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THE LAW OF BALTIC COUNTRIES – A SOURCE OF INSPIRATION FOR LEGAL SCHOLARS AND PRACTITIONERS

While it is well established in the literature that legal science *stricto sensu* includes activities directed toward identification of the content of law, the legal science *ampio sensu* has a broader meaning, as also includes the set of disciplines that have in some sense the law as an object of study, such as the science of law, legal theory, jurisprudence, legal dogmatics, the sociology of law, legal anthropology, comparative law, history of law, and science of legislation.¹ This broader approach is embedded in the very act by which the Institute of Comparative Law in Belgrade was founded² in 1955, and is continually reaffirmed in its work and the work of its researchers. The Institute's staple journal, *Strani pravni život (Foreign Legal Life)*, bears the same hallmark. As one of the oldest legal journals in Serbia, initially conceived as a bulletin containing reviews of current achievements in comparative legal theory, legislation and practice, it has since grown to foster academic debate and publish original scientific research centring on international and comparative law, contributing further to contemporary legal science not just in Serbia, but also in the Western Balkans. Over the past decades, comparative legal research published therein seems to almost unequivocally include references to the still ongoing European integration processes, seen through the lens of various national legal systems.

First and foremost, the current volume of *Strani pravni život (Foreign Legal Life)* standing before you aims to somewhat narrow down this approach and, addressing the proposal for introducing thematic volumes, voiced by the journal's Editorial Board, showcase the law of the Baltic states – primarily Estonia, Latvia, and Lithuania. This was done for several reasons.

The relevance of the European integration experience of the Baltic states for the Western Balkan countries is evident. The three Baltic States – Estonia, Latvia, and Lithuania

* Guest editor, Dr. iur., Associate Professor of the Law Faculty, University of Latvia, Latvia, e-mail: anita.rodina@lu.lv

** Guest editor, PhD, Senior Research Fellow, Institute of Comparative Law, Belgrade, Serbia, e-mail: a.bojovic@iup.rs

*** PhD, Senior Research Fellow, Institute of Comparative Law, Belgrade, Serbia, e-mail: v.coric@iup.rs

¹ For a more detailed overview of the key doctrinal approaches see: Knežević Bojović, A. & Ćorić, V. 2020. Legal Science and Regulatory Reform in Serbia: One Step Forward, Two Steps Back. In: *Legal Science: Functions, Significance and Future in Legal Systems II*. University of Latvia, pp. 324-329. doi: <https://doi.org/10.22364/isclul.7.2>.

² See: Višekruna A., Čolović, V. & Markov, M. (eds.). 2021. *65 godina Instituta za uporedno pravo*. Beograd: Institut za uporedno pravo.

make up a common European micro-region, sharing a common legal and economic past,³ not unlike the former SFRY countries. Additionally, the Baltic countries have a parallel trajectory on the path to becoming members of the European Union, participation in the Euro Area, and NATO membership. In addition, the three small states may provide good guidance for Western Balkan countries on how to ensure that other member states and the EU institutions do not take advantage of their status as small states. The approach of Baltic countries to e-governance and e-services is nowadays often resorted to as the role model by government authorities in Western Balkan countries when developing e-government and e-governance solutions. Nevertheless, systemic and in-depth academic research related to laws of Baltic countries is not sufficiently present in legal literature in Serbia and the Western Balkan region, while comparative analysis of their legal systems remains incidental and fragmented.⁴

Consequently, the current volume of *Strani pravni život (Foreign Legal Life)* presents a valuable opportunity to present and critically analyse the topical developments and achievements in the legislations and jurisprudence of the Baltic region in a single, dedicated journal volume. The papers contained therein address a broad spectrum of issues from the domain of national public and private law, and their interaction with international law, EU law, and the jurisprudence of supranational courts – most notably the European Court of Human Rights and the Court of Justice of the European Union. Most papers, consequently, are not restricted to only one legal field; rather, they examine national legal solutions in the light of key principles embedded in international legislation on human rights, or the founding principles of the European Union. Nevertheless, an attempt was made to structure the volume so as to reflect the dominant legal field that is being analysed in a paper, while recognizing the hybrid character of the topic at hand. Consequently, the contributions can be roughly grouped to those that examine the issues relating to supranational law and its implementation in national legislation, constitutional law, administrative law, criminal law and finally, private law.

³ Auers, D. 2015. *Comparative politics and government of the Baltic States: Estonia, Latvia and Lithuania in the 21st century*. London: Palgrave Macmillan. doi: <https://doi.org/10.1057/9781137369970>.

⁴ One of the publications in the Serbian language that fosters more a consistent comparative approach to the law of Baltic states was published by the Institute of Comparative Law in 2005. Under the title *Accession of the State Union of Serbia and Montenegro to the European Union: Experiences of the Ten New Member States*, it presents the experiences of Estonia, Latvia, and Lithuania, along with the experiences of the remaining seven countries which joined the Union in the same wave of enlargement in 2004, outlining the key features of their path towards EU membership (Čavoski, A. et al. 2005. *Pristupanje Državne zajednice Srbija i Crna Gora Evropskoj uniji: Iskustva deset novoprimljenih država*. Beograd: Institut za uporedno pravo). An additional opportunity for sharing knowledge on legal and political science aspects of European integration sharing experiences regarding enlargement, the Institute of Comparative Law participates in the work of a network of around 15 Central, Eastern, and South-Eastern European institutes, initially founded by the Europa Institute in Zurich, Switzerland in 2003. In their contribution to the Oxford Research Encyclopedia of Politics, Kerikmäe, Chochia & Atallah also stress that, as fairly new EU member states, the Baltic States are still largely unknown worldwide and even in the EU (Kerikmäe, T., Chochia, A. & Atallah, M. 2018. *The Baltic States in the European Union*. In: Oxford Research Encyclopedia of Politics. doi: 10.1093/acrefore/9780190228637.013.186). A significant breakthrough and milestone in remedying this was certainly the publishing of *The Law of the Baltic States* in 2017 – a comprehensive analytical overview of the legal systems in the three countries (Kerikmäe, T. et al. (eds.). 2017. *The Law of the Baltic States*. Springer. doi: <https://doi.org/10.1007/978-3-319-54478-6>).

The first group of papers is therefore dedicated to supranational legislation and jurisprudence and its interaction with national laws and practices. Addressing a shared concern regarding the level of pollution of the Baltic Sea, “a heart of the Baltic region”, Kirchner and Dervovic in their paper examine the current threats to the Baltic Sea’s natural environment and the international legal measures that are taken to protect the sea, in particular with a view to possible improvements. Buka and Broks provide valuable insights into the main changes that the system of Latvian courts faced after Latvia’s accession to the EU, with a particular view to the practices of the courts in making preliminary references to the Court of Justice of the European Union.

The second group of papers is dedicated to constitutional issues. Outlining the foundation and constitutional regulation of the Latvian Constitutional Court, additionally examining the appointment of its justices and the rules governing constitutional complaint, Rodiņa confirms the pivotal role of the Latvian Constitutional Court in fostering the system of constitutional order and values. Đurić takes on the sometimes elusive concept of non-territorial minority autonomy and examines the way in which it is regulated in Estonia. Đorđević and Stanić both choose to analyse the institute of the president of the state in the context of its role within the principle of separation of powers. While Stanić offers an in-depth analysis of the causes, development and results of the semi-presidential system in Lithuania Đorđević provides a comparative overview of the legislative solutions in three Baltic states, outlining the differences when it comes to the structure and practice of the system of powers and hence the position, role and powers of the president of the republic.

The third group of papers examines various features of administrative law. Focusing on administrative legislation and practices, Khatsernova analyses the lack of an adequate mechanism for correcting errors of state institutions in their performance of public administration functions in the Lithuanian context, relying also on the relevant jurisprudence of the European Court of Human Rights. Danovskis provides an insight into the scope of regulation of the Latvian Administrative Procedure Law, the use of e-services and other means of electronic communication, outlining additionally the impact of the pandemic of COVID-19 on the use of electronic communication between the government and private persons in administrative proceedings.

Two papers focus on criminal law. Strada-Rozenberga and Rozenbergs scrutinize the path that the Latvian normative regulation in criminal law and the Latvian criminal law doctrine took to arrive at the possibility of introducing some form of criminal liability of legal entities under the influence of various international normative documents that Latvia had acceded to, while at the same time leaving the dominant basic institutions of the Latvian criminal law theory unaffected. Turanjanin and Stanisavljević analyse the regulation of special investigative measures in the three Baltic states and the related developments in the jurisprudence of the European Court of Human Rights.

Finally, the volume contains two papers from the field of private law. Novaković analyses the European Commission’s proposed Regulation on Markets in Crypto Assets (MiCA) and the parallel potential overhaul of crypto-licensing in Estonia, the latter being prompted by the *Danske Bank* money laundering affair. Čemalović examines Estonian legislation and practice in the field of copyright and patent protection in the light of digital

transformation, positing that technological advances would require more supranational regulatory mechanisms.

The choice of topics covered within this volume proves that the law of the Baltic states can be a fertile source of inspiration for legislators and practitioners alike. The legal dilemmas presented therein are easily recognizable; the solutions provide valuable insights into possible theoretic approaches and practical avenues in resolving the said dilemmas but also point to the potential limitations and dangers of choosing one path or the other.

True to the mission of the Institute of Comparative Law and *Strani pravni život (Foreign Legal Life)*, this thematic volume fosters the advancement of comparative legal science. It is also our firm belief that the present volume will boost an added interest in the regulatory frameworks of Baltic States in the Western Balkans. First and foremost, we extend our thanks to the authors who have contributed to the achievement of this goal. We owe special appreciation to the Editorial Board for aiding us in building an improved profile of the journal. The guest editors owe special gratitude to the Editor in chief, Ms. Nataša Mrvić Petrović, for her unwavering trust in the concept of this thematic volume and in us as guest editors. Last, but not least, we are indebted to the Technical Editor, Ms. Aleksandra Višekruna, for her continuous and selfless support in our efforts to compile this volume.

ALMOST ARCTIC? PROTECTING THE BALTIC MARINE ENVIRONMENT THROUGH INTERNATIONAL LAW

Abstract

The Baltic Sea, the heart of the Baltic region, is one of the most polluted seas worldwide. For the countries of the Baltic region, the relative importance of the Baltic Sea varies, but all coastal states of the Baltic Sea use the sea and influence it through their manifold activities. The protection of the Baltic Sea therefore is a shared concern for the coastal states. This shared concern has led to the emergence of a specific international legal régime governing the Baltic Sea. In this text, current threats to the Baltic Sea's natural environment and the international legal measures that are taken to protect the sea are described, in particular with a view to possible improvements. Particular emphasis will be placed on the northernmost part of the Baltic Sea, the sub-Arctic Bay of Bothnia that faces particular environmental challenges.

Keywords: *Baltic Sea, Bay of Bothnia, environmental law, law of the sea, Arctic.*

1. Introduction

After the end of the Cold War, the Baltic Sea has become a kind of Mediterranean Sea of the European North. With the exception of the Russian Federation, all coastal states of the Baltic Sea are member states of the European Union (hereinafter: EU), highlighting the importance of the Baltic Sea for the region. The Baltic Sea has been used for transportation and fishing for centuries and over time has been highly polluted. Despite the pollution, communities around the Baltic Sea depend on the sea as a source of food, a location for recreation and businesses, in particular in the tourism sector, but also for extractive industries and the generation of energy. Restoring the ecological integrity or at least limiting the worsening of the situation should be in the interest of all coastal states of the Baltic Sea.

* Prof. Dr, MJI, RA, Research Professor of Arctic Law and Coordinator of the Arctic Governance Research Group, Arctic Centre, University of Lapland, Rovaniemi, Finland. Member of the bar in Frankfurt am Main, Germany; formerly Professor of Space Law and Associate Professor for the Law of the Sea, Faculty of Law, Vytautas Magnus University, Kaunas, Lithuania, e-mail: stefan.kirchner@ulapland.fi

** LL.B., LL.M, ERASMUS+ scholar, Arctic Governance Research Group, Arctic Centre, University of Lapland, Rovaniemi, Finland. Research Assistant, Stefansson Arctic Institute, Akureyri, Iceland, e-mail: medy.dervovic@ulapland.fi

Against this background, this article will look at the implementation of international legal standards at the domestic level. In particular, the authors will attempt to answer the questions of (a) how the Baltic Sea's natural environment is regulated in international law, (b) which challenges the Baltic Sea's natural environment faces, and (c) which issues still need to be addressed. While looking at the entire Baltic region, including the three Baltic states, Estonia, Latvia, and Lithuania, the authors will place a special geographical emphasis on the northernmost part of the Baltic Sea, that is, the Bay of Bothnia (Swedish: *Bottviken*, Finnish: *Perämeri*).

After introducing the reader to the geographical region (2) and challenges to the marine environment of the Baltic Sea (3), the authors will present applicable legal standards, with particular emphasis on international law and its implementation on the national level (4), in order to attempt to identify regulatory gaps (5) and to answer the aforementioned research questions (6).

2. The Baltic Sea Region

The three Baltic states, Estonia, Latvia, and Lithuania, share similar historical experiences (see already Piip, 1933), but as members of the EU for almost two decades (European Union, 2020), it is today's connectedness rather than mere geographical proximity, or the fact that all three states had been illegally occupied by the Soviet Union for several decades in the last century (Mullerson, 1993, pp. 480-483), that connects these countries. It is this connecting function that the waters of the Baltic Sea have had for centuries. A marginal sea of the much larger Atlantic Ocean, the Baltic Sea in many ways resembles a large lake more than a sea in the hydrographic sense of the term (Aimé, 1946, p. 308). It is rather shallow (Leppäranta & Myrberg, 2009, p. 42) and has a very low degree of salinity (Pelseneer, 1904, p. 7). In fact, the origins of the relatively young body of water (Rheinheimer, 1998, p. 319) can be traced back to the end of the last ice age when a freshwater sea formed just south of the retreating glaciers in what is now the Southern part of the Baltic Sea. Today, the Danish straits composed of the Small and Great Belt and the Øresund, south of the Kattegat, form the boundary of the Baltic Sea (Klemeshev *et al.* 2017, p. 5). The Southern coastline from Wagria in Germany to the Lithuanian port city of Klaipėda is characterized by lagoons (Chubarenko *et al.*, 2017, Fig. 6.1, p. 150), while the waters north of the Baltic Sea proper is home to a large number of islands between Sweden and Finland (Barberet & Magin, 1841, p. 90). In addition, three major bays, the Gulf of Riga, the Gulf of Finland, which stretches all the way east to Saint Petersburg, and the Gulf of Bothnia define the region. The latter part, in particular the northernmost half of the Gulf of Bothnia, the Bay of Bothnia, located north of Kvarken, often freezes over during the winter months (Finnish Meteorological Institute). The northernmost waters of the Bay of Bothnia reach Sweden's Norrbotten and Finland's Lapland province, regions that are distinctly sub-Arctic in climate (Beck *et al.*, 2018, Fig. 1.a, p. 3) and Arctic in cultural terms.

Like the Mediterranean Sea that connects Southern Europe, Northern Africa and the Middle East, the Baltic Sea is a connection rather than a barrier between peoples. In fact, the Baltic Sea has historically been so important for international shipping that characteristics it exhibited prior to anthropogenic climate change remain relevant from a legal perspective as well to this very day: in the international ship insurance industry, insurance contracts frequently are valid for one year, until a date in December that was traditionally seen as the end of the shipping season in the Baltic Sea as the sea was about to become frozen. Until a few years ago, it was even possible to drive cars on the sea ice off the coast of Finland during the winter months and there was even a bus line over the ice between Helsinki's Kaivopuisto, a park at the shore, and Suomenlinna, an island fortress that is a popular tourist destination in the Finnish capital city (Bird, n.d.). Today, the sea ice of the Baltic Sea continues to remain a challenge in Northern Europe. The presence of sea ice in the Baltic Sea has inspired Finland to become the world's leading producer of icebreakers (Mead, 1993, p. 50) and space-technology startups to develop satellite-based solution for sea ice forecasting, but also travel writers (Clare, 2017), for whom the northernmost part of the Baltic Sea is an exotic location where the everyday work of icebreaker crews merges with the earlier imaginary ideas (Schulz, 2017) of Arctic voyages of adventure and exploration (albeit millennia after the arrival of the indigenous peoples of the circumpolar north). The contemporary reality, however, is far less prosaic.

3. Challenges to the Marine Environment of the Baltic Sea

The Baltic Sea is one of the world's most polluted seas (Elmgren, 1984, p. 166). The sea is not only shallow overall, but particularly shallow in the Danish Straits (Helsinki Commission, 1986, p. 7). This leads to a very limited exchange of water between the Baltic Sea and the Atlantic Ocean (Helsinki Commission, 1986, pp. 16-17). As a consequence, the Baltic Sea exhibits a very low level of salinity (Boczek, 1978, p. 785) and a very small tidal range of only a few centimeters. Another consequence of the limited exchange of water is that land-source pollution, which makes up most of the marine pollution worldwide (Osborn, 2015, p. 81), has particularly significant impacts on the Baltic Sea (Boczek, 1978, p. 787).

Among the worst consequences of land-source pollution are eutrophication (Ramesh *et al.*, 2014), caused especially by the influx of large amounts of nitrogen and phosphorus used for fertilizers in the agricultural sectors of the coastal states into the water and acidification. Characterized by the massive growth of algae (Khan & Ansari, 2005, p. 453), eutrophication threatens the biosphere of the Baltic Sea (HELCOM-a). Parts of the Baltic Sea are so-called "dead zones" (Diaz, 2016, pp. 19-20) that are virtually devoid of oxygen (Cartensen *et al.*, 2014, Fig. 2, p. 5630). But the influx of nitrogen and phosphorus from fertilizers is only one form of land-source pollution. Several coastal states have been notorious for large-scale intentional pollution of the sea, ranging from industrial wastes to the depositing of nuclear materials at the bottom of the sea. Acidification (Stephens, 2015; Stephens, 2020) threatens biodiversity in the Baltic Sea (Gustafsson & Winder, 2020).

Also, unexploded ordnance (UXO) from World War II and the Cold War remains a major threat to the marine environment of the Baltic Sea and to navigational, human, and animal safety in the region. In addition to pollution from sources on land, the Baltic Sea suffers from pollution from ships, both from accidents and from the regular operation of vessels.

