Court is the only institution to deal with such cases.

Thus, under the American model, the final decision on whether to revoke an official's mandate is taken by Parliament, while under the German (and Austrian) model it is the Constitutional Court.⁸¹ In Lithuania, the intermediate model is chosen: the *Seimas* initiates the impeachment process, addresses the Constitutional Court and, after receiving its conclusion, takes the final decision. The academic literature stresses that a shift to the German model would give impeachment the characteristic of a constitutional rather than a political liability, and this would prevent paradoxical legal situations where the Constitutional Court finds that the actions of an official are unconstitutional, but impeachment would be unsuccessful.⁸² Therefore, it is necessary to agree with the opinion of the Speaker of *Seimas* regarding the amendment of Lithuanian constitutional regulation on this issue.

Nevertheless, it can be presumed that there is no need for this problem to be limited solely to cases involving impeachment of Members of *Seimas*. According to the Lithuanian Constitution, the Constitutional Court shall present conclusions not only on the compliance with the Constitution of concrete actions of *Seimas* members or other State officials against whom impeachment proceedings have been instituted but also on three other issues (Art. 105(3)): 1) the violation of election laws during presidential elections or elections to the *Seimas*; 2) whether the President of the Republic of Lithuania's health is not limiting his or her capacity to continue in office; 3) the conformity of international agreements of the Republic of Lithuania with the Constitution.

Thus, the Lithuanian Constitution and the Law on the Constitutional Court⁸³ provide for different procedures following which the Constitutional Court reviews the compliance of legal acts with the Constitution⁸⁴ as well as the procedures under which the Constitutional Court adjudicates in other cases assigned to its competence, that is, gives conclusions in the cases established by the Constitution and laws.⁸⁵ Examination of inquiries requesting the Constitutional Court to give a conclusion (including those in impeachment cases) can be regarded as the facultative category of powers exercised by the Constitutional Court, first of all, due to the fact that review

⁸⁰ Constitution of Austria.

⁸¹ *Bacevičius, J.* Apkaltos institutas, p. 102.

⁸² *Ibid.*, p. 102.

⁸³ The Law on the Constitutional Court of the Republic of Lithuania (03.02.1993).

⁸⁴ Art. 102(1), 105(1–2), 106(1–4) and 107(1) of the Constitution; Art. 63–72 of the Law on the Constitutional Court.

⁸⁵ Art. 105(3), 106(5) and 107(3) of the Constitution; Art. 73–83 of the Law on the Constitutional Court.

of the constitutionality of legal acts, rather than any other powers exercised by constitutional justice institutions, is generally considered to form the category of their main powers, constituting their *raison d'être*, in the absence of which constitutional justice would not be possible at all.⁸⁶ Secondly, the absolute majority of cases in the Constitutional Court are initiated specifically regarding the conformity of legal acts with higher-ranking legal acts, although primarily – the Constitution.

As mentioned before, the Constitution stipulates that, on the basis of the conclusions given by the Constitutional Court (including in impeachment cases), a final decision on the issues set out in the third paragraph of Article 105 of the Constitution is taken by the *Seimas*. Under the Law on the Constitutional Court, conclusions given by the Constitutional Court are final and thus not subject to appeal. Differently from rulings,⁸⁷ conclusions are not proclaimed in the name of the Republic of Lithuania. Therefore, previously it used to be claimed that rulings are binding on all legal subjects; whereas conclusions are presented only to the particular institution that has filed the inquiry, so that they differ from rulings in their legal force and effect. But is that really so?

Initially, conclusions were viewed as non-binding and less authoritative than Constitutional Court rulings. However, a landmark conclusion of 31 March 2004 on the impeachment of the President of the Republic fundamentally shifted this view. In this conclusion, the Constitutional Court clarified that its conclusions are binding on the *Seimas* insofar as the Constitution does not allow the *Seimas* to question the Court's findings on whether specific actions violate the Constitution. Instead, the *Seimas'* role is limited to determining the political consequences, such as whether to remove an official from office. Following this interpretation, legal scholars noted a shift: prior to 2004, the *Seimas* could engage in further deliberations and evidence-gathering after receiving a conclusion. Post-2004, the *Seimas* was restricted to making political decisions based on the legal findings of the Constitutional Court, without questioning their validity.⁸⁸ This underscores a conceptual shift from treating conclusions as advisory to recognizing them as integral components of constitutional liability.

The Constitutional Court has further reinforced that all its acts – rulings, conclusions, and decisions – carry binding authority as they interpret the Constitution and establish official constitutional doctrine. Consequently, it can be assumed that the significance and legal force of the reasoning part of conclusions is the same as that of rulings adopted by the Constitutional Court.⁸⁹ In this respect, it would seem that the operative part of a conclusion, wherein the conclusion itself is formulated, should also have binding legal status, since it is based on official constitutional doctrine; however, the drafters of the Constitution established it in a different way.

The constitutional regulation, according to which the Constitutional Court gives conclusions on the issues specified in the Constitution while, on the basis of its conclusions, the *Seimas* takes a final decision, poses a not insignificant part

⁸⁶ Ginsburg, T., Elkins, Z. *Ancillary Powers of Constitutional Courts*. Chicago: University of Chicago Law School, 2008, pp. 1431–1461. Available: http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2439&context=journal_articles [last viewed 22.01.2025].

⁸⁷ Rulings are adopted in cases regarding the review of the constitutionality of legal acts.

⁸⁸ Šileikis, E. *Alternatyvi konstitucinė teisė* [Alternative constitutional law]. Vilnius: Teisinės informacijos centras, 2005, p. 504.

⁸⁹ The decision of Constitutional Court of the Republic of Lithuania of 20 September 2005. *Žin.*, 2005, 113–4132; the ruling of Constitutional Court of the Republic of Lithuania 28 March 2006. *Žin.*, 2006, 36–1292.

of problems related to implementation of conclusions given by the Constitutional Court. Therefore, the power to conclusively decide on these questions should be conferred exclusively on an independent judicial institution – the Constitutional Court – but not on an institution that may be directly interested in the outcome of a certain question.

This position is reinforced by previously discussed arguments: the tendency prevailing in European states to give establishing force to the decisions of constitutional courts on questions analogous or similar to matters on which the Lithuanian Constitutional Court may issue conclusions (including impeachment cases); the independence and impartiality of the Constitutional Court; the development of official constitutional doctrine on the legal force of conclusions given by the Constitutional Court; the attitude of Lithuanian legal thinking towards the legal force of conclusions.

The arguments discussed above suggest that such changes to the constitutional framework are necessary. However, it is unlikely that the *Seimas* would be inclined to adopt such constitutional amendments, thereby limiting its powers with respect to the Constitutional Court. Therefore, other legislative amendments should be considered. Such amendments might not completely solve the problems discussed, but would at least partially mitigate them. It has been mentioned that Article 243(1) of the Statute of *Seimas* provides for the possibility for a person subject to impeachment to resign from his/her office or to renounce his/her mandate as a Member of *Seimas* at any point during the impeachment process, but only before the vote in the *Seimas*. Thus, even after the Constitutional Court concludes that a Member of *Seimas* or other public official has violated the Constitution or broken his oath, such an official can resign and avoid one of the consequences of impeachment – the 10-year “cooling-off period” – and participate in the next *Seimas* elections, which may be held quite soon. Such a legal regulation undermines the meaning of the institute of resignation since an official resigns already knowing the legal assessment of their actions and thus trying to avoid some of the consequences of impeachment, but not in order to take responsibility for his/her actions. Therefore, amendments to the Statute of the *Seimas* are proposed, which would allow an impeached official to resign only before the Constitutional Court has issued its conclusion in the impeachment cases, or even before the proceedings in the Constitutional Court have begun. The latter option would also prevent wasting of resources of the Constitutional Court.

There are other ways to improve the regulation of the impeachment proceedings, and one important matter to address is the suspension of powers for officials under impeachment. It is suggested that the Constitutional Court should have the authority to temporarily suspend the powers of Members of *Seimas* or other state officials while their actions are being reviewed for constitutionality during impeachment proceedings. Currently, Article 10 of the Law on the Constitutional Court allows the Court to suspend the powers of its own justices if impeachment proceedings are initiated against them, following the conclusion of a special investigation. However, there is no similar provision for other officials, such as the Members of *Seimas*, the President, or judges of the Supreme Court and Court of Appeal. Officials facing impeachment often have access to administrative resources and make important national decisions. Suspending their powers during the process would help prevent potential misuse of resources or decisions that could have negative consequences. This change would enhance the fairness and effectiveness of the impeachment process.

Summary

The Lithuanian impeachment model can be described by these main features: 1) two institutions are involved in the impeachment proceedings in Lithuania: the Constitutional Court decides whether a person's actions contradict (or do not contradict) the Constitution and whether these actions have violated the Constitution grossly, and the *Seimas* decides whether to remove a person from office for actions that contradict the Constitution; 2) compared to other European countries, the list of grounds for impeachment in Lithuania is quite broad: impeachment is possible for a gross violation of the Constitution, for violation of the oath of office, or if it is found that a crime has been committed; 3) in a comparative context, Lithuania also has a fairly wide list of officials who can be removed from their positions by impeachment proceedings: the President of the Republic, the President and judges of the Constitutional Court, the President and judges of the Supreme Court, the President and judges of the Court of Appeal, and the Members of *Seimas*; 4) Lithuania also provides for special sanctions in the impeachment process: in addition to being removed from office, persons removed from office by impeachment proceedings for a gross violation of the Constitution or for breaking their oaths of office are forbidden for a certain period of time to hold any office provided for in the Constitution, which is linked to the taking of an oath as provided for by the Constitution.

The Constitutional Court has adopted seven conclusions on the constitutionality of the actions of Members of *Seimas* and other public officials who are the subject of impeachment proceedings. In all of these conclusions, the Constitutional Court held that the actions of the officials violated the Constitution. One of the conclusions found that the actions of the President of the Republic were unconstitutional and that these actions constituted a gross violation of the Constitution. The other six conclusions found that the actions of the Members of *Seimas* were unconstitutional and that these actions constituted a violation of the oath and a serious violation of the Constitution. The spectrum of actions declared unconstitutional by the Constitutional Court in impeachment cases is very wide, ranging from unlawful granting of citizenship, sexual harassment, demonstrating hatred towards persons based on their nationality, to voting in the name of another Member of *Seimas* and absenting oneself from the *Seimas* plenary sessions without a justifiable reason.

In four of these cases, the *Seimas* revoked the mandates of the Members of *Seimas* and the mandate of the President of the Republic; one Member of *Seimas* retained his mandate; three Members of *Seimas* resigned of their own accord (two of them resigned before voting in the *Seimas* on revocation of their mandate; and one resigned after voting by the *Seimas* which did not achieve the required number of votes for revoking the mandate). There have been two cases where the *Seimas* took a decision other than that which follows from the respective conclusion of the Constitutional Court.

The constitutional regulation, according to which the Constitutional Court gives conclusions on the issues specified in the Constitution while, on the basis of its conclusions, the *Seimas* takes a final decision, poses a significant part of problems related to the implementation of conclusions given by the Constitutional Court in impeachment cases. Therefore, the power to conclusively decide on this issue should be conferred exclusively on an independent judicial institution – the Constitutional Court. This position is also reinforced by the tendency prevailing in European states to give establishing force to the decisions of constitutional courts in impeachment cases; the independence and impartiality of the Constitutional Court;

the development of official constitutional doctrine on the legal force of conclusions given by the Constitutional Court; the attitude of Lithuanian legal thinking towards the legal force of conclusions.

However, it is unlikely that the *Seimas* would be inclined to adopt such a constitutional amendment, thereby limiting its powers with respect to the Constitutional Court. Therefore, other legislative amendments should be considered that might not completely solve the problems discussed, but would at least partially mitigate them. Among other things, amendments to the Statute of *Seimas* are proposed that would allow an official in impeachment proceedings to resign only before the Constitutional Court has issued its conclusion in the impeachment proceedings or even before the Constitutional Court proceedings have begun, thus preventing the person subject to impeachment proceedings from escaping some of the consequences of the impeachment proceedings while already knowing the legal assessment of their actions.

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Satisfying Modern Needs Associated with Use of Residential Real Estate Through Classical Concepts of Property Law (Real Burden and Servitude): Latvian Example

Dr. iur. Erlens Kalniņš

Faculty of Law, University of Latvia

Assistant Professor at the Department of Civil Law

E-mail: erlens.kalnins@lu.lv

The article is dedicated to the issue of legal solutions that real estate developers in Latvia can and in practice often do use to satisfy modern needs related to the use of residential real estate, i.e. 1) management of common areas of a given residential area (access roads, streets, parking lots, parks, playgrounds, common utility networks, etc.) carried out by the developer, and proportional participation in the coverage of management expenses by all real estate owners owning properties in the area; 2) the preservation of the unified architectural and aesthetic environment of the specific residential area, created by the developer, and the prevention of activities that could “damage” this environment, which could be carried out by property owners; 3) the need for developers of apartment buildings to accommodate, to the maximum extent possible, the individual wishes of potential purchasers of apartment properties to acquire together with the particular apartment property also the right to exclusive use of a particular part (element) of the “jointly owned part” of all apartment owners. The author concludes that the most suitable and effective long-term solutions are the classical concepts of the property law – real burden and servitude, if they are skilfully adapted to meet the aforementioned modern needs.

Keywords: real burden, real servitude, *servitus ne prospectui officiat*, right of view, apartment property, right of exclusive use, owner’s servitude.

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Introduction

As evidenced by Latvian practice, residential real estate developers may aim not only to establish a given project, such as a village of individual houses or a block of apartment buildings with a unified infrastructure, to sell the newly established real estate objects and leave the site to pursue another project, but also to retain a certain degree of control over the particular residential area (village or block) in order to manage and develop it further, including by gradually expanding and improving the area. In addition, such an area may contain buildings of various types, such as individual houses, terraced houses, low-rise or high-rise apartment buildings, commercial buildings (hotels, shops, cafés, etc.), educational buildings, sports buildings, car parks and sports grounds, parks with greenery, walking paths, ponds, playgrounds and other active recreation areas. Moreover, such a real estate complex can be developed as a specifically planned and purposefully created residential area, not only with a common infrastructure, but also with a unified architectural and aesthetic environment, e.g., as a mixed-use village in which all buildings have a modern and unified Scandinavian architectural style.

If a real estate developer intends to continue to manage and develop the area, including the maintenance of shared access roads, streets and pavements, parking areas and parks, as well as common utility networks, he will normally have an interest in securing in advance its future claims against the owners of the properties in the area for reimbursement of the relevant management costs. If, in addition, such a developer of a particular area has decided, for example, not to allow incompatible departures from the planned and purposefully unified architectural style of all buildings, he will normally have an interest to respectively limit further construction on all properties in the area in a timely manner.

Finally, any developer of apartment buildings must take into account that, after the division of such real estate into separate apartment properties, which are independent real estates, the co-ownership and common use of all apartment owners continues to apply not only to the external envelope and internal load-bearing structures of the particular building, but also the common use premises (including stairwells, basements, attics) and the entire land plot on which the building is situated. Therefore, in order to make the apartment properties for sale more suitable for the buyer's needs, such a developer is usually interested in ensuring at an early stage that, depending on the individual wishes of each buyer, it is not only able to purchase a specific apartment property from the developer, but also to acquire the right to exclusive use of a separate part (element) of the “jointly owned part”, such as a certain storage room in the basement of the building or a certain parking space in the courtyard of the building.

This article examines the legal solutions that can be used under Latvian law and are often used in practice by developers of residential real estate to meet the above-mentioned needs, and – as evidenced by past practice – the most appropriate and

effective of these solutions are the classical concepts of the property law regulated by the Latvian Civil Law of 1937¹ (hereafter – CL), if they are skilfully adapted to meet the aforementioned modern needs.

1. Entitlement to reimbursement of management expenses

As indicated above, where a residential real estate developer has decided to retain a degree of control over a residential area with common infrastructure which it has created in order to manage and develop it further, such developer, as manager, will usually have an interest in securing in a timely manner its future claims against the owners of the properties in the area for reimbursement of the relevant management expenses.

1.1. Cost items of management expenses

The variety of cost items of management expenses depends on each specific situation, and most of the management activities listed below are carried out because a corresponding obligation is imposed either by law or by the local municipality's regulations on the territory usage and development.

In particular, in a residential area with a common infrastructure established by a real estate developer, such as a village of private houses or a block of apartment buildings, it is necessary to ensure the operation of locally situated but common usage utility networks (such as local water supply and sewerage systems), as well as regular inspection, maintenance and repair of such utility networks. It is also necessary to maintain common access roads, streets, pavements and squares by ensuring their regular technical and sanitary maintenance, routine or extraordinary repairs, clearing of roads, streets and pavements of snow and ice in winter and spreading of anti-skid materials. Maintenance of greenery in common areas, collection of litter, fallen leaves, dead plants and branches, mowing of lawns, timely removal of various health-threatening environmental pollutants, litter and debris that pose a risk to human health or life is required. If the area includes parks with greenery, walking paths, ponds, playgrounds and other active recreation areas, these common usage elements also require appropriate and regular inspection, technical and sanitary maintenance, and routine or extraordinary repair. Equally important is the provision and maintenance of electric lighting for driveways, streets and pavements, and for walking paths in parks or squares. In addition, public safety may be ensured by 24-hour video surveillance of public open spaces, which in turn entails the maintenance of such a video surveillance system, including regular servicing, repair and upgrading, as well as the storage of the data collected.

As these management activities incur certain expenses, the developer, as the manager of the whole area, will normally have an interest in ensuring that, in

¹ The Latvian Civil Law of 28 January 1937 was elaborated, maintaining internal continuity with its predecessor – the Code of Civil Laws of the Baltic Sea Provinces (III Part of the Code of Local Laws of the Baltic Sea Provinces) of 12 November 1864, which codified the civil law in force in the territory of the Baltic Sea provinces (governorates), which in turn were based on Roman law and Germanic law (extensively on the Latvian Civil Law and its codification history: *Schwartz, Ph.* Das Lettländische Zivilgesetzbuch vom 28. Januar 1937 und seine Entstehungsgeschichte [The Latvian Civil Law of 28 January 1937 and its historical origin]. Aachen: Shaker Verlag, 2008). After the renewal of independence of the Republic of Latvia, the Latvian Civil Law was also reinstating (see *Lazdiņš, J.* Tendencies in the Development of Laws in the Republic of Latvia after the Renewal of Independence in 1990–1991. *Journal of the University of Latvia. Law*, No. 8, 2015, pp. 51–53).

the long term, all the owners of the properties in the area share these expenses in an appropriate proportion, e.g. in proportion to the size of their land plot or in proportion to the size of their co-ownership share of their apartment property.

1.2. Contractual solutions

A real estate developer who has decided to manage the residential area he has created will usually, at the same time with selling of each of the real estate objects in question, contract his right to continue to manage the “common infrastructure” or “common streets, pavements and recreational areas” (which often continue to be owned by the developer), including the right to receive from the acquirer (buyer) of the real estate in question an appropriate monthly fee as remuneration for the management services provided by the developer, which, depending on the circumstances, includes all or part of the above-mentioned cost items of management expenses.

However, the main disadvantage of such a contractual solution is that the contract concluded with the original acquirer (purchaser) of the real estate in question, which provides for his, as the other party's, obligation to pay to the developer (manager) an appropriate monthly management fee, is, as a general principle, valid and binding only on this other party and his universal successor, such as an heir (see Articles 705 CL and 1519(1) CL). At the same time, no rights or obligations of any third party arise from such a contract (see Article 1519(2) CL). Therefore, if the real estate in question is disposed by the original acquirer to another person (singular successor) by a legal transaction, the developer, as a general principle, loses its previous contractual right to receive the monthly management fee from the new owner of the real estate disposed (third party).

Developers often try to “secure” against such negative consequences by imposing a contractual obligation on the original acquirer to ensure that the subsequent acquirer, for whose benefit the original acquirer disposes of the real estate in question, also contractually undertakes to pay a monthly management fee to the developer as manager. However, also such a contractual solution, even if a contractual penalty is imposed for non-compliance with that obligation (see Article 1716 CL), does not, by its substance, provide the developer as manager with the most important right, i.e. an “irreversible” and valid right against all third parties, to receive an appropriate monthly management fee from all owners of the real estates located in the area, whoever they may be from time to time.

1.3. Real burden as a property law security

The most appropriate and efficient long-term solution to meet the practical need to oblige each owner of real estate located in a given area to pay the monthly management fee to a specific manager (as the entitled person) of that area on a permanent and recurring basis is to encumber that real estate with a real burden as a right *in rem*.

This is because, according to Article 1260 CL, “a real burden is a permanent obligation resting on real estate to repeatedly give certain performance in money, in kind or in work”. That is to say, the right of real burden, as a right *in rem* created by its registration in the Land Register (see Article 1270(2) CL), confers a legal possibility of obtaining repeated performance from each owner of the encumbered real estate, who in turn is obliged to refrain from infringing that right and to ensure that the performance of the real burden is duly given to the entitled person. Moreover, the entitled person may be either a certain natural or legal person or each owner of another real estate (see Article 1263 CL).

While the real burden is a legal concept of the medieval Germanic law that is a characteristic feature of the feudal legal system centred on property law,² because in the Middle Ages it was more convenient and profitable to attach various duties and work performance to real estate rather than to a person,³ nowadays this classical concept of the property law is most often used to secure long-term contractual claims for receipt of repeated performance.⁴ In other words, the right of real burden – similarly as the right of pledge – is a property law right to “receive or appropriate the value of a thing”, since under Article 1268 CL “real estate is responsible for the debts of the real burden”,⁵ i.e., a real burden gives the entitled person a property law priority to obtain satisfaction for untimely (overdue) real burden deliveries from the value of the encumbered real estate or the amount of money obtained by foreclosing on the real estate and selling it at forced auction on the basis of the enforcement document.

The nature and practical usefulness and suitability of the right of real burden for securing claims of a lasting nature is particularly vividly characterised by the property law durability or “permanence” of this right, since the “sale at auction of the encumbered real estate does not terminate the real burden thereon” (Article 1262 CL) and the real burden “transfers to the purchaser” (Article 2088 CL), i.e., “to each acquirer of the real estate so that he need not expressly assume it” (Article 1261 CL). According to the meaning of the above provisions, the foreclosure of the encumbered real estate and its sale by compulsory auction – unlike a right of pledge (mortgage) – does not, in principle, terminate the real burden registered in the Land Register.⁶ Therefore, upon confirmation of the auction deed, the real burden registered in the Land Register on the real estate – unlike mortgages and pledge rights, which are deleted (see Article 1380(2) CL and Article 613(5)(2) of the Civil Procedure Law) – is generally not deleted and continues to encumber the real estate.

It is no coincidence that over the last decade a practice has developed in Latvia whereby developers of residential real estate, before offering for sale the real estate

² *Sinaiskis, V.* Latvijas civiltiesību apskats. Lietu tiesības. Saistību tiesības [Latvian Civil Law Review. Property Law. Law of Obligations]. Rīga: Latvijas Juristu biedrība, 1996, p. 86; *Čakste, K.* Civiltiesības [Civil Law]. Rīga: Zvaigzne ABC, 2011, p. 122.

³ *Višņakova, G., Balodis, K.* Latvijas Republikas Civillikuma komentāri. Lietas. Valdījums. Tiesības uz svešu lietu (841.–926. p., 1130.–1400. p.) [Commentaries on the Civil Law of the Republic of Latvia. Things. Possession. Rights *in Rem* (Art. 841–926, 1130–1400)]. Rīga: Mans Īpašums, 1998, p. 148.

⁴ *Vinzarājs, N.* Lietu tiesība [Right *in Rem*]. Tieslietu Ministrijas Vēstnesis, 1938, No. 2, pp. 442–443; *Gulbis, R.* Pienākums segt dzīvojamās mājas pārvaldīšanas izdevumus un norēķināties par pakalpojumiem, kas saistīti ar dzīvokļa īpašuma lietošanu: reālnastas tiesiskā regulējuma attiecināšana kā risinājums [Obligation to Cover Administration Expenses of Residential House and to Settle Accounts for Services Related to the Use of Apartment Property: Application of the Legal Framework of the Real Burden as Solution]. In: Latvijas Republikas Satversmei – 95. Latvijas Universitātes 75. zinātniskās konferences rakstu krājums [The Constitution of the Republic of Latvia – 95. Papers of the 75th Scientific Conference of the University of Latvia]. Rīga: LU Akadēmiskais apgāds, 2017, p. 130.

⁵ Article 1268 CL further provides that each “new owner of real estate encumbered by a real burden shall pay these debts of his predecessor, but not for more than three years prior to the transfer”.

⁶ The Senate’s Judgement of 24.05.1938 No. 475. In: Latvijas Senāta spriedumi (1918–1940). 14. sējums. Senāta Civilā kasācijas departamenta spriedumi (1937–1940). Faksimilizdevums [Judgments of the Senate of Latvia (1918–1940). Volume 14. Judgments of the Civil Cassation Department of the Senate (1937–1940). Facsimile edition]. Rīga: Latvijas Republikas Augstākā tiesa, Senatora Augusta Lēbera fonds, 1998, p. 5547; *Blaese, H., Mende, S.* Das Sachenrecht. Lettlands Zivilgesetzbuch vom 28. Januar 1937 in Einzeldarstellungen. Band II, 2 [Property Law. Latvia’s Civil Code of 28 January 1937 in Individual Presentations. Volume II, 2]. Rīga: Verlag der AG “Ernst Plates”, 1940, p. 194; *Višņakova, G., Balodis, K.* Latvijas Republikas Civillikuma komentāri, p. 151.

objects in question (e.g., undeveloped or developed land plots, or apartment properties), encumber them with a real burden registered in the Land Register, which is established in favour of the developer (or a person related to the developer) as the manager of the residential area and consists of an obligation on the part of each owner of the real estates encumbered by the real burden, for example, to pay a monthly fee for the maintenance of “common streets, pavements and green areas”.⁷ The entry of such real burden reflects in a concise manner its “contents and essential attributes” (see Article 47(1)(2) and Article 51 of the Land Register Law), such as the obligation to pay a monthly “real burden fee” (“maintenance fee”), the amount of which is determined by multiplying a specific rate by the number of square metres of the encumbered real estate. Often, such entries of real burdens also contain an obligation to pay default interest or a default contractual penalty at a fixed rate (e.g., 0.1 % of the amount of the debt for each day of delay) in the event of delayed monthly payments, as well as a reference to the so-called “value hedging clause” under which the amount of the monthly payment is automatically adjusted, for example, in line with changes in the “consumer price index”.⁸

2. The right to “prevent damage” of the unified architectural and aesthetic environment

If a real estate developer is determined to maintain the unified architectural and aesthetic environment of the residential area that it has created and to avoid inappropriate departures from, for example, the planned and purposefully implemented unified architectural style of all buildings, such a developer will normally have an interest in restricting any or certain types of construction on all properties in the area in advance and in the long term, thereby ensuring that the unified architectural and aesthetic environment is not “damaged”.

2.1. How the “damage” of a unified architectural and aesthetic environment can manifest itself

The risk that the unified architectural and aesthetic environment of a given area, which has been planned and purposefully implemented, could be “damage”, for example, by the implementation of an inappropriate construction on one of the properties, arises from the nature of ownership right. In particular, the subjective ownership right, as the most complete and comprehensive right *in rem*, confers on the owner the legal possibility to use and exploit the thing belonging to him at his discretion for the increase of his/her property or for other purposes, in so far as this right is not subject to specific restrictions (see Articles 927, 1036 and 1038 CL).

Therefore, any owner of real estate, in compliance with the legal acts regulating construction, as well as the local municipality’s regulations on the territory usage and development, has the right to initiate construction on his/her real estate, for example, to construct or place a new building, to renovate or reconstruct an existing building, including changing the size of the building or part thereof, as well as to demolish an existing building or part thereof (see Article 1(2)–(12) of the Construction Law).

⁷ See, e.g., The Kurzeme Regional Court’s Judgement in case No. C33302219, para. 7.6.

⁸ See, e.g., Land Register compartment No. 100000811096 of Babīte parish [Babītes pagasta zemesgrāmatas nodalījums Nr. 100000811096]. Available: <https://www.zemesgramata.lv/lv/Search/GetFolioDataByNumber> [last viewed 07.07.2025].

Moreover, it should be borne in mind that the unified architectural and aesthetic environment can be “damaged” not only by actions that legally qualify as “construction” in the strict legal sense, i.e. as “design and construction of all types of buildings” (see Article 1(12) of the Construction Law), which are specifically regulated by the legal acts governing construction (i.e., Construction Law and its subordinate normative acts, e.g., General Construction Regulations), but rather any action which has the effect of affecting the visual appearance of real estate, including placement of a children’s playhouse, children’s playground, garden shed, greenhouse or doghouse in the yard of a private house, repainting the exterior walls of a building a different colour, installing a satellite television dish on the facade or roof of a building, placing photovoltaic or solar panels on a land plot or on the roof of a building, planting of inappropriate greenery, and similar.