While EU environmental law, which is a key driver of legislative developments in particular in the three Baltic countries (Kirchner, 2018, p. 259), plays a role in the limitation of land-based pollution of the sea, vessel-source pollution has been regulated through international marine environmental law (see in detail Ringbom, 2015). In the following paragraphs, the focus will be on the protection of the already damaged and very fragile marine environment of the Baltic Sea against pollution from ships.

4. International Marine Environmental Law

4.1. The United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea (hereinafter: UNCLOS) (UNCLOS, 1982) is the key international treaty governing the uses of the seas. Major provisions of the UNCLOS concentrate on the partition of the sea into maritime zones, namely the internal waters, the territorial seas, the contiguous zones, the exclusive economic zones (hereinafter: EEZs), and the high seas. The interplay between the sovereignty of coastal states and the recognized freedom of the seas determines the legal régime of each zone with the particularity that sovereignty, sovereign rights, and jurisdiction fade the further the maritime zone is from the baselines.

The UNCLOS also devotes a substantial part to the protection and preservation of the marine environment. Indeed, Part XII contains 46 articles divided into 11 sections on general provisions, global and regional cooperation, technical assistance, monitoring and environmental assessment, pollution, enforcement, safeguards, ice-covered areas, responsibility and liability, sovereignty immunity, and obligations under other legal instruments. Besides this set of articles, other provisions disseminated throughout the Convention are of particular relevance for the protection and conservation of the marine environment (Salpin, 2017, pp. 789-790). Together, these provisions offer an innovative, comprehensive, and regulatory approach to this issue (United Nations General Assembly, 1989, p. 5).

Article 192 of the UNCLOS is the cornerstone of the régime protecting the marine environment as it sets the general obligation for states Parties, relevant international organizations, and possibly all states (Proelss, 2017, pp. 1283-1286), to protect and preserve the marine environment. Engineered as an obligation of result, this provision emphasizes the crucial importance of protecting the marine environment *lato sensu*. Then, building on the Stockholm Declaration (Sur, 2016, p. 509; Stockholm Declaration, 1972, Principle 21), Article 193 reiterates this obligation for states even when they exercise their sovereign right to exploit natural resources.

The protection and preservation of the marine environment are expressly provided in the context of marine pollution. According to Article 1(4) UNCLOS, the pollution of the marine environment is multifaceted. It encompasses the direct and indirect anthropogenic introduction of substances and energy which would, or could, adversely impact marine living resources, human health, or the conduct of maritime activities governed by the UNCLOS. To address marine pollution, UNCLOS relies to some extent on the triad of prevention, reduction, and control (Article 194). Considering the intricacy and urgency of pollution occurrences (cf. Pinto da Costa *et al.*, 2020, p. 22), states, individually or collectively, must act at all stages of pollution, from its generation to its aftermath.

Furthermore, the UNCLOS is supplemented by a large number of thematic and regional treaties.

4.2. Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area

Being a sea, surrounded by nine riparian states, connected to the North Sea by the Danish Straits, and exclusively composed of the internal waters, territorial seas, and economic zones of the nine coastal states, the Baltic Sea is a semi-enclosed sea within the meaning of Part IX of UNCLOS. Indeed, it meets the combination of geographical and legal criteria entrenched in Article 122 UNCLOS for the definition of enclosed and semi-enclosed seas, which is criticized in academic writings for the lack of precision it implies for its interpretation (Guliyev, 2017, pp. 493-497). However, the application of this provision to the Baltic Sea is not as controversial as for other bodies of water like the Caspian Sea (Vinogradov & Wouters, 1995).

Article 123 UNCLOS encourages coastal states of enclosed or semi-enclosed states to cooperate with each other. The geographic and hydrographic configuration of enclosed or semi-enclosed seas tends to accentuate the relatively immediate impacts of pollution on riparian states. Therefore, such conditions are conducive for the creation of an incentive to cooperate (Fleischer, 1991, p. 1124). In the case of the Baltic Sea, this is happening through the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention, 1974). Article 123 UNCLOS can be seen as *lex specialis* to the general cooperative aims contained in Article 197 UNCLOS (see Koivurova *et al.*, 2019, p. 54). The Helsinki Convention predates UNCLOS (Koivurova *et al.*, 2019, p. 54) and was updated in 1992 (Updated Helsinki Convention, 1992). To achieve its purpose of protecting the marine environment of the Baltic Sea, the 1992 Convention mainly concentrates on pollution reduction and conservation of natural habitats and biological diversity (Koivurova *et al.*, 2019, p. 61).

Compared to the original Helsinki Convention, the updated Convention appears more in line with the development of flagship concepts of international environmental law. This observation is particularly true considering the adherence to *inter alia* the precautionary and polluter-pays principles as fundamental principles and obligations in Articles 3(2) and 3(4) respectively (Lääne, 2001, p. 261). These inclusions embody significant theoretical improvements for the protection of the marine environment of the Baltic Sea (Ehlers, 1993, p. 212).

Article 20 of the updated Convention provides the duties of its governing body (Jetoo & Tynkkynen, 2021, p. 1): the Baltic Marine Environment Protection Commission (hereinafter: HELCOM). Its role remains identical since its genesis under Article 13 of the initial Helsinki Convention (Ehlers, 1993, p. 209). Specifically, HELCOM can make recommendations, suggest revisions of the Convention, adopt pollution standards and thresholds, and promote furthering cooperation with other relevant governmental actors (Kiss, 1976, p. 730). Article 20(2) supplements this non-exhaustive list by granting HELCOM flexibility to endorse other functions inasmuch as it benefits the protection of the marine environment of the Baltic Sea. HELCOM is also involved in the reporting mechanisms instituted in Articles 11(4) and 16 of the updated Helsinki Convention. Moreover, HELCOM's work is guided by the Baltic Sea Action Plan (BSAP) first adopted in 2007 (BSAP, 2007) and updated in October 2021 (Updated BSAP, 2021). It lists objectives and related actions to undertake to remedy specific environmental issues (Backer *et al.*, 2010, pp. 644-646), the aim being restoring and ensuring the overall good health of the Baltic Sea and its marine environment (Updated BSAP, 2021, p. 6).

Since the beginning of the 21st century, the ecosystem approach has become the dominant angle through which HELCOM approaches the protection of the marine environment of the Baltic Sea (Koivurova *et al.*, 2019, p. 61). To a certain degree, the regulatory methods used to protect the Baltic Sea are more modern than those used by the UNCLOS, which still very much reflects the older zonal approach which, unlike the ecosystems approach, often disregards the reality at sea (see Bohman, 2019, pp. 83-84, 91).

4.3. *The Baltic Sea as a Particularly Sensitive Sea Area*

In 2005, the International Maritime Organization (hereinafter: IMO) bestowed the status of Particularly Sensitive Sea Area (hereinafter: PSSA) to the Baltic Sea (IMO, 2005a). The designation of the Baltic Sea area as a PSSA does not cover the entire Baltic Sea as the Russian Federation opposed it for political reasons (Kim, 2021, p. 445).

The implication of the PSSA régime (IMO, 1991; IMO, 2005b) crystalizes on the acknowledgment that the area in question requires special protection “*because of its significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities*” (IMO, 2005b, Annex, para 1.2). In light of the importance of and the challenges for the Baltic Sea region exposed earlier, the Baltic Sea PSSA aims at reducing pollution from vessels for the protection and preservation of the Baltic marine environment (Engström, 2018, p. 192).

The PSSA régime suffers nonetheless from its non-legally binding nature (Roberts, 2006, p. 95). Consequently, the effectiveness of such régime would have to rest entirely on the adoption of additional protective measures by coastal states within this framework (Roberts, 2006, pp. 95-97).

4.4. *Sea-Ice Cover as a Legal Consideration*

The Bothnian Bay consists of the internal waters, territorial seas and EEZs of Finland and Sweden. For large parts of the winter, the sea is covered in ice. Article 234 UNCLOS allows coastal states to impose environmental standards in their exclusive economic zones that go beyond what UNCLOS normally allows coastal states in their EEZs. However, Article 234 UNCLOS only applies in parts of EEZs that are covered by sea ice for most of the year. Although Article 234 UNCLOS is sometimes referred to as the “*Arctic exception*” (Bartenstein, 2011) in the UNCLOS and has its origins in measures taken by Canada to protect its Arctic waters (Stokke, 2020, p. 93), the norm’s potential geographical scope is not limited to the Arctic (Kirchner, 2020). This possibility, however, remains hypothetical. While the Baltic Sea sees a lot of sea ice compared, for example, to the waters of the Norwegian Sea, that benefit directly from the warmth of the Gulf Stream, the temporal requirement for sea ice cover is not met. Like in the Sea of Okhotsk, in the Baltic Sea, sea ice is not present there for most of the year, making Article 234 UNCLOS inapplicable (Kirchner, 2020). If the thermohaline circulation in the Atlantic Ocean were to collapse (see Stocker, Knutti & Plattner, 2001), leading to sinking temperatures in Europe (Vellinga & Wood, 2008, p. 59), and if the sea ice cover in the Baltic Sea were to last for more than half of the year, Article 234 UNCLOS could become applicable in the future. In light of anthropogenic climate change, this scenario appears unlikely (on the question whether Article 234 UNCLOS will remain applicable to the parts of Canada’s and Russia’s EEZ where the norm applies today see Dremljuga, 2017). But even a norm that is not applicable directly can be relevant: Article 234 UNCLOS is a reminder that the seas, especially those in extreme climates, are in need of protection because human activities at sea have placed them at risk. Awareness of the need for improved protection for the seas is growing (United Nations, 1992). As will be shown in the following section, this is slowly leading to regulatory changes, albeit on a limited scale.

4.5. *Current Protection of Environment of the Bay of Bothnia by Finland and Sweden*

In legal terms, the Bay of Bothnia consists of relatively large internal water areas that have been made possible by the presence of many small islands and the drawing of straight baselines by both Sweden and Finland. Currently, Finland maintains a national park in the waters south-west of the city of Kemi. The Perämeri National Park, named for the Finnish term for the Bay of Bothnia, is located entirely within Finland’s internal waters (Metsähallitus, 2018). The Western boundary of the Perämeri National Park is identical with the maritime boundary between Sweden and Finland and the Southern boundary is identical to a straight baseline drawn by Finland (Finnish Maritime Administration Hydrographic Department, 1995). A few nautical miles to the West, Sweden has created a National Park in the Haparanda archipelago (Sverige Nationalparker, n.d.). This national park is located mainly within Sweden’s internal waters and only to a small degree in Sweden’s territorial sea. This construction allows both countries to maximize the level of protection afforded to these regions. Overall, it has to be noted that these national parks

make up only a small part of the overall area of the Bay of Bothnia, let alone of the Baltic Sea. While these efforts are noteworthy and laudable, in particular when it comes to protecting the local biodiversity and a holistic view towards waters and land areas in the region, the limited effect has to be kept in mind.

From a legal perspective, these measures are based on the traditional exercise of sovereignty by the coastal state in the internal waters and the territorial sea, due to the use of straight baselines by both coastal states. Domestic environmental law in the coastal states of the Baltic Sea is, however, also inspired by international law.

4.6. The Baltic Sea and the Arctic Ocean: Potential Cross-Regional Inspiration

Another cross-sea inspiration could happen between the Baltic Sea and the Arctic Ocean. Over the last half century, the nation states of the Arctic have concluded a number of international treaties that aim to protect the marine environment of the Arctic Ocean or parts thereof, such as the 1973 Agreement on the Conservation of Polar Bears (Polar Bear Agreement, 1973), the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (MOSPA Agreement, 2013) that has been negotiated under the auspices of the Arctic Council (AC) (see Koivurova, Kleemola-Juntunen & Kirchner, 2020, pp. 74 *et seq.*), or the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean, also referred to as the Central Arctic Ocean Fisheries Agreement (CAOFA, 2018). While especially the Arctic Council places significant emphasis on the protection of the Arctic natural environment (Ottawa Declaration, 1996: Preamble, para 4), including that of the Arctic Ocean, international Arctic environmental law remains incomplete. By comparison, the efforts that have been underway in the Baltic Sea region in the last decades might be an inspiration for future efforts in the Arctic Ocean region as well. While there has been progress in the Arctic, there is no regional seas program in the Arctic, although it might be argued that the Arctic Ocean, too, fulfils the requirements of Article 122 UNCLOS. International efforts to protect the marine environment of the Baltic Sea might instead be an inspiration for the Arctic, especially given that many of the states that already cooperate in protecting the Baltic Sea also cooperate in the Arctic. Half of the members of the Arctic Council, Sweden, Denmark, Finland and Russia, are coastal states of the Baltic Sea and member states of HELCOM (HELCOM-b). Similarly, five of the eight Arctic states, Iceland, Norway, Denmark, Sweden, and Finland, are also parties to the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Commission, n.d.), better known as the OSPAR Convention (OSPAR Convention, 1992). Denmark (on behalf of Greenland), Iceland, Canada and the United States of America also have a long history of cooperation in the Atlantic. These existing cooperative experiences and shared interests can in the future be harnessed to advance the protection of the marine environment of the Arctic Ocean. For the moment, though, the level of protection afforded to the Arctic Ocean has not yet reached the level of protection prescribed for the Baltic Sea. However, the self-regulation by the cruise ship industry regarding the voluntary refraining from the use of heavy fuel oils by the Association of Arctic Expedition Cruise Operators (AECO) in 2019 (AECO, 2019, pp. 7, 12), is a good

example for the type of self-regulation that is often missing in the European context where there appears to be a greater reliance on top-down regulation.

5. Gaps in the Protection of the Baltic Marine Environment

This change in the mindset of users of maritime spaces would also be welcome in the Baltic Sea region, especially given the continuously high number of challenges faced by the marine environment of the Baltic Sea. Improving international marine environmental law, both in the Baltic Sea and elsewhere, in particular in the Arctic, requires norm-setting that is based on a solid understanding of scientific research (cf. also Parviainen *et al.*, 2022). However, not all of all the problems faced by the marine environment of the Baltic Sea can be solved through more regulation. It is also necessary to make sure that existing international, regional, and national legal standards are actually implemented and enforced. This is a problem that is not limited to the Baltic Sea but is common in international law and especially with regard to the regulation of activities that happen at sea.

But there is also cause for optimism: the environmental governance of the Baltic Sea is becoming more modern and effective, for example through a stronger focus on the ecosystem approach (cf. Kern & Söderström, 2018).

The Baltic Sea has benefitted from lower Sulphur standards prior to their global introduction in 2020, but there are many challenges that remain, in particular with regard to the pollution from sources on land. Existing environmental law norms that exist on paper have to be enforced in practice. Due to the shape and size of the Baltic Sea, there is no high seas part of the Baltic Sea. All parts of the Baltic Sea are either internal waters, territorial sea or exclusive economic zones (Franckx, 2018, pp. 7, 15, fn. 41). This means that coastal states and port states have an enhanced responsibility for the protection of these fragile waters in accordance with their legislative and enforcement competences provided by the UNCLOS, primarily justified by their sovereignty, sovereign rights, and jurisdiction in these zones (see Bardin, 2002, pp. 32-33, 35-36, 58-62; Aloupi, 2017, pp. 937-939).

Likewise, the coastal states are responsible for the protection of the seas against pollution from land-based sources. Despite all the cooperation and the international legal documents that have been created in recent decades, at the end of the day the ball is in the nation states' court (on the current legal situation in Finland see Koivurova *et al.*, 2019, pp. 64 *et seq.*).

The relative success of reductions in vessel-source pollution is to be seen as a global success within the framework of the work of the IMO. Regionally, cooperation on environmental matters is already substantial, in particular through the HELCOM and the Council of Baltic Sea States (Koivurova & Rosas, 2018), but there remains room for improvement. Among the key obstacles to better environmental governance in the region is the cooperation with the Russian Federation (see Tynkkynen, 2018), which is lagging behind other coastal states in terms of environmental protection efforts. Although it needs to be recognized that the Russian Federation only is legally responsible for small portions of the coastlines of the Baltic Sea, pollution from Russia is substantial. A significantly

bigger role, however, is to be played by the EU. With all other coastal states of the Baltic Sea being member states of the EU, the Baltic Sea is almost an EU-internal body of water. Stricter standards in EU law regarding, for example, fertilizers used in the agricultural sector or concerning water pollution in general, could have a significant effect on the marine environment in the Baltic Sea. The legal basis for such legislative action already exists and the awareness of marine environmental issues has been growing in Brussels in recent years, as is evidenced by the significant efforts under the von der Leyen Commission, such as the EU4Ocean initiative.

6. Conclusions and Outlook

It can therefore be concluded that the protection of the marine environment of the Baltic Sea remains a work in progress – but that there is indeed progress, for example on the level of the EU. This progress builds on many years of international cooperation in the region. At the end of the day, though, local action matters in practice: Regional seas programs such as the Helsinki Convention provide additional layers of legal protection for the marine environment but at the end of the day, it is up to the states to protect the water they share. At the core of the hurdles that have to be overcome to improve the protection of the marine environment of the Baltic Sea is the fundamental weakness of public international law: the dependency on the will of states to refrain from fully using the scopes of their respective sovereignties and to enter into, and adhere to, international agreements that limit the ability to use the national territory in a manner that the state sees fit. Article 192 UNCLOS obliges every state “to protect and preserve the marine environment” (Article 192 UNCLOS). This obligation is not limited to either land-based or vessel-source pollution but is of a general nature. Given the large number of parties to the UNCLOS, Article 192 UNCLOS contains almost an *erga omnes* obligation. The real challenge is therefore to change the hearts and minds of those who are engaged in decision-making on the national level, and who are responsible for the practical implementation of international law on the local level. Like in the case of international human rights law, international environmental law has to be created with a global perspective but needs to be implemented locally. The need to emphasize the role of the coastal states is particularly prominent in the Baltic Sea region because no part of the Baltic Sea is beyond the jurisdiction of nation states. While diplomats and experts continue to work towards a future international legal instrument that will be binding on states and that will have the purpose of protecting biodiversity beyond national jurisdictions (de Serpa Soares, 2020, pp. 325-326), in the Baltic Sea region, the responsibility to protect the marine environment remains primarily with the coastal states. Although significant progress has been made in particular since the end of the Cold War, a lot still needs to be done to not only prevent future damage to the marine environment of the Baltic Sea but to repair the damage that has already been done.

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Dr Stefan Kirchner

Profesor arktičkog prava i koordinator Istraživačke grupe za upravljanje Arktikom, Arktički centar, Univerzitet Laplanda, Rovaniemi, Finska; član Advokatske komore u Frankfurtu na Majni, Nemačka, bivši profesor kosmičkog prava i vanredni profesor pomorskog prava, Pravni fakultet, Univerzitet Vytautas Magnus, Kaunas, Litvanija
e-mail: stefan.kirchner@ulapland.fi

Medy Dervovic, LL.M.

ERASMUS+ stipendista Istraživačke grupe za upravljanje Arktikom, Arktički centar, Univerzitet Laplanda, Rovaniemi, Finska; istraživač pripravnik, Arktički institut Stefanson, Akureiri, Island
e-mail: medy.dervovic@ulapland.fi

SKORO ARKTIČKI? ZAŠTITA BALTIČKE MORSKE ŽIVOTNE SREDINE PUTEM MEĐUNARODNOG PRAVA

Sažetak

Baltičko more, samo srce baltičkog regiona, jedno je od najzagađenijih mora na svetu. Značaj Baltičkog mora nije isti za sve države baltičkog regiona, ali sve države čija obala izlazi na Baltičko more koriste ovo more i utiču na njega kroz raznovrsne aktivnosti. Zaštita Baltičkog mora stoga je zajednička briga svih ovih država. Ova zajednička briga dovela je do nastanka posebnog međunarodnopravnog režima koji se odnosi na Baltičko more. U ovom radu se opisuju postojeće pretnje za prirodnu sredinu Baltičkog mora kao i međunarodne pravne mere usmerene na zaštitu ovog mora, sa naročitim osvrtom na moguća unapređenja. Posebna pažnja posvećena je najsevernijem delu Baltičkog mora – subarktičkom Botnijskom zalivu, koji se suočava sa posebnim ekološkim izazovima.

Ključne reči: Baltičko more, Botnijski zaliv, pravo zaštite životne sredine, pomorsko pravo, Arktik.

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APPLICATION OF THE EU LAW IN LATVIAN COURTS

Abstract

This article outlines the main changes that the system of Latvian courts faced after Latvia's accession to the EU. In the legislative field Latvia has added in its procedural laws general provisions that incorporate EU law into Latvia's legal system, as well as the possibility of national courts to apply preliminary rulings procedure. During Latvia's EU membership, Latvian courts have adapted to their role in the application of the EU law, especially in the area of administrative law. Latvian courts have referred to the Court of Justice of the EU for preliminary rulings in over 100 cases, mostly from administrative courts. This corresponds with general tendencies in other new EU Member States. However, the fact that there are very few requests for preliminary rulings from courts that are not the courts of the last instance in Latvia, suggests that Latvian courts of first instances are somewhat unwilling to make use of the preliminary rulings procedure and do not see the benefits in its use.

Keywords: *application of EU law, national courts, EU enlargement, preliminary rulings.*

1. Introduction

European integration so far has always been a process, a series of changes and developments, reflecting ever changing realities of our sub-continent. That process is irrevocably linked not only to the institutional and substantive developments of the European Union (hereinafter: EU) but also to the EU's enlargement. Some authors contend (Archick & Garding, 2021, p. 1) that the carefully managed process of enlargement is one of the EU's most powerful policy tools, and that over the years it has helped to transform many European states into functioning democracies and improved their standard of living.

According to Article 49 of the Treaty on European Union (hereinafter: TEU), which constitutes the legal basis for the accession of new member states, the EU is open to all European countries. However, the process of the accession is complex and requires lengthy legislative as well as institutional preparatory work on the part of the accessing country (see Schewe, 2016), which must be able to meet the whole of the EU's *acquis* once it joins the EU. The main part of that work is concerned with the executive and legislative

* Dr. iur., docent of the University of Latvia, Latvia, e-mail: arnis.buka@lu.lv

** Dr. iur., docent of the University of Latvia, Latvia, e-mail: edmunds.broks@lu.lv

branches adjusting the national legal system and preparing for participation in the work of EU's institutions. Yet national judiciary is also fundamentally affected by EU membership (see Dyevre, 2009).

To outline some of the challenges that national courts of the new EU Member States face, this article will provide an overview of the experience of Latvian courts from the moment of preparation to join the EU until the present day, when Latvia has been a Member State for 17 years. The article consists of three parts. The first part outlines the basics of EU's judicial order – the relationship between the Court of Justice of the EU (hereinafter: CJEU) and national courts. It briefly introduces some of the core concepts of EU law that national courts are obliged to adhere to, such as supremacy of the EU law, direct and indirect effect of the EU law. It also concisely explains the preliminary rulings procedure and its crucial role in the interaction between the CJEU and the national judiciary. The second part, drawing specifically on Latvia's experience, will illustrate possible options for amendments of national procedural laws that aim to incorporate duties imposed on national courts as well as accommodate preliminary rulings procedure. Finally, the third part of the article will assess the practice of Latvian courts 17 years after accession, with a particular emphasis on the use of the preliminary rulings procedure.

2. EU Law in National Courts: The Basics of EU's Judicial Order

Since CJEU's 1963 judgment in the *Van Gend & Loos* case the individuals are entitled to invoke much of the EU law directly before national courts. Accordingly, national courts have a duty to give full effect to provisions of EU law as well as to protect rights of individuals under EU law (see Weiler, 1991, p. 2413). Although it is the CJEU which has the authority to interpret EU law, it is only the national courts that hold monopoly on adjudication of the dispute before them. It is also the national courts that will decide on the facts of the case and will ultimately apply the EU law to the dispute. Thus national courts are an integral part of the EU's judicial order and the key element in the implementation of the EU law (see Prechal, 2006, p. 429; De Witte *et al.*, 2016).

To ensure that individuals can meaningfully invoke EU law before national courts, the CJEU in its case law has elaborated a range of duties incumbent on national courts. A pivotal role in what is often described as European 'constitutional legal order' (Stein, 1981, p. 1) is played by the right of individuals to protect their EU rights in national courts and a corresponding duty of said courts to protect those rights and therefore to allow EU law provisions to have direct effect (*C-26/62 Van Gend & Loos*). The second crucial element in the EU's legal structure is the principle of primacy of EU law, which as elaborated by the CJEU in cases *Costa and E.N.E.L.* and *Melloni (Stefano Melloni v Ministero Fiscal)*, requires that in cases of conflict between national law and EU law, the EU law should be applied. Then further building on *Van Gend & Loos* and *Costa and E.N.E.L.*, in *Simmenthal* the Court proceeded to spell out the role of national courts in upholding this new legal order. According to *Simmenthal* national courts of all levels must set aside any national law that conflicts with the EU law and Member States must

not limit the power of any national court to immediately disapply national provisions that are incompatible with the EU law.

Thus *Simmenthal* provided for a fundamental shift in the competences of national courts. Courts of all levels were to apply EU law directly and if they found a national provision that was contrary to EU law, they were to set it aside by themselves, without first turning to the constitutional court. This shift was to have a twofold effect. Firstly, it empowered national courts of all levels by strengthening their capacity as EU law courts. Secondly, it also gave the power of judicial review of national law, which in many member states was reserved only for constitutional or supreme courts, to all national courts. In subsequent cases the CJEU clarified and somewhat softened the original pronouncement – the supremacy of the Community law did not require annulment of conflicting national rules – the courts merely had to disapply the national rule. In *Melki and Abdeli* the CJEU elaborated on *Simmenthal* and further encouraged a certain dismantling of national judicial hierarchies. According to the *Melki and Abdeli* case, in order to ensure the primacy of the EU law, any national court is free to refer to the CJEU any question at any stage of proceedings, even at the end of an interlocutory procedure with a national constitutional court, thus opening a possibility that CJEU could override the conclusions reached by the constitutional court.

However, the practical importance of *Simmenthal* over time seems to have decreased with national courts increasingly opting to focus on another strand of CJEU case law, namely the duty of consistent interpretation, i.e. the so-called indirect effect of EU law. According to cases, such as *Von Colson* (C-14/83), *Marleasing* (C-106/89) and *Pfeiffer* (Joined cases C-397/01 to C-403/01) all national law must be interpreted ‘in the light of the wording and the purpose’ of EU law. This in effect requires national courts to read EU law provisions into national laws and in cases of conflicting national rules to afford precedence to those national rules that comply with EU law. The development of indirect effect has also significantly increased the role that directives play in litigations between individuals since it circumvents the absence of horizontal direct effect of directives.

Another foundational element in the EU’s judicial order is the preliminary rulings procedure. The procedure has been present in the founding treaties from the moment of their conclusion in what is now Article 267 of the Treaty on the Functioning of the European Union (hereinafter: TFEU). The procedure is premised on the idea that EU law must be applied in national courts (see Broberg & Fenger, 2014). Whenever a national court is to adjudicate a case in which EU law is applicable and the judge finds that the EU law seems ambiguous or complicated, the judge has a right (and for the courts of final instance – a duty) to suspend the proceedings at national level and to make a reference with a question to the CJEU. The CJEU does not adjudicate the case on substance, but merely makes a preliminary ruling by answering questions that the national court has put forward in the preliminary reference. After the CJEU delivers its preliminary ruling, the case goes back to the national court, which passes judgment on the substance of the case by using the interpretation that the CJEU gave in its judgment. The main function of this procedure is to ensure uniform application of EU law, which is one of the core principles of the EU’s judicial order – importance of which has been emphasized by the CJEU starting from the judgments such as C-283/81 *CILFIT* till present day (see, e.g., C-561/19 *Conorzio Italian Management*).

3. Enabling the Application of the EU Law in Latvian Courts

With the accession to the EU Latvia had to decide how to regulate application of EU law in Latvian courts so that, on the one hand, efficient and proper functioning of EU law would be ensured in accordance with requirements of EU law as elaborated by the CJEU. On the other hand, application of EU law had to be integrated into Latvian law so that it would fit into the established framework of Latvian legal system, such as hierarchy of sources and competences of the courts. The simplest option was based on the monism doctrine as it is known in the public international law (see Starke, 1936). According to this doctrine international law and national law are parts of the same legal system (and international rules have primacy over domestic law). For monists, international treaties become the law of the land, an integral part of the national legal system.

Latvian legal system generally adheres to the monist conception. Although Latvian constitution does not explicitly recognize international law as being part of the Latvian legal system, Latvian procedural laws acknowledge international law as a source of law (Latvian Civil Procedure Law, Art. 5(1); Latvian Administrative Procedure Law, Art. 15(1); Latvian Criminal Procedure Law, Art. 2(1)). In the context of Latvia's accession to the EU it meant that in principle it was not mandatory to provide particularities on the application of the EU law in Latvian procedural laws, since from the moment of the ratification of the Accession Treaty, all legal norms of the EU law became part of the Latvian legal order (Kerikmae & Joamets, 2017, p. 172). Accordingly, any Latvian court should be able to use EU law on the basis of the Accession Treaty and, therefore, apply EU law correctly without any additional provisions in the texts of national procedural laws. Such an approach has been used, for example, in the Netherlands in the context of administrative courts (see Prechal & Widdershoven, 2008).

However, Latvian legislators instead opted for addition of some general references to the EU law in the texts of Latvian procedural laws. Such an approach recognized the legal force of EU law (from the moment of coming into effect of the Accession Treaty), but simultaneously provided some procedural guidelines within the texts of the Latvian procedural laws on the application of EU law. Thus, for example, the legal basis for the use of the preliminary rulings in Latvian courts still is the EU law itself, but at the same time the Latvian procedural laws contain provisions, which inform judges as to the existence of the preliminary rulings procedure and the possibility to refer questions to the CJEU (Latvian Civil Procedure Law, Art. 5.1; Latvian Administrative Procedure Law, Art. 104.1; Latvian Criminal Procedure Law, Art. 478(2)). As an illustration to this, the Latvian Civil Procedure Law, Article 5.1 states: "In accordance with the legal norms of the European Union a court shall make a request to the Court of Justice of the European Union regarding the interpretation or validity of legal norms for a preliminary ruling".

This approach of the Latvian legislator involves a certain degree of overlap of EU law and national law. However, it also encouraged Latvian judges, who initially were used to working almost exclusively with national law, to see clearly the main changes that the EU law brought into the system of national law and to see national law in the context of the EU law. Similar approach has been used by several other EU Member States as well, for example, by Czech Republic and Slovakia (see Bobek, 2008).

4. Practice of Latvian Courts in Application of EU Law

Over the years of Latvia's EU membership the attitudes of Latvian courts towards application of EU law have steadily improved (see Buka & Bērziņa, 2016). Partly this has been due to extensive education programmes on EU law for judges and partly due to the increased confidence of judges as over time they gained experience engaging with the EU law and with the CJEU. Amongst Latvian courts it is the administrative courts, particularly in areas such as tax law, which provide the bulk of the practice on the application of EU law. Administrative courts are also the ones that are frequently faced with cases involving more complex secondary law including directives on taxation, public procurements, company law and environment. Thus administrative courts are leading in the application of EU law not only in quantity but in quality as well, particularly the Supreme Administrative Court which often makes the effort to tackle the relevant CJEU case law (see Judgment of the Administrative Department of the Supreme Court, March 24, 2010 in the case SKA-293/2010). The Supreme Administrative Court also is leading in terms of initiated preliminary rulings procedures (Buka & Bērziņa, 2016).

In comparison to Latvian administrative courts, the courts of general jurisdiction (which under Latvian law deal with private law issues) engage EU law to a lesser extent than administrative courts. The cases will most often be on private international law issues that are governed by EU regulations (see Kačevska *et al.*, 2015). As a general rule, Latvian courts in civil cases tend to avoid express usage of terms "direct effect" or "indirect effect" but merely use directives in conjunction with relevant Latvian law (see Judgment of the Civil Department of the Supreme Court of 28 November 2012 in case SKC-392/2012).

In criminal law courts so far the influence of EU law can be seen as marginal at best – it is rare to find even indirect reference to EU law in criminal law cases. Those few judgments that mention EU law, do so with a certain degree of cautiousness and uncertainty, especially in judgments from the first decade after Latvia's accession (see Judgment of the Criminal Department of the Supreme Court of the Republic of Latvia of 9 May 2013 in case SKK-165/2013).

As for preliminary rulings, an overview of case law in the post-2004 new Member States reveals that in the initial years after the enlargement the procedure was used in relatively few cases. From 2004 till 2007 there were only 35 requests for preliminary rulings from ten new Member States in total, which is considerably lower than the average number of references from older Member States (Bobek, 2008, p. 1611). This initial lack of willingness from national courts was at least partly due to the restrictive approach of the CJEU on admissibility of requests for preliminary rulings in cases where factual circumstances related to the period before the state's accession to the EU. Compared to previous enlargements where CJEU's attitudes were rather liberal (see C-43/95 *Delecta Aktiebolag* in context of the accession of Sweden, and C-122/96 *Saldanha* in context of Austria's accession) to a rather restrictive one for countries acceding in 2004 (see C-302/04 *Ynos*).

The first request for preliminary ruling from a Latvian court was made almost four years after Latvia's accession to the EU in 2007. However, since then Latvian courts have steadily increased their requests and are now making them on a regular basis. In total,

Latvian courts have made over 100 requests for preliminary rulings. As already noted, these are mainly from administrative courts and among these it is the Supreme Administrative Court that makes the majority of references (see Report of the Ministry of Justice, 2019). A very similar trend has also been observed in other new Member States (Bobek, 2008, p. 1612). Research suggests (Kačevska *et al.*, 2015, pp. 28-29) that Latvian judges of lower courts admit that they are overloaded with cases and therefore are hesitant to take time to delve deeper into the problematic issues and to engage with CJEU. This contrasts with other findings (Broberg & Fenger, 2014, p. 45) which suggest that the courts of lower instances in many countries are quite willing to obtain preliminary rulings from the CJEU. Also in some new Member States courts of lower instances seem to be far more active than their Latvian counterparts (e.g., in Poland the first seven references were all from the courts that were not the courts of last instance (Miqsik, 2008, p. 120)). Thus Latvian courts of lower instances seem to be comparatively less willing to make use of the preliminary rulings procedure.

5. Conclusions

To accommodate the merging of Latvia's legal system with the EU law and cooperation of Latvian courts with the CJEU, Latvia opted to explicitly restate in Latvia's three major procedural laws, what was anyway binding on the basis of EU law itself. Thus Latvian law now explicitly provides that EU law is a part of Latvian law and that administrative, civil and criminal law courts are to apply EU law. Similarly all three procedural laws expressly describe what is anyhow the right and sometimes the duty of national courts on the basis of Article 267 of the TFEU. These national provisions in no way seek to narrow the effect of the EU law, but rather were intended to dispel any doubts that national judges (particularly in the early years after the accession) might have had.

As for the practice of Latvian courts, they seem to have adapted to their role in the application of the EU law, especially in the area of administrative law. Latvian courts have asked the CJEU for preliminary rulings in over 100 litigations, mostly in administrative law cases. This corresponds with trends in other EU Member States; even more, Latvian courts are more active than other countries of comparable size. However, the fact that very few requests for preliminary rulings are done by courts that were not the courts of last instance in Latvia, signifies that Latvian courts of the first instances are slightly sceptical in regards to the preliminary rulings procedure and do not see the benefits in its use.

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Dr Arnīs Buka

Docent, Univerzitet u Letoniji, Letonija
e-mail: arnis.buka@lu.lv

Dr Edmunds Broks

Docent, Univerzitet u Letoniji, Letonija
e-mail: edmunds.broks@lu.lv

PRIMENA PRAVA EVROPSKE UNIJE PRED LETONSKIM SUDOVIMA

Sažetak

U radu se ukazuje na ključne promene sa kojima su se suočili letonski sudovi nakon pristupanja Letonije Evropskoj uniji. U zakonodavnom domenu, Letonija je u svoje procesne zakone unela opšte odredbe kojima se pravo Evropske unije unosi u pravni sistem Letonije, zajedno sa mogućnošću da letonski sudovi primene postupak upućivanja prethodnog pitanja. Tokom članstva Letonije u Evropskoj uniji, letonski sudovi su se prilagodili svojoj ulozi u primeni prava Evropske unije, naročito u oblasti upravnog prava. Letonski sudovi su Sudu pravde Evropske unije uputili preko sto prethodnih pitanja, a uglavnom se radilo o pitanjima koja su uputili upravni sudovi. To je u skladu sa opštim tendencijama u novim državama članicama Evropske unije. Ipak, činjenica da je vrlo mali broj letonskih sudova koji nisu sudovi poslednje instance uputio prethodno pitanje Sudu pravde Evropske unije ukazuje da su letonski prvostepeni sudovi donekle nevoljni da koriste ovaj postupak i da još uvek ne prepoznaju koristi koje mogu imati od njega.