2.2. The “right of view” as a property law prohibition to perform construction or otherwise affect the visual appearance of real estate

The real estate developer’s efforts to restrict further construction on the real estate objects it has developed and which are further resold through contractual solutions have the same disadvantages as its attempts to secure its right to reimbursement of management expenses through contractual solutions. Such a developer is usually a private entity, not the state or local municipality vested with legislative powers, and is therefore not competent to restrict construction in a particular area, for example by means of a generally binding behavioural prescription of a regulatory nature. Moreover, it has been recognised in case law that a general “obligation to comply with the conditions for usage of the territory” of each real estate owner imposed by the developer of a particular area cannot be the subject of a real burden in favour of the developer, among other reasons because, under Article 1260 CL, a real burden can only be an active or positive action and not also abstaining from certain actions, including the abstaining from performance of construction.⁹

Therefore, the only private law solution that is appropriate and sufficiently effective to oblige each owner of real estate to refrain from certain activities on his real estate, including refraining from any or certain types of construction, is to encumber the real estate with an appropriate so called “negative real servitude” (*servitus in non faciendo*) for the benefit of each owner of another or “dominant” real estate (see Articles 1130, 1131, 1141 CL). As recognised in legal doctrine and case law, a negative real servitude confers on each owner of the dominant real estate the legal possibility of prohibiting the owner of the real estate encumbered by such servitude or the “servient” real estate from carrying out on the real estate belonging to him certain actions of a real nature which, in the absence of the servitude, he could carry out by exercising his ownership right over his real estate. Thus, a negative servitude restricts the right of each owner of the real estate to use and enjoy the thing belonging to him as he sees fit, including “to derive all possible benefits from it” (see Articles 927 and 1038 CL), since he is obliged to refrain from carrying out an action on his real estate which is prohibited by the established servitude.¹⁰

Moreover, Latvian law, based on the Roman law tradition, expressly provides for such a negative real servitude such as the “right of view” (*servitus ne prospectui*

⁹ The Senate’s Decision on Ancillary Complaint of 30.01.2014 in case No. SKC-1479/2014, para. 7.

¹⁰ *Tyutryumov, I. M.* Grazhdanskoye pravo. Vtoroye izdaniye [Civil Law. 2nd edition]. Tartu: Tipografiya G. Laakman, 1927, pp. 219–220; *Blaese, H., Mende, S.* Das Sachenrecht, pp. 144, 159–162; The Senate’s Decision on Ancillary Complaint of 14.06.2023 in case No. SKC-644/2023, paras. 11.1–11.4.

officiatur), i.e., Article 1189 CL provides that the right of view servitude “gives the right to prohibit the person bound by the servitude to perform any action which deprives the beneficiary of the servitude of a free view”. According to Roman law, such a real servitude precluded each owner of the servient real estate from erecting buildings, planting trees or other plants, placing piles of timber, building materials or other materials on his real estate, or even hanging laundry, if the free view from the dominant real estate, for example to the sea, forest or town square, was thereby deprived, obstructed, narrowed or otherwise impaired (damaged).¹¹ Similarly, Latvian legal doctrine explains that the right of view (*servitus ne prospectui officiat*) confers on each owner of the dominant real estate a right of prohibition against any attempt by each owner of the servient real estate to obstruct or otherwise damage the servitude beneficiary’s unobstructed view, and this right may be exercised not only against the threatened blockage of the unobstructed view by a building or other structure, but also against the planting of trees or bushes, the creation of embankments, the stacking of timber or building materials, and similar.¹²

Finally, as provided in Article 1155 and Article 1172(2) CL, in addition to the real servitudes expressly provided for by law, other real servitudes “subject to the general rules of servitudes” may also be created by contract. In other words, the list of types and sub-types of real servitudes contained in the CL is not exhaustive and, taking into account the practical needs of modern life, private persons may create new types or sub-types of real servitudes (positive and negative) by contract, as long as they comply with the essence and basic principles of the real servitude concept.¹³ It is therefore also possible to contractually modify the content of the “right of view” governed by Article 1189 CL in such a way that the servitude not only prohibits the each owner of the servient real property from “any action which deprives the beneficiary of the servitude of a free view”, but also, for example, prohibits him from making any changes to the visual appearance of the real estate in order to prevent, in general, any deviations from the existing environment which, in the absence of such a servitude, the owner of the real estate might make by exercising his ownership right. It should be noted that this does not contradict the principle that the servitude must be such as to benefit its user (see Article 1135 CL), since the “benefit” conferred by the servitude may be of a monetary or non-monetary nature, including by providing the beneficiary of the servitude with certain convenience or something pleasant, such as a free view¹⁴ or an aesthetically undamaged view or landscape.

For example, in one of the well-known real estate projects in Latvia, which was established and continues to develop as a mixed-use village with a unified infrastructure and where all buildings have a modern and unified Scandinavian architectural style,¹⁵ the developer of the village has for more than ten years practiced the establishment of the “right of view”, which encumbers all newly established and

¹¹ *Luden, H.* Die Lehre von den Servituten [The Doctrine of Servitudes]. Gotha: Justus Perthes, 1837, p. 53; *Dernburg, H., Sokolowski, P.* System des Römischen Rechts. Der Pandekten. 8. Auflage [System of Roman Law. The Pandects. 8th edition]. Berlin: Verlag von H. W. Müller, 1912, § 207, p. 435.

¹² *Erdmann, C.* System des Privatrechts der Ostseeprovinzen Liv-, Est- und Curland. Zweiter Band. Sachenrecht [System of Private Law of the Baltic Provinces of Livonia, Estonia and Curland. Second Volume. Property Law]. Riga: N.Kymmels Verlag, 1891, p. 299; *Blaese, H., Mende, S.* Das Sachenrecht, p. 162; *Višņakova, G., Balodis, K.* Latvijas Republikas Civillikuma komentāri, p. 103.

¹³ The Senate’s Decision on Ancillary Complaint of 14.06.2023 in case No. SKC-644/2023, para. 11.4; The Senate’s Judgment of 11.04.2024 in case No. SKC-13/2024, para. 12.1.3.

¹⁴ *Erdmann, C.* System des Privatrechts der Ostseeprovinzen, p. 257; *Višņakova, G., Balodis, K.* Latvijas Republikas Civillikuma komentāri, p. 67.

¹⁵ Real estate project “Saliēna”. Available: <https://www.saliena.eu/> [last viewed 07.07.2025].

for-sale real estate objects (i.e., undeveloped and developed land, as well as apartment buildings divided into apartment properties) in favour of adjacent real estates owned by the developer as beneficiary of the servitude and usually serving as an access road or street. The content of such “right of view” registered in the Land Register, which is reflected in a concise form in the entry of the particular servitude, is most often as follows: “Perpetual servitude – right of view: no construction work may be carried out without the written consent of the owner of the dominant real estate”.

3. The right to exclusive use of a specific part of the “jointly owned part” of the apartment owners

As indicated above, the developer of an apartment building usually has an interest in ensuring at an early stage that, depending on the individual wishes of each buyer, it will be able not only to purchase a specific apartment property from the developer, but also to acquire the right to exclusive use of a separate part (element) of the “jointly owned part” of all apartment owners, such as a specific storage room in the basement or a specific parking space in the courtyard of the building.

3.1. Legal construction of the concept of apartment property

Meeting the above practical need requires taking into account the legal construction of the concept of “apartment property” regulated by the Law on Apartment Property (hereafter – LAP).

Namely, if a real estate registered in the Land Register, consisting of a land plot and an apartment building or an office building (with groups of residential and non-residential premises), is divided into two or more apartment properties, each of these apartment properties shall be registered in a newly opened Land Register compartment (folio) as an independent real estate (see Article 2(1), Article 6 and Clause 5 of the transitional provisions of LAP, and Article 126 of the Land Register Law). Each apartment property consists of the following two legally inseparable elements: 1) a “separate property”, i.e. the “interior” of a group of premises (a particular apartment or non-residential premises such as an office or a shop) separated from the rest of the apartment building and in the exclusive use of the owner of that apartment; and 2) a certain co-ownership share of the “jointly owned part” of all apartment owners, which in turn necessarily includes the external envelope of the building in question (including external walls and roof), the internal load-bearing structures and inter-storey slabs, the common premises (including staircases, basements, attics) and the entire land plot on which the building is situated (see Articles 2(2), 3 and 4 of LAP). Furthermore, the “jointly owned part” of all apartment owners is accordingly subject to the provisions of Articles 1067–1072 CL (see Article 4(2) of LAP), which regulate so-called “shared co-ownership”, i.e., the ownership right that is owned simultaneously by two or more persons in certain co-ownership shares (see Article 1067(1) CL).

Thus, even after the division of real estate into apartment properties, the “jointly owned part” continues to be held in co-ownership by all apartment owners, and only the community of apartment owners, comprised of all apartment owners at any given time, is entitled to decide on the regime of divided use of the “jointly owned part” between the apartment owners, such a decision requiring that apartment owners who vote “for” represent at least three-quarters of all apartment properties (see Article 15(3), Article 16(2)(2) and Article 17(7)¹ LAP).

3.2. Determination of the regime of “divided use”

The “jointly owned part” is also covered by the provision of Article 1070(1) CL (see Article 4(2) LAP), which regulates the determination of the regime of “divided use” of a thing jointly owned by the co-owners and provides that such use is to be proportionate to the size of each co-owner’s co-ownership share.

Previous case law has already recognised that it is possible to determine the divided use of the “jointly owned parts” (e.g., the common basement, attic or land plot) of the apartment owners by means of an agreement concluded by all apartment owners, a decision of the community of apartment owners or a court judgment,¹⁶ for example, by giving each owner of a particular apartment exclusive use of a particular parking space located on the common land plot or a particular storage room built out in the common basement or attic. Thus, it is possible to establish a regime of divided use in respect of a “jointly owned part” – as in the case of jointly owned real estate as such – by establishing a “right of exclusive use” of each co-owner (apartment owner) over a specific part (element) of the common real estate, excluding those parts (elements) which, in the particular case, can objectively only be used jointly by all or some of the co-owners (e.g. common access road, staircases, elevator).¹⁷

Moreover, despite the fact that the law does not expressly provide for such a possibility, according to the prevailing opinion in legal doctrine and case law, it is possible to register in the Land Register the regime of divided use established not only between co-owners but also between apartment owners, thus not only giving the “right of exclusive use” in question legal effect against third parties,¹⁸ but also making this right inheritable and alienable together with the apartment property for the benefit of the owner of which that right was once established.

3.3. “Right of exclusive use” as a right of real servitude

However, usually before the apartment properties are offered for sale, the developer is already interested in regulating the future divided use of the “jointly owned part” by means of the concept of real servitude, i.e., by encumbering a specific part (element) of the “jointly owned part” with a respective real servitude and by providing that the beneficiary of the servitude is entitled to exclusive (separate) use, for example, of a specific parking space located on the common land plot, a specific storage room built out in the common basement or attic, or, for example, a specific part of the facade of a building for the display of an advertisement or a sign, or a specific part of the roof of a building for the placement of photovoltaic or solar panels.

It should be noted that the existence of any real servitude requires two real estates “one of which is encumbered in favour of the other” (Article 1141 CL), which in this case are 1) the servient real estate registered in the so called “main compartment” of the Land Register which has been subsequently divided into apartment properties and which, after division into apartment properties, consists of the “jointly owned part”, and 2) the specific apartment property registered in the newly opened so called “sub- compartment” as the dominant real estate. Moreover, Article 1241(3) CL allows

¹⁶ The Senate’s Judgement of 18.05.2023 in case No. SKC-14/2023, paras. 7.1–7.3.

¹⁷ The Senate’s Judgement of 11.03.2021 in case No. SKC-211/2021, para. 13.2.

¹⁸ *Grūtups, A.* Latvijas Republikas Civillikuma komentāri. Īpašums (927.–1129. p.) [Commentaries on the Civil Law of the Republic of Latvia. Ownership Right (Art. 927–1129)]. Rīga: Mans Īpašums, 1996, pp. 153–154; The Senate’s Decision on Ancillary Complaint of 02.11.2011 in case No. SKC-781/2011, paras. 10–14; The Senate’s Decision on Ancillary Complaint of 05.12.2012 in case No. SKC-1800/2012, para. 10; The Senate’s Assignment Hearing Decision of 26.11.2024. in case No. SKC-980/2024, paras. 8.1–8.2.

for the possibility of encumbering jointly owned real estate (and thus also the “jointly owned part”) with a real servitude in favour of such dominant real estate which is owned by one of the co-owners of the servient real estate (i.e. one of the apartment owners), since in such a case there is no question of a complete overlap (*confusio*).¹⁹

Establishment of a real servitude on jointly owned real estate (thus also on the “jointly owned part”) requires the consent of all co-owners (all apartment owners) (see Articles 1068(2) and 1232(2) CL). Therefore, developers of apartment buildings usually take care to establish and register the relevant real servitudes in the Land Register before offering the apartment properties for sale in order to make the apartment properties for sale more attractive and more suitable to the wishes and interests of the buyers by adapting to the needs of potential buyers. It should be noted here, however, that according to the classical approach reflected in Article 1130 CL (concept of servitude), the right of servitude is constructed as a “right over another’s property” (*ius in re aliena*), with the result that no one can have a right of servitude over his own property (*nulli res sua servit*).²⁰ However, for practical reasons, the idea that an owner may, by a unilateral act, establish an “owner’s servitude” by encumbering one real estate owned by him in favour of another real estate owned by him in order to regulate the “relationship of usage” between those real estates in advance, i.e. before disposal of the dominant or servient real estate, is gaining more and more support in Latvia. Moreover, a draft law amending LAP is currently being prepared in order to regulate in more detail in this law the “right of exclusive use” of apartment owners over a certain part (element) of their “jointly owned part” as a special form of real servitude, which may also be established by unilateral deed of the developer of the particular real estate in favour of the apartment properties owned by him but intended for sale, already before the apartment properties are offered for sale.

From the point of view of each apartment owner, the advantage of this solution is that the specific real servitude, such as a “parking servitude”, established in favour of a specific apartment property is exclusively exercisable by each owner of that apartment property, i.e. each subsequent owner. However, from the point of view of the community of apartment owners, in this case it is essential that any real servitude is inextricably linked to the dominant real estate, which is why, for example, a “parking servitude” as a real servitude cannot be legally disposed or transferred to a third party separately from the dominant apartment property (see Articles 1145 and 2113(1) CL).

Summary

The most appropriate and efficient long-term solution for obtaining a sufficiently guaranteed reimbursement of the costs associated with the management of a particular residential area is to encumber the real estate located in the particular residential area with an appropriate real burden as a right *in rem*, the content of which is comprised of the obligation of each owner of the encumbered (servient) real estate to make certain management fee payments on an ongoing and recurring basis to the specific developer (manager) of the area as the entitled person.

However, the most appropriate long-term solution to prevent the “damage” of the unified architectural and aesthetic environment created by the developer

¹⁹ The Senate’s Judgement of 15.09.2010 in case No. SKC-171/2010, paras. 9.1–9.2.

²⁰ *Sinaiskis, V. Latvijas civiltiesību apskats*, pp. 74, 76.

in a planned and purposeful manner is to encumber the real estates located in the territory with a negative real servitude – “right of view”, the content of which is comprised of the obligation of each owner of the encumbered (servient) real estate to refrain from carrying out such activities on his real estate which may affect the visual appearance of the real estate in question, including “damaging” the uniform architectural style of all buildings, which has been implemented in a planned and purposeful manner.

Both solutions allow the respective obligation of the obliged party, i.e., the obligation to proportionally bear the expenses of management and the obligation to refrain from actions affecting the visual appearance of the real estate, to be legally “linked” to a specific real estate, with the result that the obliged party is not a specific natural or legal person, but each owner of the encumbered (servient) real estate, i.e., each successive owner.

Likewise, the need of developers of apartment buildings to make the apartment properties for sale more suitable to the wishes and interests of the buyers, i.e., depending on the individual wishes of each buyer, to be able not only to purchase a specific apartment property from the developer, but also to acquire the right to exclusive use of a certain part (element) of the “jointly owned part” of all apartment owners, is most appropriately addressed by means of a real servitude in favour of a specific apartment property, which grants to each owner of that apartment property the right to exclusive use of, for example, a specific parking space located on the common land plot or a specific storage room constructed in the common basement or attic.

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Seizing the Momentum: Strategic Reforms for More Effective Financial Investigations¹

Dr. iur. Marina Matić Bošković

Faculty of Law, Megatrend University

Senior Research Fellow and Lecturer

Institute of Criminological and Sociological Research

E-mail: m.m.boskovic@roldevelopmentlab.com

Despite progress in aligning national legislation with international standards, Serbia continues to face significant obstacles in building a strong and consistent track record in asset recovery. The author examines the effects of Serbia's previous Financial Investigation Strategy, assessing its impact on the country's capacity to detect, trace, and seize criminal assets. The article offers analysis key achievements and persistent gaps in implementation, with particular focus on inter-agency coordination, legislative consistency, and operational practice.

In light of Serbia's EU accession process, the article explores the obligations stemming from Chapter 23 (Judiciary and Fundamental Rights) and Chapter 24 (Justice, Freedom and Security), highlighting the need for full alignment with the recently adopted EU Directive 2024/1260 on asset tracing, freezing, confiscation, and management. Special attention is given to the Directive's emphasis on the alignment of legislative framework, strengthening of policy planning and improvement of track record.

Though desk research, the author identifies critical bottlenecks in the current practice of financial investigations and analyses the underlining causes of low rates of provisional and permanent confiscation of criminal assets. Drawing on EU standards, FATF recommendations, and EU comparator jurisdictions, the paper proposes a set of recommendations aimed at improving legislative alignment, institutional coordination, and proactive financial investigations.

Keywords: financial investigations, asset recovery, track record, EU requirements.

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Introduction

The fight against organised crime and corruption greatly depends on the state's ability not only to detect and prosecute criminal offences, but also to deprive offenders of illicitly acquired assets.² Financial investigations, when strategically used and institutionally supported, are essential tools for tracing, freezing, and confiscating criminal proceeds.³ In Serbia, the strengthening of financial investigations has been an important component of judicial and law enforcement reforms over the last decade. Nevertheless, the country still faces considerable challenges in achieving consistent results in the seizure and confiscation of assets.⁴

Serbia's 2015 Financial Investigation Strategy aimed to address many of these challenges by proposing reforms to the legal framework, enhancing institutional capacities, and fostering inter-agency cooperation.⁵ While some progress has been made, the implementation of the Strategy revealed structural weaknesses, fragmented responsibilities, and a lack of sustained coordination among key actors, such as the police, prosecution, and asset management authorities.

At the same time, Serbia's path towards European Union membership places additional obligation on its institutions. The protection of the EU's financial interests and alignment with the EU *acquis*, particularly under Chapters 23 (Judiciary and Fundamental Rights) and 24 (Justice, Freedom and Security), requires that Serbia modernise its asset recovery framework.⁶ The adoption of Directive (EU) 2024/1260 on asset recovery and confiscation⁷ presents a new opportunity to harmonise Serbia's

² *Hryniewicz-Lach, E.* Improving Asset Confiscation: In the Quest for Effective and Just Solution. ERA Forum, Vol. 25, 2024, pp. 231–247.

³ *Lakićević, Đ.* Pojam i krivičnoprocesni značaj finansijskih istraga [Term and Criminal Significance of Financial Investigations]. *Bezbednost [Security]*, Vol. 66, No. 1, 2024, pp. 159–177.

⁴ Commission Staff Working Document, 2024 Rule of Law Report – Country Chapter on the rule of law situation in Serbia, Accompanying the document. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. SWD (2024) 831 final, p. 9. Available: https://commission.europa.eu/document/download/862952fa-6e79-44c4-b629-174a441e3d2e_en?filename=62_1_58091_coun_chap_serbia_sb.pdf [last viewed 10.04.2025].

⁵ Available: <https://www.mpravde.gov.rs/sr/vest/8960/strategija-istraga-finansijskog-kriminala-za-period-od-2015-do-2016-godine.php> [last viewed 10.04.2025].

⁶ Western Balkans Competitiveness Outlook 2024: Serbia. Competitiveness and Private Sector Development, OECD, 2024.

⁷ Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation, OJ L, 2024/1260, 2.5.2024.

legal framework with EU standards. In parallel, the Reform Agenda of Republic of Serbia from 2024 explicitly envisages the adoption of amendments to the Law on Seizure of Assets⁸ with the clear objective of aligning it with the EU *acquis*.⁹

In addition to aligning its legal framework with the requirements of Directive (EU) 2024/1260, Serbia is also under an obligation to harmonise its legislation with several international instruments to which it is a signatory. These include binding United Nations and Council of Europe Conventions, as well as internationally recognised standards such as the Financial Action Task Force (FATF) Recommendations adopted by the FATF Plenary in February 2012.¹⁰

This article examines the institutional and legal impact of Serbia's previous strategic efforts in financial investigations and asset recovery. The author explores the implications of the 2024 Directive and outlines key reform steps necessary for full alignment, including the adoption of a new national strategy and amendments to the Law on Seizure of Assets.¹¹ In doing so, the author aims to provide actionable recommendations to improve Serbia's effectiveness in tracing and confiscating criminal assets and contributing to the overall credibility of its justice and rule of law reforms.

⁸ The Law on Confiscation of Assets Derived from a Criminal Offence (Law on Seizure of Assets), Official Gazette of Republic of Serbia, No. 32/2013, 94/2016, 35/2019.

⁹ Reform and Growth Facility for the Western Balkans – Reform Agenda of the Republic of Serbia. Available: https://www.mei.gov.rs/upload/documents/nacionalna_dokumenta/adopted_reform_agenda_narrative_-_republic_of_serbia.pdf [last viewed 03.04.2025].

¹⁰ The United Nations Convention against Transitional Organized Crime (UNTOC) contains several important provisions relevant to financial investigations and asset confiscation. Article 12 requires States Parties to adopt measures that enable the confiscation of the proceeds of crime and property used in the commission of offence. Article 13 sets out procedures and obligations for international cooperation in confiscation proceedings, while Article 14 addresses the disposal of confiscated property and encourages its use for restitution to victims or return to the requesting State. Similarly, the UN Convention against Corruption (UNCAC), which Serbia has ratified, sets comprehensive standards for asset seizure and recovery. Article 31 requires States to adopt measures necessary to enable the confiscation of the proceeds of corruption-related offences, as well as property used or intended for use in such offences. Articles 53, 54, and 55 establish mechanisms for international cooperation in asset recovery, including the recognition and enforcement of foreign confiscation orders. Article 57 further provides rules for the return and disposal of confiscated assets, with an emphasis on facilitating international restitution and compensation. More on alignment with UNCAC, see: Civil Society Report on the implementation of Chapter II and Chapter V (Asset Recovery) of the UNCAC in Serbia, Transparency International Serbia, 2023. Available: <https://uncaccoalition.org/wp-content/uploads/Final-draft-Parallel-Report-Chapters-II-V-Transparency-Serbia-July-2023.pdf> [last viewed 10.04.2025].

Among the Council of Europe instruments. The 190 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg Convention – EST 141) lays down a framework for mutual legal assistance in matter related to tracing and confiscating proceeds from crime. Furthermore, the 2005 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw Convention – EST 198), which expands the scope of cooperation to cover terrorism financing.

In addition to treaty obligations, Serbia is expected to align its legal framework with the FATF Recommendations, particularly Recommendations 4 and 38. These recommendations emphasize the importance of enabling confiscation of criminal proceeds without a conviction, ensuring efficient procedures for the identification and tracing of criminal assets, and fostering international cooperation for asset recovery. They also require the establishment of appropriate mechanism for managing and returning confiscated assets and protecting financial systems from abuse.

¹¹ Sakellaraki, A. EU Asset Recovery and Confiscation Regime – *Quo Vadis?* A First Assessment of the Commission's Proposal to Further Harmonise the EU Asset Recovery and Confiscation Laws. A Step in the Right Direction? *New Journal of European Criminal Law*, Vol. 13, No. 4, 2022, pp. 478–501.

1. Results of Serbia's 2015 financial investigation strategy

Serbia's 2015 Financial Investigation Strategy marked an important step in strengthening the country's institutional and legal response to financial crime, focused on enhancing operation effectiveness of financial investigations.

The Strategy was adopted for a two-year period (2015–2016) and was designed to reinforce Serbia's commitment to tackling organised crime and corruption. The Strategy identified three goals: enhancing the effectiveness of the judiciary and public prosecution, improving inter-agency cooperation among competent institutions and introducing forensic accounting capacities. In addition to these three goals, a cross-cutting objective of the Strategy was the capacity building of all relevant institutions involved in the detection, investigation, and prosecution of financial crimes. This included targeting training, institutional reform, and modernization of operational practice.

Among the most significant outcomes of the Strategy was the adoption of the Law on the Organization and Competence of State Bodies in Suppression of Organised Crime, Terrorism and Corruption¹², which created a specialised institutional framework for corruption-related cases. This law centralised competencies and introduced specialised departments within the police, prosecution and judiciary to ensure greater efficiency, coordination, and expertise. The Law established a formal basis for inter-agency cooperation, enabling formation of joint teams comprising representatives from the prosecution, police, tax administration, customs, and other relevant institutions, all coordinated under the leadership of the public prosecutor.¹³ It also introduced a formal role of liaison officers within relevant institutions to ensure continuous and direct between the institutions involved in investigations. Furthermore, the Law introduced the possibility of systematically engaging financial forensic expert.¹⁴

Another notable success of the 2015 Strategy was the introduction of joint task forces and the appointment of liaison officers within all relevant institutions involved in financial investigations. The joint task forces allowed for a more integrated and multidisciplinary approach bringing together representatives from the police, prosecution, tax administration, customs, and other competent bodies. However, only limited number of task forces were actually established over time, which significantly reduced the intended impact of this strategic measure.¹⁵ The designation of liaison officers within key institutions created clear lines of contact and responsibility,

¹² The Law on the Organisation and Competence of State Bodies in Suppression of Organised Crime, Terrorism and Corruption, Official Gazette of Republic of Serbia, No. 94/2016, 87/2018 – another law and 10/2023. See: Škulić, M. Organizacija i nadležnost državnih organa čija je funkcija suzbijanje koruptivnih krivičnih dela [Organization and jurisdiction of state bodies whose function is to suppress corrupt criminal acts]. In: *Finansijski kriminalitet [Financial Crime]*, Kostić, J., Stevanović, A. (eds.). Belgrade: Institute of Comparative Law and Institute of Criminological and Sociological Research in cooperation with the Judicial Academy, 2018, pp. 11–41.

¹³ Vuković, I. Oduzimanje imovine proistekle iz krivičnog dela – Evropski okvir i srpsko zakonodavstvo [Seizure of asset derived from criminal offence – European framework and Serbian legislation]. *Crimen*, Vol. 7, No. 1, 2016, pp. 3–32.

¹⁴ Krstić, G. Specialisation of State Authorities in Combating Organised Crime, Terrorism and Corruption with Special Impact in Relationship between Prosecutors Office and Police. *Nauka, bezbednost, policija*, Vol. 22. No. 3, 2017, pp. 67–88.

¹⁵ The number of joint task forces established remains limited: one was formed in 2023, one in 2022, two in 2021, and three in 2020. 2023 Annual Report of Supreme Public Prosecutor Office of Republic of Serbia, p. 65. Available: http://www.vrhovnojt.gov.rs/docs/SKM_95824041013280.pdf [last viewed 10.04.2025].

ensuring that requests for information or cooperation were handled more efficiently. Liaison officers were formally appointed, however, practitioners have consistently point out that the mechanism was not fully functional or effective in practice.¹⁶

While the Strategy provided a valuable initial roadmap, its limited two-year duration and the absence of a subsequent long-term policy framework, have left gaps in implementation continuity and strategic follow-up.

The main shortcoming of the Strategy was its lack of comprehensive approach to financial investigations, since it failed to include critical components related to the seizure, management and confiscation of criminal assets. By omitting these elements, the Strategy missed an opportunity to fully integrate asset recovery cycle into Serbia's broader financial crime response. Furthermore, while the Strategy outlined general goals and priority areas, it lacked an accompanying action plan. Without a detailed action plan, including clear timelines, responsible institutions, measurable indicators, and financial resources, the Strategy could not ensure accountability or effective monitoring of progress. In addition, Serbian authorities have never conducted a formal impact assessment of the implementation of the 2015 Strategy. This represents a significant gap in the policy cycle, as such an assessment would have provided critical insights in the effectiveness, efficiency, and limitations of the measures undertaken during the Strategy's two-year implementation period. The absence of an impact assessment also undermines transparency and accountability, as it leaves stakeholders without a clear understanding of the Strategy's outcomes.

2. EU accession process and obligation in the area of asset seizure

As a part of its EU accession process, Serbia is required to progressively align its legal and institutional frameworks with the EU *acquis*. In the field of asset seizure and confiscation, this alignment is primarily governed by Chapter 23 – Judiciary and Fundamental Rights and Chapter 24 – Justice, Freedom and Security, both of which emphasize the importance of effective tools for combat organised crime, corruption and financial crime.