Ključne reči: primena prava EU, nacionalni sudovi, proširenje EU, prethodno pitanje.

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CONSTITUTIONAL COURT AS A GUARDIAN OF THE LATVIAN LEGAL SYSTEM

Abstract

In the article, the author explains the foundation and the constitutional regulation of the Latvian Constitutional Court marking its place within the principle of the separation of powers. The appointment of the justices and some novelties along with problems encountered in the justice selection procedure is provided in other chapter of the article. By describing the competence of the Constitutional Court, it is pointed out that it is very narrow as the Constitutional Court adjudicates only cases about conformity of legal enactments with the norms of higher hierarchy. The author analyses also the circle of persons who can stand before the Court. Special emphasis is given to the constitutional complaint – a petition which can be submitted to the Constitutional Court by an individual and which marks also dialogue between the Latvian Constitutional Court and the European Court of Human Rights. At the end, the author explains the legal force and real influence of judgments of the Constitutional Court, including rights of the Constitutional Court to determine a point in time when the anti-constitutional regulation becomes null and void. The author concludes that the Constitutional Court not only theoretically, but also in reality ensures a system for the constitutional order and values, as well as principles in the Republic of Latvia.

Keywords: *Constitutional Court, justice, competence, locus standi requirements, judgment.*

1. Introduction

In today's democracies protection of the constitution is in the hands of judges. Judicial review is considered as a power of courts to control constitutionality of legislation. As such, it plays an important role in the state (De Visser, 2014, p. 55). In other words, judicial review of the constitutionality of a law "presents an exciting and perplexing encounter between legislator and judge" (Cappelletti, 1971, p. 1). The doctrine (Weinrib, 2016, p. 148) even assumes that constitutional supremacy, constitutional rights and judicial review have found a modern constitutional state.

* Dr. iur, Associate Professor of the Law Faculty, University of Latvia, Latvia, e-mail: anita.rodina@lu.lv

In the Republic of Latvia, like in several other countries, the exclusive function – to safeguard the constitution (Judgment of the CC in case No. 2009-11-01, para. 5), or to ensure existence of a legal system that complies with the Constitution of 15 February 1922 (*Satversme*), and to provide its opinion regarding constitutionally important issues (Judgment of the CC in case No. 2008-35-01, para. 11.2) – is in the hands of the Constitutional Court of the Republic of Latvia (hereinafter – the Constitutional Court or CC).

The Constitutional Court as the youngest constitutional institution commenced its activities on 9 December 1996, and passed its first judgment on 7 May 1997 (Judgment of the CC in case No. 04-01(97)). The establishment of the Constitutional Court is to be considered as a significant addition to the parliamentary order of Latvia and also to the development of the rule of law. The Constitutional Court, in performing its function, has expedited the transformation of the Latvian legal system from Soviet law (Ziemele, 2017). The Constitutional Court continues to create and consolidate the Latvian legal system also today. The judgments of the Constitutional Court have become a reflection of the concise text of the Constitution (*Satversme*) of 15 February 1922. Moreover, it has also formulated the values, upon which the constitutional identity of the State is founded, by stating that “Latvia is based on such fundamental values that, among the rest, include basic rights and fundamental freedoms, democracy, sovereignty of the State and people, separation of powers and rule of law” (Judgment of the CC in case No. 2008-35-01, para. 17). In other words, the rulings by the Constitutional Court are of principal importance in the functioning of the legal system, as well as in the protection of the constitutional order. Prof. A. Endziņš, the first President of the Constitutional Court, has provided the most accurate description of the Constitutional Court’s significance and role in Latvia, by stating that the Constitutional Court is a force that the legislator must consider and respect (Discussion, 2016, p. 234).

2. Foundation of the Constitutional Court and Its Constitutional Regulation

In the beginning of nineties, in many newly established democracies, which appeared on the world map in the Eastern and Central Europe, Constitutional Courts as guardians of the constitution were created (Prochazka, 2002, pp. 33-73; Schwartz, 2000, pp. 5-21). It was a time when constitutional review spread within the new democracies. Latvia was not an exception. The first legal act of constitutional level, envisaging the establishment of a constitutional court in Latvia, was the declaration of the Supreme Council of the LSSR which was adopted on 4 May 1990 under the title “On the Restoration of the Independence of the Republic of Latvia”. The second sentence in paragraph 6 thereof provided that in cases of “[d]isputes over the issues regarding the application of a legal act shall be resolved by the Constitutional Court of the Republic of Latvia”. Subsequent to that, the law of 15 December 1992 governing judicial power envisaged that the Supreme Court shall be entrusted with the function of constitutional supervision. Quite soon the political and legal thought gave up the idea of entrusting the right of constitutional supervision (not

review) to the Supreme Court, starting to develop a concept of a special – Constitutional Court. In June 1996, the law amending the *Satversme* as well as the Law on Constitutional Court were passed. This is the reason why the Latvian Constitutional Court belongs to the “third generation” of constitutional courts (Solyom, 2015, p. 6).

The constitutional status and regulation on the Constitutional Court is included in one Article of the *Satversme* – in Article 85.¹ Constitutional regulation of the Court is very narrow, because it was necessary to retain the laconic style of the *Satversme*. Therefore, the *Satversme* just indicates the competence of the Constitutional Court by giving an authorization to its further specification in law; it regulates the legal status of Justices and the rights of the Constitutional Court to declare laws or other enactments or parts thereof null and void. Procedures laid down by law for adjudicating cases are determined by the Constitutional Court Law and the Rules of Procedure of the Constitutional Court.

The Constitutional Court in Latvia is a part of the judicial power. It fulfils its functions by administering justice, ensuring control over two other branches of power (Judgment of the CC in case No. 2001-06-03, para. 1.2). Unlike other courts belonging to the general court system, the Constitutional Court solves specific disputes pertaining to the compatibility of legal provisions with the provisions of higher legal force (Judgment of the CC in case No. 2011-11-01, para. 11.1). The Constitutional Court is not solving criminal cases, civil law disputes, nor the cases that follow from administrative legal relationships (Judgment of the CC in case No. 2007-03-01, para. 9; Judgment of the CC in case No. 2008-43-0106, para. 12).

The Latvian Constitutional Court is founded on the principles of the European model of constitutional review. It has the characteristics typical of the European model: centralisation, implementation of abstract and concrete constitutional review, possibility of repressive (*a posteriori*) form alongside with preventive (*a priori*) review, *erga omnes* power of its judgments.

3. Corps of Justices

The Constitutional Court is one of the smallest courts in Europe as it consists of seven justices. Justices are selected in a specific procedure and there are special requirements for candidates for the positions as an independent court is an essential guarantee of democracy and freedom in each country (Shetreet, 2011, p. 3). The requirements set for the candidates to the office of the Constitutional Court Justice in Latvia are similar to the ones set for constitutional court justices in other countries and to the Supreme Court Judges. A general requirement, which applies to the judges of general courts and to the Constitutional Court Justices, is that only Latvian citizen/national with impeccable reputation may become a judge. Candidates for the office of the Constitutional Court

¹ Article 85 of *Satversme* provides: “[i]n Latvia, there shall be a Constitutional Court, which, within its jurisdiction as provided for by law, shall review Cases concerning the compliance of laws with the Constitution, as well as other matters regarding which jurisdiction is conferred upon it by law. The Constitutional Court shall have the right to declare laws or other enactments or parts thereof invalid. The Saeima shall confirm the appointment of judges to the Constitutional Court for the term provided for by law, by secret ballot with a majority of the votes of not less than fifty-one members of the Saeima.”

Justice must have appropriate education in the legal science² and professional experience of ten years.³ Experience in appointing the Constitutional Court Justices in Latvia shows that persons with experience in academic work are very often appointed to this office. As of May 2021, all seven judges have background from the University of Latvia, Law Faculty and six of them are working at the same University (one is employed elsewhere in the academia). There is also age requirement: a person who has reached the age of 40 can become a Constitutional Court Justice.

In Latvia, all judges, including the Constitutional Court Justices, are appointed to the office by the *Saeima*. The decision of the *Saeima* is one of the main criteria for ensuring the independence of judges (Judgment of the CC in case No. 2004-04-01, para. 10). Even though the final decision on confirming a Constitutional Court Justice is taken by the *Saeima*, three constitutional institutions have the right to propose candidates to the office: three candidates can be proposed by at least ten Members of the *Saeima*; two – by the Cabinet of Ministers; two – by representatives of the judicial power – by the Plenary Session of the Supreme Court, which may select candidates among the judges of the Republic of Latvia.

Unlike a judge in the general court system, which is appointed to the office by general ballot of the *Saeima* (on the basis of Article 24 of the *Satversme*, decision being adopted by the majority vote of Members present), for the Justice of the Constitutional Court to be appointed, at least 51 Members of the *Saeima* have to vote for the candidate. Said number is quite a challenging tool as, for example, at the end of 2020 none of the five candidates could get 51-vote-support from *Saeima* members (13th *Saeima* autumn session on 21 December 2020). After confirmation, a Constitutional Court Justice takes the judge's oath (solemn affirmation), which is accepted by the President and then he/she can start fulfilling his or her duties. An interesting situation of taking an oath occurred due to the Covid 19 restrictions which were introduced in Latvia at the beginning of 2020. On April 20, 2021 the oath was given in remote procedure via Zoom platform (see *Lyportals*, 2021).

The Constitutional Court Justices are appointed to the office for “the term stipulated in the law” (Article 85 of the *Satversme*) – ten years. It must be specified that normative regulation in Latvia is not very explicit and accurate in prohibiting a person to be reappointed to the office of the Constitutional Court judge as it is in other countries (European Commission for Democracy Through Law (Venice Commission), 1997, pp. 13-15). The doctrine of Latvia has witnessed contrary opinions in this regard (Neimanis, 2021, pp. 21-23; Priekulis, 2021, pp. 13-20). In the commentaries of the Article 85 (Rodiņa & Spale, 2013, pp. 151-152) of the Constitution, it was explained, regardless of revising the provision (Article 7(3) of the Constitutional Court Law) “[o]ne and the same person may not hold the position of a Constitutional Court judge for longer than ten consecutive years”, the person should be appointed as Constitutional Court justice only once in a lifetime. In spite

² Person who has acquired a higher professional or academic education (except the first level professional education) in legal science and also a master's degree (including a higher legal education, which in regard to rights is equal to a master's degree) or a doctorate may be a judge at the Constitutional Court.

³ Ten years of service in a legal speciality or in a judicial speciality in scientific educational work at a scientific or higher educational establishment after acquiring a higher professional or academic education (except the first level professional education) in legal science.

of that, a person who had been a justice for entire ten years was nominated as the candidate (not appointed) at the end of 2020 (*Latvijas Republikas Saeima Juridiska Komisija*, 2020).² Interestingly, in none of the institutions which are responsible for the appointment of the Justices there was a debate on this issue.

4. Competence of the Constitutional Court

Constitutional courts currently have several core competencies or functions such as ensuring the conformity of national legislation with the constitution, ensuring the integrity of political office and processes, the protection of fundamental human rights, and resolving institutional disputes, (De Visser, 2014, p. 93). In spite of different classifications of the functions of the constitutional courts in the doctrine, the main aim of the Constitutional Court is to safeguard the priority of constitutional provisions – or to protect the *Satversme*, by reviewing cases in accordance with the law (Judgment of the CC in case No. 2009-11-01, para. 5). The competence of the Constitutional Court is included in the *Satversme* (Article 85), as well as in the Law on Constitutional Court (Section 16). The Constitutional Court in Latvia reviews: 1) the conformity of national laws with the *Satversme*; 2) the conformity of international treaties signed or entered into by the Republic of Latvia with the *Satversme* as well as their conformity until the confirmation of the relevant treaties in the *Saeima* with the *Satversme*; 3) the conformity of other pieces of legislation or parts thereof with the norms of higher hierarchy; 4) the conformity of other acts of the *Saeima*, the Cabinet, the President, the Speaker of the *Saeima* and the Prime Minister, except for administrative acts, with national law; 5) the conformity of an order by which an authorized Minister has suspended a decision taken by a local government council with the law; 6) the conformity of national legal norms with those international treaties which entered into by the Republic of Latvia as long as they are not in conflict with the *Satversme*.

The competence of the Latvian Constitutional Court is very narrow, as it adjudicates only cases about the conformity of legal enactments with the norms of higher hierarchy. In Europe, this is a very typical function of the constitutional courts, expressing the main idea of the “father” of the European model – Hans Kelsen (Kelsen, 2002, p. 72). However, at the same time this narrow competence from time to time causes debates about both practical and theoretical needs to extend the competence of the Constitutional Court, for instance, by providing the competence to decide on constitutionality of political parties, review referendum and election cases. However, thus far the conclusion has been crystal clear: since the branch of administrative courts is very strong in Latvia, the Constitutional Court should not necessarily be open to other cases (Rodiņa, 2014, p. 130).

In Latvia, similarly to other constitutional courts, the repressive (*a posteriori*) constitutional control or the control of laws which have been adopted in a specific legislative process is realized. Besides *a posteriori* review, with regard of international treaties which are signed, but not ratified yet, *a priori* review can be realized. Until 2021 *a priori* review has been realized only in two cases. One was about the constitutionality of the border treaty between Latvia and Russia (Decision of the 3rd Panel of the CC on April 26, 2007) and another case (Decision of the Assignment Meeting of the CC of the Republic of Latvia

on August 3, 2020) was about constitutionality of the Convention on Preventing and Combating Violence against Women and Domestic Violence of the Council of Europe (so-called Istanbul convention).

5. Eligibility for Submission of an Application to the Constitutional Court

In order to initiate a proceeding before the Constitutional Court, a person who submits an application should meet all requirements set out in the Law on Constitutional Court. The Constitutional Court has no right to launch a proceeding on its own initiative, excluding its *ex officio* right in the stage of submitting an application.

As it is common in the constitutional courts in Europe, standing is allowed for subjects of abstract review. In this procedure, abstract compliance of the legal provision with the Constitution is conducted, given that its enforcement is not connected to safeguarding the subjective rights of a concrete person or to adjudication of other dispute at the court (Dorf, 2008, pp. 3-4). The subjects of abstract constitutional review in Latvia are the President of the State, the Cabinet of Ministers, the *Saeima* as a collegiate institution, minimum 20 members of the *Saeima*, the Prosecutor General, and the Council of the State Audit Office. Members of the *Saeima* are the most active submitters of applications regarding abstract review. Since the establishment of the Constitutional Court (in 1996) until the mid of 2021, in total they have submitted 86 applications to the Constitutional Court, whereas the Cabinet of Ministers (executive) has submitted two, the President one application, the Prosecutor General five applications, and the Council of the State Audit Office has submitted four applications. The Council for the Judiciary and the Ombudsman are also subjects of abstract control. While the Council of Judiciary has applied to the Court once, the Ombudsman has submitted 38 applications so far. They both are subject to specific procedural restrictions.

The Ombudsman always plays a significant role in the protection of fundamental rights in every legal system. The Ombudsman, by submitting an application, will not act in the interests of one person (whose rights have been violated), because by submitting an application it defends society as a whole (Rodiņa, 2012, pp. 384-396). But before applying to the Constitutional Court, the Ombudsman first of all has to try to settle the dispute with the institution that has passed the legal regulation. The Ombudsman can submit an application if the competent authority or official, who has issued the disputed act, has failed to rectify the established deficiencies within the time frame determined by the Ombudsman. If those procedural requirements are not observed, a case will not be initiated, as “dialogue” with an institution is a precondition for applying to the Court.

The Council for the Judiciary can submit an application in the framework of its jurisdiction established by law, i.e. regarding the given issues, which fall under the mandate of the Council for the Judiciary. Taking into consideration the fact that the Council for the Judiciary is an institution, which participates in the development of the policies and strategies governing the judicial system, as well as in the improvement of the organisation of the performance of the judicial system, its application will always be connected with the judicial system and judges.

Also, courts can apply to the Constitutional Court.⁴ Applications by courts within the European model of constitutional adjudication are known as applications of concrete control (Sweet, 2012, p. 823). In accordance with Section 19¹ of the Constitutional Court Law, an application to the Constitutional Court can be submitted by the court, which adjudicates a civil case or criminal case, the court, which adjudicates an administrative case, as well as by the judge, in performing an entry of immovable property or connected corroboration of rights in the Land Register. In Latvia all courts – first instance courts, appellate courts and also the Supreme Court or Cassation Court can submit an application to challenge a legal norm that has to be applied in a concrete case under examination (Judgment of the CC in case No. 2008-10-01, para. 8). As the judgment by the Constitutional Court and also the interpretation of the legal norm provided in the decision on terminating legal proceedings has *erga omnes* effect, the court will have to resolve a case by taking into consideration the ruling by the Constitutional Court.

A local government council has the right to submit two types of application. When it comes to the first type of application, it is relevant that only a council may submit a request pertaining to the initiation of a case on the compliance of a specific order with the national law where the authorised minister has suspended a decision taken by the local government council. The Law on Local Governments (Section 49) gives an authorisation to the Minister for Environmental Protection and Regional Development, by issuing an order, to suspend the operation of an unlawful binding regulation or other regulatory act or specific paragraphs of such act issued by a city or municipality council. If the order to suspend an unlawful regulation is passed, then the chairperson of the city or municipality council must convene, within two weeks after receipt of an order, an extraordinary meeting of the council to decide on the order. If the council fails to take a decision to revoke the relevant binding regulations or other regulatory acts or specific paragraphs thereof, it must submit an application to the Constitutional Court with regard to the revocation of the order of the Minister within a time period of three months. In this case only the relevant council or the council whose decision is suspended, may apply to the Constitutional Court. No other subject can challenge an order of a minister except local government council, because the aim of this kind of application is to solve a dispute between the council and the minister about the constitutionality of a national legal act.