A key element of this process is compliance with Directive (EU) 2024/1260 on asset recovery and confiscation, which sets minimum standards for tracing, freezing, managing, and confiscating criminal assets across the EU. Although Serbia is not yet a Member State, it is expected to align its legislation with this Directive, in line with its obligations under the Stabilisation and Association Agreement (SAA) and the National Programme for the Adoption of the *Acquis* (NPPA) for period 2024–2027.¹⁷ Serbia must harmonise its national legislation with the Directive (EU) 2024/1260, particularly in areas such as the expansion of the non-conviction-based confiscation mechanisms, clear rules on asset management and enhanced inter-agency cooperation. In addition, it is expected that Serbia participates in cross-border cooperation with EU Member States, particularly through mutual legal assistance frameworks and enhance data sharing. Directive envisages obligation for Member States to adopt a new Strategy on Asset Seizure and Management. The lack of

¹⁶ Stojanović, Z., Miloradović, O., Radisavljević, M., Trešnjev, A. Priručnik za suzbijanje privrednog kriminaliteta i korupcije [Manual for suppression of economic crime and corruption]. OEBS, Belgrade, 2017.

¹⁷ National Programme for the Adoption of the *Acquis* for period 2024–2027. Available: https://www.mei.gov.rs/upload/documents/nacionalna_dokumenta/nppaa/nppaa_2024-2027.pdf [last viewed 03.04.2025].

a comprehensive and updated strategy has been noted as a weakness in previous European Commission Progress reports.

One of the most critical aspects of Serbia's EU accession process is the establishment of a credible track record in the effective seizure and confiscation of assets acquired through criminal activities. The European Union Common Position on Chapter 23¹⁸ sets out a number of interim benchmarks that Serbia must meet. One of the interim benchmarks pertain to the strengthening of repressive measures against corruption, specifically to establish a track record of effective and efficient investigations, prosecutions, convictions, and asset confiscations in corruption cases.¹⁹ The European Commission has repeatedly emphasised in its Annual Reports on Serbia that while legislative frameworks are being improved, the practical application remains limited.²⁰ Low volumes of confiscated assets and insufficient use of financial investigations reflect a lack of proactivity and coordination among institutions.

In order to illustrate and further assess this concern, the analysis relies on a comparison of statistical data provided by the Supreme Public Prosecutor's Office of Serbia²¹ and comparison with available data from Croatia. Croatia was selected for comparison as it shares a similar legal heritage, regional context, and was the last country to join the EU, making it a relevant benchmark. The methodology applied combines a review of official prosecutorial data. This comparison highlights notable difference in the volume of confiscated assets, the structure and transparency of financial investigations, thereby providing a clearer picture of where Serbia stands in meeting its EU requirements.

Croatia reports significantly higher asset confiscation results in terms of monetary value and number of persons involved. While Croatia reported 742 persons from whom property was permanently confiscated in 2023,²² Serbia reported only 13 persons as subject to permanent confiscation in the same year. The number of orders for the prohibition of disposal of property was 588, issued against 1516 persons in Serbia, in comparison to 53 prohibitions in Croatia. In addition, Croatia's reporting is more comprehensive and disaggregated, with clear monetary amounts. In Serbia, the absence of consolidated financial figures on the value of seized/confiscated assets presents a limitation for performance assessment.

During 2023 public prosecutor's offices across the Republic of Serbia initiated a total of 272 financial investigations, compared to 316 in 2022. These investigations targeted 432 individuals, which marks a significant decrease from 584 individuals in 2022. This downward trend in the initiation of financial investigations is concerning,

¹⁸ European Union Common Position, Chapter 23: Judiciary and fundamental rights. AD 20/16, Brussels, 8 July 2016.

¹⁹ *Kolaković-Bojović, M., Turanjanin, V., Tilovksa-Kechehi, E.* EU New Strategic Policies Towards the Western Balkans: Hope for the Future of Endless Postponement. In: Conference Proceedings, Towards a Better Future: The Rule of Law, Democracy and Polycentric Development. St. Kliment Ohridski University, Bitola, 2018, pp. 125–135.

²⁰ EU Commission, Staff Working Document, Serbia 2024 Report accompanying the document Communication from the Commission to the European Parliament, Council, the European Economic and Social Committee and the Committee of the Regions, Communication on EU Enlargement Policy, Brussels, 30.10.2024 SWD(2024) 695 final. Available: https://enlargement.ec.europa.eu/document/download/3c8c2d7f-bff7-44eb-b868-414730cc5902_en?filename=Serbia%20Report%202024.pdf [last viewed 03.04.2025].

²¹ 2023 Annual Report of Supreme Public Prosecutor Office of Republic of Serbia, p. 125. Available: http://www.vrhovnojt.gov.rs/docs/SKM_95824041013280.pdf [last viewed 03.04.2025].

²² 2023 Annual Report of State Prosecutor Office of Croatia, p. 54. Available: https://dorh.hr/sites/default/files/dokumenti/2024-04/DORH_Izvjesece_za_2023.pdf [last viewed 03.04.2025].

particularly when viewed alongside the relatively small number of permanent confiscation decisions (only 13 in 2023).

This discrepancy between the number of investigations and the actual confiscations suggests inefficiencies in the process and highlights the need for a deeper analysis of the functioning of financial investigations in Serbia.

The legal system of the Republic of Serbia, through various legislative provisions, establishes a dual framework for conducting financial investigations. These are parallel financial investigations and financial investigations under the Law on Seizure of Assets.²³ Parallel financial investigations are conducted simultaneously with criminal proceedings and focus on both the commission of the criminal offence and the financial benefit derived from it.²⁴ One segment of the investigation aims to establish the facts of the offence (identifying the perpetrator, method, and motive), while the other segment focuses on tracing, identifying, and documenting property acquired through or as a result of the criminal activity. This includes tracking where the property is located, how it was acquired, and who currently holds ownership. The purpose of parallel financial investigation is to follow the illicit financial flows and to enable the effective freezing and eventual confiscation of the proceeds of crime. Financial investigations under the Law on Seizure of Assets are initiated with the specific aim of identifying and seizing unlawfully acquired assets, even when they are not directly traceable to specific criminal act. In such cases, proceedings are initiated against individuals suspected of committing certain offences listed under the Law on Seizure of Assets. The key criterion is the existence of a clear and significant disparity between the suspect's lawful income and their total assets over a defined period. Unlike parallel investigations, the focus here is on indirect connections between the suspect's assets and the criminal conduct, often relying on indicators of unexplained wealth.

The dual-track approach ensures that Serbia's financial investigation system is aligned with international standards, aiming both to remove the financial incentive for committing crimes and to recover illicit assets for the benefit of the public interest.²⁵

However, in practice, financial investigations often face a number of challenges: insufficient inter-institutional coordination, delays in gathering data from various agencies, and a lack of specialized training among those conducting the investigations.²⁶ In addition, the Law on Seizure of Assets has to be aligned with EU *acquis* to enable increase in the number of effective asset seizure.

3. Alignment of Serbian legislation with Directive (EU) 2024/1260 on Asset Recovery and Confiscation

In addition to the Law on Seizure of Assets, the Criminal Code and the Criminal Procedural Code also contain provisions relevant to the seizure and confiscation of

²³ Article 3, para. 1 of the Law on Seizure of Assets.

²⁴ Guide for Conducting of Financial Investigations. Belgrade, 2024. Available: <https://pars.rs/public/Dokumenti/Publikacije/1733/Prirucnik-za-sprovođenje-finansijskog-istraživanja.pdf> [last viewed 03.04.2025].

²⁵ Lukić, T. Oduzimanje imovine stečene krivičnim delima – značaj finansijske istrage [Confiscation of proceeds from Crime]. Zbornik radova Pravnog fakulteta u Novom Sadu [Collected Papers of the Faculty of Law in Novi Sad], No. 2, 2009, pp. 381–411.

²⁶ Ligeti, K., Simonato, M. (eds.). Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU. Hart Publishing, 2017.

assets, thus forming a broader legal framework for the addressing the proceeds of crime.²⁷

The Criminal Code²⁸ of Serbia regulates confiscation of assets obtained through criminal activity as one of the ancillary consequences of committing a criminal offence. According to Article 91 of the Criminal Code, property gained by committing a criminal offence shall be confiscated from the perpetrator, and, if such property has been transferred to third parties, it may also be confiscated from them if they knew or should have known of its illegal origin. The law defines both mandatory and discretionary confiscation, depending on the type of offence and the specific circumstances of the case.

Articles 537–543 of the Criminal Procedure Code²⁹ of the Republic of Serbia specifically regulates procedure for the seizure of property benefits gained from criminal offences, ensuring compliance with principle of legality, proportionality, and due process.

The Law on Seizure of Assets was adopted in 2013 with aim to allow extended confiscation, specifically for the temporary or permanent confiscation of assets not directly linked to the criminal offence for which a person was charged. In such proceedings, the burden of proof shifts to the defendant,³⁰ who must demonstrate the legal origin of the property.³¹ This legal construction was justified by the exclusive application of the law to the most serious criminal offences, a position later confirmed by the European Court of Human Rights in the case *Ulemek v. Serbia*.³²

²⁷ Radisavljevic, M., Kabravalva, A., Debeljacki, M. (eds.). Oduzimanje imovine proistekle iz krivičnog dela / Priručnik za primenu u praksi [Seizure of asset derived from criminal offence – Manual for application in practice]. Supreme Court of Serbia, OEBS, Belgrade, 2019. Available: <https://www.vrh.sud.rs/sites/default/files/attachments/Oduzimanje-imovine-proistekle-iz-krivicnog-dela-prirucnik-za-primenu-u-praksi.pdf> [last viewed 08.04.2025].

²⁸ Criminal Code. Official Gazette of Republic of Serbia, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019, and 94/2024.

²⁹ Criminal Procedure Code. Official Gazette of Republic of Serbia, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021, 62/2021.

³⁰ Ignjatović, D., Škulić, M. Organizovani kriminalitet [Organised crime]. 2012. Pravni fakultet Beograd [Law Faculty Belgrade]. More on extended confiscation in: Thunberg Schunke, M. Extended Confiscation in Criminal Law. National, European and International Perspectives. Intersentia, Cambridge, 2017.

³¹ Kostić J., Rašić, M., Komlen Nikolić, L., Paunović, B. Oduzimanje imovine proistekle iz krivičnog dela – Izazovi i preporuke za unapređenje postupka [Seizure of asset derived from criminal offence – Challenges and recommendations for improvement of procedure]. Judicial Academy, Belgrade, 2022.

³² European Court of Human Rights, Case *Ulemek v. Serbia*, Application No. 41680/13, decision of 2 February 2021.

In case *Ulemek v. Serbia*, the European Court of Human Rights noted that the forfeiture order under Article 2 of Serbia's 2008 Law was issued only following a conviction for serious crimes, such as organized crime. Thus, they were tied to a criminal offence of significant gravity. Serbian courts consistently held that asset forfeiture was not a penalty under Article 34 para. 2 of the Constitution or Article 7, para. 1 of the European Convention on Human Rights, viewing it instead as a consequence of unlawful enrichment, not additional punishment. The forfeiture mechanism was established under a special law, not the Criminal Code, and served restorative rather than punitive aims, in line with international obligations such as the Council of Europe Convention on money laundering and confiscation of criminal proceeds. Finally, while the measure was severe, this alone did not render it penal under Article 7 of the Convention.

The Court also confirmed the legitimacy of the Law's objective. The forfeiture was part of a broader legislative effort to combat organized crime by depriving individual of illicit gains and preventing those assets from being used in future criminal activity. Since the applicant's complaint focused solely on the restorative nature of the measure, and no evidence suggested that forfeiture was disproportionate to its legitimate aim, the Court rejected the complaint under Article 1 of the Protocol No. 1.

Key legal definitions are essential to understanding the Law implementation. “Proceeds of crime” refers to property that is clearly disproportionate to the owner’s lawful income. The term “owner” includes not only the person against whom proceedings are conducted but also a bequeathers, a deceased person against whom proceedings were not initiated or were terminated, but who is found to have participated in a crime through proceedings against others. The definition also extends to legal successors, meaning heirs of convicted persons, cooperative witnesses, or bequeathers.

Under Article 3, any property, whether located in Serbia or abroad, may be subject to confiscation. The Law also provides for non-conviction-based confiscation. Article 23 allows temporary seizure of assets if there is reasonable suspicion that the property originates from a criminal offence, even in the absence of a conviction. In such case, the Public Prosecutor may request seizure or issue a freezing order if there is a risk the property may be disposed of before the court decides. Article 44 further stipulates that permanent confiscation must be requested within six months from the date of a final conviction for an offence listed in Article 2.

To ensure full alignment with the Directive and international standards, several amendments are needed to strengthen the Law on Seizure of Assets. One of the essential revisions should be the extension of the scope of the Law to include environmental crimes. This would bring Serbian legislation in line with the Directive, which explicitly recognises environmental crimes as a predicate offence that can result in the seizure and confiscation of assets.³³ Given the increasing international attention to environmental protection, and the significant financial gains of the associated with environmental crime, its inclusion in the Law is both timely and necessary.

Furthermore, the terminology and definitions currently employed in the Law require modernisation. The term “property” should be broadened to ensure consistency with the standards set out by the FATF and Council of Europe’s Warsaw Convention. In particular, the legal framework should clearly cover digital assets, including cryptocurrencies and other forms of virtual property that are increasingly used to conceal or transfer criminal proceeds.³⁴ This requires explicit recognition in the Law and corresponding provisions of the identification, freezing, management, and eventual confiscation of such assets.

The definition of “proceeds from crime” must also be expanded to include any property that is disproportionate to the lawful income of the suspect. This approach supports a value-based confiscation system, which is critical for tackling criminal proceeds that may be disguised or have changed form. Equally, the definition of the “third parties” who may be holding or controlling such assets should be widened in line with the Directive.³⁵ Moreover, the definition of the “owner” must be

³³ Preamble Point (9) “... The scope of this Directive should further include environmental crime, which are a core business for organised criminal groups and often are connected to money laundering or concern waste and residues produced in the context of drug production and trafficking...”

³⁴ *Važić, N.* Pravni stavovi krivičnog odeljenja Vrhovnog kasacionog suda o spornim pravnim pitanjima u praktičnoj primeni Zakona o oduzimanju imovine proistekle iz krivičnog dela – zauzeti na sednici Krivičnog odeljenja 03.02.2020. godine [Legal positions of the criminal department of the Supreme Court of Cassation on disputed legal issues in the practical application of the Law on confiscation of property deriving from a criminal offense – taken at the session of the Criminal Department on 03.02.2020]. Bilten, No. 2, Supreme Court of Cassation, 2021, pp. 11–18.

³⁵ Preamble, point (28): “... The rule on third party confiscation should extend to both natural and legal persons, without prejudice to the right of third parties to be heard, including the right to claim ownership of the property concerned.”

aligned to include not only those who formally hold title to the property, but also individuals who exercise effective control or benefits from the assets.

In addition, The Law should be amended to stronger incorporate the mechanism of non-conviction-based confiscations, allowing court to order the confiscation of the property even in the absence of a criminal conviction, when the unlawful origin of assets is established.³⁶ This is especially important in cases where the suspect has absconded, is deceased, or cannot be prosecuted for procedural reasons.

In light of the growing complexity of managing digital and intangible assets, the Law should introduce provisions to ensure their effective tracing, freezing, and management. This would require coordination with existing legislation governing digital assets.

4. Need for a new national strategy on financial investigation, asset seizure and recovery

As Serbia moves forward with aligning its legal and institutional frameworks with Directive (EU) 2024/1260, it is essential that future policy planning in the area of financial investigations and asset recovery be grounded in comprehensive ex post evaluation and should adopt a holistic approach, integrating financial investigations with asset training, seizure, confiscation and management.

The obligation to adopt a new strategic document addressing financial investigations arises from multiple national planning instruments. The Action Plan for Chapter 23³⁷ specifically requires the preparation of a strategic document in the field of combating financial crime. This document is to be based on an analysis of the alignment of Serbia's regulatory framework with the FATF (Financial Action Task Force) recommendations, particularly with regard to the conduct of parallel financial and criminal investigations. A similar requirement is outlined in the Action Plan for the implementation of the Anti-Corruption Strategy for period 2024–2025.³⁸ Furthermore, the Action Plan for Chapter 24³⁹ refers to this planning document as the Financial Crime Strategy. The adoption of the strategy is envisaged by the end of 2025.

Although the obligation to adopt a new strategic document on financial investigations is clearly articulated in several national planning instruments, may key questions regarding the design, scope, and implementation remain unresolved.

One of the primary open questions concerns the scope of the new strategy. It is not yet clearly defined whether the document will be limited strictly to financial investigations, or whether it will take a broader approach. According to the Ministry of Justice, the upcoming strategy will also cover key areas related to asset recovery, including the seizure and management of property derived from criminal offences. This confirms the intention for the document to take a comprehensive and integrated approach to financial crime, aligning Serbia's policy planning with requirements

³⁶ Article 15 of the Directive. See: *Matt, H.* Criminal law principles should be applied in all asset recovery cases throughout the EU. *New Journal of European Criminal Law*, Vol. 15, No. 4, 2024, pp. 373–374.

³⁷ Revised Action Plan for Chapter 23, July 2020. Available: <https://www.mpravde.gov.rs/files/Revidirani%20AP23%202207.pdf> [last viewed 03.04.2025].

³⁸ Official Gazette of Republic of Serbia, No. 63/2024. Available: <https://www.srbija.gov.rs/dokument/45678/strategije-programi-planovi-.php> [last viewed 03.04.2025].

³⁹ Revised Action Plan for Chapter 24, July 2020. Available: <http://www.mup.gov.rs/wps/wcm/connect/a7fbd693-caec-4f3e-b471-187a2be8bcf0/lat-Akcioni+plan+za+P24+-+revidirana+verzija+23+07+2020.pdf?MOD=AJPERES&CVID=ng1k6t5> [last viewed 03.04.2025].

from Directive (EU) 2024/1260. A more expansive scope could allow the strategy to serve as a unified framework for coordinating Serbia's obligations under multiple international instruments, but it also requires greater institutional coordination.

Another issue is duration of the strategy. The previous strategy from 2015 was adopted for a two-year period, which proved insufficient for the comprehensive implementation of its objectives and led to the lack of follow-up measures. A future strategy should ideally span a medium to long-term period to ensure measurable institutional and legal progress.

Additionally, there is a critical question of whether the strategy will be accompanied by an action plan with clearly defined activities, timeline, responsible institutions, and resources allocation. Without an accompanying action plan, the strategic objectives risk remaining aspirational rather than operational. The action plan must include costing estimates to facilitate budgetary planning and secure donor or government funding for capacity building, technical upgrades, and cross-sectoral coordination mechanisms.

A key consideration is whether the new strategy will address and incorporate the recommendations made by MONEYVAL, the FATF and UNCAC.⁴⁰ Serbia has undergone multiple evaluations under these frameworks, all of which have highlighted deficiencies in the areas of financial investigations, asset recovery, and inter-agency cooperation. Addressing these recommendations through a single, comprehensive strategy would enhance Serbia's compliance with international standards and strengthen its credibility.

5. Recommendations for improvement

It can be concluded that Serbia has made steps toward strengthening its financial investigation and asset recovery framework. However, the failure to comprehensively address the full asset recovery cycle in the strategic documents, weakening its impact. Despite notable legal reforms, including the adoption of the Law on Seizure of Assets, Serbia's track record in confiscating criminal assets remains limited. Statistical data from 2023 indicate a drop in the number of initiated financial investigations and low number of permanently confiscated assets.

To meet EU accession requirement to establish track record in seizure of assets, a number of recommendations emerge. Serbia must adopt a new and comprehensive national strategy on financial investigations and assets recovery. This strategy should be based on a thorough assessment of the previous strategy's implementation, include clear objectives, measurable indicators, and a detailed action plan, define institutional responsibilities and required financial resources for implementation of the strategy.

Legislative amendments are also necessary, particularly to the Law on Seizure of Assets. The Law should be aligned with EU and international standards by expanding its scope to include environmental crimes and digital assets, broadening definitions of proceeds of crime, owners, and third parties, and incorporating mechanism for non-conviction-based confiscation and confiscation from third parties. Amendments should also establish procedures for effective tracing, freezing, and management of digital assets.

⁴⁰ More on UNCAC asset recovery requirements in: *Borlini, L., Rose, C. The Normative Development of Laws on Asset Preservation and Confiscation: An Examination of Emerging Best Practices. International Journal of Constitutional Law, Vol. 22, No. 2, 2024, pp. 514–537.*

Additionally, institutional coordination must be significantly improved. Financial investigations should be systematically launched alongside criminal investigations for serious offences, supported by clear protocols, and facilitated by improved communication and data exchange between police, prosecution, tax administration, and assets management bodies. Building institutional capacity, particularly in digital forensics and financial intelligence, is essential. Furthermore, the Law should recognise the right of a requesting state and the obligation of domestic authorities to give primary consideration to the return of confiscated property or the provision of compensation to injured persons from third countries. Such a provision would demonstrate Serbia's commitment to the principles of restorative justice, ensure better cross-border victim compensation and contribute to greater international cooperation in asset recovery efforts.

Finally, Serbia should invest in developing a transparent and consolidated statistical system that enables monitoring of financial investigations, seizures, and confiscations. Comprehensive and accessible data would strengthen accountability, inform policymaking, and demonstrate Serbia's commitment to aligning with EU standards. Enhanced international cooperation particularly with EU Member States, and agencies, should also be pursued through improved legal instruments and institutional partnerships. Together, these steps will significantly improve Serbia's ability to recover criminal assets and contribute to the overall credibility of its justice and rule of law reforms.

Summary

While Serbia's 2015 Financial Investigation Strategy was a notable step toward strengthening institutional and legal capacities in the area of financial investigations, its limited scope, lack of an action plan, and absence of impact evaluation hindered its long-term effectiveness. The failure to address asset seizure and management as integral parts of financial investigations reflects a piecemeal rather than a strategic approach. To overcome this challenge Serbian authorities should urgently adopt a new strategy on financial investigations, asset seizure, and recovery that should include a detailed action plan, clear performance indicators, defined responsibilities, and a realistic implementation timeline.

Serbia's obligations under the EU accession process, international treaties (UNTOC, UNCAC, Council of Europe Conventions), and FATF standards require it to modernise and comprehensively reform its legal and institutional framework. Despite improvements in Serbia's legislative framework, such as the Law on Seizure of Assets and creation of special bodies, there is still a lack of alignment with Directive (EU) 2024/1260, particularly in areas such as non-conviction-based confiscation, inclusion of environmental crime, digital assets, and management mechanisms for seized assets.

Statistical data show a significant discrepancy between the number of financial investigations and the number of permanent confiscations. Compared to Croatia, which has a comparable legal heritage and regional context, Serbia's results remain limited. This confirms the European Commission's concern over the track record of confiscation, lack of proactivity and coordination among institutions. The practice of launching financial investigations must become standard for all serious criminal offences. Clear guidelines and standard operating procedures should be developed to ensure timely initiation, data sharing, and operational coordination among law enforcement institutions.

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Issues of Legal Understanding of Confidence in the Republic of Latvia

Dr. iur. Ēriks Treļš

State Police College
Docent at the Department of Police Law
Rīga Stradiņš University
Lecturer at the Faculty of Social Sciences
E-mail: eriks.trels@gmail.com

Dr. iur. Ivans Jānis Mihailovs

Rīga Stradiņš University
Docent at the Faculty of Social Sciences
Researcher at the Latvian Academy of Culture
E-mail: ivans.mihailovs@rsu.lv

The authors of the article continue the ongoing discussion on the consolidation of the term “loyalty” in Latvian regulatory framework, confirming that sometimes this word is unjustifiably replaced by the term “confidence”. This is often observed in official translations of regulatory acts. Strengthening both of these concepts in Latvian regulatory framework is of essential importance, taking into account both the overall geopolitical situation and national security risks. This issue has been relevant in Latvia and worldwide for a long time, but it gained particular attention in the Republic of Latvia in January 2024, when the *Saeima*, responding to the wishes of the population, amended the State Administration Structure Law, supplementing it with the “Obligation of Allegiance”. The authors of the current article analyse the content of the concepts “confidence”, “trust”, and “loyalty”, pointing out significant differences in the content and understanding of these concepts. The authors emphasize that the different interpretations and translations of the aforementioned concepts can create confusion in the application of legal norms. In conclusion, the authors call for a more precise definition and distinction of the concepts of “loyalty” and “confidence” in Latvian regulatory framework in order to eliminate possible ambiguities and improve the application of legal norms.

Keywords: confidence, trust, loyalty, state, government.

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Introduction

The Preamble of the Constitution (*Satversme*) of the Republic of Latvia stipulates: “Loyalty to Latvia, the Latvian language as the only official language, freedom, equality, solidarity, justice, honesty, work ethic and family are the foundations of a cohesive society”¹. This exact translation into English can be found on the website *likumi.lv*,² which is maintained and developed by the Official Publisher of the Republic of Latvia – “Latvijas Vēstnesis”. Translations of regulatory acts are provided by a state administrative institution – the State Language Centre (Latvian: *Valsts valodas centrs*).

At the end of 2024, the legislator – the Parliament (*Saeima*) of the Republic of Latvia, taking into account the geopolitical situation, the need to prevent possible national security risks, as well as taking into account the collective petition of 13,165 Latvian citizens to ban persons with pro-Kremlin leanings from holding positions in state and local government institutions,³ amended the State Administration Structure Law, supplementing it with Section 102 “Obligation of Allegiance” (entered into force on 18 January 2024).⁴

As discussions about the regulation of the duty of loyalty and the application of relevant legal norms became increasingly topical, the authors’ attention was drawn to the fact that the term “loyalty” (Latvian: *lojalitāte*) is often used as a synonym for the term “confidence” (Latvian: *uzticība*). For example, the annotation to the Draft Law “Amendment to the Law on State Administration Structure” mentions that loyalty requirements are included in the existing regulatory enactments and that the second part of Section 26 State Audit Office Law “provides for the State Auditor’s loyalty (Latvian: *lojalitāte*) to the Republic of Latvia”.⁵ However, the second part of Section 26 State Audit Office Law stipulates that upon taking office, the State Auditor shall take the following oath (pledge) in the *Saeima*: “I do hereby solemnly swear (promise) to be faithful (Latvian: *uzticīgs*) to the Republic of Latvia, to comply with

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 25.05.2025]; Grozījumi Latvijas Republikas Satversmē [Amendments to the Constitution of the Republic of Latvia] (19.06.2014). Available: <https://likumi.lv/ta/id/267428-grozijums-latvijas-republikas-satversme> [last viewed 25.05.2025].

² See The Constitution of the Republic of Latvia. (15.02.1922). Available: <https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia> [last viewed 25.05.2025].

³ Aizliegt ieņemt amatus valsts un pašvaldību institūcijās prokremliski noskaņotām personām [To prohibit pro-Kremlin persons from holding positions in state and local government institutions] (18.05.2022). Available: <https://manabalss.lv/aizliegt-ienemt-amatus-valsts-un-pasvaldibu-institucijas-prokrieviski-noskanotam-personam/show> [last viewed 25.05.2025].

⁴ Grozījumi Valsts pārvaldes iekārtas likumā [Amendments to the State Administration Structure Law] (21.12.2023). Available: <https://likumi.lv/ta/id/348861-grozijums-valsts-parvaldes-iekartas-likuma> [last viewed 25.05.2025].

⁵ Likumprojekta “Grozījums Valsts pārvaldes iekārtas likumā” Nr. 256/Lp14 anotācija [Draft Law “Amendments to the State Administration Structure Law” No. 256/Lp14. Annotation]. Available: <https://titania.saeima.lv/LIVS14/SaeimaLIVS14.nsf/0/904D0FFFE72C54F1C22589A4003E96FB?OpenDocument> [last viewed 25.05.2025].

its laws and to fulfil my duties in good faith.”⁶ Although the term “loyalty” is not mentioned in Latvian, the official translation of the oath reads, as follows: “I do hereby solemnly swear (promise) to be loyal to the Republic of Latvia, to comply with its laws and to fulfil my duties in good faith.”⁷

The oath of allegiance to the Republic of Latvia and its Constitution is stipulated in several laws regulating the activities of various state services, for example, Section 11 of the Law on the Course of Service of Officials with Special Service Ranks Working in Institutions of the System of the Ministry of the Interior and the Prison Administration,⁸ Section 4 of the Military Service Law,⁹ Section 5 of the National Guard of the Republic of Latvia Law,¹⁰ Section 22 of the Law “On State Security Institutions”,¹¹ Section 11 of the State Border Guard Law.¹² Members of the Parliament (*Saeima*),¹³ judges,¹⁴ prosecutors,¹⁵ sworn advocates,¹⁶ sworn notaries,¹⁷ and sworn bailiffs¹⁸ also swear (solemnly promise) to be loyal to Latvia. Similarly, state civil servants promise to be honest and just, loyal to the independent and democratic Republic of Latvia.¹⁹ However, these oaths and promises do not include the term “loyalty” or the obligation to be loyal. On the other hand, for example, a teacher has

⁶ Valsts kontroles likums [State Audit Office Law] (01.06.1993). Available: <https://likumi.lv/ta/id/62538-valsts-kontroles-likums> [last viewed 25.05.2025].

⁷ See State Audit Office Law (01.06.1993). Available: <https://likumi.lv/ta/en/en/id/62538-state-audit-office-law> [last viewed 25.05.2025].

⁸ Iekšlietu ministrijas sistēmas iestāžu un Ieslodzījuma vietu pārvaldes amatpersonu ar speciālajām dienesta pakāpēm dienesta gaitas likums [Law on the Course of Service of Officials with Special Service Ranks Working in Institutions of the System of the Ministry of the Interior and the Prison Administration] (15.06.2006). Available: <https://likumi.lv/ta/id/138750-iekšlietu-ministrijas-sistemas-iestazu-un-ieslodzijuma-vietu-parvaldes-amatpersonu-ar-specialajam-dienesta-pakapem-dienestagai...> [last viewed 25.05.2025].

⁹ Militārā dienesta likums [Military Service Law] (30.05.2002). Available: <https://likumi.lv/ta/id/63405-militara-dienesta-likums> [last viewed 25.05.2025].

¹⁰ Latvijas Republikas Zemessardzes likums [National Guard of the Republic of Latvia Law] (06.05.2010). Available: <https://likumi.lv/ta/id/210634-latvijas-republikas-zemessardzes-likums> [last viewed 25.05.2025].

¹¹ Valsts drošības iestāžu likums [On State Security Institutions] (05.05.1994). Available: <https://likumi.lv/ta/id/57256-valsts-drosibas-iestazu-likums> [last viewed 25.05.2025].

¹² Valsts robežsardzes likums [State Border Guard Law] (05.11.2020). Available: <https://likumi.lv/ta/id/318741-valsts-robezсарdzes-likums> [last viewed 25.05.2025].

¹³ 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 25.05.2025]. Legal analysis of the deputy's oath: *Kārklīņa, A.* The Oath of the Members of Parliament (MPs) and Liability for Its Breach. Journal of the University of Latvia. Law, No. 8, 2015, pp. 134–153. Available: <https://journal.lu.lv/jull/article/view/191/175> [last viewed 25.05.2025].

¹⁴ Par tiesu varu [On Judicial Power] (15.12.1992). Available: <https://likumi.lv/ta/id/62847-par-tiesu-varu> [last viewed 25.05.2025]. On Judicial Power. (15.12.1992). Available: <https://likumi.lv/ta/en/en/id/62847-on-judicial-power> [last viewed 25.05.2025].

¹⁵ Prokuratūras likums [Office of the Prosecutor Law] (19.05.1994). Available: <https://likumi.lv/ta/id/57276-prokuraturas-likums> [last viewed 25.05.2025].

¹⁶ Latvijas Republikas Advokātūras likums [Advocacy Law of the Republic of Latvia] (27.04.1993). Available: <https://likumi.lv/ta/id/59283-latvijas-republikas-advokaturas-likums> [last viewed 25.05.2025].

¹⁷ Notariāta likums [Notariate Law] (01.06.1993). Available: <https://likumi.lv/ta/id/59982-notariata-likums> [last viewed 25.05.2025].

¹⁸ Tiesu izpildītāju likums [Law on Bailiffs] (24.10.2002). Available: <https://likumi.lv/ta/id/68295-tiesu-izpilditaju-likums> [last viewed 25.05.2025].

¹⁹ Valsts civildienesta likums [State Civil Service Law] (07.09.2000). Available: <https://likumi.lv/ta/id/10944-valsts-civildienesta-likums> [last viewed 25.05.2025].

a duty to be loyal to the Republic of Latvia and its Constitution.²⁰ The Ministry of Justice has also expressed the opinion that “loyalty is the recognition, abidance, and respect of the fundamental values of a democratic state governed by the rule of law. It is loyalty to the values and fundamental principles set out in the Constitution. [...] Loyalty as trust, respect, attachment to something, in this case – to the state of Latvia and its Constitution, is to be recognized as one of the highest and most important virtues and moral principles that have existed and continue to exist in every society”²¹.

The authors of this article conclude that the highest form of loyalty is patriotism. Even the basic law textbook states: “A citizen must be loyal to the Republic of Latvia, he has the right and duty to protect its freedom, independence and democratic parliamentary state system. Citizens’ loyalty to the state, respect for it and conscientious performance of duties is called loyalty.”²²

The above circumstances have prompted the authors of the article to explore the conceptual understanding of “confidence” (Latvian: *uzticība*) with a particular emphasis on its legal implications. Therefore, the aim of the paper is to analyse the concept of confidence in legal regulation and practice of its application (basically focusing on important aspects of confidence in the public law of the Republic of Latvia, also using some statements from private law), to identify possible problems and to propose solutions.

In the article, general research methods were used, such as comparison and summarization, causal relationship detection, analysis and synthesis, as well as methods of legal norms interpretation.

1. Distinguishing between the concepts of “confidence”, “trust”, and “loyalty”

When grammatically interpreting concepts of “confidence” (Latvian: *uzticība*), “trust” (Latvian: *uzticamība*), and “loyalty” (Latvian: *lojalitāte*), it must be stated that they differ in content. For example, in the Latvian Literary Language Dictionary, the term “confidence” is explained, as follows: confidence is a specific expression of the adjective “faithful” (Latvian: *uzticīgs*) or belief in a favourable, honest attitude, behaviour towards oneself, as well as reliance, faith.²³

Dr. iur. Gatis Bārdiņš, referring to the explanation of the Latvian Literary Language Dictionary expresses the opinion that the term “confidence” (Latvian: *uzticība*) should be used only in cases related to the adjective “faithful” (faithful is someone who is constant and unwavering in their beliefs or actions, unchanging in their attitude). In contrast, in cases involving the adjective “trustworthy” (trustworthy is someone who can be trusted, relied on), the term “trusting (in something)” (Latvian: *uzticēšanās*) should be used.

²⁰ Izglītības likums [Education Law] (29.10.1998). Available: <https://likumi.lv/ta/id/50759-izglitiba-likums> [last viewed 25.05.2025].

²¹ Judgement of the Constitutional Court of the Republic of Latvia of 21 December 2017 in case No. 2017-03-01. Latvijas Vēstnesis, No. 256, 27.12.2017.

²² *Džugleja, T.* Tiesību pamati. [Fundamentals of Law]. Rīga, Talsi: Talsu tipogrāfija, 2011, p. 51.

²³ Latviešu literārās valodas vārdnīca [Latvian Literary Language Dictionary]. 8. sējums. T–Ž. Rīga: Zinātne, 1996, 213.–214. lpp.

The Cambridge Dictionary defines “confidence” as “the quality of being certain of your abilities or of having trust in people, plans, or the future”.²⁴ The Oxford English Dictionary describes “confidence” as “the mental attitude of trusting in or relying on a person or thing; firm trust, reliance, faith”.²⁵

In the Latvian Literary Language Dictionary, the term “loyalty” is understood as behaviour that manifests respect for the existing power, compliance with its laws, or behaviour that manifests an honest, correct, respectful attitude (towards something or someone).²⁶ In the Cambridge Dictionary, “loyalty” is defined as “the quality of being loyal”, while “loyal” is described as “firm and not changing in your friendship with or support for a person or an organization, or in your belief in your principles”.²⁷ The Oxford English Dictionary states that “loyalty” means “faithful adherence to one’s promise, oath, word of honours, etc.”²⁸

Loyalty is strengthened in regulatory enactments in the interests of the state and society, because loyalty to the state for which a person works or is in public service is a prerequisite for democracy, security and justice. This falls within the scope of self-protective democracy, by legal means and restrictions reducing the possibilities when a person can accept double standards in their activities, i.e., a person belongs to (is in the service or works) the system of state institutions, has a duty to act in the interests of the state (including society) or institution, but at the same time the person expresses an opinion or allows actions that are contrary to the interests of the state or institution, in fact acting anti-state or supporting anti-state activities or manifestations, respectively threatening the state itself, its territorial indivisibility, sovereignty, independence or constitutional order, while also undermining public trust in state administration, but more broadly – in the state.

One of the articles rightly mentions that the European Court of Human Rights has repeatedly referred to the general loyalty clause.²⁹ For example, the European Court of Human Rights in the judgment of the case *Vogt v. Germany* recognized that loyalty includes belief in the state, its fundamental values, but does not mean an obligation to align with the goals and policies of a particular government in power.³⁰ The Court emphasized that loyalty also means distancing oneself from groups that question and vilify the state and the existing constitutional order.

Violation of the duty of loyalty may be evidenced in cases where a person:

has supported an anti-state movement, glorified the crimes of the communist or Nazi regime, war crimes, or expressed another radical opinion that is disparaging of the Republic of Latvia and its Constitution, or has taken other

²⁴ Confidence. The Cambridge Dictionary. Available: <https://dictionary.cambridge.org/dictionary/english/confidence> [last viewed 25.05.2025].

²⁵ Confidence. The Oxford English Dictionary. Available: <https://www.oed.com/search/dictionary/?scope=Entries&q=confidence> [last viewed 25.05.2025].

²⁶ Latviešu literārās valodas vārdnīca [Latvian Literary Language Dictionary]. 4. sējums. J–L. Rīga: Zinātne, 1980, 738. lpp.

²⁷ Loyal. The Cambridge Dictionary. Available: <https://dictionary.cambridge.org/dictionary/english/loyal> [last viewed 25.05.2025].

²⁸ Loyalty. The Oxford English Dictionary. Available: <https://www.oed.com/search/dictionary/?scope=Entries&q=loyalty> [last viewed 25.05.2025].

²⁹ Mikuda, S. Likumprojekts par lojalitāti Latvijas valstij un Satversmei būtu pilnveidojams [The draft law on loyalty to the State of Latvia and the Constitution should be improved] (07.06.2023). Available: https://lvportals.lv/skaidrojumi/352384-likumprojekts-par-lojalitati-latvijas-valstij-un-satversmei-butu-pilnveidojams-2023#_ftn2 [last viewed 25.05.2025].

³⁰ Judgement of the European Court of Human Rights of 2 September 1996 in “*Vogt v. Germany*”, application 17851/91. Available: <https://hudoc.echr.coe.int/?i=001-57949> [last viewed 25.05.2025].

actions that clearly indicate that the person is not loyal to the Republic of Latvia and its Constitution. An opinion or action by which a person, at an event organized or supported by him, publicly denies or justifies, or even glorifies genocide, crimes against humanity, crimes against peace or war crimes against the territorial indivisibility, sovereignty and independence of democratic states or the constitutional order or the Republic of Latvia and its inhabitants, or grossly disparages and calls for the elimination of the national independence and territorial unity of the Republic of Latvia, would also be considered disloyal. Such activity also includes providing various types of support to individuals or states that undermine or threaten the territorial integrity, sovereignty or constitutional order of democratic states. It is not possible to list such activities exhaustively, but they may include financial, material, logistical, informational (propaganda) or other types of activities, as well as individual activities or a set of them, aimed at providing such assistance, support or activities against the territorial indivisibility, sovereignty and independence of a democratic state or the promotion of constitutional order.³¹

In this case, it is clearly evident that the concept of “loyalty” encompasses a broader set of obligations and actions than the concept of “confidence”. “Confidence” can include “confidence” or “trusting” in state policy or state administrative institutions, or *vice versa* – the opposite action – unwavering in one’s views or actions, unchanging in attitude to accept ideas unfavourable or harmful to the state, whereas “loyalty to the state” simultaneously accepts criticism of state administrative institutions, permitted political activity, existence in the opposition, and the exercise to lawful peaceful protests. Loyalty to the state and its fundamental law cannot be interpreted as loyalty to or trust in the government.

This is also consistent with the findings of the Constitutional Court that loyalty characterizes an individual’s relationship with the state. Those working in public administration must be loyal to the state and perform their duties in the interests of the state and society. Thus, political loyalty is understood as loyalty to the state, in which an individual serves as a member of the civil service.³²

For the purposes of comparison, it is worth noting that the most comparable regulatory framework addressing issues of loyalty to that of Latvia can be found in a neighbouring country – Lithuania. For example, Section 4(2)6 of the Law on Civil Service of the Republic of Lithuania (*Lietuvos Respublikos Valstybės tarnybos įstatymas*) explicitly identifies loyalty to the state as one of the key principles of civil service conduct and professional ethics.³³ The principles of civil servants’ conduct and professional ethics shall include, among others, loyalty to the Lithuanian state and its constitutional order. A civil servant must act in the interests of the state, not violate its constitutional order, and, if necessary, take all lawful actions required to

³¹ Likumprojekta “Grozījums Valsts pārvaldes iekārtas likumā” Nr. 256/Lp14 anotācija [Draft Law “Amendments to the State Administration Structure Law” No. 256/Lp14. Annotation]. Available: <https://titania.saeima.lv/LIVS14/SaeimaLIVS14.nsf/0/904D0FFFE72C54F1C22589A4003E96FB?OpenDocument> [last viewed 25.05.2025].

³² Judgement of the Constitutional Court of the Republic of Latvia of 11 April 2006 in case No. 2005-24-01, para. 11.2. Latvijas Vēstnesis, No. 61, 18.04.2006; see also: *Bārdiņš, G.* Par termiņiem “uzticība” un “uzticēšanās” [About the Terms “Trust” and “Confidence”]. *Jurista Vārds*, No. 36, 29.08.2017, pp. 14–15.

³³ Lietuvos Respublikos Valstybės tarnybos įstatymas [Law on the Civil Service of the Republic of Lithuania] (08.07.1999). Available: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.84605/asr> [last viewed 25.05.2025].

protect that order. This formulation clearly establishes the obligation of civil servants not only to refrain from actions harmful to the state, but also to actively defend its constitutional foundations, thereby emphasizing a substantive and proactive understanding of “loyalty”.

A comparison conducted by Lithuanian researchers showed that the civil service systems of Lithuania, Estonia, and Latvia are open – meaning that any citizen of these countries can apply for a public service position, provided that he or she meets the formal requirements established by law. In relation to the use of the term loyalty, they note: “Latvian and Lithuanian civil servants must be loyal to the government [...] Principles mentioned in the pledge and duties listed in the Estonian and Latvian public service acts are similar: loyalty to the state, legality, performance of duties and serving the public interest.”³⁴

Overall, it should be noted that in the Republic of Latvia, especially in the field of public law, there is currently a lack of a unified understanding of the concepts of “loyalty” and “confidence”, the use of these terms in various regulatory enactments and practice is different, which also affects the interpretation and application of legal norms.

In addition, the aforementioned situation is also influenced by the specifics of translations and terminological choices in foreign languages. For example, in the official English translation of the Constitution of the Republic of Latvia, “confidence” is translated as “loyalty” (“Loyalty to Latvia”, “to be loyal to Latvia”),³⁵ while in the Russian translation it is translated as “confidence” or “faithfulness” (Russian: *Верность Латвии, быть преданным Латвии*).³⁶ Identically, in the official English translation of the Law “On Judicial Power”, “confidence” is translated as “loyalty” (“to be loyal to the Republic of Latvia”).³⁷ The Latvian word *uzticība* has several translation options in English, but two are more commonly used – “confidence” and “trust”. Sometimes, they are used together in documents: “trust and confidence”.³⁸

However, as explained in one of the studies on the judiciary, when characterizing the relationship between individuals and institutions, one can speak of “confidence” of institutions, and not of individuals’ “trust” in them, although these phenomena are related, and the term “trust” is also used in scientific literature in connection with attitudes towards institutions.³⁹ The above also confirms that in Latvian, alongside

³⁴ *Palidauskaitē, J., Pevkur, A., Reinholde, I.* A Comparative approach to civil service ethics in Estonia, Latvia and Lithuania. *Journal of Baltic studies*, Vol. 41, No. 1, 2010, p. 54. <https://doi.org/10.1080/01629770903525316> [last viewed 25.05.2025].

³⁵ The Constitution of the Republic of Latvia (15.02.1922). Available: <https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia> [last viewed 25.05.2025].

³⁶ Конституция Латвийской Республики [The Constitution of the Republic of Latvia] (15.02.1922). Available: <https://likumi.lv/wwwraksti/LIKUMI/SATVERSME/KRIEVU.PDF> [last viewed 25.05.2025].

³⁷ On Judicial Power (15.12.1992). Available: <https://likumi.lv/ta/en/en/id/62847-on-judicial-power> [last viewed 25.05.2025].

³⁸ Agreement Between the Government of the Republic of Latvia and the Government of the Republic of Lithuania on Mutual Protection of Classified Information (22.05.2015). Available: <https://likumi.lv/ta/en/starptautiskie-likumi/id/504-agreement-between-the-government-of-the-republic-of-latvia-and-the-government-of-the-republic-of-lithuania-on-mutual-protection-of> [last viewed 25.05.2025].

³⁹ *Šņitņikovs, A., Kārklīņa, I.* Tiesu uzticamība un korupcijas uztvere tiesu darbībā Latvijā [Judicial Trustworthiness and Perception of Corruption in the Judiciary in Latvia] (2013). Available: https://www.at.gov.lv/files/uploads/files/9_Tieslietu_padome/Korupcijas%20petijums-LU.doc [last viewed 25.05.2025].

the term “confidence”, the term “trust” is used, which accordingly opens up an even broader range of understanding.

2. Levels of confidence in the regulatory framework of the Republic of Latvia

Confidence, as a requirement set out in regulatory enactments for the residents of the Republic of Latvia, must be assessed at least on three levels:

- 1) In the context of the institution of citizenship, because every citizen must be confident in his or her state. This confidence is *a priori* presumed for every person whose right to citizenship of the Republic of Latvia is acquired at birth, or is specifically emphasized upon admission to Latvian citizenship and the person solemnly promises: “I will be loyal to the Republic of Latvia. I undertake to be devoted to Latvia and fulfil the Constitution and laws of the Republic of Latvia in good faith.”⁴⁰ As can be seen, in this case, “confidence” and “loyalty” are separate concepts. The understanding of the aforementioned concepts and the meaning of the oath have become particularly relevant during the 2024 discussion on the possibility of revoking citizenship to those persons who maliciously oppose the existence of sovereign Latvia, despite the fact that these persons do not have the citizenship of another country, and accordingly, the Citizenship Law includes deception in obtaining citizenship. In this case, deception is also understood as a violation of confidence (loyalty) to Latvia, which the person being naturalized promises to maintain when applying for citizenship. However, one must agree with the opinion that in such a case, the regulatory enactments should precisely define “what constitutes confidence (loyalty) to Latvia and, accordingly, a violation of this promise (oath) of loyalty”⁴¹; The importance of Confidence increases significantly when extraordinary circumstances arise in the country, for example, the threat of war, an emergency situation, etc.⁴²
- 2) The highest requirements of confidence and appropriate assurances are related to persons entering various positions, for example, in the civil service, legal professions, etc., assuming the restrictions associated with the position and being aware of the specifics of their actions in the interests of the state and society, as well as swearing or solemnly promising to be loyal to Latvia. In this case, breach of the oath is primarily associated with the loss of the relevant status, as well as specifically provided liability for administrative violations or criminal offenses, if, for example, they are committed by an official;
- 3) Even higher trustworthiness requirements have been imposed on several individuals working in or serving in the state, or on private individuals who perform certain state functions or provide services, and a special trust assessment (vetting) has been provided, which is a prerequisite for obtaining

⁴⁰ Pilsonības likums [Citizenship Law] (22.07.1994). Available: <https://likumi.lv/ta/id/57512-pilsonibas-likums> [last viewed 25.05.2025].

⁴¹ *Jelisejevs, A.* Latvijas pilsonība nav uz mūžu. Lojalitāte Latvijai zvērsta pārkāpums ir maldināšana, iegūstot pilsonību naturalizācijas ceļā [Latvian citizenship is not for life. Violation of the oath of loyalty to Latvia is considered deception when acquiring citizenship through naturalization]. *Jurista Vārds*, No. 7, 13.02.2024.

⁴² *Balodis, R., Danovskis, E.* Functionality Problems of Collegial Government Institutions During the COVID-19 Pandemic and Solutions for the Future. *Journal of the University of Latvia. Law*, No. 14, 2021, pp. 197–215. <https://doi.org/10.22364/jull.14.12> [last viewed 25.05.2025].

a certain status. For example, the Law “On Official Secret” states that “[i]ssuing of a facility security clearance shall be refused or facility security clearance shall be cancelled if [...] during the security vetting such facts were established in respect of a merchant that provide a basis for doubting its reliability and ability to keep the official secret” and “[a]ccess to confidential, secret and top secret official secret objects shall be denied to a person [...] in respect of whom, during the security vetting, facts have been established that provide a basis for [...] doubting his or her reliability and ability to keep an official secret”⁴³. In this case, the person’s trustworthiness is assessed by competent authorities, which may result in a situation where the person continues relations with the state, but in a certain aspect the person has not demonstrated its trustworthiness requirements in order to receive the necessary permission or admission.

It should be noted that on 20 April 2023, Amendments to the Criminal Law entered into force, which provide for criminal liability “for a person who intentionally discloses a confidential, secret, or top secret official secret” (Section 94 of the Criminal Law) or “who commits disclosure of a confidential, secret, or top secret official secret through negligence” (Section 95 of the Criminal Law).⁴⁴ The ways in which information containing state secrets reaches another person can differ, for example, in a frank conversation, in a public speech, showing documents, drawings, schemes, etc.⁴⁵ A state secret may also be disclosed due to carelessness, distraction, inattention, negligence, for example, by leaving a document containing a state secret visible to another person or otherwise accessible, etc.⁴⁶

At the initiative of the Constitution Protection Bureau (Latvian: *Satversmes aizsardzības birojs*), the Latvian State Security Service (Latvian: *Valsts drošības dienests*) and the Defence Intelligence and Security Service (Latvian: *Militārās izlūkošanas un drošības dienests*) amendments were drafted in three laws at once: the Criminal Law⁴⁷, the Freedom of Information Law⁴⁸, and the Law “On Official Secret”⁴⁹. In the draft laws submitted by the National Security Committee (Latvian: *Nacionālās drošības komisija*) of the Parliament (*Saeima*) of the Republic of Latvia their necessity was justified, indicating that with these amendments security requirements will be separated into two groups – information for official purposes and confidential, secret, or top secret information, and that the right of a private

⁴³ Par valsts noslēpumu [On Official Secret] (17.10.1996). Available: <https://likumi.lv/ta/id/41058-par-valsts-noslepumu> [last viewed 25.05.2025].

⁴⁴ Grozījumi Krimināllikumā [Amendments to the Criminal Law] (20.04.2023). Available: <https://likumi.lv/ta/id/341428-grozijumi-kriminallikuma> [last viewed 25.05.2025].

⁴⁵ *Krastiņš, U., Liholaja, V.* Krimināllikuma komentāri [Comments on the Criminal Law]. The second part (Chapters IX–XVII). 3rd ed. Riga: Tiesu namu aģentūra, 2022, p. 112.

⁴⁶ *Ibid.*, p. 113.

⁴⁷ Krimināllikums [Criminal Law] (17.06.1998). Available: <https://likumi.lv/ta/id/88966-kriminallikums> [last viewed 25.05.2025].

⁴⁸ Informācijas atklātības likums [Freedom of Information Law] (29.10.1998). Available: <https://likumi.lv/ta/id/50601-informacijas-atklatibas-likums> [last viewed 25.05.2025].

⁴⁹ Par valsts noslēpumu [On Official Secret] (17.10.1996). Available: <https://likumi.lv/ta/id/41058-par-valsts-noslepumu> [last viewed 25.05.2025].

person to access information for official purposes cannot prevail over the need to protect such information.⁵⁰

The above considerations lead to a conclusion that the highest requirements of trustworthiness require a person to have a certain lifestyle, behaviour, and actions both while performing official or work duties and outside the time and place of performing these duties.

3. Specifics of understanding trust in the field of private law

If so far the article has examined the specific aspects of the understanding of “trust” in the field of public law, then in order to gain a broader perspective, it is necessary to point out the specifics of understanding the concept of trust in some branches of private law, emphasizing the specifics of commercial law and labour law accordingly.

In this case, the subjective factors of the understanding of “trust” in the field of commercial law are particularly noteworthy, when an authorized institution, person or persons (shareholders, participants, etc.) decide on trust in a specific person, accordingly assessing their actions, decisions made, or the performance indicators of a specific institution. For example, the position of a member of the board of directors of a limited liability company “is a position of trust, as a result of which a member of the board who has lost trust cannot seek reinstatement in the office through the courts. Whether there was an objective reason for the loss of trust does not affect the aforementioned finding, as trust and its loss are subjective factors. Therefore, the court cannot impose a board member on the company and its members against their will, and therefore the dismissed board member does not have the right to claim reinstatement”.⁵¹ Therefore, in this context, the concept of trust emphasizes the ability of an institution or person to rely on a specific person, as well as the right to express one’s will.

Similarly, with the court emphasizing the assessment of the employee’s actions and the need to justify the decision or dismissal, Section 101(1) 2) of the Labour Law states that an employer has the right to give a written notice of termination of an employment contract only on the basis of circumstances related to the conduct of the employee, when the employee, in performing work, has acted illegally and therefore has lost the trust of the employer.⁵² According to the findings of the Senate of the Supreme Court, the employer must assess “both the criteria generally accepted in society for unlawful conduct, and the impact (resonance) the relevant violation has had on the specific employment legal relations, the relevant work environment (work collective), and the impact it has had on the employer’s reputation”⁵³. Thus, in addition to the finding of an employee’s unlawful conduct, the employer’s emotional

⁵⁰ Likumprojekta “Grozījumi Krimināllikumā” Nr. 212/Lp14 anotācija [Draft Law “Amendments to the Criminal Law” No. 212/Lp14. Annotation]. Available: <http://titania.saeima.lv/LIVS14/SaeimaLIVS14.nsf/WEBRespDocumByNum?OpenView&restricttocategory=212/Lp14|647> [last viewed 25.05.2025].

⁵¹ *Strupiņš, A.* Komerctiesību attīstība: problēmas un perspektīvas [Development of Commercial Law: Issues and Perspectives]. Augstākās Tiesas Biļetens No. 16, 2018, p. 127.

⁵² Darba likums [Labour Law] (20.06.2001). Available: <https://likumi.lv/ta/id/26019-darba-likums> [last viewed 25.05.2025].

⁵³ Latvijas Republikas Augstākās tiesa [The Supreme Court of the Republic of Latvia], Tiesu prakse lietās par individuālajiem darba strīdiem [Case Law in Individual Labour Dispute Cases] (2010/2011). Available: <https://www.at.gov.lv/files/uploads/files/docs/petijumi/darba%20stridi.pdf> [last viewed 25.05.2025].

reaction to the employee's unlawful conduct is necessary, which is his or her inner personal feeling.⁵⁴

It can be concluded that in the field of public law, "confidence" includes confidence in the state – Latvia, confidence in state policy or state administrative institutions, and is different from the concept of "loyalty". In the field of private law, however, "trust" is related to reliance on a specific person (e.g., employee, board member), which is based on subjective factors or judgment.

Summary

Finally, the authors put forward the following theses in the form of conclusions and proposals:

Although the term "confidence" (Latvian: *uzticība*) is significant in Latvian legal doctrine and is used quite often in regulatory enactments, there is a lack of a unified understanding of the term "confidence" with the concepts "loyalty" (Latvian: *lojalitāte*) and "trust" (Latvian: *uzticamība*) also being used (often as synonyms), which also affects the interpretation and application of legal norms.

The identified terminological uncertainty also affects the translations of Latvian regulatory acts into English, in which the term "confidence" (Latvian: *uzticība*) is understood as "confidence", "loyalty" or "trust".

In the context of public law, the concept of "confidence" means faith in the state – Latvia, as well as its policies and state administration institutions. This confidence is different from the concept of "loyalty". In the field of private law, however, "trust" is closely related to trust in a specific person, such as an employee or a board member. It is based on subjective factors and individual judgment.

The term "confidence" (Latvian: *uzticība*) raises the issue of responsibility, especially in the case of the so-called oath of allegiance, and also allows it to be assessed at different levels – the confidence of every citizen in the state, a specially defined declaration of trust or requirements of an official or a person with a special status.

The highest standards of trustworthiness require a person to adopt a certain lifestyle, behaviour, and conduct, both while performing official or work duties and outside the time and place of performing these duties.

Considering the content and meaning of the term "confidence" (Latvian: *uzticība*) in service or employment relationships, regulatory enactments should be gradually organized, establishing uniformed "confidence" standards and promises (oaths) for all public administration employees.

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⁵⁴ Atlaišana darbinieka uzvedības dēļ [Dismissal due to employee conduct] (18.07.2022). <https://follow.eu/lv/bez-rubriki-lv/atlaisana-darbinieka-uzvedibas-del/> [last viewed 25.05.2025].

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Lithuanian Electoral Code: General Observations and Main Changes in Financing of Political Campaigns*

Dr. Elena Masnevaitė

Faculty of Law, Vilnius University
Assistant Professor at the Department of Public Law
E-mail: elena.masnevaite@tf.vu.lt

 0000-0002-6075-3413

The Electoral Code of the Republic of Lithuania consolidates electoral laws into a unified framework of a constitutional law, seeking to enhance clarity and transparency in electoral processes. Its preparation took almost 13 years and was not easy at all. Key innovations include stricter regulations on political donations, transparency measures, and mandatory disclosure of financial agreements. While the code in some ways marks progress, challenges persist, such as non-regulation of third-party participation and an over-reliance on prohibitions, raising concerns about alignment with international standards.

In this article, the author highlights the key characteristics of the code from a constitutional perspective and examines its strengths and challenges in regulating election campaign financing, while offering ideas for future improvements.