As for the second type of application, local government council can apply to the Constitutional Court to challenge a normative act if an act being disputed violates the rights of the relevant local government (Decision of the CC in case No. 2007-21-01; Judgment of the CC in case No. 2016-23-03, para. 14). In 2020, the Constitutional Court received 21 applications by local governments challenging norms included in the Law on Administrative Territories and Settlements which reduced the number of administrative territories in Latvia. As many local governments were not satisfied with the outcome of the reform, they applied to the Constitutional Court challenging regulation of the above-mentioned reform law (Judgment of the CC in case No. 2020-37-0106).

⁴ Courts have submitted 161 applications altogether. Courts have become more active in the last years. For example, in 2012 and 2014 courts applied to the Constitutional Court 8 times (every year), but in 2020 courts submitted 33 applications and in 2021 (until May) - 17 applications.

6. Individual before the Constitutional Court

Individuals or persons are entitled to lodge a specific type of application with the Constitutional Court – the constitutional complaint.

In accordance with the Article 92 of the *Satversme*, every person is entitled to defend his/her rights and lawful interests before a fair court. In those cases, where a legal norm, which is not in compliance with the legal norm of higher hierarchy, infringes the fundamental rights, defined in the *Satversme*, the Constitutional Court is that institution of the judicial power where a person may defend his/her rights and lawful interests. In other words, Article 92 of the *Satversme* incorporates also the right to file a constitutional complaint to the Constitutional Court (Judgment of the CC in case No. 2002-09-01, para. 1). It means that the right to lodge an application with the Court by a person is protected by the *Satversme*, precisely by its Article 92.

The legal definition of the constitutional complaint is contained in the Law on Constitutional Court, where Article 19²(1) states: “[a] constitutional complaint (application) may be submitted to the Constitutional Court by any person who considers that their fundamental rights as defined in the Constitution are infringed upon by legal norms that do not comply with the norms of a higher legal force”. The Latvian type of the constitutional complaint contains the same features common for this type of application in other countries. Firstly, it is an application which gives the right of a person to apply to the Constitutional Court directly, without using any mediator. Secondly, it is a tool to protect fundamental rights established in the *Satversme*. Thirdly, the constitutional complaint is tied to other procedural limitations, because special criteria always limit the rights of persons to file a constitutional complaint (see more European Commission for Democracy Through Law (Venice Commission), 2010, pp. 32-35). This means that access to court in the case of a constitutional complaint is not absolute, but is subject to several limitations (Lautenbach, 2013, p. 137). In other words, an individual is bound by special *locus standi* requirements.

Firstly, there should be an infringement on the fundamental rights. In Latvia, *actio popularis* does not exist (Judgment of the CC in case No. 2001-06-03, para. 2.4.; Dissenting opinion in case No. 2003-04-01). Accordingly, a person can submit a constitutional complaint to protect fundamental rights that had been breached, not public or inconcrete public interests (Osipova, 2016, pp. 12-15). In the theory, it is recognized that an infringement upon the fundamental human rights is “cornerstone” of constitutional complaint in Latvia (Rodiņa, 2009, p. 154). If a person cannot prove that his/her fundamental rights are violated, then he/she has no *locus standi* to file a complaint to the Constitutional Court (Judgment of the CC in case No. 2001-06-03, para. 2.4).

Secondly, an individual may use the Constitutional Court as the last national legal remedy. The constitutional complaint is a subsidiary legal measure, which means that an individual must exhaust other legal measures before filing a constitutional complaint to the Constitutional Court. In other words: the subsidiarity is one of the admissibility criteria which is incorporated in the Section 19²(2) of the Law on Constitutional Court, providing that a person has the right to file a constitutional complaint only if all the options have been exhausted to protect the specified rights with general remedies for protection of rights

or if such do not exist. The legal instruments, which can serve as general legal remedies and eliminate an infringement upon rights, can be, for example, a complaint to a higher authority or to a higher official, a complaint or statement of claim to a general jurisdiction court, and others if they are provided by the normative acts.

The subsidiarity is a well-known principle in Europe. It also leads to interaction between national courts and European Court of Human Rights (hereinafter: ECtHR). The principle of subsidiarity constitutes the foundation of the protection system at ECtHR. The applicant is obliged to exhaust domestic legal remedies because the primary role of protecting the fundamental rights lies on the contracting states (Senden, 2011, p. 22). It means that principle of subsidiarity implemented in the ECtHR requires using the Constitutional Court before applying to the ECtHR, if the Constitutional Court can be used as a legal remedy (ECtHR, *Markus v. Latvia*, para. 49; ECtHR, *Ternovskis v. Latvia*, para. 53).

It is known that the competences of the Constitutional Courts in different countries differ. Therefore, the role of the Constitutional Court as a legal remedy before the ECtHR varies and it mainly depends on the competence of each country's constitutional court. For that reason, the Latvian Constitutional Court cannot be recognized as being a legal remedy, if the problem, essentially, is the application of the particular legal norm or incorrect application thereof. It was explained in the case *Elberte v. Latvia*; the procedure of an individual constitutional complaint cannot serve as an effective remedy if the alleged violation resulted only from the erroneous application or interpretation of a legal provision which, in its content, is not unconstitutional (ECtHR, *Elberte v. Latvia*, para. 80). In case *Nagla v. Latvia*, ECtHR pointed out that in cases related to the interpretation or application of a legal provision, or an alleged legislative gap, the Constitutional Court could not be regarded as being an effective legal remedy (ECtHR, *Nagla v. Latvia*, para. 48).

Although the Constitutional Court has been recognized as an effective legal measure in cases submitted to the ECtHR in which a person could use it before applying before ECtHR. For example, in line with Article 35, para. 1 of the Convention, which requires the exhaustion of remedies which are effective and adequate, or more specifically capable of directly redressing the raised complaints, the Constitutional Court was identified as a remedy, which had not been used in case *Grišankova et Grišankovs v. Latvia*. The ECtHR found that before the applicant contested a provision of Latvian legal framework as being contrary to the Convention, and the right relied on was among those guaranteed by the Latvian Constitution, the proceedings, in general, should have been brought before the Constitutional Court, prior to being brought before the ECtHR (ECtHR, *Grišankova et Grišankovs v. Latvia*). In this case, the applicants could submit application to the Constitutional Court to challenge the legal regulation of the Law on Education. As this duty was not fulfilled, the ECtHR declared the application inadmissible. Also, in case *Gubenko v. Latvia*, the Constitutional Court was recognized as being an effective legal remedy that had not been exhausted (ECtHR, *Gubenko v. Latvia*, para. 25). The same was in the case *Zirnīte v. Latvia* where ECtHR found that the applicant's arguments concerning the "quality of law" did fall within the competence of the Constitutional Court which had not been used before the application to the ECtHR (ECtHR, *Zirnīte v. Latvia*, para. 70).

Thirdly, a constitutional complaint shall be filed within a set time period. The time period for filing a constitutional complaint is a typical component of a constitutional complaint (Rodiņa, 2009, p. 199). It is set to ensure that the case is resolved within a reasonable time, it protects the certainty of the other party that the solution of a conflict will not be later re-examined and, finally, the fact that a person tolerates the infringement of his/ her fundamental rights proves that he/she is less interested in the protection of his or her own fundamental rights (Judgment of the CC in case No. 2002-09-01, para. 1). The setting of the term for submitting a constitutional complaint is very closely linked to the implementation of the principle of subsidiarity. Therefore, the starting point for calculating the time period for filing a constitutional complaint to the Constitutional Court depends on the possibility to use legal remedies for the protection of the fundamental rights. Firstly, if other legal remedies can be used and the person has used them, then a constitutional complaint may be filed within six months after the ruling of the final institution has come into force. Secondly, if the fundamental rights established in the *Satversme* cannot be defended by general legal remedies, then a constitutional complaint may be filed to the Constitutional Court within six months from the period when the breach of fundamental rights took place (the second sentence of Article 19²(4) of the Law on Constitutional Court).

7. Legal Force of the Judgments and Role of the Constitutional Court in the Legal System

Constitutional adjudication at the Constitutional Court can be concluded in two ways: the Constitutional Court can pass a judgment or under specific circumstances (specified in the Article 29 of the Law on Constitutional Court), until the pronouncement of the judgment, the Constitutional Court can pass a decision to terminate legal proceedings.

In accordance with the law a legal norm can be declared as not being consistent with the *Satversme* by a judgment, nor by a decision. A Constitutional Court's judgment has *erga omnes* effect: both the judgment and the interpretation of a legal provision included in it are mandatory to all persons and institutions. A judgment by the Constitutional Court is final. It means that it can be appealed against and re-examined neither by any state institution nor by any international institution. Likewise, the Constitutional Court itself is not entitled to re-examine its own judgment. Nevertheless, a judgment made in a concrete case cannot include the changes that might happen after it has entered into force. If the circumstances of the case change substantially, the claim cannot be considered as having been adjudicated (Judgment of the CC in case No. 2002-20-0103). In other words, the claim cannot be adjudicated eternally because the Constitutional Court always examines and reviews a case in the particular moment in time, in particular circumstances and the judgment cannot predict future changes. This means that the constitutionality of a legal norm that has been already reviewed can be re-examined if the actual social reality and the context of legal relationships has changed (Judgment of the CC in case No. 2016-06-01, para. 17.2).

The competence to declare invalid the laws and other legal acts and parts thereof is included in the second sentence of Article 85 of the *Satversme*. But the *Satversme* does

not regulate the point when the norm, which is declared unconstitutional, loses its legal effect. It is regulated by the Law on Constitutional Court. According to its Section 32(3), a legal provision, which has been declared by the Constitutional Court as non-compliant with a norm of higher hierarchy shall be regarded as not being in effect from the day of the publication of the Constitutional Court's judgment (*ex nunc*). This is the so-called general presumption and the most frequently used tool in the practice of the Constitutional Court, and it provides an opportunity to reach a fair balance between two values: legal certainty and legality. In the meantime the Law on Constitutional Court has granted to the Constitutional Court a broad discretion to determine the moment when a legal norm, which is not compatible with the *Satversme*, becomes invalid. The Constitutional Court, by substantiating its opinion, can rule that the unconstitutional legal norm becomes invalid from the day it was adopted (*ex tunc*) or on another day (*ex tunc*), or the date may be set in the future (*pro futuro*). When it has to decide on the date when the legal norm loses its legal force, the Constitutional Court considers several principles: the principle of justice, the principle of legality, the principle of separation of power, legal expectations and legal certainty (Judgment of the CC in case No. 04-05(97), para. 5; Judgment of the CC in case No. 2016-12-01, para. 15). That approach is attributable to the fact that the Law on Constitutional Court does not only authorize the Constitutional Court, but also places responsibility upon it that its judgments in the social reality will ensure legal stability, peace and clarity (Judgment of the CC in case No. 2009-11-01, para. 30).

Doubtlessly, retroactive (*ex tunc*) decisions should be considered as an exception to preserving legal certainty (Heringa, 2016, p. 223). The retroactive invalidation of a legal norm may affect third parties and public interests. Therefore, retroactive effect is applied and should be applied in exceptional cases. Case law studies show that the contested legal norm is declared invalid *ex tunc* – from the moment of adoption, if it had been adopted *ultra vires* or in case of significant procedural violations (Judgment of the CC in case No. 2007-11-03, para. 29). At the same time, the Constitutional Court has recognized that it could deviate from this presumption if significant circumstances were established that would substantiate the need to deviate from the existing practice (Judgment of the CC in case No. 2016-23-03, para. 18).

The retroactive decisions are of particular importance in cases which have been initiated based on filed constitutional complaints. That can be explained by the fact that the *ex tunc* decision might be the only possibility to protect individual's fundamental rights. The Constitutional Court, rather often, upon declaring a contested provision as being non compatible with the *Satversme* and invalid, sets a special condition according to which such a provision in relation to the applicant becomes invalid *ex tunc* (Judgment of the CC in case No. 2020-21-01, para. 16). It is noteworthy that a person is not contesting an individual act (a court decision, an administrative act), but a regulatory (normative) legal act, which substantially applies to an unlimited circle of subjects. At the same time, these *ex tunc* decisions attach special importance to the theory of the so-called active defender of rights (Rodiņa, 2015, p. 373). According to it, only an individual who does not passively observe, but acts and turns to the Constitutional Court by submitting a constitutional complaint, may truly hope to protect fundamental rights before the Constitutional

Court. In some cases, the Constitutional Court has decided to protect also rights of those persons who have started to use other legal remedies (application to institution or court), declaring norm invalid *ex tunc* with respect of those persons as well (Judgment of the CC in case No. 2020-31-01, para. 23.2.). Therefore, in deciding *ex tunc* and recognizing an unconstitutional legal norm as being invalid retroactively, the Constitutional Court, in particular, highlights the main purpose of the constitutional complaint – to provide not only theoretical but also practical protection of the fundamental rights of a person who has suffered an infringement, as the Constitutional Court has the duty, within its mandate, to ensure effective protection and restoration of fundamental rights of the affected individuals (Judgment of the CC in case No. 2009-43-01, para. 35.3).

The Constitutional Court in some cases has applied the temporal effect *pro futuro*, which means that the norm declared as inconsistent with the *Satversme* continues to be applied for a certain period. The Constitutional Court has concluded on a number of occasions that an immediate revoking of the contested provision would be even less compatible with the *Satversme* compared to leaving the contested provision in force for some definite time period. Effect *pro futuro* is usually applied if it is necessary to give time to the legislator to regulate the situation or to amend unconstitutional legal norm, to avoid legal vacuum (Judgment of the CC in case No. 2020-34-03, para. 15).

The authority of the Constitutional Court to veto legislation as unconstitutional is only one dimension of its powers. Practice shows that references to the judgments of the Constitutional Court are included not only in [other] court rulings, but also in legislation and political documents. Most importantly, the parliament and the government draft law to comply with the relevant case law or to anticipate the direction of future disputes. Case No. 2017-17-01, reviewed by the Constitutional Court in 2018, marked a significant development in this respect. In this case a legal norm, in the drafting of which the findings contained in the Constitutional Court's judgment had been ignored, was recognized as not being compatible with the law. In the judgment the Constitutional Court explained that the legislator's obligation is always to examine also those arguments that have been expressed in the procedure of adopting the legal norm regarding its possible incompatibility with legal norms of higher hierarchy or the judicature of the Constitutional Court (Judgment of the CC in case No. 2017-17-01, para. 22.3). In this particular case, the Constitutional Court had to conclude that from the materials of the procedure for adopting the legal norm under review it was impossible to gain assurance that, *inter alia*, the *Saeima* had substantiated that the intended solution was compatible with the case law of the Constitutional Court (Judgment of the CC in case No. 2017-17-01, para. 22.3). Thus, the Court arrived at the conclusion that the contested norms could not be considered as being norms adopted in due procedure and, therefore, were incompatible with legal norms of higher hierarchy.

The protection of fundamental human rights has added a new dimension to the constitutional justice in Latvia. Individuals are the most active petitioners who have submitted to the Constitutional Court more than twelve thousand applications. Not all of them have been successful but the procedure has been initiated in 517 cases. It is obvious in Latvia that persons via constitutional complaint delegate to the constitutional Justices policy issues that could have been dealt with in other institutions (parliament, government,

etc.) and, by doing so, they contribute to the development of the law and the whole legal system (Sweet, 2000, pp. 140-141). Thanks to the constitutional complaints submitted by persons, several legal issues, essential for a democratic state governed by the rule of law, have developed in Latvia. For example, the mechanism of legal aid provided for by the state was developed and implemented thanks to the judgments by the Constitutional Court. Likewise, the legal regulation of a person's incapacity was improved owing to the judgment of the Constitutional Court. Thanks to individual petitions, in accordance with international commitments, the mechanism for expropriating property, and the right to a fair trial have been improved. The findings consolidated in the case law of the Constitutional Court have helped to improve the process of legislation, realization of social rights etc.

The impact of judicial politics depends not only on links between the Court and political officials, but also between the Court and the society (Glick, 1988, p. 326). The real aim of the Constitutional Court can be reached if there is recognition from both the public power and the society. This premise is defended also by the Constitutional Court, who has noted that “[t]he judicial power must enjoy public trust in order to perform its duties successfully” (Judgment of the CC in case No. 2015-06-01, para. 16.2). In Latvia, the Constitutional Court enjoys a high level of trust of the society. More precisely, the Constitutional Court enjoys the highest public trust in comparison with other courts - 51% of respondents trust it (CC of the Republic of Latvia, 2020). Having in mind high societal support, the Constitutional Court can work to ensure a system for the constitutional order and values, principles of law, human rights.

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Dr Anita Rodiņa

Vanredni profesor Pravnog fakulteta Univerziteta u Letoniji, Letonija

e-mail: anita.rodina@lu.lv

USTAVNI SUD KAO ČUVAR PRAVNOG SISTEMA LETONIJE

Sažetak

U radu autorka objašnjava osnivanje i ustavno regulisanje Ustavnog suda Letonije, opredeljujući njegovo mesto u kontekstu načela podele vlasti. Imenovanje sudija i određene novine, te problemi do kojih dolazi u procesu izbora sudija predstavljaju se u drugom delu rada. Prilikom prikaza nadležnosti Ustavnog suda, autorka ukazuje na to da je ona veoma usko postavljena, budući da Ustavni sud postupa samo u predmetima u vezi sa usklađenošću pravnih akata sa višim aktima. Autorka potom analizira krug lica koja imaju ovlašćenja da učestvuju u postupku pred sudom. Posebna pažnja je posvećena ustavnoj žalbi – pravnom sredstvu koje Ustavnom sudu podnose pojedinci i koje takođe predstavlja mehanizam dijaloga između Ustavnog suda i Evropskog suda za ljudska prava. Konačno, autorka ukazuje na pravnu snagu i stvarni uticaj presuda Ustavnog suda, uključujući i ovlašćenje Ustavnog suda da opredeli trenutak od koga akt koji nije u skladu sa ustavom postaje ništav. Autorka zaključuje da Ustavni sud ne samo pravnoteorijski već i praktično obezbeđuje sistem ustavnog poretka, vrednosti i načela u Republici Letoniji.

Ključne reči: Ustavni sud, sudije, nadležnost, uslovi za *locus standi*, presuda.

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NON-TERRITORIAL MINORITY AUTONOMY IN ESTONIA

Abstract

Non-territorial minority autonomy/self-governance is one of the models for the protection of national minorities. Non-territorial minority autonomy is guaranteed in Estonia by constitutional provisions and it is defined as one of the minority rights. In this sense, the paper analyzes the legal nature and the scope of such an autonomy in the legal order of Estonia.