Keywords: Lithuanian election law, electoral code, political organisation, election campaign, financing, third-party participation, Central Electoral Commission.

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Introduction

The preparation and adoption of the draft Electoral Code in Lithuania followed a rather long and challenging path. On the other hand, this should not be particularly surprising, as drafting and adopting any code tends to require significant time due to the specific nature of regulatory legal acts of this kind. In this case, there was also a very pronounced political dimension, which made finding compromises on certain issues exceptionally difficult, not to mention that the Code was adopted as a constitutional law, the adoption of which requires a qualified majority of votes in the Seimas of the Republic of Lithuania¹, thus demanding political consolidation².

The Electoral Code of the Republic of Lithuania³, adopted on 19 July⁴ 2022, came into effect on 1 September 2022. It took almost 13 years for the Code to materialise. Six different types of laws – the Law on Elections to the *Seimas* of the Republic of Lithuania⁵, the Law on Presidential Elections of the Republic of Lithuania⁶, the Law on Elections to the European Parliament of the Republic of Lithuania⁷, the Law on Elections to Municipal Councils of the Republic of Lithuania⁸, the Law on the Financing and Financial Control of Political Campaigns of the Republic of

¹ See the Article 69 of the Constitution of the Republic of Lithuania (25.10.1992). Available: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/079fcad0cf8711ecb69ea7b9ba9d787b?jfwid=b454lz9dz> [last viewed 12.04.2025].

² See more: Šinkūnas, H. Teisė.Pro. Rinkimų kodeksas: Kas, ką, kada ir kaip? [Electoral Code: Who, What, When, and How?]. 23 September 2022. Available: <https://www.teise.pro/index.php/2022/09/23/h-sinkunas-rinkimu-kodeksas-kas-ka-kada-ir-kaip/> [last viewed 12.04.2025].

³ Lietuvos Respublikos rinkimų kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo konstitucinis įstatymas (19.07.2022) [Constitutional Law on the Adoption, Entry into Force, and Implementation of the Electoral Code of the Republic of Lithuania]. Available: <https://www.e-tar.lt/portal/lt/legalAct/418f26f0082b11edb4cae1b158f98ea5> [last viewed 12.04.2025]. **Note.** Unless otherwise specified, this article analyses the original version of the Electoral Code and the version of other legal acts as of 1 September 2002.

⁴ After President's veto.

⁵ Lietuvos Respublikos Seimo rinkimų įstatymas (09.07.1992). Available: <https://www.e-tar.lt/portal/lt/legalAct/TAR.06267D86738E> [last viewed 12.04.2025].

⁶ Lietuvos Respublikos Prezidento rinkimų įstatymas (22.12.1992). Available: <https://www.e-tar.lt/portal/lt/legalAct/TAR.E39827DBDE34> [last viewed 12.04.2025].

⁷ Lietuvos Respublikos rinkimų į Europos Parlamentą įstatymas (20.11.2003). Available: <https://www.e-tar.lt/portal/lt/legalAct/TAR.FE3C428580B8> [last viewed 12.04.2025].

⁸ Lietuvos Respublikos savivaldybių tarybų rinkimų įstatymas (07.07.1994). Available: <https://www.e-tar.lt/portal/lt/legalAct/TAR.336A4B109EBC> [last viewed 12.04.2025].

Lithuania⁹ (hereinafter – the Law on the Financing), and the Law on the Central Electoral Commission of the Republic of Lithuania¹⁰ – were codified into a single legal act.

It is not clear, whether this is a coincidence, or if the legislature indirectly intended to symbolically mark this date as a new beginning.¹¹ Even if it is purely coincidental, the Electoral Code indeed represents the start of a new tradition in regulating electoral law in Lithuania.¹² Not only is it a codified legal act, but it is also a constitutional law.

The adoption of the Electoral Code in Lithuania represents a landmark moment in the evolution of electoral governance, unifying all electoral laws into a single, cohesive framework. This development aims to address longstanding challenges related to transparency, accountability, and equity in the electoral process. However, while the Electoral Code introduces significant innovations, such as enhanced financial disclosure requirements and stricter controls on political donations, it also raises questions about its practical implications and alignment with democratic principles such as equality, transparency, and accountability.

Despite the fact that more than three years have passed since the Lithuanian Electoral Code came into force, it is important to note that its issues have been scarcely studied,¹³ and the matters raised in the current paper have been analysed only by the author of this article.

This study delves into the key provisions of the Electoral Code, including its approach to political advertising, third-party involvement, regulation of campaign finances, and the legal status of the Central Electoral Commission. It critically evaluates the balance between prohibition and regulation, highlighting areas where the Code's provisions may fall short of international standards or constitutional norms. By situating Lithuania's reforms within a broader regional and international context, the article offers insights into the successes and shortcomings of the Lithuanian Electoral Code and explores pathways for further strengthening its contribution to democratic governance.

The author of this article employs a combination of legal, historic, comparative, and analytical research methods to examine the provisions and implications of the Lithuanian Electoral Code. The analysis is grounded in a comprehensive review of the Code's text, supplemented by interpretations of relevant national constitutional and administrative case law, jurisprudence of the European Court of Human Rights, legal and policy documents, and academic literature.

⁹ Lietuvos Respublikos politinių kampanijų finansavimo ir finansavimo kontrolės įstatymas (23.08.2004). Available: <https://www.e-tar.lt/portal/lt/legalAct/TAR.CF812DA6E814> [last viewed 12.04.2025].

¹⁰ Lietuvos Respublikos vyriausiosios rinkimų komisijos įstatymas (20.06.2002). Available: <https://www.e-tar.lt/portal/lt/legalAct/TAR.AF228880894E> [last viewed 12.04.2025].

¹¹ In Lithuania, the new academic year begins on September 1st, which is recognized as the commemorative “Day of Science and Knowledge”. See the Article 1(2(64)) of the Law on Commemorative Days of the Republic of Lithuania [Lietuvos Respublikos atmintinų dienų įstatymas] (03.07.1997). Available: <https://www.e-tar.lt/portal/lt/legalAct/TAR.D570962773F8> [last viewed 12.04.2025].

¹² It should be noted that electoral codes are not very popular, either in Europe or globally. See more: Global Citizenship Observatory, National Electoral Laws Database. Available: <https://globalcit.eu/national-electoral-laws/> [last viewed 12.04.2025].

¹³ *Matjošaitytė, L.* Rinkimų teisės pokyčiai 2023 metais [Changes in Electoral Law in 2023]. In: Lietuvos teisė 2023: esminiai pokyčiai [Lithuanian Law 2023: Main Changes]. Available: <https://cris.mruni.eu/server/api/core/bitstreams/28109aab-c830-40c1-b8cc-037aedf2af39/content> [last viewed 14.04.2025] <https://doi.org/10.13165/LT-23-01-01>.

1. A few general insights about the Electoral Code itself

The fact that all the “rules of the game” for elections can now be found in one place, and that they have been unified as much as possible for all elections, is undoubtedly a significant advantage. This is something that, first and foremost, should be appreciated by participants of electoral political campaigns. Previously, some participants sometimes found it difficult to navigate the different election laws and their requirements. This was especially true in cases where election laws regulated certain issues in similar but not identical ways. The result of this was more frequent violations of election laws. Therefore, it can be preliminarily stated that the Electoral Code will serve, albeit not in a classical sense, as a kind of preventive tool against election law violations.

Nevertheless, the matter of codifying electoral laws should have been addressed differently. This refers to the two-tier legal regulation established in the constitutional law and ordinary law. In this regard, this opinion is not unique, as there have been others who share this view. For instance, in September 2021, a group of Members of *Seimas* drafted and registered a proposal for the Constitutional Law on the List of Constitutional Laws¹⁴. Among other things, this proposal suggested amending the list of constitutional laws by removing the Constitutional Law on the Approval, Entry into Force, and Implementation of the Electoral Code and replacing it with the Constitutional Law on the Fundamentals of Elections.

During the presentation of this draft constitutional law in the session of *Seimas*, it was particularly emphasized that the Electoral Code would contain numerous highly detailed procedural provisions. In practice, if it became evident that some of these provisions were flawed, it would pose a significant problem, as constitutional laws can only be amended with a majority of at least 3/5 of all Members of *Seimas*, meaning at least 85 votes from 141 (Article 69(3) of the Constitution). The *Seimas* did not support this idea. After its presentation, the draft constitutional law was not approved and was returned to the initiators for revision.¹⁵ The initiators ultimately abandoned this proposal altogether.

It is very unfortunate, as the detailed legal regulation established in the Electoral Code was programmed to definitely cause practical problems.¹⁶ Naturally, this was to be expected, as in a legal act of such scope, something is always overlooked

¹⁴ Lietuvos Respublikos konstitucinių įstatymų sąrašo konstitucinio įstatymo projektas Nr. XIVP-817 (10.09.2021) [Draft Constitutional Law of the Republic of Lithuania on the List of Constitutional Laws No. XIVP-817]. Available: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/6edf9420120711ecad9fbbf5f006237b?positionInSearchResults=2&searchModelUUID=5cbd1990-94e8-497a-9a21-a75c362a7b4b> [last viewed 14.04.2025].

¹⁵ III (rudens) sesijos 2021 m. gruodžio 9 d. vakarinio posėdžio Nr. 123 stenograma [Transcript of the evening session No. 123 of the III (autumn) session on 9 December 2021]. Available: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/80c1ffc059ab11ecacfd54306d0ca27> [last viewed 14.04.2025].

¹⁶ For example, the Article 76(4) of the original version of the Electoral Code stipulated that **a candidate’s biography provides information** about their place of birth, **nationality**, education, knowledge of foreign languages, workplace, public activities, hobbies, and marital status. On October 10, 2023, this provision was amended and now states as follows: **The candidate in their biography must provide information** about their **date** and place of birth, education, knowledge of foreign languages, workplace, **work experience**, public activities, hobbies, and marital status. See more: Lietuvos Respublikos rinkimų kodekso 32, 64, 69, 76, 78, 79, 80, 81, 85, 87, 88, 89, 93, 97, 100, 110, 114, 125, 138, 163, 181, 185 ir 193 straipsnių pakeitimo konstitucinis įstatymas Nr. XIV-2185 (10.10.2023) [Constitutional Law No. XIV-2185 on the Amendment of Articles 32, 64, 69, 76, 78, 79, 80, 81, 85, 87, 88, 89, 93, 97, 100, 110, 114, 125, 138, 163, 181, 185, and 193 of the Electoral Code of the Republic of Lithuania]. Available: <https://www.e-tar.lt/portal/lt/legalAct/7a0f33c0733d11eea5a28c81c82193a8> [last viewed 14.04.2025].

and (or) not considered. Indeed, why does the Code stipulate such details as, for example, the requirement that the bottom of a voter signature collection sheet must include the name and surname of the person collecting the signatures, the number of their passport, ID card, or document confirming the right to reside permanently in the Republic of Lithuania, their residential address, signature, and the date of the signature (Article 79(4) of the Electoral Code), regulating these in a legal act of constitutional law level? Does such provision truly require greater stability than what can be ensured by ordinary legislation? Apparently not.

Moreover, the Constitutional Court has noted that, although the Lithuanian Constitution does not explicitly establish the criteria that the Seimas should follow when including specific constitutional laws in the list of constitutional laws, it can be inferred from the provisions of the Constitution, which establish a more complex procedure for adopting and amending constitutional laws, that constitutional laws should regulate constitutionally significant areas of social relations and particularly important issues of state and societal life.¹⁷

The draft of the Constitutional Law on the Fundamentals of Elections was not prepared, making it difficult to determine what exactly the initiators of the draft Constitutional Law on the List of Constitutional Laws meant by the term “fundamentals”. If the author of this publication was to answer how she envisions it, she would first identify the constitutional principles of elections¹⁸ and the provisions of the Code of Good Practice in Electoral Matters¹⁹ approved by the European Commission for Democracy through Law (also known as the Venice Commission), despite the fact that this code technically is merely advisory in nature.²⁰

It is entirely unclear why the Electoral Code includes provisions regulating the legal status, tasks, powers, principles of operation, as well as the composition, organizational procedures, and funding of the Central Electoral Commission as well. The explanatory notes²¹ accompanying the draft versions of the Electoral Code provide no answer to this question. The Central Electoral Commission is expressly identified in the Constitution as a permanent institution. This alone justifies the need

¹⁷ Ruling of the Constitutional Court of the Republic of Lithuania of July 2020 in case No. 5/2019. Available (EN): <https://lrkt.lt/en/court-acts/search/170/ta2220/content> (last viewed 14.04.2025).

¹⁸ The Lithuanian Constitution enshrines more electoral law principles than those explicitly mentioned in its text, namely: universal, equal, direct suffrage, and secret ballot. The Constitutional Court's rulings additionally emphasize principles such as free and democratic elections, transparency, fairness in the electoral process, fair competition in elections, and justice. See more: *Pukanasytė, I.* Rinkimų teisės principai Konstitucinio Teismo jurisprudencijoje [Principles of Electoral Law in the Jurisprudence of the Constitutional Court]. *Socialinių mokslų studijos: mokslo darbai*, Vol. 5, issue 1, 2013, p. 218.

¹⁹ Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report. No. CDL-AD(2002), 30 October 2002. Available: <https://rm.coe.int/090000168092af01> [last viewed 14.04.2025].

²⁰ Nevertheless, since 2007, the European Court of Human Rights has treated the electoral law principles enshrined in the Code of Good Practice in Electoral Matters and their interpretation as a standard for resolving cases under its jurisdiction. Deviations from the principles outlined in this Code could lead to violations of the provisions of the European Convention on Human Rights or, conversely, help demonstrate that no violation of the Convention occurred. See more: *Miliuvienė, J.* “Soft law” įtaka konstitucinės jurisprudencijos raidai [The Influence of Soft Law on the Development of Constitutional Jurisprudence]. Doctoral dissertation. Vilnius: Mykolo Romerio universitetas, 2020, pp. 92–93.

²¹ Lietuvos Respublikos rinkimų kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo konstitucinio įstatymo projekto Nr. XIVP-1279 aiškinamasis raštas (11.01.2022) [Explanatory Note for the Draft Constitutional Law of the Republic of Lithuania on the Approval, Entry into Force, and Implementation of the Electoral Code No. XIVP-1279]. Available: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/6d3672b072d811ecb2fe9975f8a9e52e?jfwid=u9s5ag0yo> [last viewed 14.04.2025]; Lietuvos Respublikos rinkimų kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo konstitucinio įstatymo projekto Nr. XIVP-1279(2) aiškinamasis raštas (02.03.2022) [Explanatory Note for the Draft Constitutional Law of the Republic

for a separate law defining its status, not to mention that the provisions of the Law on Central Electoral Commission, which were “mechanically” incorporated²² into the Electoral Code, are of a completely different nature in terms of their subject matter and purpose. The Legal Department of the Office of the *Seimas* of the Republic of Lithuania highlighted this issue,²³ but, unfortunately, its comments on this specific matter were not taken into account.²⁴

2. Ten changes and one missed opportunity: Electoral code provisions on financing of political campaigns compared to the previously applicable legal framework

The rules on the financing of political campaigns, particularly the requirement for transparency, are established, among other reasons, to ensure that the general public transforms into a well-informed public. Well-informed public makes decisions only after assessing the available information. This necessity is grounded in the concept of democracy as a system based on the rational choices of a well-informed electorate.²⁵

It would be wise to start by addressing the changes in the legal regulation of donations, which are indeed quite significant. Let us begin with a new definition of the term “donation” as outlined in the Electoral Code: a donation is money transferred free of charge to a participant of an electoral political campaign or non-monetary benefits provided in the form specified in the Article 109(1) of this Code, intended for an electoral political campaign (Electoral Code, Article 107(1)). Markedly, the definition is quite concise, not overloaded with details, and has a clear structure. I.e., it is immediately apparent that donations can be of two types: monetary and non-monetary. For clarity, these types of donations are distinguished within the Electoral Code itself (Article 107(2)).

The Electoral Code also provides a definition of the term “non-monetary donation”. A non-monetary donation is defined as movable or immovable property,

of Lithuania on the Approval, Entry into Force, and Implementation of the Electoral Code No. XIVP-1279(2). Available: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/d53129d09a2111ec9e62f960e3ee1cb6?jfwid=u9s5ag0yo> [last viewed 14.04.2025].

²² Lietuvos Respublikos Seimo kanceliarijos Teisės departamento 2022 m. vasario 22 d. išvada Nr. XIVP-1279 „Dėl Lietuvos Respublikos rinkimų kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo konstitucinio įstatymo projekto“ [Opinion No. XIVP-1279 of the Legal Department of the Office of the *Seimas* of 22 February 2022 “Regarding the Draft Constitutional Law on the Approval, Entry into Force, and Implementation of the Electoral Code of the Republic of Lithuania”]. Available: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/7af7650093b511ec9e62f960e3ee1cb6?jfwid=u9s5ag0yo> [last viewed 14.04.2025]; Seimo kanceliarijos Teisės departamento 2022 m. kovo 8 d. išvada Nr. XIVP-1279(2) „Dėl Lietuvos Respublikos rinkimų kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo konstitucinio įstatymo projekto“ [Opinion No. XIVP-1279(2) of the Legal Department of the Office of the *Seimas* of 8 March 2022 “Regarding the Draft Constitutional Law on the Approval, Entry into Force, and Implementation of the Electoral Code of the Republic of Lithuania”]. Available: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/b3de39a09ed911ec9e62f960e3ee1cb6?jfwid=u9s5ag0yo> [last viewed 14.04.2025].

²³ Ibid.

²⁴ Researchers studying the legal status of the Central Electoral Commission after the Electoral Code came into effect have not highlighted this issue either. See more: *Pyrzyńska, A., Malužinas, M.* Pozycja prawna Centralnej Komisji Wyborczej Republiki Litewskiej [Legal Position of the Central Electoral Commission of the Republic of Lithuania]. *Przegląd Sejmowy*, Vol. 179, issue 6, 2025, pp. 85–107. <https://doi.org/10.31268/PS.2023.220>.

²⁵ *Pludowski, T.* Komunikacja polityczna w amerykańskich kampaniach wyborczych [Political Communication in American Election Campaigns]. Warszawa: Wydawnictwo Naukowe PWN, 2008, pp. 127–130.

information, property rights, intellectual property, or other material or non-material values transferred free of charge to an independent participant, as well as free-of-charge actions, volunteer work, or the results of actions, provided that the acquisition costs of these items or services are considered electoral political campaign expenses under this Code (Article 109(1)).

The Law on the Financing did not contain anything similar. That is, although the term “non-monetary donation” was used, it was not defined in the law, and the general definition of “donation” provided in it was cumbersome, confusing, and misleading, as well as clearly lacking systematic coherence. This, naturally, often led to problems in practice, as recipients of donations and electoral commissions interpreted and understood the term differently, leading to inconsistencies in its application.

It is also highly commendable that the Electoral Code explicitly and clearly states that voluntary work is considered a non-monetary donation (Article 109(6)). This was not the case in the Law on the Financing, where voluntary work was included in the general concept of “donation”, which, as noted above, was vague.

One of the most notable examples in this regard is the political campaign 2019 of President Gitanas Nausėda. During his campaign, or for its benefit, certain individuals allegedly provided specific services, calling it “voluntary support”²⁶ for the candidate. Paulius Tamulionis, a shareholder and director of the communications agency “Idea prima”, contributed to Gitanas Nausėda’s presidential campaign, providing consultations and other public relations-related services. Paulius Tamulionis stated that he did part of the work voluntarily, without accepting payment, but acknowledged that the usual cost of such campaign services could reach up to €100 000. This was not reflected in the list of individuals who donated to the candidate or in the candidate’s financial accountability documents. However, the Central Electoral Commission, after gathering preliminary information, decided that it was insufficient to initiate an investigation into this case. To reduce the likelihood of such instances recurring, the Electoral Code includes an additional safeguard – a requirement to record voluntary work in the financial accounting register, specifying what work was performed, by whom, to what extent, and when (Article 113(4)).

From the perspective of transparency and openness, one of the positive changes worth highlighting is the prohibition of cash donations established in the Electoral Code. Monetary donations can only be made via bank transfer or electronic payment methods that allow the donor’s identity to be verified (Article 112(4)). While such legal regulation may cause practical difficulties for some donors, the greater value lies in the fact that this new regulation should significantly limit the financing of election campaigns through third parties, a practice currently characterized by high levels of opacity. But, of course, it would be overly naïve to claim that this prohibition would fully resolve the issue.

It is also commendable that the Electoral Code has increased the maximum amount for small donations, particularly by defining it not as a specific fixed sum but as a percentage (3%) of one of the variable economic indicators – the Average Monthly Gross Salary (AMGS) – applied in elections (Article 108(1)). This approach allows for a relatively swift response to changing economic conditions without requiring excessive amendments to the relevant legislation. The Electoral Code stipulates that

²⁶ See more: *Davidonytė, B., Pancerovas, D.* 15min. Gitanui Nausėdai prezidentu tapti padėjo ir nematomas rėmėjas [An Invisible Supporter also Helped Gitanas Nausėda Become President]. 23 November 2020. Available: <https://www.15min.lt/naujiena/aktualu/lietuva/gitanui-nausedai-prezidentu-tapti-padejo-ir-nematomas-remejas-56-1410592> [last viewed 14.04.2025].

the AMGS applied in elections is equal to the AMGS of the national economy for the third quarter of the previous calendar year, rounded to the nearest whole number. According to data provided on the Official Statistics Portal, the AMGS for the last quarter of the previous year was €2335,9 gross²⁷. Thus, the current maximum amount for a small donation would be €70. In contrast, under the Law on the Financing, the maximum amount for a small donation was set as €12, a limit established back on 1 January 2015.

Unlike the requirements set out in the Law on the Financing, the Electoral Code eliminates the requirement for an individual donating more than a small donation to declare not only their income but also their assets in accordance with the law before making the donation to the recipient. This requirement was often excessive, as there is no practical need to declare assets if the declared income is sufficient to justify the donated amount. On the other hand, although such cases might be rare, it is conceivable that an individual may not have any income but possesses significant assets, including financial resources. In such cases, the corresponding provision of the Electoral Code could be considered overly restrictive. This nuance should not be overlooked.

Another novelty is related to the inclusion of membership fees paid to a political party in the maximum amount that a single individual may donate in a calendar year (Electoral Code, Article 110(5)). The emergence of such legal regulation has a practical basis. For instance, there have been cases, where a married couple not only paid the maximum allowable political party membership fees but also made additional donations of the maximum allowable amount to the same political party. However, this regulation should be considered questionable, and the reasons for this will be explained in greater detail.

Firstly, political party membership fees and donations to independent participants are different sources of funding for different entities. Secondly, it is difficult to understand why individuals who are members of political parties are being discriminated against compared to those who are not members of political parties, especially since the Law on Political Organizations of the Republic of Lithuania²⁸ sets maximum limits for political party membership fees (Article 19(4)). Reducing these limits could be one option to address this issue. And, finally, the corresponding provisions of the Electoral Code are not aligned with the Law on Political Organizations in that, under the Electoral Code – which is a constitutional law – only the membership fees paid to political parties are included in the maximum donation amount, excluding political organizations, which can also be funded through membership fees.

A different perspective applies to the provision in the Electoral Code, which states that donations made by an individual to other independent participants and membership fees paid to a political party are included in the total donation a candidate in a single-member electoral constituency or a referendum initiator can receive for their political campaign financing within a calendar year (Article 110(6)), provided

²⁷ Oficialiosios statistikos portalas. Šalies ūkio darbuotojų vidutinis mėnesinis darbo užmokestis ir vidutinė valstybinio socialinio draudimo senatvės pensija [Official Statistics Portal. Average Monthly Wages of the Country's Workforce and the Average State Social Insurance Old-Age Pension]. Available: <https://osp.stat.gov.lt/covid19-statistika/covid19-itaka-darbo-rinkai/darbo-uzmokestis> [last viewed 14.04.2025].

²⁸ Lietuvos Respublikos politinių organizacijų įstatymas (15.09.2022) [Law on Political Organizations of the Republic of Lithuania]. Available: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/a81b677034fa11edbf47f0036855e731/asr> [last viewed 14.04.2025].

that membership fees paid to a political party are excluded from this provision. Moreover, it is also unclear why the aforementioned provision of the Electoral Code is applied to donations made by referendum initiators to finance their referendum political campaign.

And here is the provision of the Electoral Code stating that the amount of donations allowed to finance a candidate's election campaign in a single-member constituency includes the sum of debts incurred during the election campaign and expenses paid before the start of this campaign (Article 110(3)), which deserves thunderous applause. For a long time, a solution could not be found to combat the detrimental practice where a candidate donates the maximum allowable amount to their election campaign and incurs an equivalent or even greater amount in debts²⁹. This essentially meant that candidates, using such a scheme, could easily bypass the established maximum spending limit for political election campaigns several times over. Furthermore, there have been instances when, after the election campaign ended, some candidates' campaign debts simply disappeared or were repaid with funds from unclear sources.

The Electoral Code specifies the same source of funding for the election campaigns of representative participants – the funds of the independent participants who nominated them. However, using conditional donations as an example (this is an assumption), it is additionally stipulated that, if the donor specifies which representative participant the donation is intended for, this donation cannot be used to finance the election campaigns of other participants (independent or representative) (Article 105). This creates conditions for emphasizing (materializing) the donor's political preferences. It somewhat resembles a voter's ability to give preferential votes to candidates they favour more on a shared candidate list. The difference is that the act of donating to a specific representative participant does not protect the "secrecy of voting". Quite the opposite, treasurers are required to publish this information on the website of the Central Electoral Commission, including who donated, when, how much, and to whom.

It is also worth mentioning that, compared to the Law on the Financing, the content of financing transparency has been significantly improved in the Electoral Code. It is particularly gratifying that now, not only election campaign financing agreements are made public on the Central Electoral Commission's website, but also the agreements concluded by independent participants with service providers and advertising producers (Article 124(2)). Of course, this will be done in strict compliance with personal data protection requirements.

²⁹ To be fair, it should be mentioned that an interim solution to this issue was found and could have been applied since 1 January 2020. This was established by the Law on the Financing: Article 18. Debts of Political Campaign Participants and Their Settlement.

1. A political party is entitled to settle its debts only from the sources of funding specified in the Law on Political Parties of the Republic of Lithuania, while other participants in a political campaign may settle their debts only from their own (personal) funds.
2. Debts incurred by political campaign participants during the political campaign period must be settled before the commencement of the next political campaign for the corresponding elections. In cases where a former independent political campaign participant fails to settle debts by the specified deadline, upon their registration as an independent participant in the next political campaign, the maximum allowable amount of political campaign expenses for that participant shall be reduced by 25 percent by the decision of the Central Electoral Commission.
3. A former independent political campaign participant who has settled their debts must notify the Central Electoral Commission of the settlement and the sources of funds used for it within 5 working days.

Now, let us delve deeper into election campaign financing expenses, specifically focusing on political advertising. Let us begin by noting that the Electoral Code provides a clarified definition of the term “advertising”, explicitly distinguishing between types of political advertising, namely positive and negative political advertising (Article 95(1)). It should be noted that, in this regard, the legislator has not introduced anything new. It has merely formalized the practice established by the Central Electoral Commission and upheld by the courts,³⁰ whereby certain information is considered political advertising and is further classified as positive or negative depending on the intention behind its dissemination – that is, the intended direction of influence of the political advertisement. This direction can also be non-individualized, such as aiming to influence election results.

Notably, compared to the Law on the Financing, the Electoral Code places an emphasis on paid political advertising. To prevent a variety of interpretations of this concept, the definition of paid political advertising is also provided. Paid political advertising is defined as political advertising that is prepared, produced, and (or) disseminated for payment, or for which financial resources are used, engaging individuals who typically provide such services for remuneration (Article 95(2)).

Insofar as it pertains to the ordering of paid political advertising for election campaign purposes and its corresponding payment, the Electoral Code establishes stricter regulations—this can only be done by the participant of the election campaign themselves (Article 95(3)). It would not be incorrect to assume that this legislative reaction was prompted by the public campaigns against political party “Lietuvos lenkų rinkimų akcija-Krikščioniškų šeimų sąjunga”³¹ (hereinafter – LLRA-KŠS) and its leader Valdemaras Tomaševskis³² organized in 2020 by the journalist and public activist Andrius Tapinas and Laisvės TV, such as the publications “Viso gero, Voldemortai”³³ (“Goodbye, Voldemort!”) and “Viso gero, Valdemarai?”³⁴ (“Goodbye, Valdemar?”). In these publications, people were urged to participate more actively in the elections to prevent LLRA-KŠS from entering the *Seimas*. If they could not choose a suitable candidate, voters were advised to spoil their ballots. The publications also introduced the party’s candidates for the *Seimas*, presenting negative information about them, and included critical statements from Lithuanian Poles about LLRA-KŠS.

Here should be elaborated further on the earlier remark about a missed opportunity. Instead of regulating the participation of third parties in election campaigns by defining their funding sources, declaration and labelling obligations, and potential

³⁰ See, for example, decision of the Supreme Administrative Court of Lithuania of 3 May 2023 in case No. eA-574-662-2023 or decision of the Supreme Administrative Court of Lithuania of 30 March 2022 in case No. eA-183-502/2022.

³¹ Lithuanian Poles’ Electoral Action – Christian Families Alliance.

³² Waldemar Tomaszewski.

³³ See more: *Skerytė, J.* LRT. Tapino ir Tomaševskio kovoje dedamas taškas: VRK šurkščių pažeidimų nenustatė [Full Stop in Tapinas and Tomaševskis’ Dispute: The Central Electoral Commission Found No Serious Violations]. 31 October 2020. Available: <https://www.lrt.lt/naujienos/lietuvoje/2/1266826/tapino-ir-tomasevskio-kovoje-dedamas-taskas-vrk-siurksciu-pazeidimu-nenustate> [last viewed 14.04.2025].

³⁴ A publication of similar content. See its content: Laisvės TV, diskusinis leidinys “Viso gero, Valdemarai?” [“Goodbye, Valdemar?”]. 30 September 2020. Available: https://issuu.com/laisves_tv/docs/viso_gero_valdemarai_laikrastis_a2_570x400mm [last viewed 14.04.2025].

spending limits – as repeatedly proposed by the Central Electoral Commission³⁵ and the Lithuanian branch of Transparency International³⁶ – the legislator chose a different path: to prohibit it. Although such a prohibition is not explicitly stated in the Electoral Code, the provision allowing only the participants of election campaigns to order and pay for paid political advertising effectively amounts to the same thing. It is regrettable that Lithuania did not follow the example of other countries, such as neighbouring Latvia, and instead of regulating these social relations, chose to ignore them through a prohibition.³⁷ Moreover, the chosen approach clearly does not align with the case law of the European Court of Human Rights on this matter.

The European Court of Human Rights has repeatedly emphasized that the values protected by the Convention for the Protection of Human Rights and Fundamental Freedoms can be safeguarded not only through prohibitions but also by establishing an effective control mechanism.³⁸ The Court has also ruled that it is impermissible to prohibit entities that are not formally participants in an election campaign from taking part in such campaigns, as this would restrict their freedom of expression. At the same time, it has stressed the need to strike a balance – specifically, by regulating and controlling the participation of such entities in election campaigns.³⁹ Finally, such decisions contribute neither to the strengthening of civil society nor to an increase in public trust in political parties. Moreover, it can be assessed that they violate the Lithuanian Constitution, specifically Article 25(1, 2, 3, 4) – freedom of expression; Article 33(1, 2) – citizens' right to participate in governing their country; Article 34(1) – citizens' active right to vote; and Article 35(1, 2) – freedom of association. The author assures that nothing revolutionary has been stated here. Some scholars who examine the topic and challenges of political financing⁴⁰ have noted for quite some time that donations from citizens and other individuals with active voting rights should be regarded as an equivalent to voting as a means of supporting the political elite. In a wealthy society – such as ours – money can be considered a method and resource for participating in public life.

There are also opinions that external financial support for political parties should not only be allowed but even encouraged – as a sign of voluntary social-political commitment. Financial or other support for political parties is viewed as an element

³⁵ Lietuvos Respublikos vyriausiosios rinkimų komisijos 2020 m. spalio 31 d. sprendimas Nr. Sp-254 [Decision No. Sp-254 of the Central Electoral Commission of 31 October 2020]. Available: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/6997d7021b7e11eb9604df942ee8e443?positionInSearchResults=2&searchModelUUID=b30aae35-26b1-4536-a68a-79486bd8a5d9> [last viewed 14.04.2025].

³⁶ Proposals by the Lithuanian Chapter of Transparency International (TILS) for Amendments to Election Laws, 30 April 2021. Available: <https://www.transparency.lt/wp-content/uploads/2021/04/Transparency-International-Lietuvos-skyriaus-pasi%C5%ABlymai-rinkim%C5%B3-%C4%AFstatym%C5%B3-pakeitimams.pdf> [last viewed 14.04.2025].

³⁷ Facebook. The discussion “Election Campaigns Online: To Regulate or Embrace?” organized by Transparency International and the Central Electoral Commission, 30 April 2021. Available: <https://www.facebook.com/tilietuva/videos/128306695959735> [last viewed 14.04.2025].

³⁸ Decision of 7 June 2007 of European Court of Human Rights in the case *Parti Nationaliste Basque – Organisation Régionale d'Iparralde v. France*, No. 71251/01. Available: <https://hudoc.echr.coe.int/eng?i=002-2677> [last viewed 14.04.2025].

³⁹ Decision of 19 February 1998 of European Court of Human Rights in the case of *Bowman v. The United Kingdom*, No. 141/1996/760/961. Available: <https://hudoc.echr.coe.int/fre?i=001-58134> [last viewed 14.04.2025].

⁴⁰ *Dahl, R. A. Who Governs? Democracy and Power in an American City*. New Haven: Yale University Press, 1961, p. 226; *Nassmacher, K.-H. Introduction: Political Parties, Funding and Democracy*. In: *Funding of Political Parties and Election Campaigns*, *Austin, R., Tjernström, M.* (eds.). Stockholm: International Institute for Democracy and Electoral Assistance, 2003, p. 6

of an individual's right to freely participate in the activities of a political party.⁴¹ Donations and financial support in this context should be understood more broadly than defined in the Electoral Code. Some voters wish to control the scope and content of the material support they provide to their candidate or political organization, as in certain cases, the actual use of funds does not always align with the donor's intentions.⁴²

It must be emphasized that the regulation of political advertising in the Electoral Code is not entirely adequate in terms of its recognizability and labelling. Firstly, because the recognizability requirement applies only to paid political advertising. In other words, in this case, "true" political advertising is considered to be only paid political advertising, even though the definition of "political advertising" in the Electoral Code itself includes "information disseminated free of charge in any form or by any means" that aims to influence election results or voter motivation during elections, or promotes a state politician, political organization, its member, or participant in an election campaign, as well as their ideas, goals, or program.

The general principle of advertising recognizability requires that advertising be clearly distinguished from other disseminated information and be clearly recognizable by its format. Furthermore, if there is a likelihood that the audience (recipients) may not recognize advertising disseminated in a media outlet due to its presentation format, such advertising must be appropriately labelled.

Of course, political advertising is a specific type of advertising and is not subject to all general principles of advertising dissemination. However, the principle of recognizability should certainly apply. Otherwise, the audience may interpret the presented information as news – that is, as facts or true (accurate) data – rather than as advertising (as defined in the Article 2(82) of the Law on Provision of Information to the Public of the Republic of Lithuania⁴³).

Despite this, the Electoral Code establishes an obligation to label only paid political advertising and only during the period from the start of the election campaign until the announcement of the final election results (Article 95(4)), although another provision of the Electoral Code states that unmarked political advertising – including both paid and unpaid political advertising – is considered hidden political advertising. Ultimately, the Code prohibits political advertising that is labelled in violation of the established requirements, as well as hidden political advertising, with violations subject to liability as stipulated by law (Article 95(5)). If these provisions of the Electoral Code were interpreted solely using a linguistic method – thankfully, this is not the case – it would seemingly lead to a legal absurdity.

Summary (concluding remarks)

The adoption of the Electoral Code represents a pivotal development in Lithuania's electoral legal framework, encapsulating disparate provisions into a cohesive and

⁴¹ *Von Alemann, U.* Party Finance, Party Donations and Corruption: The German Case. Available: https://www.sozwiss.hhu.de/fileadmin/redaktion/Fakultaeten/Philosophische_Fakultaet/Sozialwissenschaften/Politikwissenschaft/Dateien/von_Alemann/01_alemann_party-finance-n-corrupt-exchange.pdf [last viewed 14.04.2025].

⁴² *Burnell, P.* Introduction: Money and Politics in Emerging Democracies. In: *Funding Democratization*, *Burnell, P., Ware, A.* (eds.). New Brunswick: Transaction Publishers, 2007, p. 13.

⁴³ Lietuvos Respublikos visuomenės informavimo įstatymas (02.07.1996) [Law on Provision of Information to the Public of the Republic of Lithuania]. Available: <https://www.e-tar.lt/portal/lt/legalAct/TAR.065AB8483E1E> [last viewed 14.04.2025].

codified constitutional law. This endeavour not only enhances the clarity and consistency of electoral regulations but also establishes a robust foundation for more transparent and equitable election processes. By unifying these “rules of the game” into a singular legal instrument, the Electoral Code signifies a commendable step forward in modernizing electoral governance and addressing historical inconsistencies.

Nevertheless, certain regulatory choices embedded within the Code merit deeper reflection. The preference for outright prohibitions, particularly concerning third-party involvement in political campaigns, raises concerns about alignment with broader democratic principles. International standards, including the jurisprudence of the European Court of Human Rights, emphasize the value of regulatory balance over exclusionary measures to safeguard both freedom of expression and fair competition. These prohibitions may inadvertently stifle civic engagement, undermining the vibrant participation that is fundamental to a healthy democracy.

Furthermore, the inclusion of provisions regulating the Central Electoral Commission (CEC) within the Electoral Code itself has raised practical and theoretical concerns. The CEC’s status as a permanent institution, explicitly recognized in the Constitution, suggests the necessity of a separate law dedicated to defining its roles, responsibilities, and operational principles. Incorporating such provisions into the Electoral Code risks conflating distinct regulatory domains and complicating legislative adjustments to the CEC’s legal framework. Addressing this issue through a standalone legal act could enhance both clarity and legislative flexibility.

The Code’s innovations, such as enhanced transparency measures for political financing and the publication of financial agreements, deserve recognition. These changes aim to bolster public trust and accountability, providing greater oversight of campaign funding practices. Yet, their practical efficacy hinges on consistent enforcement and societal acceptance, which will be tested in forthcoming electoral cycles.

In conclusion, while the Electoral Code introduces significant advancements in Lithuania’s electoral law, it is not without its challenges. Addressing these gaps – particularly in relation to third-party regulation, the Central Electoral Commission’s legal framework, and harmonization with constitutional and international norms – will be essential to fostering a resilient and inclusive democratic framework. The success of this ambitious legal instrument will ultimately depend on its ability to adapt and evolve in response to practical realities and the needs of an engaged civil society.

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The Admissibility of Evidence in Latvian Criminal Proceedings

PhD Oskars Kulmanis

Faculty of Law, University of Latvia

Lecturer at the Department of Criminal Law

E-mail: oskars.kulmanis@lu.lv

This article is dedicated to issues regarding the admissibility of evidence in Latvian criminal proceedings. As a quality the admissibility of evidence is the second step that is evaluated to determine if the case material can be used in criminal proceedings. The article is devoted to the procedural instrument of admissibility of evidence and evaluation of absolute nature of exclusionary rules set in Article 130(2) of the Latvian Criminal Procedure Law. This article provides the procedural understanding of exclusionary rules and its relation to the credibility of evidence.

Keywords: admissibility of evidence, exclusionary rules, reliability of evidence, fair trial.

Introduction

In Latvian criminal procedure the admissibility of evidence is understood as requirement that in order to use the evidence in proofing, it must be obtained and fixed according to law. In fair criminal proceedings the admissibility of evidence emphasizes the aspects of obtaining and fixing information on facts and it is aimed to ensure the use of evidence.

However, the legislation in force, which sets rules on the inadmissibility of evidence or exclusionary rules, does not entail an assessment of the importance of the use of such evidence. Such a situation must be resolved from a legal point of view by establishing a single mechanism enabling the court to assess whether information obtained in a procedural defect could be used to justify a judicial ruling.

The aim of this article is to understand the content of the admissibility of evidence and the nature of exclusionary rules, whether they are procedural or material in nature and do they have any supremacy over the purpose of criminal proceedings. The third chapter is dedicated to the aspect that admissibility of evidence can also be viewed in context of reliability of evidence. The notion of fair trial does not prohibit the use of unlawfully obtained evidence, by fair means it allows the purpose of criminal proceedings to be achieved in a way that the defence rights are ensured even if such evidence is not obtained according to the law.

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1. The understanding of the admissibility of evidence in criminal proceedings

Article 130(1) of the Criminal Procedure Law¹ strengthens the conditions for admissibility of evidence². The first paragraph of this article prescribes that information obtained during criminal proceedings regarding facts may be used as evidence, if it has been acquired and fixed in accordance with the procedures laid down in this Law. The legislature therefore made two cumulative conditions for establishing the admissibility of evidence: 1) information on facts has been obtained in accordance with the procedures laid down in law; 2) the acquired information on facts has been procedurally fixed in accordance with the order laid down in the Law. Moreover, that definition of the admissibility of evidence includes the main meaning of the evidence: its use. The admissibility of evidence is therefore systematically linked to the use of evidence.

The admissibility of evidence is the second mandatory feature in the logical scheme of the characteristics of evidence, which is examined after relevance of evidence and before the reliability of evidence. The conditions for the admissibility of evidence relate to the establishment of certain limits, both in terms of what information on facts in criminal proceedings must be obtained and in the way in which information is procedurally fixed. In other words, the admissibility of evidence requires that the acquisition and fixing of information on facts is carried out in a specified, comprehensible and transparent manner. Such conditions are an integral part of fair proceedings.

It has been noted in legal science that determining whether someone is guilty of a criminal offence cannot be based on assumptions and intuitive findings but by proving it as a result of fair proceedings.³ In the model of adversarial proceedings,

¹ Kriminālprocesa likums [Criminal Procedure Law] (21.04.2005). Available: <https://likumi.lv/ta/id/107820-kriminalprocesa-likums> [last viewed 14.04.2025].

² According to Article 130(2) information regarding facts that has been acquired in the following manner shall be recognised as inadmissible and unusable in proving: 1) using violence, threats, blackmail, fraud, or duress; 2) in a procedural action that was performed by a person who, in accordance with this Law, did not have the right to perform such operation; 3) allowing the violations specially indicated in this Law that prohibit the use of a specific piece of evidence; 4) violating the fundamental principles of criminal proceedings.

³ Meikališa, Ā., Strada-Rozenberga, K. Taisnīgums kriminālprocesā. In: Kriminālprocess. Raksti. 2010–2015 [Fairness in criminal proceedings. In: Criminal Procedure. Articles 2010–2015]. Rīga: Latvijas Vēstnesis, 2015, p. 173.

the prosecuting officer draws up a case, raises a charge and is responsible for presenting evidence and for proving the criminal offences identified in the indictment.⁴ Accordingly, in criminal matters the prosecution is obliged to present and prove the facts relevant to the case as reliable “beyond reasonable doubt”.⁵ It follows that the purpose of criminal proceedings is, *inter alia*, achieved through proofing.

To ensure the proofing, information on facts must be obtained and this is basically done in pre-trial criminal proceedings. The procedures for obtaining and fixing information on facts is determined by Chapters 9 to 11 of the Criminal Procedure Law.

The obtaining of information on facts involves, in particular, interference with the various rights and legitimate interests of persons involved in criminal proceedings, such as the right to liberty, privacy, human integrity and human dignity. However, criminal proceedings, as proceedings of public interest which are aimed for the identification and prosecution of the perpetrators of criminal offences, include the fair resolution of the damage caused to the victim and require proportionate interference with the rights of those involved in those proceedings. This is what happens most often when information on facts is obtained during criminal proceedings.

Legal science notes that the purpose of criminal proceedings is not achieved in situations where evidence that is not relevant to the case is obtained.⁶ Such a finding is fully justified since, in order to attain the objective pursued by criminal proceedings, the obtaining of unnecessary information on facts in each case gives rise to a finding that the interference with the rights of individuals resulting from their acquisition is not justified.

The relevance of the evidence allows for the free use in criminal proceedings of all information on facts relating to the case. However, the admissibility of evidence sets certain limits for a free approach: evidence relevant to the case must be admissible, i.e., obtained and fixed in accordance with the procedures laid down by law.⁷

The rule of the admissibility of evidence is an important procedural concept. It requires that evidence to be used in criminal proceedings should be declared admissible in accordance with the law. Provisions governing whether or not evidence is admissible should be broadly translated. The aspect of applicable law refers to statutory provisions normally laid down in criminal procedural law or in the constitution, which generally lay down considerations prohibiting torture or inhuman or degrading treatment, as well as corporal punishment.⁸ Moreover, the fact-finding, whether pre-trial criminal proceedings are inquisitorial or adversarial, must be genuine, that is,

⁴ Jackson, J. Taking Comparative Evidence Seriously. *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching*. Oxford and Portland, Oregon: Hart Publishing, 2007, p. 306. Available: <https://ebookcentral-proquest-com.datubazes.lanet.lv/lib/lulv/reader.action?docID=1772822> [last viewed 14.04.2025].

⁵ Nance, D. *The Burdens of Proof*. Cambridge: Cambridge University Press, 2016, p. 1.

⁶ Ashworth, A., Redmayne, M. *The Criminal Process*. 3rd ed. New York: Oxford University Press Inc., 2005, p. 106.

⁷ See Kuczynska, H. Admissibility of Evidence Obtained as a Result of Issuing a European Investigation Order in a Polish Criminal Trial. *Review of European and Comparative Law*, 46 (3), 2021, p. 70. Available: https://heinonline-org.datubazes.lanet.lv/HOL/Page?collection=journals&handle=hein.journals/recol46&id=70&men_tab=srchresults# [last viewed 14.04.2025].

⁸ Skorupka, J. The rule of admissibility of evidence in the criminal process of continental Europe. *Revista Brasileira De Direito Processual Penal*, 7 (1), 2021, p. 94. Available: <https://heinonline-org.datubazes.lanet.lv/HOL/Page?handle=hein.journals/rbdpp7&id=93&collection=journals&index=> [last viewed 14.04.2025].

the facts must reflect reality. In the case of the inquisitorial proceedings, the criminal justice authorities, the police, the prosecutor's office, the court have a greater influence on the process of proof, its scope and the determination of the facts in the case.⁹ In this context, it should be noted that formal compliance with the procedures for obtaining information on facts by fixing planted evidence, false content, is incompatible with the purpose of criminal proceedings and points to a different understanding of the meaning and purpose of criminal proceedings by the person conducting such actions.

The prerequisite relating to observance of the procedures laid down by law for the acquisition of information on facts shall include all the conditions for the admissibility of evidence related to the obtaining of evidence. Four theories have been developed in legal science justifying exclusion of facts obtained in an irregular manner from the scope of evidence and prohibition of using the following facts in evidence: 1) the necessity to dissuade persons performing criminal proceedings from committing repeated similar violations in the future by obtaining information on facts; 2) the requirement to guarantee the reliability of the evidence; 3) the necessity to ensure observance of the rights of the person who has the right of defence; 4) the necessity to ensure the legitimacy and authority of a ruling regulating criminal legal relations.¹⁰ Nowadays, given the objective of the European Union directives adopted in criminal procedure law to establish common minimum standards and an area of justice, the admissibility of evidence in the theory of the legitimacy of a judicial judgment also guarantees the recognition and enforcement of judicial rulings in criminal matters in the European Union.

In legal science, it is recognised that the protective purpose of the admissibility of evidence, when establishing that information on facts was obtained, in particular, as a result of an infringement of the rights of an accused, ensures that the information should, in principle, be excluded from the body of evidence. Information on facts obtained by way of derogation from the conditions laid down in the procedural law should be excluded, except where the court considers that the accused suffered no disadvantage as a result of the breach.¹¹ Compliance with the conditions for obtaining and fixing information on facts laid down by law is an important guarantee, which also ensures the quality or trustworthiness of the content of the information obtained. However, not in all cases, compliance with the procedural form will ensure that personal evidence is true. In this context, it is noted that, in fact, the purpose of criminal proceedings is not aimed at obtaining false evidence and therefore excludes the use of methods directed at influencing sources of information. The requirements for the use of legal means shall preclude obtaining the result of the proceedings at all costs and by use of inappropriate measures. This will essentially reinforce the quality of the proceedings and appropriate practice of obtaining the information on facts.

Compliance with the conditions for the admissibility of evidence is also closely linked to genuine fact-finding of the case. Obtaining information according to the legal order significantly strengthens the quality of evidence obtained in the case.

⁹ Skorupka, J. The rule of admissibility of evidence, pp. 97–98.

¹⁰ Delmas-Marty, M., Spencer, J. R. European Criminal Procedures. Cambridge: Cambridge University Press, 2005, p. 603; Jackson, J. D., Summers, S. J. The Internationalisation of Criminal Evidence. Beyond the Common Law and Civil Law Traditions. Cambridge: Cambridge University Press, 2012, pp. 154–156.

¹¹ Jackson, J. D., Summers, S. J. Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms. Bloomsbury Publishing Plc, 2018, p. 277. Available: <https://ebookcentral-proquest-com.datubazes.lanet.lv/lib/lulv/reader.action?docID=5264892> [last viewed 14.04.2025].

If the information was obtained by procedural errors, it is important to determine whether it has prevented to clarify the substance of the case. In circumstances where procedural errors have not prevented to achieve the purpose of criminal proceedings, the possibility of using such defectively obtained information should be considered. In this way, the admissibility of evidence as a framework for establishing the truth prevents the acquisition and use of falsely produced evidence.

In the light of the foregoing, it must be held that the institute for the admissibility of evidence contains an assessment of all the procedural means for obtaining, fixing and using information on facts, which is necessary in order to ascertain the substance of the case and to achieve a fair settlement of criminal relations.

The admissibility of evidence must be regarded as a sign of the procedural form of the evidence.¹² The conditions of procedural form, as well as the criteria for the admissibility of evidence, shall be regulated by the Criminal Procedure Law.¹³ In order to be admissible, the information contained therein must be obtained in accordance with a procedural form laid down in law: 1) the information on facts included in the content of the evidence has been obtained from actual sources of information specified in law; 2) the information on facts included in the content of the evidence has been obtained by competent subjects of criminal proceedings; 3) the information included in the content of evidence has been obtained and fixed in a manner specified by law (as well as unauthorized methods have not been used); 4) other conditions of the Law, which have been imposed as a mandatory precondition for the procedural use of information in the status of evidence, have been observed.¹⁴ Due to the study of the issue raised in the article, these conditions will not be considered separately.

2. The absolute nature of exclusion of evidence

The conditions, which cause inadmissibility of evidence, are set in Article 130(2) of the Criminal Procedure Law, determining that information on facts that has been acquired in the following manner shall be recognised as inadmissible and unusable in proofing: 1) using violence, threats, blackmail, deception or coercion; 2) in a procedural action performed by a person who was not entitled to perform it in accordance with this Law; 3) by committing the violations specifically indicated in this Law, which prohibit the use of the particular evidence; 4) in violation of the fundamental principles of criminal proceedings. It follows from that list that the inadmissibility of the evidence is caused by a serious procedural defect in the process of obtaining that information. These cases laid down in Article 130(2) of the Criminal Procedure Law shall be interpreted and fulfilled and shall be used in practice in a reasonable manner.¹⁵

Investigations in criminal proceedings shall be carried out in accordance with the procedures laid down in the Criminal Procedure Law. Investigative tactics

¹² *Strada-Rozenberga, K.* Pierādīšanas teorija kriminālprocesā. Vispārīgā daļa [The theory of proof in criminal procedure. General part]. Rīga: SIA "Biznesa augstskola "Turība"", 2002, p. 203.

¹³ *Meikališa, Ā., Strada, K.* Kriminālprocesuālo terminu skaidrojošā vārdnīca. 2. labotais un papildinātais izdevums [Interpretative dictionary of criminal procedural terms. 2nd corrected and supplemented edition] Rīga: RaKa, 2000, p. 192.

¹⁴ *Strada-Rozenberga, K.* Pierādīšanas teorija kriminālprocesā, p. 218.

¹⁵ *Meikališa, Ā., Strada-Rozenberga, K.* Kriminālprocess. Raksti 2005–2010 [Criminal procedure. Articles. 2005–2010]. Rīga: Latvijas Vēstnesis, 2010, p. 124.

must be effective but must not be carried out using completely prohibited methods. The purpose of criminal proceedings must be achieved by legal and equitable means.

In legal science it is recognised that the admissibility of evidence is a procedural matter. It may have priority over material-legal issues. This priority determines that the form of a procedural question whether evidence is usable for proofing is admissible before legal answer can be provided on material legal questions. In particular, deciding procedural matters on the admissibility of evidence is mandatory before a material court ruling is taken. In this context, the question may be asked whether the procedural question of the admissibility of evidence from a normative point of view is of normative supremacy to the decision of material legal matters.¹⁶

It follows from Article 127(2) of the Criminal Procedure, read in conjunction with Article 130(1) of that law that the admissibility of evidence is, from a formal point of view, a necessary feature of evidence. From a regulatory point of view, the assessment of admissibility in turn ensures that information on facts obtained in criminal proceedings can be accepted and used as evidence in support of a judicial ruling. This means that the assessment of the admissibility of evidence is a procedural matter which takes place successively before the proofing and the court's ruling is substantiated.

However, from the perspective of the mandatory legal consequences laid down in Article 130(2) of the Criminal Procedure Law, it must be acknowledged that there is rather a subordination between the admissibility of evidence as a procedural matter and substantive matters. There is a procedural sequence between the assessment of the admissibility of the evidence and the justifying a court ruling, in which the two circumstances cannot exist without one another. From the point of view of the use of evidence, cases of inadmissibility of evidence do not provide for exceptions depending on the circumstances of a particular case and the public interest in criminalizing perpetrators. In democratic society this public interest in fair criminal proceedings also seeks to respect the interests of victims of crime to restore their violated rights¹⁷.

A promising method that helps to reduce human rights abuses is to exclude illegally obtained evidence from the body of evidence in the trial. The point of such an exclusion condition is in the hope that the law enforcement officers will refrain from using unlawful methods of obtaining information on facts, as they are aware that material evidence or witness statements obtained in this way will be recognized as inadmissible evidence.¹⁸ In that regard, it is necessary to consider the condition relating to the admissibility of evidence as to whether, and within what limits, the use of unlawfully obtained evidence could be justified by the public interest.

Both the obtaining of evidence and conditions governing it and examination of evidence are aspects that have potential influence on fairness of criminal proceedings.¹⁹ The admissibility of evidence and examination of evidence shall be recognised as mutually related elements forming a fair trial. The admissibility

¹⁶ *Levine-Schnur, R., Malcai, O.* When Procedure Takes Priority: A Theoretical Evaluation of the Contemporary Trends in Criminal Procedure and Evidence Law. *Canadian Journal of Law and Jurisprudence*, No. 1, 2017, pp. 187, 188, 194. Available: <https://heinonline.org/HOL/P?h=hein.journals/caljp30&i=188> [last viewed 14.04.2025].

¹⁷ For example, see *Gurēvičs, D., Strada-Rozenberga, K.* Victim of Crime and the State's Liability for the Result of Criminal Proceedings. *Journal of the University of Latvia "Law"*, Vol. 16, 2023, p. 61.

¹⁸ *Gless, S., Richter, T.* Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules. Cham: Springer Nature, 2019, p. 2. Available: <https://library.oapen.org/handle/20.500.12657/23097> [last viewed 14.04.2025].

¹⁹ *Jackson, J. D., Summers, S. J.* The Internationalisation of Criminal Evidence, p. 151.

of evidence lays down criteria for obtaining and fixing information on facts. On the other hand, examination of evidence is part of a judicial investigation which takes place at the trial stage of criminal proceedings and includes an assessment of the admissibility of evidence in the case file sent to the court and possibility of using it. Examination of evidence is an essential element of a fair trial that has been put forward so that the evidence obtained in criminal proceedings can be used for justifying a court ruling.

It has been discussed in legal science that if grounds for exclusion of evidence are only aimed at preventing police officers from taking unjustified action, such circumstances should open to judicial discretion, which would allow the court to derogate under certain circumstances from the conditions for the exclusion of evidence. This is particularly important in circumstances where the deterrence of police officers from unlawful conduct in criminal proceedings can be achieved by means of compensation other than the acquittal of the accused person. Such an approach is based on the grounds that the conditions for the exclusion of evidence cannot be prioritised, superior to the outcome of the case. The conditions of exclusion which prevent the use of evidence resulting from an infringement of the rights of a person shall be different from those which prevent the use of defective or misleading evidence. The latter conditions of exclusion include a pure priority of justification over a specific outcome. Conditions excluding the use of relevant and reliable evidence reflect only one aspect of fairness that would be comparable to other considerations. Moreover, there may be a situation in which the taking of a conviction is morally justified, despite inadmissibility of evidence obtained, which may exclude the legal validity of the outcome of such a case. Such a priority of legal justification would be justified in cases where evidence was obtained as a result of torture. In other cases, a generally absolute limit to the use of illegally obtained evidence seems morally and legally unlikely.²⁰

The aforementioned considerations show a sufficiently significant aspect of the admissibility of evidence, which may be limited to the use of defective or misleading evidence and the use of reliable and relevant evidence. In this sense, as it has already been noted, the admissibility of evidence should not be considered from the perspective of obtaining and fixing information, but from the perspective of its use. Accordingly, the admissibility of evidence includes an assessment of conditions for obtaining information and conditions for the use of the information obtained from the perspective of guaranteeing fair proceedings. This is also in line with the approach enshrined in the case-law of the European Court of Human Rights, which places significant emphasis on guaranteeing fair and adversarial proceedings.