Keywords: Estonia, national minorities, non-territorial autonomy.

1. Introduction

In minority discourse, autonomy is often defined as means of enabling ethnic groups to exercise direct control over matters of particular importance to them, while simultaneously leaving the wider entity to exercise competencies related to common interests (Ghai, 2002, p. 8). In legal and political science studies, it has been noticed that territory, along with the issues of existence and determination of ethno-cultural group and autonomy, is one of the variables within the observed triadic nexus (Malloy, 2015, p. 2). The ultimate ratio of establishing territorial autonomy for minorities is principally based on transforming the solutions of minority issues into the rule of the majority, so that those issues are addressed through the classical logic of majority democracy, since minorities, by establishing territorial autonomy for them, become the majority in the sub-state entity (Palermo, 2015, pp. 20-21). In fact, territorial autonomy for minorities whose essence is the recognition of the special status of a particular territory designed to serve the interests of that minority can only make sense, according to some authors, if the minority has majority status within that territory, since modern territorial administration cannot be different from majoritarian democracy. Otherwise, minorities would not be able to profit from the democratic institutions created in such territorial units (Brunner & Küpper, 2002, p. 21). Moreover, according to some opinions, it does not make much sense to entrust minority territorial autonomy only with powers related to minority issues, because that would mean that general functions of territorial administration would have to be performed by special state agencies that would not have any function in other areas of the state, which would result in decreased autonomy (Brunner & Küpper, 2002, p. 24).

* Senior Research Fellow, Institute of Comparative Law, Belgrade, Serbia, e-mail: v.djuric@iup.rs

Also, there are certain limitations to the approach that supports the opinion that establishment of territorial autonomy for minorities can only make sense if the minority has the status of a majority within the territory. The main limitation in setting up the territorial autonomy for national minorities is in its relation to the circumstances of the ethnic group (Ghai, 2002, p. 8) regional concentration. Furthermore, the limitations stated in theoretical works regarding national territorial autonomy are embodied in the fact that it includes persons who are not members of the minority and in whose favor the autonomy is established, as well as that the national composition of the population, since there is a tendency to migration, may change. Thus, the former majority becomes a minority and the autonomy loses its *raison d'être* (Lapidoth, 1997, pp. 39-40), or the autonomous authorities face the demands of internal minorities within the framework of territorial autonomy (Smith, 2014, p. 18). An alternative to the limitation in territorial autonomy, especially for dispersed minorities, but also in minority territorial nationalism and security challenges that the demands of minority political elites for its introduction can cause, is often seen, alone or in combination with other solutions, in non-territorial autonomy.¹ Such a form of autonomy could be defined as *the self-governance of a group of persons through a sub-state entity with a non-territorial character in matters that are considered to be vital for maintenance and reproduction of their distinctive cultural characteristics that may relate to the language, culture, religion or customs of particular groups* (see Online Compendium Autonomy Arrangements in the World, 2016). One of the European countries that has opted for such a form of minority protection is Estonia. The subject of this paper is the institutional aspects of the bodies and arrangements through which such autonomy/self-governance is exercised in Estonia and the determination of their legal nature. The first step in such an analysis is to consider the constitutional regulation of the protection of national minorities in Estonia.

2. Constitutional Regulation of the Protection of Ethnic Minorities in Estonia and Legal Regulation of Non-Territorial Autonomy

The 1992 Constitution of the Republic of Estonia in paragraph 1 proclaims that Estonia is an independent and sovereign democratic republic wherein supreme political authority is vested in the people. Although it proclaims demos as the holder of sovereignty, the Estonian Constitution recognizes the existence of the majority and ethnic minorities. Namely, the Preamble of the Constitution clearly stresses that the state, among other things, must guarantee the preservation of the Estonian people, the Estonian language and Estonian culture. The second part of the Constitution, which deals with human rights, freedoms and duties, contains several provisions that mention ethnic minorities. Firstly, in paragraph 49, everyone has the right to preserve his or her ethnic identity. Paragraph 50 clearly regulates *the right of national minorities to cultural autonomy* (see below), while paragraphs 51 and

¹ Learn more about that in Nimni, 2007, pp. 345-364; Roshwald, 2007, pp. 365-378; Kymlicka, 2007, pp. 379-393; Nootens, 2015, pp. 33-55; Coakley, 2016, pp. 1-23; Smith & Hiden, 2012, p. 109; Ghai, 2002, p. 9; Lapidoth, 1997, p. 40 etc; Đurić, 2017a, pp. 26-27.

52 are dealing with the use of language. According to article 2, paragraph 51, in local self-government units where at least half of the population belongs to ethnic minorities, everyone has the right to receive responses to their address in the language of the national minority language from government agencies, local authorities and their officials, while according to article 1, paragraph 52, in local self-government units where the language of the majority of the population is not Estonian, local authorities may, to the extent and pursuant to a procedure provided by law, use the language of the majority of residents as internal working language, while, according to article 2 of the same paragraph, the use of foreign languages, including the languages of national minorities, in government agencies and courts is provided by law. Those are also the only provisions of the Constitution of that state on the protection of national minorities.

Therefore, according to the Constitution of the Republic of Estonia, national minorities have the right to establish self-governing bodies (agencies) in the interest of their ethnic culture in accordance with the conditions and procedure provided by the Law on Cultural Autonomy for National Minorities (*Vähemusrahvuse kultuuriautonomiam seadus*; de Villers, 2012, p. 175). Since the Constitution recognizes the right to non-territorial cultural autonomy for national minorities, it is important to determine how Estonian legislation determines the holder of that right. Estonian legislation has chosen to combine the general definition of a national minority with individual naming of each minority group. According to Article 1 of the Law on Cultural Autonomy for National Minorities, the term “national minority” applies to Estonian citizens (citizens) who reside on the territory of Estonia, have long-standing, firm and lasting ties with Estonia, who are distinct from Estonians based on their ethnicity and cultural characteristics, religion or language and who are motivated by a desire to collectively preserve their cultural traditions, religion or language which constitute the basis of their common identity. Article 2, paragraph 2 of the Law proclaims that bodies of cultural autonomy may be established by members of the German, Russian, Swedish or Jewish minorities, as well as members of national minorities numbering more than 3.000, thus specifying a numerical criterion that shows the smallest number of members required for the existence of a national minority, at least in terms of exercising that right. On the other hand, the stated definition means that explicitly listed minorities do not have to meet the legal criteria to qualify for cultural autonomy (de Villers, 2012, p. 175). In fact, a quantitative limit is not set for explicitly listed minorities, so they can form cultural autonomy with fewer members (Suksi, 2015, p. 104). Bearing in mind that the criterion of citizenship also applies to explicitly listed minorities, and since there is a huge number of persons who haven’t acquired Estonian citizenship within the Russian community in Estonia, and consequently the status of members of the Russian national minority, some authors pointed out that Estonian legislation on cultural autonomy is discriminatory (Groenendijk, 1993, p. 20).

Pursuant to Article 2, paragraph 1 of the Law, cultural autonomy is the right of members of a certain national minority to establish bodies of cultural autonomy in order to achieve the cultural rights given to them by the Constitution. Pursuant to Article 11 of the Law, the principal organizations of cultural autonomy are the cultural council of the national minority and the cultural boards that organize the activities of cultural autonomy

institutions. However, the Law does not explicitly proclaim the legal nature of those bodies, so it is rightly noted in theoretical comments that the Law in force is nothing more than a “broad framework” (Smith, 2013, p. 125), i.e. that the status of those bodies is not clear and that, more importantly, they have neither acquired legal personality (Poleshcuhuk, 2013, p. 156) nor public status, which limits the possibilities for the cultural development of the minority through the structures of non-territorial autonomy (Smith, 2015, p. 171). In general, some analysis of Estonian legislation points out that the Law is the direct successor to the 1925 Law, which has always been considered as the proof of liberality and tolerance of the Estonian state towards the minorities, but that the current Law in its character is nothing more than a “performative law” whose success, as is the case with all laws of such nature, is reflected in the fact that it has been adopted (Aidarov & Drachsler, 2011, p. 171), i.e. it is pointed out that, unlike the 1925 Law, the practical meaning of self-governance in the current law is not clear, and the scope of its provisions is somewhat limited since the minority self-governments are not regarded as legal entities and there is an open question whether they can establish other institutions, manage properties or conclude contracts. Also, there is neither a stable nor a clear guarantee of their financing (Osipov, 2013, p. 11). Since they do not have the status of a legal entity, the bodies of non-territorial cultural autonomy in Estonia can at best function as “coordinating councils of their minority” (Osipov, 2015, p. 217). Although the prevailing understanding of the theoretical comments on Estonian legislation is that cultural councils do not have the status of a legal entity, there are also opinions based on their right to set taxes (see section on financing), and that it is still a “public authority”, more precisely a “public law corporation with powers similar to local self-governance” (Decker, 2008, p. 108). In 2012, the Estonian Ministry of Culture supported the opinion that cultural autonomy is a form of self-governance that can be realized by legal entities that can be non-profit associations and/or foundations, which has led some authors into concluding that cultural autonomy is, in other words, a form of organizing persons who had been voluntarily organized already (Poleshcuhuk, 2015, p. 241).

Bearing in mind somewhat unclear legal status and legal nature of non-territorial cultural autonomy in Estonia, and with the purpose of understanding them properly, attention should be paid to issues of organizational structure and the formation of arrangements through which such autonomy is exercised.

3. Formation, Organizational Structure and Termination of the Body of Non-Territorial Autonomy

In principle, in Estonia it follows from the relevant legal solutions that a certain minority group can be qualified for non-territorial autonomy by the very fact that it is recognized, but its members can choose not to activate for that purpose, so there is no obligation by the minority group to form its own non-territorial cultural autonomy (de Villers, 2012, p. 175). The bodies through which such autonomy is exercised are constituted through direct elections where members of national minorities, who have the right to such

autonomy, participate.² Direct elections for such bodies raise the issue of creating electoral roll that lists persons who may participate in such elections. Article 7 of the Law on Cultural Autonomy in Estonia stipulates that ethnic cultural societies or their associations shall constitute national registers of national minorities, and that the Government of Estonia shall establish regulations for the maintenance and use of national registers. The Government of Estonia has passed Regulation no. 238 (*Vähemusrahvuste rahvusnimekirjade pidamise ja kasutamise kord*), which has regulated the issues of keeping and using those registers in more detail. According to Article 8, paragraph 1 of the Law on Cultural Autonomy, such registers shall include, inter alia, data on ethnicity, mother tongue, religion and children of persons belonging to national minorities, with the possibility for children under 15 to be registered in the national register at the request of their parents. Paragraph 3 of the same article of the Law stipulates that the name of a minority member shall be registered *based on a personal application*. Article 9 of the Law regulates the possibility of deletion from the register *at personal request* [emphasis added by the author]. Based on the presented decisions on entry and deletion from the register, it is clear that in Estonia, the basic criterion for belonging to a certain national minority is the self-identification of an individual (Suksi, 2015, p. 105). In the reality of social life, the Swedish national minority in Estonia, when constituting cultural autonomy, have faced the fact that many of its members, especially children from that community, have been largely integrated into the Estonian community, which has led some authors into concluding that there is a typical challenge of non-territorial protection of minorities in case of overlapping, or multiplied ethnic identities, which, when it comes to classification requirement that one person belongs to one ethnic identity, can be problematic (de Villers, 2012, p. 175). Besides at personal request, the Law stipulates that deletion from the register is also done in case of death; also if a person renounces Estonian citizenship, but particularly interesting is a decision according to which deletion from the register is done if a minority member *permanently resides in a foreign country*, which actually means that citizenship and residence are the criteria for exercising the right to vote for the election of a body of non-territorial cultural autonomy in that state. Since the registers of national minorities are composed of cultural societies, some authors point out the distinction regarding citizenship in the process of forming a body of cultural autonomy. Namely, while on the one hand foreign citizens cannot participate in the elections for bodies of cultural autonomy, nor be elected or appointed to leading positions in cultural autonomy, on the other hand, such persons can be members of organizations created under private law, which participate in the preparation of national registers (Suksi, 2015, p. 106).

The National Register is not an electoral roll, but a basis for registration in the process of electing a body of cultural autonomy. Namely, pursuant to Article 15 of the Law, electoral roll is compiled based on the National Register. Electoral roll is published no later than two months before the election, and every person registered in the electoral roll has the right to request deletion from the electoral roll no later than two weeks before the election. It is interesting to note that the Law on Cultural Autonomy for National Minorities does not explicitly regulate the issue of the right to vote. This issue is regulated

² On voting right for the election of the minority bodies and representatives see Đurić, 2017b.

by the Government Decree which, according to Article 14 of the Law, is authorized to pass election regulations for cultural councils of national minorities. According to Article 3 of the Regulation on Elections of Cultural Councils of National Minorities (*Vähemusrahvuse kultuurinõukogu valimise eeskiri*), persons registered to vote and those who reach the age of majority on the third day of the election at the latest (see below) have the active right to vote, while according to Article 12, persons who are registered in the electoral roll and who reside in the relevant polling location have the passive right to vote.

According to Article 16, paragraph 1 of the Law on Cultural Autonomy, the elections for a cultural council will not be held if less than one half of the minority members from the national register do not agree to be registered in the electoral roll. In Estonia, elections for those bodies of minority non-territorial cultural autonomy are held on the basis of an application submitted to the (existing) cultural council by the minority, which can be submitted at the earliest three years after the previous application. In fact, members of a national minority submit an application for the establishment of cultural autonomy and the election of the first cultural council to the Government through their ethnic cultural society or associations of societies. The Government decides on the application according to the General Administrative Procedure Act. In that part of the procedure, the Committee consisting of representatives of the Ministry of Culture, the Ministry of Interior and the cultural association that submitted the application first checks the quality and correctness of the application, and the Ministry of Culture is in charge of publishing a public call through which the other associations within ethnic minority are being informed about the procedure of establishing cultural autonomy. Such a decision actually means that non-governmental organizations and organizations established under civil law created to promote the position of national minorities are given “important positions” in initiating the creation of non-territorial cultural autonomy, but also on the other hand, that non-territorial cultural autonomy is not an appropriate concept for heterogeneous and passive minority communities (Aidarov & Drachler, 2011, pp. 45, 55). In that sense, it is clear that elections may or may not be held every three years. Estonian legislation (the Law or the Regulation) doesn't explicitly regulate the issue of calling elections, but it is clear from the present decisions that activities related to the initiation of the election procedure are divided between the Government (Ministry of Culture) in the case of the first or cultural council that admits an application for holding new elections and the General Election Committee, which is formed in case of a valid application, conducts elections and which, according to Article 11 of the Regulation, publishes electoral roll no later than two months before the first day of elections. The regulation in Article 2, paragraph 2 prescribes that the elections shall last for three days, of which one day must be Sunday.

The right to nominate candidates for the election of members of the national minority cultural council, according to the Regulation on the election of cultural councils, belongs to ethnic cultural societies or their associations, but individuals can also file for candidacy or nominate another candidate if they collect 20 signatures of voters registered in the electoral roll. The candidates file to the competent election committee, and one person can be a candidate only in one polling location and only on one list of candidates. The candidacies must be submitted no later than 40 days before the first day of elections. If it

is determined that the candidacies filed on the day before the expiration deadline do not contain all the necessary documentation, the candidate will be given a deadline to correct the candidacy, but the corrected candidacies must be filed no later than 38 days before the first election day. Candidate registration, i.e. announcement of the list is done no later than 35 days before the first day of the election. Interestingly, the Regulation stipulates that, if the number of candidates is equal to or less than the number of members of the cultural council elected in the voting location, cultural societies of national minorities and their councils will be invited to submit a supplementary nomination of candidates, but no later than 15 days before the first election day. Pursuant to Article 13, paragraph 1 of the Law on Cultural Autonomy, in order to organize and conduct the election of cultural councils in that country, the ethnic cultural society or their associations will elect the General Election Committee whose composition is confirmed by the Government of Estonia and where the Government will nominate its candidate to monitor regularity of voting rules. If necessary, the General Election Committee forms local election committees and issues the organizational instructions for the procedure of holding elections, ranking and publishing the results. Voters choose directly and secretly between independent candidates who are on the so-called consolidated list of independent candidates, or between candidates from the list of candidates proposed by minority associations. The Regulation on the Election of Cultural Councils in Estonia prescribes a combined system of distribution of mandates. Namely, in each polling place, an electoral quotient is determined, which represents the quotient of the number of valid votes and the number of members of the cultural council who are elected in that polling location. Mandates are given to candidates who have received an equal or greater number of votes than the electoral quotient. If all members of the cultural council, being elected in that polling location, are not elected in that way, the remaining votes, which they received, are passed on to the lists where those candidates have been put (and in case of independent candidates, i.e. those candidates that have not been nominated by minority associations, but the voters themselves, the so-called consolidated list where they are put), and then the remaining seats are allocated according to D' Hondt method.

The Cultural Council, the main organization for the cultural autonomy of a national minority at the state level, which is elected by direct election, may form city or district cultural councils or appoint local cultural representatives. The procedure for forming city and/or district cultural councils, as well as their competencies, is regulated, pursuant to Article 22 of the Law on Cultural Autonomy of National Minorities, by the statute of cultural autonomy passed by the council elected at the state level. Such a solution reminds some authors of the autonomous arrangements that exist in federal or decentralized states where the competencies of the constituent units are legally defined and protected (de Villers, 2012, p. 176).

The Law on Cultural Autonomy in Estonia contains a very original solution regarding the abolition of cultural autonomy institutions. Pursuant to Article 28 of the Law, the Government of Estonia will stop the activities of cultural autonomy for national minority institutions, i.e. abolish cultural autonomy, if according to the data from the national register the number of a national minority members residing in Estonia fell below 3,000

in the last five years, and during two consecutive elections for the Cultural Council, as well as if it is not possible to form an electoral list for the election of the Cultural Council, and according to the legal requirement more than 50% of registered voters has to participate to make elections valid. Upon the termination of the activities, i.e. abolition, the property of the cultural autonomy institutions will be transferred to other entities in accordance with the decision of the cultural council.