Additionally, there is a different objective, which would not allow the use of defective or misleading evidence. In such a case, the possibility of using the evidence is linked to the need to assess the trustworthiness of the content which reveals the binding of the admissibility as an element of use with the reliability of the evidence. It guarantees that the importance of the use of evidence is assessed from the perspective of the purpose of fair criminal proceedings, and in view of the fact that misleading evidence may not play a role in proving. In the case of relevant and reliable evidence, although it may be obtained by a procedural defect, their use has a different meaning, which generally justifies their use in the determination of the substance of the case and in the justification of the court ruling.

²⁰ *Levine-Schnur, R., Malcai, O. When Procedure Takes Priority*, pp. 202–204.

In Anglo-American law, the question of the conditions for exclusion of evidence is addressed in the context of the right to a fair trial enshrined in Article 6 of the European Convention on Human Rights, emphasising, first of all, to what extent a factor of public interest may influence the assessment of an infringement of a fair trial enshrined in Article 6 of that Convention. Secondly, whether and under what circumstances the use of evidence obtained as a result of an infringement of another right enshrined in the European Convention on Human Rights will render the proceedings unfair.²¹ In some cases, considerations regarding the importance of the public interest are expressed in determining whether interference with the rights guaranteed by the European Convention on Human Rights was proportionate. This relates, for example, to the scope of Articles 8 to 11 of the Convention. This is much less so in the context of Articles 5 to 6 of the Convention.²²

The practical exercise of the rights of the defence involves taking part in the examination of the evidence and challenging its use, which consists, in essence, in the exercise of the position of defence. Similarly, the defence is entitled to present its evidence. As a whole, those actions seek to ensure that there is a procedural opportunity to cast doubt on the merits of the accusation on the court. The European Court of Human Rights has emphasized, when assessing whether the proceedings as a whole were fair, account must be taken of whether a person's rights of defence have been safeguarded. It shall be assessed whether the person has been provided with the opportunity to contest the veracity of the evidence and object to the use thereof. In addition, it is also necessary to assess the quality of the evidence, including the circumstances in which it was obtained, and whether those circumstances cast doubt on the reliability or accuracy of the evidence. Where objections are raised as to the reliability of the evidence, the existence of a fair procedure for verifying the admissibility of the evidence is of even greater importance.²³

The issue of fairness of the proceedings does not always arise when the evidence obtained is not corroborated by other materials, so there is less need for additional corroborating evidence in situations where the evidence is compelling and there is no risk of finding it improbable.²⁴ In that regard, the European Court of Human Rights also attaches importance to whether the evidence in question can be regarded as decisive for the outcome of criminal proceedings.²⁵ In determining the fairness of the proceedings as a whole, the public interest in conducting investigations and

²¹ Ashworth, A. The Exclusion of Evidence Obtained by Violating a Fundamental Right: Pragmatism Before Principle in the Strasbourg Jurisprudence. In: Criminal Evidence and Human Rights. Reimagining Common Law Procedural Traditions. Oxford and Portland, Oregon: Hart Publishing, 2013, p. 145.

²² Ibid., p. 150.

²³ Judgement of 9 November 2018 of the European Court of Human Rights in case *Beuze v. Belgium*, No. 71409/10, para. 150. Available: <https://hudoc.echr.coe.int/eng?i=001-187802> [last viewed 14.04.2025]; judgement of 30 July 2019 of the European Court of Human Rights in case *Harun Grübüz v. Turkey*, No. 68556/10 para. 72. Available: <https://hudoc.echr.coe.int/eng?i=001-194858> [last viewed 14.04.2025]; judgement of 13 September 2016 of the European Court of Human Rights in case *Ibrahim and Others v. the United Kingdom*, No. 50541/08, 50571/08, 50573/08, 40351/09, para. 274. Available: <https://hudoc.echr.coe.int/eng?i=001-166680> [last viewed 14.04.2025].

²⁴ Judgement of 11 July 2006 of the European Court of Human Rights in case *Jalloh v. Germany*, No. 54810/00 para. 96. Available: <https://hudoc.echr.coe.int/eng?i=001-76307> [last viewed 14.04.2025]; judgement of 17 October 2019 of the European Court of Human Rights in case *Lopez Ribalda and Others v. Spain*, No. 1874/13, 8567/13 para. 151. Available: <https://hudoc.echr.coe.int/eng?i=001-197098> [last viewed 14.04.2025].

²⁵ Judgement of 1 June 2010 of the European Court of Human Rights in case *Gafgen v. Germany*, No. 22978/05 para. 164. Available: <https://hudoc.echr.coe.int/eng?i=001-99015> [last viewed 14.04.2025].

prosecuting the offence in question is weighed against the individual's interest in lawfully obtaining evidence against him.²⁶

The European Court of Human Rights emphasizes that it cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of this kind may be admissible.²⁷ The Court ascertains whether the proceedings as a whole were fair, bearing in mind whether the rights of the defence were respected.²⁸ This includes an obligation to assess whether the unlawful taking of evidence also constituted another violation of the rights protected by the European Convention on Human Rights, as well as the nature of the offence. In this context, the quality of the evidence and their role in the proceedings, as well as whether the person had the opportunity to challenge the use of the evidence and its authenticity, are assessed in the perspective of fair proceedings. Accordingly, the importance of the quality of the evidence applies on the aspect whether the conditions for obtaining it give rise to doubts as to the reliability and accuracy of their content. On the other hand, it should be taken into account, in such case, whether the evidence has a decisive role to play in influencing the outcome of the proceedings.²⁹

In Latvia, assessing the admissibility of evidence within the existing legal framework, which ensures the use of information on the facts in proving, at first it is determined whether evidence obtained as a result of a procedural defect prevents the use of relevant evidence. That is to say, whether the evidence is to be found to be inadmissible. It may then be assessed whether the use of evidence obtained as a result of a procedural defect is considered to be limited. The second paragraph of Article 130 of the Criminal Procedure Law does not determine an exception that would allow public interests, including the life of others and the interest of protecting fundamental rights of others, to weight in connection with conditions of exclusionary rules. Since there is no exception that determines an option to use inadmissible evidence, Latvian case law has not considered such a possibility. Therefore, the introduction of such a condition should be considered.

Firstly, the benefit of the public from fair proceedings and the procedural guarantees it provides is one element of a state based on rule of law which prevents the use of arbitrary or otherwise illegally obtained evidence resulting from acts that are incompatible with fair criminal proceedings. On the other hand, in the view of the context of fair proceedings the procedural aspect does not exclude the use of evidence obtained as a result of a procedural defect.

Secondly, there is no reason to consider the present system of conditions for obtaining the information on facts as ineffective. In cases, where criminal proceedings are found to be more difficult, it is also possible to gather the necessary evidence to proceed the case. The existing system of conditions for obtaining the information

²⁶ Judgement of 3 March 2016 of the European Court of Human Rights in case *Prade v. Germany*, No. 7215/10 para. 35. Available: <https://hudoc.echr.coe.int/eng?i=001-160990> [last viewed 14.04.2025].

²⁷ Judgement of 12 July 1988 of the European Court of Human Rights in case *Schenk v. Switzerland*, No. 10862/84, para. 46. Available: <https://hudoc.echr.coe.int/eng?i=001-57572> [last viewed 14.04.2025]; judgement of 23 September 2014 of the European Court of Human Rights in case *Cevat Soysal v. Turkey*, No. 17362/03, para. 63. Available: <https://hudoc.echr.coe.int/eng?i=001-146403> [last viewed 14.04.2025].

²⁸ See judgement in case *Cevat Soysal v. Turkey* (cf. above); judgement of 9 November 2018 of the European Court of Human Rights in case *Beuze v. Belgium*, No. 71409/10, para. 120. Available: <https://hudoc.echr.coe.int/eng?i=001-187802> [last viewed 14.04.2025].

²⁹ Judgement of 18 October 2016 of the European Court of Human Rights in case *Vukota-Bojić v. Switzerland*, No. 61838/10, paras. 93–95. Available: <https://hudoc.echr.coe.int/eng?i=001-167490> [last viewed 14.04.2025].

on facts clearly and unequivocally defines the procedures for obtaining and fixing the evidence. However, the existing conditions for the admissibility of evidence, enshrined in Article 130 of the Criminal Procedure Law, which include absolute cases of the recognition of evidence as inadmissible, do not include a condition to assess whether there is a possibility to use evidence obtained in a procedural manner is consistent with fair proceedings.

As it has already been noted, rules governing the admissibility of evidence as part of fair proceedings highlight the aspects of obtaining and fixing the information on facts, the admissibility is aimed at ensuring the use of the evidence. However, the existing legal framework, which provides for cases of declaring the evidence inadmissible, does not involve an assessment of the importance of the use of such evidence. In the opinion of the author, such a situation should be addressed from a legal point of view by establishing a single mechanism allowing the court to assess whether the evidence obtained as a result of procedural defect could be used to justify a court ruling.

The importance of the admissibility in this case is understood more broadly, covering not only the conditions for obtaining and fixing the information on facts, but also demonstrating the importance of the use of evidence in proofing, namely how their use in fair proceedings contributes to achieving the purpose of criminal proceedings. In such a case, the understanding of the admissibility of evidence is explained by the fact that the proof is admissible and usable for the justification of the court ruling. Such an understanding would also be in line with the principle of fair trial, which includes elements relating to the justification of the ruling. Furthermore, in such a case, when deciding on the admissibility of evidence, it is possible to consider the interests of the public, other parties involved in the proceedings, which in this way would allow for proportionality considerations to be introduced in the content of the exclusion of inadmissible evidence, which, in the circumstances of certain cases, would allow the court to justify the use of evidence obtained as a result of procedural defect for justification of the court ruling.

In the light of forementioned, it is proposed to clarify the second paragraph of Section 130 of the Criminal Procedure Law by replacing words “shall be recognised” with words “may be recognised”.

In addition, it should be noted that the need for the institute of limited admissibility of the evidence will be lost by achieving a systemic compliance between the conditions for the admissibility of the evidence and the conditions for its use, which would allow the third paragraph of Section 130 of the Criminal Procedure Law to be excluded. The person directing the proceedings shall, when preparing the final decision in the case, have an obligation to substantiate whether and why the evidence in the case is or is not to be used in proof.

In such circumstances, the person directing the proceedings may, in determining the need to use evidence obtained as a result of procedural defect, recognise them as admissible in the circumstances of a specific case, although the circumstances specified in paragraph two of Section 130 of the Criminal Procedure Law exist.

3. The application of the admissibility of evidence without the exclusionary rules

The conditions for obtaining evidence relate to the conditions for the admissibility of evidence. On the other hand, however, the assessment of these circumstances is also inextricably linked to the reliability of evidence since it is also possible to draw

conclusions on the content and quality of evidence. In the case of a reliable content of evidence, the use of such evidence derived from procedural defects is generally permitted if the right of defence is safeguarded by their examination. In such a case, the credibility of evidence as the quality of the content of the information is not only a step-by-step criterion of the content of evidence, which is the third stage of the logical scheme of the evidence. In such a case, reliability of evidence gains procedurally decisive importance since it is possible to decide on the feasibility and necessity of the use of such evidence.

An assessment of the reliability of the evidence can guarantee fair proceedings in situations where planting of evidence needs to be assessed in the case. The European Court of Human Rights has highlighted the importance of the involvement of persons in the search as a procedural guarantee, which protects against the possible creation of false evidence. For example, the participation of a lawyer in investigative activities in which the accused does not take part may be a decisive guarantee for the protection of the rights of the accused. This is important in circumstances where the presence of a lawyer can protect against the planting of evidence, thereby also helping to achieve a wider objective and ensuring equality between the accused and the investigating and prosecution authorities. Indications of potential evidence planting have been identified by the European Court of Human Rights in a situation where the disputed evidence was not found in the house during the previous two searches, but the national court had not assessed this circumstance of the case.³⁰ Planted evidence is one of the circumstances in which such information cannot be used in criminal proceedings and should be excluded from the body of evidence.

Although the concept of the reliability of evidence and the requirements for assessment is set down in Article 128 of the Criminal Procedure Law, the choice of which evidence to believe and which not falls within the jurisdiction of the court adjudicating on the substance of the case.³¹ It follows from that finding that the assessment of the reliability of the evidence depends on the internal convictions of each judge. Despite the impartiality of the judge as much as possible, it is this evidence feature that can play a decisive role in the assessment of the evidence. There may be situations in which the evidence is attributable and obtained in accordance with the procedures laid down by law for the taking and corroboration of evidence, but the judge may, when considering the circumstances of the case, cast doubts as to the reliability of that evidence.

It is recognized that the accused must be given the opportunity to challenge, at any level of jurisdiction, both the reliability of the evidence and the admissibility of the evidence if it is obtained in breach of the European Convention on Human Rights.³² The European Court of Human Rights has stated that it must be established whether the proceedings as a whole were fair, including the need to examine the way in which the evidence was obtained. In assessing whether the proceedings as a whole were fair, it is necessary to examine whether the rights of the defence have been respected.

³⁰ Judgement of 27 October 2020 of the European Court of Human Rights in case *Ayetullah Ay v. Turkey*, No. 29084/07, 1191/08 paras. 163, 167. Available: <https://hudoc.echr.coe.int/eng?i=001-205373> [last viewed 14.04.2025].

³¹ Decision of 7 February 2017 of the Supreme Court of the Republic of Latvia in case No. SKK-1/2017. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/299079.pdf> [last viewed 14.04.2025].

³² *Grabenwarter*, C. European Convention on Human Rights. Commentary. Munchen: C. H. Beck, 2014, pp. 137.–138; See also judgement of 12 May 2000 of the European Court of Human Rights in case *Khan v. United Kingdom*, No. 35394/97 para. 38. et seq. Available: <https://hudoc.echr.coe.int/eng?i=001-58841> [last viewed 14.04.2025].

It is necessary to examine whether the applicant has been given the opportunity to challenge the reliability of the evidence and its admissibility. In assessing the quality of the evidence, it is also necessary to examine the circumstances of the taking of evidence, whether they call into question the reliability or accuracy of the evidence. Doubts about fairness do not arise if the evidence obtained is corroborated by other evidence. If the evidence obtained has a high degree of credibility and there is no risk that it may not be credible, there is less need for corroborative evidence.³³

In legal science, by assessing the European Court of Human Rights findings in *Khan v. United Kingdom*, it is recognized: as long as the accused is given the opportunity to contest the evidence used against him and as long as the evidence is credible and not obtained, for example, as a result of incitement, even in the event of an infringement of the right to privacy resulting from their acquisition, the admissibility of that evidence is not precluded.³⁴

The European Court of Human Rights recognizes: one of the factors affecting the fairness of the proceedings is the assessment of the quality of the evidence, that is to say, whether the circumstances of the taking of evidence call into question its reliability or accuracy, given the degree and nature of the coercion committed at the time of its acquisition.³⁵ An incomplete examination of the admissibility of evidence also precludes a proper assessment of the reliability of the evidence. The examination of evidence must not be formal; it must be effective and thorough. This is also closely linked to situations where objections are raised to the evidence planting. In such situations, the assessment of evidence apart from the circumstances in which it was obtained may lead to erroneous conclusions regarding the nature of the circumstances. Thus, the assessment of the reliability of evidence is also one element of fair proceedings.

The examination of evidence also covers situations in which information obtained, for example, in breach of Article 8 of the European Convention on Human Rights is used but does not render the proceedings unfair within the meaning of Article 6. For example, if the evidence was obtained as a result of covert surveillance³⁶ or correspondence control,³⁷ or as a result of searches and seizures³⁸. There is no breach

³³ Judgement of 15 November 2007 of the European Court of Human Rights in case *Galstyan v. Armenia*, No. 26986/03, para. 77. Available: <https://hudoc.echr.coe.int/eng?i=001-83297> [last viewed 14.04.2025]; judgement of 7 April 2022 of the European Court of Human Rights in case *Fatullayev v. Azerbaijan* (No. 2), No. 32734/11, para. 78. Available: <https://hudoc.echr.coe.int/eng?i=001-216685> [last viewed 14.04.2025].

³⁴ *Busser, E.* Data Protection in EU and US Criminal Cooperation: A Substantive Law Approach to the EU Internal and Transatlantic Cooperation in Criminal Matters between Judicial and Law Enforcement Authorities. Maklu Publishers, 2009, p. 95. Available: books.google.lv [last viewed 14.04.2025].

³⁵ Judgement of 13 September 2016 of the European Court of Human Rights in case *Ibrahim and Others v. the United Kingdom*, No. 50541/08, 50571/08, 50573/08, 40351/09, para. 274. Available: <https://hudoc.echr.coe.int/eng?i=001-166680> [last viewed 14.04.2025].

³⁶ Judgement of 10 March 2009 of the European Court of Human Rights in case *Bykov v. Russia*, No. 4378/02, paras. 69–83. Available: <https://hudoc.echr.coe.int/eng?i=001-91704> [last viewed 14.04.2025].

³⁷ Judgement of 31 October 2017 of the European Court of Human Rights in case *Dragos Ioan Rusu v. Romania*, No. 22767/08, paras. 47–50. Available: <https://hudoc.echr.coe.int/eng?i=001-178175> [last viewed 14.04.2025].

³⁸ Judgement of 25 July 2013 of the European Court of Human Rights in case *Khodorkovskiy and Lebedev v. Russia*, No. 11082/06 and 13772/05, paras. 699–705. Available: <https://hudoc.echr.coe.int/eng?i=001-122697> [last viewed 14.04.2025]; judgement of 3 March 2016 of the European Court of Human Rights in case *Prade v. Germany*, No. 7215/10 para. 36–43. Available: <https://hudoc.echr.coe.int/eng?i=001-160990> [last viewed 14.04.2025].

of fair proceedings on the grounds that the person was given the opportunity to exercise his rights of defence and to oppose the veracity of the evidence and its use, since the observations made were taken into account by the court and made its assessment of them. It is also necessary to examine whether the obtaining of evidence raises doubts as to the reliability and accuracy of the evidence and the relevance of the evidence, that is to say whether it must be regarded as the only or decisive evidence for establishing the guilt of a person. In cases where the evidence is decisive but not the only evidence and is only part of a complex body of evidence, it is reasonable to acknowledge that there were procedural safeguards for assessing the admissibility and reliability of the evidence and thus their use did not lead to an unfair proceeding.³⁹

The scope of the right to privacy also covers the confidentiality of the lawyer and the client. Article 122 of the Criminal Procedure Law expressly and unequivocally determines the cases in which the immunity of a lawyer is established and waived only when a lawyer, under the guise of legal aid, facilitated or participated in the commission of a criminal offence. In other cases, there is a respectable part of the confidential and inviolable legal relationship between the lawyer and the client, which is an integral part of a fair trial in a democratic and legal state. In other words, unjustified interference with the information protected by criminal procedural immunity extinguishes the very essence of effective assistance of a lawyer, therefore such method of investigating a case cannot be accepted.

Certain conditions are established for evidence in criminal proceedings obtained in breach of the prohibition of torture and cruel treatment laid down in Article 3 of the European Convention on Human Rights. The use of evidence obtained in breach of one of the absolute rights forming the core of the European Convention on Human Rights always entails risks of fairness in the proceedings, even if the admission of such evidence was not decisive in support of the accusation.⁴⁰ The use of witness statements obtained in breach of Article 3 of the European Convention on Human Rights – notwithstanding the fact that the conduct constitutes torture, inhuman treatment – automatically renders the criminal proceedings as a whole unfair and justifies a finding of infringement of Article 6 of the European Convention on Human Rights.⁴¹ The prohibition of torture in the taking of evidence shall also apply where evidence of such absolutely prohibited acts has been obtained from a third party.⁴² It is justified to find that evidence obtained as a result of an infringement of an absolute right is not only inadmissible, but also, in the event of its use renders proceedings as a whole unfair. Such a strong stance is a clear signal of the consequences of the use of prohibited methods. A fair settlement of criminal relations cannot be achieved by obtaining evidence through prohibited methods.

³⁹ See judgement of 31 October 2017 of the European Court of Human Rights in case *Dragos Ioan Rusu v. Romania*, No. 22767/08, paras. 53–57. Available: <https://hudoc.echr.coe.int/eng?i=001-178175> [last viewed 14.04.2025].

⁴⁰ Judgement of 28 June 2007 of the European Court of Human Rights in case *Harutyunyan v. Armenia*, No. 36549/03, para. 63. Available: <https://hudoc.echr.coe.int/eng?i=001-81352> [last viewed 14.04.2025].

⁴¹ Judgement of 25 September 2012 of the European Court of Human Rights in case *El Haski v. Belgium*, No. 649/08, para. 85. Available: <https://hudoc.echr.coe.int/eng?i=001-113445> [last viewed 14.04.2025]; judgement of 11 February 2014 of the European Court of Human Rights in case *Cēsnieks v. Latvia*, No. 9278/06, paras. 65–70. Available: <https://hudoc.echr.coe.int/eng?i=001-140769> [last viewed 14.04.2025].

⁴² Judgement of 5 October 2017 of the European Court of Human Rights in case *Korme v. Bulgaria*, No. 39014/12, paras. 89–91. Available: <https://hudoc.echr.coe.int/eng?i=001-177778> [last viewed 14.04.2025].

Summary

The admissibility of evidence in criminal procedure establishes the order in which the information on facts is obtained and fixed. As a part of fair proceedings, the admissibility of evidence is systematically linked to the use of evidence which is an integral part of justifying the court ruling in a criminal case.

Although the assessment of the admissibility of evidence is a procedural matter, it takes place successively before the proofing and the court's ruling is substantiated. From the perspective of the mandatory legal consequences laid down in Article 130(2) of the Criminal Procedure Law, there is rather a subordination between the admissibility of evidence as a procedural matter and substantive matters. Such an approach does not provide for exceptions depending on the circumstances of a particular case and the public interest in criminalizing perpetrators. Therefore, by setting absolute prohibition for the use of unlawfully obtained evidence, the admissibility of evidence as a procedural aspect may come in a contradiction with the purpose of criminal procedure.

In cases of unlawfully obtained evidence, when deciding on the admissibility of evidence, it is possible for the court to consider the interests of the public, other parties involved in the proceedings, which in this way would allow for proportionality considerations to be introduced in the content of the exclusion of inadmissible of evidence. In the circumstances of certain cases, proportionality considerations would allow the court to justify the use of evidence obtained as a result of procedural defect for justification of the court ruling. The reliability of evidence and the notion of fair criminal proceedings would allow the use of illegally obtained evidence. Therefore, it is necessary to amend the concept of declaring the evidence inadmissible set out in Article 130(2) of the Criminal Procedure Law, that would allow to declare evidence admissible.

If the evidence is obtained by violation of an absolute right, such evidence should be declared inadmissible, because the use of it would render the proceedings unfair. In different situations, the court could evaluate the right infringed by the obtaining of evidence and the reliability of evidence. By guaranteeing rights of the accused to participate in court hearing and evaluation of evidence, the court could determine to use illegally obtained evidence, if there is no doubt of its reliability. Such approach would secure the aim of the criminal proceedings.

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Penalty Clauses in Parking Space Use Contracts in Latvia

Mg. iur. **Kristaps Silionovs**

Faculty of Law, University of Latvia
Doctoral Student at the Department of Civil Law
E-mail: kristaps.silionovs@lu.lv

Dr. iur. **Pauls Zeņķis**

Faculty of Law, University of Latvia
Assistant Professor at the Department of Civil Law
E-mail: pauls.zenkis@lu.lv

In this article, the authors analyse the legal nature of parking space use contracts in Latvia. The first part of the article examines the legal classification of parking space use contracts, as well as the key criteria that influence it. The second part of the article provides an overview of penalty clauses in parking space use contracts, identifying common problematic aspects and assessing the potential legal consequences of disproportionate contractual penalties. The authors also explore the ways how courts may intervene when penalty clauses are deemed disproportionate or unjust, offering a critical perspective on the enforceability and fairness of contractual penalties in parking space use contracts.

Keywords: penalty clauses, proportionality, non-fulfilment, parking space use contract.

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Introduction

In Latvia, automobiles remain the primary mode of daily transportation.¹ Therefore, it is reasonable to assert that the use of parking spaces is an integral part of everyday living. Even though parking space use contracts (hereinafter – parking contract) are frequently encountered in practice, such contracts have received relatively little attention in Latvian legal discourse. While parking contracts may initially appear trivial, the matter quickly reveals its complexity when one poses the basic question: what type of contract is a parking contract – a storage, a lease (rent), or perhaps another type? The situation becomes even more complicated when parking contracts are examined in conjunction with the penalty clauses. For instance, does a delay in vacating a parking space entitle the imposition of a contractual penalty for total non-performance? Or should such a violation be regarded as a failure to perform in a proper manner, thereby invoking the 10% limitation (calculated from value of principal obligation) on contractual penalties as set forth in the Article 1716 (3) of the Civil Law of Latvia (hereinafter – the Civil Law)?²

In view of the foregoing, this publication has a twofold purpose. Firstly, it aims to classify parking contracts within the framework of private law by analysing their placement in a specific category of contracts regulated by the Civil Law. Secondly, it seeks to examine the particularities of applying the contractual penalties in the context of parking contracts. Although the regulation of penalty clauses is discussed specifically in relation to parking contracts, the proposed solutions are, *mutatis mutandis*, applicable to other contracts, as well.

1. Classification of parking contracts

As acknowledged by the drafters of the Draft Common Frame of Reference, the classification of parking contracts within a specific category of contracts is a surprisingly complex issue.³ As the following analysis will demonstrate, a so-called parking contract cannot be universally attributed to a single, clearly defined type of contract. Rather, depending on its specific terms and content, a parking contract may fall within different contractual classifications. Namely, depending on the specific circumstances of each case, elements of a lease, a storage, or even a loan-for-use contract (Lat. – *commodatum*) may be present within a parking contract. Therefore, proper classification of parking contract under the Civil Law requires an analysis of both the characteristic features of these contract types and the specific elements present in each individual case.

The principal characteristic of a parking contract is that a person parks (or is permitted to park) their vehicle in a designated space. Beyond this core element, additional contractual features (elements of contract) may vary in individual cases and significantly influence how the contract is classified under the Civil Law. In order to classify a given parking contract in a specific case, attention must primarily be paid

¹ Goško, D. Pētījums: “Puse Latvijas iedzīvotāju ar sabiedrisko transportu pārvietojas vismaz reizi nedēļā” [Research: “Half of Latvia’s residents use public transport at least once a week”]. Available: <https://www.kantar.lv/tnsab74/puse-latvijas-iedzivotaju-ar-sabiedrisko-transportu-parvienojas-vismaz-reizi-nedela/> [last viewed 02.03.2025].

² Latvijas Civillikums [Civil Law of Latvia] (28.01.1937). Available: <https://likumi.lv/ta/en/en/id/225418-civil-law> [last viewed 04.04.2025].

³ Von Bar, C., Clive, E., Schulte-Nölke, H. (eds.). Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), full edition, p. 1810. Available: http://storme.be/european-private-law_en.pdf [last viewed 26.02.2025].

to three criteria. Firstly, a parking contract may be concluded either with or without remuneration. Secondly, the parking service provider may implement various security measures (such as surveillance cameras, automatic barriers, security personnel, or vehicle release only upon presentation of a ticket), thereby assuming responsibility for the vehicle's safety – or, conversely, may expressly refrain from providing any safety guarantees for the vehicle. Third, a parking contract may take the form of either a consensual contract, concluded upon agreement, or a real contract, concluded upon the actual placement of the vehicle in the parking space. This criterion holds relevance only where uncertainty exists as to whether the contract constitutes a storage under Civil Law or a lease contract.

1.1. Parking contract without remuneration

In cases where a parking contract does not imply remuneration, it may be classified either as a loan-for-use or as a gratuitous storage contract. The absence of remuneration for the use of the parking space precludes the possibility of classifying the contract as a lease. This is because, pursuant to Article 2112 of the Civil Law, a lease contract is, by its nature, a contract for remuneration. In other words, remuneration is an essential element of a lease contract.⁴

Both the loan-for-use contract⁵ and the gratuitous storage contract⁶ are real contracts. Therefore, this characteristic cannot be used to distinguish cases where a parking space is loaned for use from those where a vehicle is bailed for safekeeping. To differentiate between the loan-for-use of a parking space and the storage of a vehicle, decisive importance lies in the obligations undertaken by the parking space operator. It is necessary to consider not only those obligations expressly agreed upon by the parties, but also those that can be clearly inferred from the specific circumstances. Although the storage contract in the Civil Law is regulated under the chapter on contracts of return of property, in essence, storage contract constitutes a specific type of service undertaken by the bailee (the party receiving the object for safekeeping).⁷ This is because the bailors' primary interest – the main purpose of the contract – is to ensure the secure safekeeping of the item,⁸ entrusting the object of the bail to the bailee (see Article 1972(1) of the Civil Law).

In the case of a loan-for-use contract, the underlying interest in concluding the contract is of a different nature. As explained by Professor V. Bukovskis, under a loan-for-use contract, the object (in this case, the parking space) is transferred to another person for a specific use, based on the assumption that the lender will not require use of the object for at least a certain period of time. Furthermore, there are often considerations that make it inappropriate to request remuneration for the use

⁴ *Torgāns, K.* Saistību tiesības [Law of Obligations]. Otrais papildinātais izdevums, Rīga: Tiesu namu aģentūra, 2018, p. 334.

⁵ *Torgāns, K.* Komentārs Civillikuma 1974. pantam [Commentary on Article 1974 of Civil Law]. In: Latvijas Republikas Civillikuma komentāri: Ceturtā daļa. Saistību tiesības. Autoru kolektīvs prof. K. Torgāna vispārīgā zinātniskajā redakcijā. Rīga: Mans īpašums, 1998, p. 387.

⁶ The Senate's Judgement of 28 April 2017 in case No. SKC-222/2017 (C12128211), para. 12. Available: <https://www.at.gov.lv/downloadlawfile/5177> [last viewed 04.04.2025].

⁷ *Baykov, A.* Obyazatel'stvennoye pravo [Law of Obligations]. Chast' II. Otdel'nyye vidy obyazatel'stv (osobennaya chast' obyazatel'stvennogo prava). Rīga: SIA "JUMI", 2005, pp. 228-229.

⁸ *Švarcs, F., Rimša, S.* Saistību tiesības [Law of Obligations]. Sevišķā daļa. Rīga: Latvijas Universitāte, 2001, p. 89.

of the object.⁹ Therefore, as a general principle, a distinctive feature of a loan-for-use is that it is limited either by a specific period of time or by a defined purpose. Once the agreed time has elapsed or the purpose has been fulfilled, the object of the loan-for-use must be returned.¹⁰

Applying the above to parking contracts, the decisive factor in distinguishing between the loan-for-use of a parking space and the storage of a vehicle lies in the obligations undertaken by the parties. If the circumstances indicate that the vehicle was parked specifically for the purpose of the parking operator ensuring its safekeeping, the contract in question should be classified as a storage contract. Conversely, if the vehicle was parked not for the purpose of ensuring its security, but to serve some other objective, the contract between the parties must be regarded as a loan-for-use contract.

Of course, the parties to the contract may expressly state their intent at the time of concluding the contract, and such situations generally should not give rise to particular difficulties. This may be the case where the parties enter into a written contract, discuss the terms of the contract orally, or conclude the contract through conclusive (implied) conduct. For example, a vehicle is parked in a lot where the operator has displayed information regarding the terms of use,¹¹ expressly stating that they do not assume civil liability for the vehicle's security.

The legal classification of a contract may become more complex in cases where the parties have not clearly expressed their intentions at the time of its conclusion. For example, the parking operator may have failed to ensure that the information provided regarding the use of the parking facility is unambiguous. In such situations, to determine the nature of the contract concluded between the parties, the primary focus should be on whether there are circumstances which, when considered collectively, lead to the conclusion that one party (the parking space operator) has undertaken to ensure the security of the vehicle.

Evidence that the parking operator has assumed responsibility for the vehicle's safekeeping may include the implementation of various security measures – such as surveillance cameras, security personnel, automatic barriers, a parking ticket system, and similar arrangements. In the absence of clear indicators that the parking operator has undertaken to guarantee the vehicle's security, the contract should be classified as a loan-for-use. A similar approach to distinguish vehicle storage contracts from other types of contracts has also been proposed by the drafters of the Draft Common Frame of Reference.¹²

Additionally, where the distinction between a storage and a loan-for-use contract is ambiguous, it is important to consider whether the circumstances indicate that the parking space was made available for a specific purpose. An illustrative example

⁹ *Bukovskiy, V. Svod grazhdanskikh zakonov guberniy Pribaltiyskikh s prodolzheniem 1912–1914 g.g. i s raz'yasneniyami v 2 tomakh* [Code of Civil Laws of the Baltic Provinces with Supplements from 1912–1914 and with Commentaries, in 2 Volumes]. Tom II, soderzhashchiy pravo trebovaniy. Riga: Tipografiya G. Gempel' i Ko, 1914., p. 1600.

¹⁰ *Erdman, K. Obyazatel'stvennoye Pravo Guberniy Pribaltiyskikh* [Law of Obligations of the Baltic Provinces]. Izdaniye pochetnogo mirovogo sud'i F. E. Kamkina. Riga: Tipo-litografiya L. Blaikekshteyna, 1908. p. 314.

¹¹ See, for example: The Senate's Judgement of 13 August 2019 in case No. SKA-243/2019 (A420336415), para. 11. Available: <https://www.at.gov.lv/downloadlawfile/5921> [last viewed 04.04.2025].

¹² *Von Bar, C., Clive, E., Schulte-Nölke, H.* (eds.). Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), full edition, p. 1811. Available: http://storme.be/european-private-law_en.pdf [last viewed 26.02.2025].

in this regard would be supermarket parking lots, where parking spaces are, by their nature, provided to customers for a specific purpose – namely, to enable them to park their vehicles while shopping. Once that purpose has been fulfilled – that is, once the person has completed their shopping – the parking space must be vacated. In the case of supermarket parking contracts, it is evident that the parking space (i.e., the loan-for-use) is granted to the individual for the purpose of achieving a particular objective, and not because the supermarket operator intends to assume responsibility for the security of the vehicle.

1.2. Parking contract with remuneration

If the use of the parking space is provided for remuneration, the key issue is whether the parties have concluded a storage contract that has element of remuneration or a lease (rent) contract. First, unlike a storage regulated under Civil Law, a lease contract is a consensual contract.¹³ This means that only in the case of a lease can the parties enter into the contract prior to the vehicle being parked (unless a preliminary contract (pre-contract) for a storage is concluded). Consequently, if the parties have entered into a parking contract before the vehicle is actually placed (delivered) in the parking area, such a contract should primarily be classified as a lease.

In this context, it must be emphasized that the aforementioned criterion is inapplicable in situations where the distinction lies between a commercial storage contract, as governed by the Article 447 of Latvian Commercial Law (hereinafter – Commercial Law),¹⁴ and a lease contract. This is due to the fact that, in contrast to the storage contract under the Civil Law – which is a real contract – the commercial storage contract under the Commercial Law is consensual in nature.¹⁵

Second, in order to distinguish a lease from a storage (both one regulated in the Civil law and in the Commercial law) contract, the same criterion can be applied as in distinguishing a storage from a loan-for-use contract. I.e., it should be considered whether the parking operator has undertaken to ensure the safekeeping of the vehicle. Namely, if the parking space operator is responsible for the safety of the vehicle, the contract should be qualified as a storage. If there is no such responsibility, it should be considered a lease of a parking space.

Taking the above considerations into account, where remuneration is provided for the use of a parking space, the parking contract may qualify either as a lease or as a storage contract. Conversely, if no remuneration is stipulated, the contract may be classified either as a loan-for-use or a storage contract. To distinguish a storage contract from a loan-for-use or a lease, the primary factor to examine is whether the circumstances indicate that the parking operator has undertaken to ensure the security of the vehicle.

¹³ *Torgāns, K.* Saistību tiesības [Law of Obligations]. Otrais papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2018, p. 335.

¹⁴ Komerclikums [Commercial Law]. (13.04.2000.). Available: <https://likumi.lv/ta/en/en/id/5490-commercial-law> [last viewed 04.04.2025].

¹⁵ For more detailed information on commercial contracts in Latvia, see: *Kārklīņš, J., Mantrov, V.* Company Law and Insolvency Law. In: *The Law of the Baltic States*. Cham: Springer International Publishing AG, 2017, pp. 315–316.

2. Penalty clauses in parking contracts

As established by Latvian case law, in order for a parking contract to be concluded through conclusive (implied) conduct – such as by parking a vehicle in a parking space – the parking operator must ensure that the terms and conditions governing the use of the parking facility are accessible to the driver.¹⁶ This requirement allows any interested person to familiarize themselves with the standard terms of use, either by reviewing them online or on-site. The authors have also made use of this opportunity by analysing, by way of example, the standard terms of use for specific parking facilities managed by three most common parking operators in Riga, Latvia (hereinafter – the Standard parking terms).¹⁷

In the course of analysing the Standard parking terms, the authors have identified two issues concerning the application of contractual penalties in parking contracts that merit further examination. Firstly, by way of clever contract drafting, the Standard parking terms stipulate a contractual penalty for the total non-fulfilment of obligations regardless of the nature of the breach – that is, whether the payment was made late, not made at all, or if the paid parking time was exceeded. Secondly, in accordance with the Standard parking terms, the same penalty (i.e., the same amount) is applied regardless of the circumstances of the breach or how the breach materialized. For example, no consideration is given to whether the parking space is unlawfully used for 30 minutes or for several days. This, in turn, raises questions about the proportionality of the contractual penalty. These considerations warrant more detailed analysis in the paragraphs that follow.

2.1. Contractual penalty for total non-fulfilment and improper fulfilment

Whether a contractual penalty is stipulated for total non-performance or for improper performance (such as late performance) is of significant importance in Latvian private law. This is because, pursuant to Article 1716(3) of the Civil Law, a contractual penalty for improper performance is limited to 10% calculated from the value of the principal debt (the value of principal obligation). By contrast, a contractual penalty for non-performance is not limited by any specific percentage threshold, as provided in Article 1716(2) of the Civil Law. In comparison with other European countries, the 10% cap on contractual penalties for improper performance may be regarded as an anomaly.¹⁸ In this regard, it should be explained that this limitation was introduced in Latvia in 2013 as an extreme measure to reduce the use

¹⁶ See for example: The Senate's Judgement of 5 April 2019 in case No. SKC-121/2019 (C30400416), para. 7.3. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/379846.pdf> [last viewed 05.04.2025]; Riga regional court Judgment of 10 December 2020 in case No. C68322619, para. 10. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/446404.pdf> [last viewed 05.04.2025].

¹⁷ The following parking standard terms were analysed: SIA "Park Expert" Rules for the Use of Managed Parking Lots. Available: <https://parkexpert.lv/> [last viewed 05.04.2025]; SIA "EuroPark Latvia" Rules for the Use of Managed Parking Lots. Available: <https://www.europark.lv/palidziba/autostavvietas-teritorijas-lietosanas-noteikumi> [last viewed 05.04.2025]; SIA "Cityparks Latvija" Rules for the Use of Managed Parking Lots. From private archive of the authors.

¹⁸ *Freimanis, K., Niedra, R.* Līgumsodu griestu noteikšana Eiropā: salīdzinošs pētījums [Setting Limits on Contractual Penalties in Europe: A Comparative Study]. *Jurista Vārds*, 25.02.2014., No. 8 (810), p. 23.

of contractual penalties for usurious purposes.¹⁹ At the time, this issue was also especially pronounced in the consumer credit sector in other Baltic states.²⁰

As follows from the Standard parking terms, they are structured in a manner that at first glance allows the parking operator to impose a contractual penalty for total non-performance, as provided in Article 1716(2) of the Civil Law. Standard parking terms establish a prepayment obligation – namely, payment for parking must be made before the parking space is used. A contractual penalty, in turn, is imposed for the fact that the parking space is used without prior payment. In other words, the contractual penalty is not stipulated for a delay in payment or a failure to vacate the parking space in a timely manner *per se*, but rather for the mere fact that the parking space was utilised at any point prior to the advance payment being made for its use.

The Senate of Latvia (Supreme Court of Latvia), in assessing contractual penalties in parking contracts, has held that a parking operator cannot unilaterally determine when a breach constitutes total non-performance of an obligation and when it amounts to improper performance of a contractual duty.²¹ The same can be found in legal doctrine, where it is recognized that courts should exercise particular caution when examining contractual penalty disputes, given that there may be attempts to circumvent limitations on contractual penalties by cleverly drafting contracts.²² The authors concur with this position. Specifically, in order to determine whether a contractual penalty is stipulated for total non-performance or for improper performance, the nature of the breach in question must be assessed.

The parties' freedom to determine the content of a contract, including provisions on contractual penalties, is limited to the extent that it does not conflict with mandatory legal provisions or the principles of private law.²³ This also means that the parties cannot circumvent the statutory framework governing contractual penalties for improper performance by contractually stipulating which breaches constitute improper performance and which amount to total non-performance. The nature of the breach – and, consequently, the nature of penalty – must be determined objectively.

The Latvian legal doctrine or text of Civil Law does not provide clear guidelines or criteria for determining when a contractual penalty is stipulated for total non-performance of an obligation and when it applies to improper performance. It is recognized that differentiating between contractual penalty for total non-fulfilment and improper fulfilment can be complex.²⁴ As a result, this issue has generally been

¹⁹ Annotation to the Law "Grozījumi Civillikumā" [Amendments to the Civil Law]. Available: <https://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/3C0A3795A906DBBCC2257AFB0040E85C?OpenDocument> [last viewed 04.04.2025]; See also: *Kārklīšs, J., Mantrov, V., Rasnačs, L., Torgāns, K.* Contract Law in Latvia. Alphen upon Rhine: Kluwer Law International BV, 2020, pp. 243–245.

²⁰ In regards to Lithuania see: *Bublienė, D.* The Future of Consumer Credit in Lithuania: *Quo vadis, Consumer Credit?* *Juridica International*, 2014, No. 22, pp. 155–157; Regarding Estonia see: *Sein, K., Volens, U.* Legal Problems and Regulations related to Easy-access Non-secured Consumer Loans in Estonia. *Juridica International*, No. 22, 2014, pp. 135–136.

²¹ The Senate's Decision of 31 August 2021 in case No. SKA-444/2021 (A420336415), para. 3. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/457301.pdf> [last viewed 05.04.2025].

²² *Torgāns, K., Kārklīšs J., Bitāns, A.* Līgumu un deliktu problēmas Eiropas Savienībā un Latvijā [Problems of Contract and Tort Law in the European Union and Latvia]. Prof. K. Torgāna zinātniskā redakcijā. Rīga: Tiesu namu aģentūra, 2017, p. 145.

²³ The Senate's Judgment of 30 May 2023 in case No. SKC-3/2023 (C24160116), paras. 14.5–14.6. Available: <https://www.at.gov.lv/downloadlawfile/9015> [last viewed 05.04.2025].

²⁴ *Torgāns, K., Kārklīšs J., Bitāns, A.* Līgumu un deliktu problēmas Eiropas Savienībā un Latvijā [Problems of Contract and Tort Law in the European Union and Latvia]. Prof. K. Torgāna zinātniskā redakcijā. Rīga: Tiesu namu aģentūra, 2017, p. 144.

addressed on a case-by-case basis by examining the specific contractual breaches involved. At the same time – and importantly – the distinction between penalties for total non-performance and for improper performance is also recognized in other countries belonging to the Continental European legal tradition. In these jurisdictions, the distinction plays a significant role in determining whether a contractual penalty may be claimed cumulatively with performance of the contract or with damages²⁵ (the same can also be found in the Civil law (see Article 1720 of the Civil Law)). This, in turn, allows for the application of doctrinal insights developed in other Continental European legal systems.

To distinguish between a contractual penalty for total non-performance and a penalty for improper performance, German Professor F. Faust suggests examining the interest that the parties intended to protect through the penalty clause. Specifically, if the contractual penalty is intended to safeguard the performance of the obligation in substance, it protects the party's interest in the fulfilment of the contract as such. Consequently, in such cases, the penalty should be regarded as one stipulated for total non-performance. However, if a contractual penalty is agreed not to ensure that the obligation is fulfilled in substance, but rather to ensure its punctual performance, such a penalty is considered to apply in cases of improper performance of the obligation.²⁶ In other words, if the penalty is meant to protect the interest in how the obligation is performed – such as the time, place, manner, or scope of performance – it is considered to apply in cases of improper or defective performance. This understanding is also recognised by other German authors.²⁷

A somewhat similar approach can also be observed in relatively recent case law of the Senate of Latvia. In analysing when a contractual penalty should be considered applicable for total non-performance of an obligation, and when it applies to improper performance, the court has reached the following conclusions:

*If it is important to ensure the performance of a delayed or improperly fulfilled obligation, it is rational to apply an increasing percentage-based contractual penalty. A fixed contractual penalty is appropriate where such inducement is not significant or not possible, and in such cases, the penalty primarily serves as an alternative to compensation for damages, potentially with a punitive element.*²⁸

The principle for distinguishing a contractual penalty for improper performance from one for total non-performance thus may be formulated as follows: if the penalty is agreed upon to safeguard the interest in the performance of the obligation in substance, it constitutes a penalty for total non-performance. Conversely, if the penalty is intended to protect the interest in the manner of performance – such as its timing, location, form, extent, etc. – it should be regarded as a penalty for improper performance.

²⁵ Treitel, G. H. International encyclopedia of comparative law. Volume VII. Contracts in general. Chapter 16. Remedies for Breach of Contract (Courses of Action Open to a Party Aggrieved), Mouton: Hague, 1976, pp. 95–96.

²⁶ Faust, F. Contractual penalties in German Law. European Review of Private Law. Vol. 23, issue 3, 2015, pp. 294–295.

²⁷ Gottwald, P. In: Krüger, W. (Hrsg.). Münchener Kommentar zum Bürgerlichen Gesetzbuch [Munich Commentary on the Civil Code]. Band 3. Schuldrecht. Allgemeiner Teil II. 9. Auflage. München: C. H. Beck, 2022, § 340, Rn. 5.

²⁸ The Senate's Judgement of 1 February 2022 in case No. SKA-54/2022 (A43007118), para. 16. Available: <https://www.at.gov.lv/downloadlawfile/8434> [last viewed 05.04.2025].

Applying the above-mentioned to parking contracts, if the contractual penalty is intended to protect the interest in receiving payment for the use of the parking space in substance, such a penalty may be regarded as one stipulated for total non-performance. Thus, 10% limitation set by Article 1716(3) of the Civil Law would indeed not be applicable. Put another way, the car parking operator could, in principle, stipulate a contractual penalty unlimited by Article 1716(3) of the Civil Law for cases where the obligation has not been performed at all.

Such situations may arise, for instance, when a vehicle is parked in a parking space where payment is required from the very first minute of use. The vehicle remains parked for a period of time and subsequently leaves the premises without any payment having been made. In such circumstances, it cannot be established that the payment was merely delayed, nor that the parking space was simply vacated after the expiration of the permitted (paid) time. Accordingly, it can be concluded that no performance of the obligation took place whatsoever (there is breach of performance in substance).

At the same time, this implies that the parking space operator should generally be unable to apply a contractual penalty on the same basis in cases where the breach consists of some form of failure to meet punctuality requirements (i.e., improper performance). In other words, a penalty stipulated for total non-performance shall generally not be valid in situations where the obligation has merely been performed improperly. For example, if a person misses the payment deadline²⁹ set out in the parking contract or vacates the parking space with a delay. In order to impose a contractual penalty for these types of breaches, it is necessary to provide a separate penalty clause.

Alternatively, the parking space operator could ensure that the amount of the contractual penalty specified in single clause complies both with the legal framework governing penalties for improper performance and provides sufficient protection against total non-performance. However, such a scenario appears unlikely, given that the maximum allowable amount of a contractual penalty for improper performance (10% of the principal obligation) might not provide adequate protection for the parking space operator in cases where the obligation is not performed at all.

At the same time, although parking space operators may stipulate contractual penalties for total non-performance (for example, for failure to pay for the use of a parking space), such penalties cannot be applied arbitrarily. This means that a contractual penalty for total non-performance may not be structured as an increasing penalty (see Article 1716(2) of the Civil Law). Therefore, certain provisions found in the Standard parking terms that allow for a penalty to be imposed for each day the parking space is used without payment³⁰ must be regarded as invalid.

²⁹ See, for example: Administrative regional court Judgement of 25 April 2017 in case No. A420336415, para. 10. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/310349.pdf> [last viewed 05.04.2025].

³⁰ See, for example: paragraph 10 of SIA "Park Expert" Rules for the Use of Managed Parking Lots. Available: https://content.web-repository.com/s/3603809799135902/uploads/Faili_pdf/PE_zime_Br%C4%ABv%C4%ABbasiela_201_PREPRINT-EK-4683642.pdf [last viewed 07.03.2025].

2.2. Proportionality of contractual penalties

Every contractual penalty, whether set for total non-performance or improper performance is subject to courts assessment of proportionality.³¹ In case of improper performance the legislator has already established certain proportionality assessments limiting the amount of contractual penalty in Article 1716(3) of the Civil Law. However, the requirement of proportionality applies equally to contractual penalties imposed for total non-performance of obligations (Article 1717 of the Civil Law).

Although the application of legal principles, including the principle of proportionality, must be assessed on a case-by-case basis, certain general criteria that should be considered when evaluating the proportionality of a contractual penalty. In Latvian legal doctrine³² and case law,³³ it is generally accepted that the assessment must take into account 1) the damages caused by the breach; 2) the value of unfulfilled obligations; and 3) the profitability of ordinary circumstances – namely, the expected return that such funds would typically generate.

In the context of parking space contracts, all the aforementioned criteria are closely linked to the remuneration that a parking space operator would typically receive for the use of the space. Specifically, the potential damages that a parking space operator may incur as a result of complete non-fulfilment of the contract primarily consist of lost profits due to the inability to make the parking space available to another user willing to pay for its use. The same applies to the value of the unfulfilled obligation, as it requires an assessment of the amount that would have been payable for the use of the parking space. The same applies to expected returns in usual circumstances.

If a parking contract, as is the case with the Standard terms, stipulates a single fixed contractual penalty regardless of the nature or extent of the breach, it leads to a highly inflexible application of the penalty. This, in turn, increases the risk of the penalty being deemed disproportionate. The risk is further elevated where the amount of the contractual penalty is *prima facie* high. In case of the Standard terms, for example, the contractual penalty ranges from 10 to 35 times (depending on the location) the fee that the vehicle owner would be required to pay for one hour of parking.

In light of the above considerations, it is the position of the authors that caution should be exercised when determining the amount of contractual penalty for total non-fulfilment under parking contracts. This is because the damage caused to the parking space operator by the breach, value of unfulfilled obligation or the typical profitability that a parking space would ordinarily generate, might not be commensurate with the penalty amount stipulated in contract. This might especially be the case if the parking contract terms do not include any mechanisms to differentiate between cases in which the parking space is used without payment for one hour and cases where it is used without payment for several days. Such situation significantly increases the likelihood that the contractual penalty may be deemed disproportionate, particularly in situations where payment has not been made for a relatively short period. In essence, in such cases, the contractual penalty as a means

³¹ The Senate's Judgement of 14 September 2022 in case No. SKC-62/2022 (C04265910), para. 14.3. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/485844.pdf> [last viewed 05.04.2025]; See also: *Kārklīņa, A.* Restriction of Competition After Termination of Employment Relationships. *Journal of the University of Latvia. Law. No. 14, 2021*, pp. 174–176.

³² *Kubilis, J.* Līgumsoda samērīguma un taisnīguma izvērtēšanas kritēriji [Criteria for Assessing the Proportionality and Fairness of Contractual Penalties]. *Jurista Vārds*, 12.01.2010, No. 2 (597), p. 22.

³³ The Senate's Judgement of 31 January 2019 in case No. SKC-65/2019 (C30729311), para. 11. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/374199.pdf> [last viewed 04.04.2025].

of securing the performance of obligations to some extent transforms into a source of income for parking space operators, which is not the intended purpose of this legal instrument.³⁴

2.3. Consequences of disproportionate penalty clauses in parking contracts

In conclusion, it is necessary to consider the legal consequences that may arise if a contractual penalty in parking contract is found to be disproportionate. In this context, attention should be drawn to Articles 1724¹ and 1717 of the Civil Law. Article 1724¹ grants the court the discretion to reduce the amount of a contractual penalty being claimed if, under the specific circumstances of the case, it is deemed excessive.³⁵ In contrast, Article 1717 of the Civil Law allows for court to declare a contractual penalty clause absolutely null and void, thereby entirely excluding the unlawful provision from the legal relationship between the parties.³⁶ Also, given that the majority of parking contracts qualify as consumer contracts, it *inter alia* is important to note that a disproportionately high contractual penalty may be also regarded as an unfair contract term. Consequently, such a term could be deemed null and void *ab initio*, pursuant to Article 6(3)(4) and Article 6(8) of the Consumer Rights Protection Law.³⁷

Although Latvian legal doctrine recognises that the consequences of applying Articles 1724¹ and 1717 of the Civil Law differ,³⁸ it is worth considering the criteria that determine when a contractual penalty should be reduced under Article 1724¹, and when it should be deemed absolutely void under Article 1717 of the Civil Law. Article 1724¹ of the Civil Law was introduced into the Civil Law through amendments adopted in 2009,³⁹ which aimed to modernise the Civil Law by incorporating various principles drawn from contemporary European private law, including the court's discretion to reduce excessive contractual penalties.⁴⁰ According to professor of University of Latvia K. Torgāns, one of the drafters of these amendments, the content of Article 1724¹ was modelled after the paragraphs of German *Bürgerliches Gesetzbuch*⁴¹ (hereinafter – BGB).⁴² This suggests that, in order to clearly distinguish the respective scopes of Articles 1724¹ and 1717 of Civil Law, it is useful to examine how similar distinctions are drawn within German legal doctrine.

As explained in German legal doctrine, when examining the legal provisions that allow for the reduction of a contractual penalty (paragraph 343 of the BGB)

³⁴ Riga regional court Judgment of 10 December 2020 in case No. C68322619, para. 11.3. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/446404.pdf> [last viewed 04.04.2025].

³⁵ The Senate's Judgement of 30 January 2019 in case No. SKC-48/2019 (C04457413), para. 12.1. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/374111.pdf> [last viewed 04.04.2025].

³⁶ *Kārklīņš, J., Buls, L.* Līgumsoda reforma [Reform of Contractual Penalties]. *Jurista Vārds*, 03.12.2013, No. 49 (800), p. 40.

³⁷ *Patērētāju tiesību aizsardzības likums* [Consumer Rights Protection Law] (18.03.1999). Available: <https://likumi.lv/ta/en/en/id/23309-consumer-rights-protection-law> [last viewed 15.06.2025].

³⁸ *Ibid.*

³⁹ *Likums "Grozījumi Civillikumā"* [Law "Amendments to the Civil Law"] (04.06.2009). Available: <https://likumi.lv/ta/id/193385-grozijumi-civillikuma> [last viewed 04.04.2025].

⁴⁰ Annotation to the Law "Grozījumi Civillikumā" [Amendments to the Civil Law]. Available: <https://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/0/F6A7D8A3C318EE1DC2257386004EF3D8?OpenDocument> [last viewed 04.04.2025].

⁴¹ *Bürgerliches Gesetzbuch* [Civil Code]. Available: <https://www.gesetze-im-internet.de/bgb/> [last viewed 04.04.2025].

⁴² *Torgāns, K., Kārklīņš, J., Bitāns, A.* Līgumu un deliktu problēmas Eiropas Savienībā un Latvijā [Problems of Contract and Tort Law in the European Union and Latvia]. Prof. K. Torgāna zinātniskā redakcijā. Rīga: Tiesu namu aģentūra, 2017, p. 160.

or its declaration as absolutely void (paragraph 138 of the BGB), the distinguishing criterion is the point in time at which the disproportionality of the penalty is assessed. Specifically, if the penalty is found to be disproportionate already at the time the contract is concluded – without reference to any actual breach – then the penalty is considered absolutely void. Conversely, if the penalty was proportionate at the time of contract formation but later proves excessive in light of the specific nature or circumstances of the breach, it may be reduced to a reasonable amount.⁴³

Given that Article 1724¹ of the Civil Law is based on paragraph 343 of the German BGB, the authors take the view that the Latvian regulation should be applied *mutatis mutandis* in line with the principles developed in German legal doctrine. In other words, Article 1724¹ of the Civil Law should apply in situations where the contractual penalty may have been proportionate at the time the contract was concluded, but has become disproportionate considering the specific circumstances surrounding the breach. In contrast, Article 1717 should apply where the penalty was clearly excessive from the outset, i.e., already at the time of the contract's conclusion.

When applying the above considerations to contractual penalties stipulated in parking contracts, it is necessary to distinguish between cases where the penalty should be reduced under Article 1724¹ of the Civil Law, and those where it should be deemed absolutely void under Article 1717. Specifically, Article 1724¹ of the Civil Law would apply in situations where the contractual penalty was not manifestly excessive at the time the contract was concluded but proves to be disproportionate considering the actual breach. For example, this may include cases where the same penalty is imposed for a 30-minute delay in paying for parking as for a five-hour delay, despite the significantly different degree of non-performance.

In contrast, Article 1717 of the Civil Law may be applicable where the penalty was clearly disproportionate to the potential consequences of the breach from the outset. An illustrative example would be a parking contract stipulating a parking fee of EUR 3.00 per hour and penalty of EUR 500.00 for failure to pay the parking fee – an amount that is manifestly excessive relative to the nature and severity of the breach.

Summary

Where parking space is provided for remuneration, contract may qualify either as a lease or as a storage contract. If no remuneration is stipulated, the contract may be classified as a loan-for-use or a storage contract. To distinguish a storage from a loan-for-use or a lease, the primary factor to examine is whether the parking space operator assumes responsibility for the vehicle's security.

To determine whether a penalty applies for total or improper performance, one must assess the interest contractual penalty is intended to protect: if it ensures fulfilment of the obligation in substance, it concerns total non-performance; if it protects how the obligation is performed, it relates to improper performance.

Where a contractual penalty is disproportionate at the time of contract conclusion, it may be declared null and void pursuant to Article 1717 of the Civil Law. Article 1724¹ applies where the penalty was initially proportionate but later proves excessive in light of the actual breach.

⁴³ Faust, F. Contractual penalties in German Law. *European Review of Private Law*. Vol. 23, issue 3, 2015, pp. 292–293.

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LU Akadēmiskais apgāds
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