Since Estonian legislation, on the one hand, does not regulate the matter of acquisition and loss of entity, as well as the relationship between units within the organizational structure of the cultural council, while, on the other hand, it proclaims the adoption of the statute of the cultural council, the attention should be paid to the issues of their role, tasks and powers, as well as the ways of financing such bodies in order to discover their legal nature.

4. Role and Powers

The legislation of Estonia, although it proclaims direct elections for bodies of minority cultural autonomy, i.e. self-government, does not contain provisions that would explicitly prescribe that such bodies represent minorities, which have elected them as collectivities. Instead, they prescribe the goals of cultural autonomy, i.e. self-government, because their governing bodies and institutions are being actually formed. Pursuant to Article 5 of the Estonian Law on Cultural Autonomy, the main objectives of cultural autonomy are to organize education in the mother tongue and monitor the use of funds provided for that purpose, to form cultural institutions of national minorities, to organize their activities and ethnic cultural events, to provide and give means, scholarships and awards for the promotion of national minority culture and education. In fact, according to Estonian legislation, the establishment and operation of such institutions is the core and basic activity of minority cultural autonomy, where, according to paragraph 2, article 2, members of national minorities, in the interest of their ethnic culture, have the right to form cultural autonomy institutions, which shall comply with the laws of Estonia when dealing with matters within their competence. Pursuant to Article 22 of the Law on Cultural Autonomy, the Statute of Cultural Autonomy passed by the Cultural Council, among other things, regulates the issues of forming institutions of cultural autonomy, as well as the rights and duties of cultural autonomy organizations based on their basic purposes. Article 24 proclaims that institutions of cultural autonomy are educational institutions that provide intensive instruction in the ethnic language or ethnic culture, ethnic cultural institutions, ethnic cultural enterprises and publishing houses, and ethnic social care institutions. However, the wide possibility of establishing and somewhat more distinct role of minority cultural autonomy bodies in determining the rights and duties of institutions is proclaimed by the legal provision in Article 25 that educational institutions have a private character, since the provisions of the Law on Private Schools apply to the organization of their work as well as the decision in Article 26, which stipulates that such institutions are independent legal persons that may own real property and are liable for

their financial obligations. In terms of the presented legal provisions, the statement specified in some works that (by passing the Law) it has not been assumed that cultural autonomy shall take over the existing public educational institutions seems to be true (Poleshcuhuk, 2013, p. 156; Poleshcuhuk, 2015, p. 240).

The Law on Cultural Autonomy for National Minorities in Estonia does not proclaim the right and authority of cultural councils of national minorities to decide on certain status issues, which are of importance to the entire national minority, such as language, symbols, signs, decorations, etc., and does not contain provisions on making decisions about their own funds and property of cultural councils, or about their authority, i.e. the obligation to decide on financial plans and final accounts. The absence of such provisions corresponds to the imprecise legal status of such bodies. Also, legislation in Estonia, except in financial matters and to a rather limited extent (see next section), does not proclaim any modalities for the participation of minority autonomous bodies in decision-making. Since cultural councils as their bodies in Estonia do not have the status of a legal entity and bearing in mind that due to that there is no significant scope of their powers, the Advisory Committee that monitors the implementation of the Framework Convention for the Protection of National Minorities has taken the view that the Cultural Autonomy Act in Estonia is “ineffective and impractical” (Advisory Committee on the Framework Convention for the Protection of National Minorities, 2011, para. 65).

The Law on Cultural Autonomy also does not contain an explicit provision on the participation of cultural councils in deciding on the distribution of funds from public sources intended for financing the activities of national minorities, but such participation cannot be excluded by a systematic interpretation of the Law, although its scope is somewhat limited due to ambiguities regarding legal subjectivity of cultural councils. Namely, Article 27 of the Law prescribes that the cultural autonomy of national minorities, i.e. the entire cultural autonomy, and not only the activities of cultural councils as a directly elected body and the main organization of cultural autonomy, will be financed from the state budget.

Bearing in mind that according to Article 5 of the Law, the principal objectives of cultural autonomy include monitoring the use of resources provided for the organization of education in the mother tongue, as well as establishing and bestowment of funds for the promotion of culture and education of national minorities and normatively expressed desire of the legislator that cultural councils shall be the main organizations of minority cultural autonomy, it could be concluded that cultural councils can play a certain role, at least in the form of suggestions, when it comes to distribution of funds intended for financing the activities of national minorities.

On the other hand, since the Law does not explicitly prescribe that cultural councils must have the status of a legal entity and starting from the fact that, in this regard, the Law does not prescribe that cultural councils have their own budget, or that they prepare and adopt a financial plan, it is clear that the possible role of cultural councils in deciding on the distribution of funds intended for the activities of national minorities is rather limited.

5. Financing

Article 27 of the Estonian Law on Cultural Autonomy regulates the matter of financing cultural autonomy, i.e. the entire cultural autonomy, and not only the activities of the bodies through which it is realized. According to that article, cultural autonomy shall, among other things, be financed by allocations from the state budget in accordance with the law and special contributions for those purposes, which also applies to cultural councils as the main organizations of cultural autonomy. It is interesting to notice that the Law prescribes that cultural autonomy shall be financed from contributions specifically allocated from local government budget to cultural autonomy educational, cultural and social care institutions, but it does not mention that local committees established by the cultural council will be financed from local public funds. Such solutions are understandable since the bodies of cultural autonomy in Estonia do not have the status of a legal entity. In practice, the state assists cultural autonomy by providing assistance to “contractual partners” of the Ministry of Culture, which means that autonomies, i.e. cultural councils that are not legal entities and therefore do not have their own accounts, are assisted by other main minority organizations (Poleshchuk, 2015, p. 241).

On the other hand, the Law proclaims a wide range of non-budgetary sources to finance cultural autonomies, as well as their councils as the main organizations of cultural autonomy. Besides contributions, donations and gifts, as other non-budgetary sources of funding, Article 27 of the Law lists fees, i.e. taxes for non-cultural autonomy, the amount of which shall be determined by the cultural council and donations from foreign organizations. The decision according to which fees or taxes for non-cultural autonomy are determined by the cultural council is assessed in theoretical comments as the only exception to the position that national cultural autonomies in Estonia do not have any significant public powers, although such taxes could be characterized as annual membership fees (Suksi, 2015, p. 99), while receiving donations from abroad is considered to be a “generous concession” against possible suspicion of the state regarding foreign interference of home countries in matters of national minorities (Suksi, 2015, p. 99).

6. Conclusion

The Constitution of Estonia defines the right of national minorities to cultural autonomy as a special collective minority right. The constitutional determination of non-territorial minority autonomy as a special right raises the question of the manner of its exercising and regulation, as well as the content of that right.

The manner of exercising that right is normatively elaborated by the provisions of the Law on Cultural Autonomy for National Minorities. It seems that the Estonian legislator opted for the model according to which cultural councils, as bodies of minority non-territorial autonomy, are only one of the segments of such type of autonomy; in fact according to which they are not the exclusive institutional form of non-territorial autonomy so the realization of such type of autonomy has been shared between different

minority institution and organization. This corresponds to the fact that cultural councils undoubtedly do not have public law subjectivity.

The absence of public law, more precisely and explicitly recognized and determined legal status of cultural councils is an omission of the legislator, which can greatly prevent the realization of the role of such bodies. Since such bodies do not have a public law character, the key role in their formation is played by the initiative of minority members, which can be interpreted by consistently expressing concern to preserve identity, which is one of the constituents required internationally for the existence of a minority. On the other hand, the Estonian legislator, by explicitly stating certain national minorities, has recognized in advance their right to form cultural councils, and particularly interesting is the fact that despite the lack of recognition of the cultural councils' legal subjectivity, state legislation prescribes a special condition for validity of direct elections of such bodies. In any case, direct elections to cultural councils represent the expression and manner of exercising the collective right of a national minority to non-territorial autonomy.

On the other hand, the powers of cultural councils as main bodies of non-territorial cultural autonomy do not have a predominantly authoritative character and, with the exception of the right to determine taxes for financing cultural autonomy, which have the character of membership fees, lead into concluding that they are coordinating councils of minorities whose status and role are regulated by norms of a public law nature, but which cannot be considered public law corporations. For this reason, the relevant legislation failed to explicitly normatively regulate their status and character, which in turn leads to the limited scope of that type of protection of national minorities in Estonia.

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Dr Vladimir B. Đurić

Viši naučni saradnik, Institut za uporedno pravo, Beograd, Srbija

e-mail: *v.djuric@iup.rs*

NETERITORIJALNA MANJINSKA AUTONOMIJA U ESTONIJI

Sažetak

Neteritorijalna manjinska autonomija/samouprava predstavlja jedan od modela zaštite nacionalnih manjina. Neteritorijalna manjinska autonomija u Estoniji zajemčena je odredbama ustava i definisana kao jedno od manjinskih prava. U tom kontekstu, u radu se analiziraju pravna priroda i obim ove autonomije u pravnom poretku Estonije.

Ključne reči: Estonija, nacionalne manjine, neteritorijalna autonomija.

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CAUSES, DEVELOPMENT AND RESULTS OF THE SEMI-PRESIDENTIAL SYSTEM IN LITHUANIA

Abstract

In 1992, Lithuania, similar to many European post-communist countries, and differently from its Baltic neighbours, Estonia and Latvia, chose a typical semi-presidential system of government. A logical question arises, why did Lithuania take a different path in relation to Latvia and Estonia? In other words, it is necessary to investigate the causes of this decision of the Lithuanian constitution-maker, which can help us to realize why and when such solutions are being pursued. Secondly, when that path was already chosen, almost thirty years ago, it is scientifically justified to investigate how this system of government works in practice. The answer to these questions shows us the origin of this choice, and the degree of its justification, as well as the elements on which its positive and negative sides depend.

Keywords: *Lithuania, semi-presidential system of government, directly elected president, government, relations between the president and the government, political elites, political culture.*

1. The Notion of a Semi-Presidential System – Arguments *pro et contra*

Robert Elgie (2007b, p. 2) points out that the meaning of semi-presidentialism is highly contested among scholars. According to him, the original definition of semi-presidentialism was provided by Maurice Duverger, who stated out that a political regime is considered semi-presidential if the constitution which established it combines three elements. First, the president is elected by universal suffrage. Second, he possesses quite considerable powers. Finally, third, he has opposite him a government with executive and governmental power and can stay in office only if the parliament does not show its opposition to them. In the years that followed, most people adopted the basics of Duverger's understanding of semi-presidentialism. For example, a similar definition of the semi-presidential system in our literature is proposed by Professor Darko Simović (Simović, 2008, p. 358).

Bearing in mind the fact that it is a highly contested issue, it was expected that some writers propose a slightly modified version of the definition. Regarding that Elgie (2007b,

* PhD, Research Fellow, Institute of Comparative Law, Belgrade, Serbia, e-mail: m.stanic@iup.rs

pp. 2-3) cites as an example Giovanni Sartori (1997, pp. 131-132), who wrote that a system is semi-presidential if it encompasses five characteristics. First, the president is elected by popular vote for a fixed term of office. Second, the head of state shares the executive power with a government. Third, the president is independent from parliament but is not entitled to govern alone or directly and therefore his will must be conveyed and processed via his government. Fourth, at the same time government is president-independent and parliament-dependent and need the support of a parliamentary majority. Fifth, the dual authority structure of semi-presidentialism allows for different balances and also for shifting prevalences of power within the executive. Consistent with this, Arent Lijphart (2004, p. 102) has argued that sometimes, of course not always, semi-presidential systems actually make it possible for the president to be even more powerful than in most pure presidential systems.

It must be emphasized that not only the notion of a semi-presidential system is disputable, but also its practical value. There are arguments *pro and contra*. The main argument in favour of semi-presidentialism is that the dual executive can allow for a degree of power-sharing between competing forces, while the second is that the direct election of a fixed-term president can provide the system with political stability and legitimacy, even if we have highly fractionalized parliament and therefore unstable governments (Elgie, 2007a, p. 55). Oleh Protsyk (2005, pp. 721-748; Matsuzato, 2006, p. 320) claims that popular presidential elections significantly affect the formation of a cabinet, always with the possibility of cohabitation (Elgie & McMennamin, 2011, p. 3). There are two main arguments against semi-presidentialism (Elgie, 2007a, pp. 56-57). First is the personalization of the political process as a result of the direct election of the president which could encourage the president to disregard the rule of law because s/he feels above the normal political process. Second, during the cohabitation periods, there is always the possibility of political instability. Anyway, the fact is that this system of government has become an increasingly popular form of government worldwide and has emerged as the most common regime type in Central and Eastern European countries (Sedelius & Mashtaler, 2013, p. 109). Lithuania is one of those countries and bearing this in mind, it is interesting after almost thirty years to examine the Lithuanian case, both in the paper and in the practice, as well as the social circumstances that led to such solutions.

2. History of the Adoption of the Lithuanian Constitution

In the early 1990s after gaining independence the majority of the Lithuanian population, mainly Lithuanians recalled the times when the country had been independent before the Second World War (Urbanavicius, 1999, p. 151). It was a period of the Lithuanian history when the constitutional order was marked by Antanas Smetona widely regarded as a president who created a strong Lithuanian state and there was a desire to restore once again a regime built on such stability (Sedelius, 2006, p. 106; Urbanavicius, 1999, p. 151), under a form of government that may be called super-presidentialism (Norkus, 2013, p. 10). As a matter of fact, proposals of full presidential systems in the constitutional history of post-

communist countries are extremely rare (Matsuzato, 2006, p. 321).¹ Also, the reputation of the constitutions of 1938 was low (Norkus, 2013, p. 11) and as a consequence the main political factors simply stood against the idea of just re-adopting the clearly undemocratic 1938 constitution (Sedelius, 2006, p. 106; Urbanavicius, 1999, p. 151).

We have to have in mind that Lithuanian political culture is rather personality centred (Raunio & Sedelius, 2019b, p. 3). That is the reason, as Sedelius & Urbanavicius (2006, p. 106; 1999, p. 151) describe it, why the demands on a strong presidency prevailed, especially within the popular front movement, *Sajudis*, and its leader, Vytautas Landsbergis. They leaned towards presidentialism, envisioning a president in charge of the government, and with the right to appoint and dismiss cabinets without parliamentary support. However, the former communists in the Lithuanian Labour Party (LDLP), who initially outlined a pure parliamentary system, heavily opposed Landsbergis proposals. It was more than clear in the context of conflict between the main political forces that the only solution was a balance (Urbanavicius, 1999, p. 151). Hence, the more important is that the elites reached the firm conviction that the constitution should be adopted through consensus (Matsuzato, 2006, p. 325), sought after some middle ground between the super-parliamentarism of the early 1920s and the super-presidentialism of the late 1930s (Norkus, 2013, pp. 10-11). In the end, “the semi-presidential constitution in Lithuania was a compromise with the intention of combining the prospects of legitimacy derived from the parliament with a dual executive structure, adopted in 1992 under the post-Soviet context of deep ideological cleavages, weak parties, and personally based politics” (Raunio & Sedelius, 2019a, p. 48).

3. The Election and the Competencies of the President of Lithuania

The Lithuanian constitution, adopted in 1992, “provides for a directly elected president with limited but more than marginal formal powers” (Raunio & Sedelius, 2019b, p. 3). The President of the Republic shall be Head of State. He shall represent the State of Lithuania and shall perform everything with which he is charged by the Constitution and laws (Constitution of the Republic of Lithuania, Art. 77). A Lithuanian citizen by descent, who has lived in Lithuania for not less than the last three years, if he has reached the age of not less than 40 prior to the election day, and if he may stand for election as a Member of the Seimas, may stand for election as President of the Republic. The President of the Republic shall be elected by the citizens of the Republic of Lithuania for a five-year term by universal, equal, and direct suffrage by secret ballot. The same person may not be elected President of the Republic for more than two consecutive terms (Constitution of the Republic of Lithuania, Art. 78). The candidate for the post of the President of the Republic who, during the first voting in which not less than half of all the voters participate, receives the votes of more than half of all the voters who participated in the election, shall be deemed elected. If less than half of all the voters participate in the election, the candidate who receives the greatest number of votes, but not less than 1/3 of the votes of all the

¹ For some considerations on the position of president in post-communist countries see Višekruna & Stanić, 2015, pp. 189-190.

voters, shall be deemed elected. If during the first voting round no single candidate gets the requisite number of votes, a repeat voting shall be held after two weeks pitting the two candidates who received the greatest number of votes against each other. The candidate who receives more votes thereafter shall be deemed elected (Constitution of the Republic of Lithuania, Art. 81).

The President decides the basic issues of foreign policy and, together with the Government, conducts foreign policy (President of the Republic of Lithuania. Official page; Constitution of the Republic of Lithuania, Art. 84). He signs international treaties and submits them to the Seimas for ratification. The President appoints and recalls, upon the submission of the Government, diplomatic representatives of the Republic of Lithuania to foreign states and international organizations. He receives letters of credence and recall of diplomatic representatives of foreign states; confers the highest diplomatic ranks and special titles. Also, the president performs significant functions in domestic policy. Therefore, the President is the Commander-in-Chief of the Armed Forces of the State. He heads the State Defense Council and he confers the highest military ranks. The President appoints and dismisses, upon the assent of the Seimas, the Commander of the Armed Forces and the Head of the Security Service. He holds the right of a legislative initiative at the Seimas and also the right to veto the laws passed by the Seimas. The President appoints and dismisses, upon the assent of the Seimas, the Prime Minister. He charges him to form the Government and approves its composition. The President has the right to apply to the Constitutional Court. In cases provided for by the Constitution, the President may dissolve the Seimas. President Acts as Major Guarantor of Effective Judiciary and submits candidatures of the Supreme Court justices and a candidature for the President of the Supreme Court to the Seimas. He appoints judges and the President of the Court of Appeal. The President appoints judges and presidents of regional and local courts. He submits to the Seimas the candidatures for three judges of the Constitutional Court and a candidature for the President of the Constitutional Court. The President grants citizenship of the Republic of Lithuania, grants pardons to convicted persons, and confers State decorations.

4. Functioning of the Semi-Presidential System in Lithuania in Practice

4.1. Algirdas Brazauskas (1993-1998)

From 1993 to 1996 Algirdas Brazauskas was president and he was from the Lithuanian Democratic Labour Party (LDLP), with an absolute majority in the Parliament during that legislative period. Regardless of that fact, the president decided to distance himself from governing (Sedelius, 2006, p. 147). Maybe, his attitude was caused by the fact that he was not a good public speaker and he created an image of a technocratic politician (Urbanavicius, 1999, p. 167). An indication of his rather passive position was the rarely use of his right to veto parliamentary decisions (Elgie & McMamin, 2011, p. 5). Still, we should not think that Brazauskas was just a weak president because from time to time

he tried to intervene decisively in government matters, notably in foreign affairs, or in the appointment of certain ministers under the two governments (Frison-Roche, 2007, p. 70).

Especially, during the Lithuanian bank crisis in 1995, Brazauskas to some extent stepped in and tried to stabilise the government situation, although rather carefully (Elgie & McMenamin, 2011, p. 5). His central role, as Norkus says (Norkus, 2013, p. 23), in the LDLP government was demonstrated impressively early in 1996 when he replaced the ex-communist prime minister Adolfas Šleževičius by another ex-communist Mindaugas Stankevičius against the former's will. However, this crisis showed that the president was a bit stronger than the constitutional situation would suggest (Urbanavicius, 1999, p. 162). According to Raunio & Sedelius (2019a, p. 100) Brazauskas "was careful not to antagonize the government or the Seimas, and hence had regular meetings with the other main political leaders. He was referred to as a 'housekeeper' who wanted to ensure that his country was functioning properly. He noted that as the constitutional powers of the president are limited, he tried to influence the Seimas and the government with his political authority and support of the people. Obviously his contacts were more frequent with LDDP, the party he had chaired before winning the presidency. However, following the 1996 Seimas elections things got more difficult for Brazauskas under the center-right coalition of Homeland Union and Christian Democrats (TS-LKD), and the president essentially limited his actions to the sphere of foreign affairs."

4.2. *Valdas Adamkus (1998-2003)*

The relations between the president and the government changed rather significantly during the following presidential era of the American-Lithuanian Valdas Adamkus "who was elected on an independent ticket both in the 1998 and in the 2004 presidential elections. He wrote that he needed to 'create traditions' for the institution of the president and that he wanted to act as a 'counterweight' to the government and not let parties impose their own will on him" (Raunio & Sedelius, 2019a, p. 100). He was the most popular politician in Lithuania with a support rating of 81 per cent and was not afraid to confront the majority in the Seimas (Urbanavicius, 1999, p. 167). Shortly after Adamkus' victory, "the Lithuanian Constitutional Court proclaimed its interpretation of Lithuania as a parliamentary system. However, neither this ruling nor the heterogeneity of his electorate stopped Adamkus from interpreting and using his presidential powers in his own ways. He was congenial to the idea of presidency in the American political culture and from the beginning worked to drive Lithuanian semi-presidentialism back to its presidential phase" (Norkus, 2013, p. 16). Already early in his period, "Adamkus showed his ambition to have a say in policy matters as well as commenting on the government's performance, and at the beginning of 1999, the relation between the president and Prime Minister Vagnorius began to deteriorate" (Sedelius, 2006, p. 148) and Adamkus chose to confront the second but not the first cabinet formed by Prime Minister Vagnorius (Protsyk, 2006, p. 234). The president "openly criticized Vagnorius about economic reform. As the president had no friendly majority in the Seimas, he leaned on his popular support" (Raunio & Sedelius, 2019a, p. 101).

4.3. Rolandas Paksas (2003-2004)

After the mandate of president Adamkus, “the Lithuanian semi-presidentialism reverted to its parliamentary phase until it was interrupted by the (in)famous Paksasgate story in 2003–2004” (Norkus, 2013, p. 23), the short presidency of Rolandas Paksas which ended with his impeachment from office in 2003 (Raunio & Sedelius, 2019a, p. 64). This process is in detail described by Sedelius (2006, p. 150). He writes that various disputes accompanied the first few months of the Paksas presidency. First of all, he was accused of not respecting the division of power with the government within the foreign policy sector, and he had to defend himself against allegations that the presidential office, in collusion with the LDLP, had attempted to oust Arturas Zuokas, the popular Mayor of Vilnius. That was not all and Paksas faced more serious troubles. However, everything started in October 2003 when the whole country was shaken by accusations that the president, his top advisers, and his biggest campaign contributor – the Russian-born businessman Yuri Borisov – had links with organised crime and Russian foreign intelligence service. The scandal (widely referred to as the ‘Paksasgate’) emerged as the security chief, Mecys Laurinkus, who had earlier been dismissed from the president’s office, submitted a report revealing these allegations to the parliament.

Hence (Sedelius, 2006, p. 150), “the first parliamentary commission was established to investigate possible threats to national security. The commission endorsed a first report concluding that ‘the President has been and is still vulnerable’ and found that Paksas had violated the constitution and the presidential oath on six counts. This was sufficient for the parliament to initiate impeachment proceedings against Paksas on charges of having revealed state secrets, illegally influenced privatisation, and jeopardised national security. The constitutional court as well as a special impeachment commission of parliamentarians and lawyers investigated the matter further. The court’s ruling of March 31, 2004, concluded that Paksas had violated the constitution and his presidential oath by granting citizenship to Borisov (who had lost citizenship one year before, after receiving Russian citizenship) and by leaking classified information to him. One week later, on April 6, Paksas as the first European president in history was voted out of office by slightly more than the required two-thirds of the parliamentarians.” Sedelius (2006, p. 150) cites (Mite, 2004a; 2004b; Nations in Transit, 2004) that as a consequence, by an amendment to the Lithuanian election law on May 25, stating that nobody who has been impeached should again be allowed to run for president, the parliament prevented Paksas from reappearing in future presidential races. Also, “the Lithuanian Constitutional Court on 25 May 2004 stated that an individual who had been removed from office through the process of impeachment for breaking his oath of office may never seek office requiring an oath” (Norkus, 2013, p. 17).

4.4. Valdas Adamkus (2004-2009)

Sidelius writes (2006, pp. 104-106) that during his second term Adamkus adopted overall a less assertive stance, with the balance of power more in favour of the prime minister even during the minority government of Kirgilas (2006–2008). Adamkus faced

prime ministers and cabinets from opposing political camps most of the period. In addition, it was to some extent expected, because the political scandal surrounding Paksas' impeachment called for a less confrontational approach in order to rebuild confidence in the political system in general and in the presidency in particular. The priorities were a little bit different than during his first tenure of office. It seemed so only at first glance and we should be aware of the fact that he took a less assertive stance towards the government, but did not completely abandon it.

As an example, president Adamkus used high-profile television speeches to force prime ministers and members of the Government to resign. For example, in 2005 Adamkus had intervened in the conflicts between Viktor Uspaskich, the leader of the Labour Party and the minister of economic affairs, and Artūras Zuokas, the mayor of Vilnius and the chairman of the Liberal and Centre Union. In a television appearance, Adamkus requested that the quarrelling politicians should resign from their public offices, with Uspaskich indeed deciding to leave his ministerial post. Another example was in 2006 when Adamkus again resorted to a statement on national television questioning whether the government still enjoyed the confidence of the Seimas, with Prime Minister Brazauskas resigning afterwards.

4.5. *Dalia Grybauskaitė (2009-2019)*

President Dalia Grybauskaitė was also elected as an independent candidate in both the 2009 and the 2014 elections. In order to be more precise, we should mention that in 2009 she was supported by the center-right parties the Homeland Union-Lithuanian Christian Democrats and the Liberal Movement. Throughout her tenure in office her leadership style was characterized as assertive and confrontational and she became more powerful than her predecessors (Raunio & Sedelius, 2019a, p. 102). Many Lithuanian observers point out her speeches and self-presentation style (Norkus, 2013, p. 19). Grybauskaitė has shared power with premiers from opposing camps, and this has no doubt influenced her behavioural strategies (Raunio & Sedelius, 2019a, p. 102), and met them almost weekly (Raunio & Sedelius, 2020, p. 63). The exception was the 2009–2012 period (Raunio & Sedelius, 2019a, p. 102).

As Zenonas Norkus says, “at the beginning of the first tenure of office, she abstained from any steps that could undermine the rather fragile Right-to-Center coalition supporting the government pressed by the outbreak of the economic crisis late in 2008 to pursue its unpopular policy. The exorbitantly strong performance at the election and the weakness of the governing coalition under the Homeland Union leader Andrius Kubilius provided a good background for the presidentialization of the Lithuanian semi-presidentialism. Using the weakness of Kubilius' government, Grybauskaitė took steps to take under her personal control the Lithuanian foreign policy and made new appointments in the secret services and law enforcement agencies. Her behaviour during the building of the new government in late 2012 was a series of strategic manipulations in pursuit of this goal. She prevented the appointment as members of the new government of some experienced politicians by using their allegedly weak knowledge of Western languages as a formal pretext for disqualification. As a result, the Lithuanian government is one of the weakest in all post-communist times, with most members of the Cabinet representing the so to say ‘second choice’ of the governing

parties” (Norkus, 2013, pp. 18-19). After the 2016 elections, “Grybauskaitė made it clear that she intends to shape the selection of ministers. In the spring of 2018, she enforced the resignation of the minister of agriculture Bronius Markauskas and rejected Prime Minister Skvernelis’ candidate for the minister of justice” (Raunio & Sedelius, 2019a, p. 105).

5. Conclusion

It is obvious that thinking about a semi-presidential system as an ideal form of organization of state power that could be recommended to all newly established and young democratic systems should be rejected (Simović, 2008, p. 361). As a matter of fact, “the semi-presidential system became an ultimate compromise and a result of negotiations between ex-communists favouring parliamentary models, and the opposition advocating stronger presidential solutions” (Sedelius, 2006, p. 109). The democratic reputation of Lithuania helped them in drafting constitutions that were relatively free from international influence and to concentrate on institutional design because of the lack of regional conflicts and serious ethno-identical cleavages in society. As a result, Lithuanians promulgated a viable semi-presidential constitution (Matsuzato, 2006, p. 327).

Speaking about legal solutions we have to underline that Lithuania belongs to a semi-presidential group in Europe with medium-strong presidencies (Raunio & Sedelius, 2019a, p. 56). On one hand, as Matsuzato notes (Matsuzato, 2006, p. 331), “despite the elite’s attempt to interpret the semi-presidential constitutions in a maximally parliamentary manner, the presidents of Lithuania never turned into passive executors of parliamentary will”. As Raunio & Sedelius write (2020, p. 64), in Lithuania it is certainly legitimate and appropriate for the president to both “go public” and to interfere in matters that constitutionally belong to the competence of the government. On the other hand, the Lithuanian political system has come to be regarded as comparatively stable throughout the politically, socially and economically turbulent 1990s (Sedelius, 2006, p. 147) and this country is among the European countries with the lowest frequency of intra-executive conflict (Protsyk, 2006; Sedelius & Mashtaler, 2013; Raunio & Sedelius, 2019a, p. 8). Lithuania experienced an almost rapid democratisation process during the 1990s and is today considered as consolidated democracy (Sedelius, 2006, p. 119). We will conclude that all this tells us that the solutions of the Lithuanian constitution-maker have been appropriate and that, within the rules of the semi-presidential system of government, it has contributed to further stabilization and democratization of the Lithuanian state.

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Dr Miloš B. Stanić

Naučni saradnik, Institut za uporedno pravo, Beograd, Srbija
e-mail: m.stanic@iup.rs

UZROCI, RAZVOJ I ISHODIŠTE POLUPREDSIEDNIČKOG SISTEMA VLASTI U LITVANIJU

Sažetak

Litvanija je 1992. godine slično brojnim evropskim postkomunističkim zemljama, a različito od svojih baltičkih suseda Estonije i Letonije, izabrala tipičan polupredsednički sistem vlasti. Postavlja se logično pitanje – zbog čega je Litvanija pošla različitim putem u odnosu na Letoniju i Estoniju? Drugim rečima, neophodno je istražiti uzroke ovakve odluke litvanskog ustavotvorca, što nam može pomoći da odgonetnemo zašto i kada se ide ka ovakvim rešenjima. Kada je već, pre skoro trideset godina, odabran taj put, naučno je opravdano istražiti kako ovaj sistem vlasti u praksi funkcioniše. Odgovor na ova pitanja nam pokazuje ishodište ovakvog izbora, te stepen njegove opravdanosti, kao i elemente od kojih zavise njegove pozitivne i negativne strane.

Ključne reči: Litvanija, polupredsednički sistem vlasti, neposredno izabrani predsednik, vlada, odnosi predsednika i vlade, političke elite, politička kultura.

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THE PRESIDENTS OF THE BALTIC STATES – COMPARATIVE OVERVIEW

Abstract

Estonia, Latvia and Lithuania are three countries that encompass diverse and creative constitutional solutions when it comes to the system of separation of powers and the constitutional engineering of the role of the president of the republic. Sharing the same Soviet history, these sovereign states continue to maintain high level of cooperation, but also develop their constitutional systems in different directions. While Lithuania adopted one form of the semi-presidential system, Estonia and Latvia on the other hand opted for parliamentary ones. Differences are especially prominent when it comes to particular presidential powers, e.g. presidential veto power, where constitutional solutions of these countries manifest attributes that are not only significantly different from one another, but also unique in a general comparative perspective and from the theoretical standpoint. Some of these powers also enable (or have the potential to do so) the presidents of Estonia, and especially Latvia to achieve much more prominent role in comparison to the one that is to be expected from the president in a parliamentary system. In this paper the author analyses key elements regarding presidential power in all three of the Baltic States, their constitutional foundation and framework, as well as real manifestation in political life, especially highlighting the sui generis constitutional solutions that the Baltic States exhibit in this matter.

Keywords: *Baltic States, President, Presidential Powers, Constitution, Latvia, Lithuania, Estonia.*

1. Introduction – Divergent Development of Presidential Power in the Baltic States

After the collapse of the Soviet Union the Baltic States regained their independence, went through governmental and economic reforms, then joined NATO and finally – European Union in 2004. The restoration of independence and transition processes went peacefully and rather smooth. “For the time being, with the USSR gone, the Russians were too preoccupied with wrenching internal changes to make revanchist moves against the littoral; the Germans too were busy dealing with the problems of reunification; the Poles, who had been the bane of Lithuania’s statehood as recently as the decades between the two world wars, were having to cope with their own problems of post-communism. Very

* PhD, Research Fellow, Institute of Comparative Law, Belgrade, Serbia, e-mail: m.djordjevic@iup.rs

promising as future friends and supporters were those countries which in the cataclysms of the twentieth century had shown no territorial interest in the littoral – the Scandinavian countries, the United Kingdom, France, and, of course, the superpower that had emerged as the victor in the Cold War, namely, the United States of America. Diplomatic recognition of renewed independence was easy enough both to receive and to grant, but the really pressing questions revolved around material aid, investment, and advice about how to create institutions that would function as efficiently and productively as those in the west” (Plakans, 2014, p. 403).

After the fall of the Berlin wall, the constitutional system change was initiated – and in some countries continued as “a directive from above”, leading many countries to give rise to presidential and powerful semi-presidential systems (in Lithuania), while in some others like Estonia and Latvia parliamentarism has been institutionalized – as the evidence that the old communist political elites did not like-mindedly prefer the presidential system of government (Kasapović, 1996, pp. 129-130). Some authors state that because of “Lithuania’s semi-presidential choice by the preference of the population for strongman rule and a concrete balance of power among the elites during the preparation of a semi presidential constitution”, the “consolidation of semi-presidentialism in Lithuania can be attributed to its role in assimilating political newcomers into the traditional elite community and counterbalancing populist voting behaviour in parliamentary elections” (Matzuzato, 2006, p. 318).

The new Lithuanian system was striving to achieve a balance between presidential powers and powers of the prime minister (while both of them remain significant). The position of the prime minister is such that he can be defined as “the primary decision-maker, while the president has the authority to intervene sporadically, or in specific areas, and usually in foreign and defense policy” (Rapajić, 2016, pp. 121-122). The semi-presidential system was the result of a compromise, “an ‘honorable’ outcome for both options, as each could claim to have gotten something for themselves and prevented the other side from achieving all what it wanted” (Rapajić, 2016, pp. 114-115). Estonia and Latvia went down the road of introducing parliamentary system with the indirect election of the president of the republic. Heads of these states had sometimes however quite prominent roles in reality.

Because of that, there were also different characterizations of the constitutional systems of these countries back in 1995. Some authors were suggesting that Lithuania actually belonged to the category of presidentialism, Latvia to semi-presidentialism and only Estonia to the parliamentary system (Kasapović, 1996, p. 126). Lithuania is nowadays in contemporary literature rather considered to be an example of the balanced form of semi-presidentialism, with the advantages of effective restriction of power concentration “in hands of one or few leaders”, but also with disadvantages that led to several institutional conflicts, even to the impeachment of the President in 2004 (Krupavičius, 2013, p. 205) – the only impeachment to ever happen in one Baltic State. The role and the constitutional place of the president of the Republic also lead to doctrinal conclusions about the system being “the semi-presidential system heavily weighted in favor of the legislature [...] where the office holders’ presidential powers are actually relatively weak and comparable to those of Estonian and Latvian heads of state” (Auers, 2015, pp. 55, 59).

Sharing the same or similar historical paths, expressing and maintaining high level of mutual cooperation, these countries certainly express differences when it comes to the structure and practice of the system of powers, hence the position and role of the president of the republic. Additionally, the relation between the formal and informal (“real”) powers of these respective presidents was sometimes in certain discrepancy with the expected one (e. g. Latvian president gained more dominant role than expected, thanks to some presidential powers like presidential, suspensive veto) and some of the presidential powers have unique characteristics in comparative perspective.

2. Estonia

The role of the president was one of the topics that caused most discussion and debate in the 1991–1992 Estonian Constitutional Assembly and in the Lithuanian legislature’s debates on the new constitution. “Debates polarized around the need for a popularly elected versus parliament-elected president. The Estonian Constitutional Assembly debated the costs and benefits of five different constitutional models before ultimately settling on a parliamentary model with an indirectly elected presidency” (Auers, 2015, p. 54). Presidential activism was somewhat more pronounced right after gaining independency, but right after the first term of the Estonian President Lennart Meri, political parties made it clear that they would only vote for his re-election if he decreased his activism. Since then presidential activism has constantly decreased and presidents have (similar to the views of parliament and government on the matter) seen their legitimacy and authority as limited (Köker, 2017, p. 111).

At first glance, the powers given by the Constitution to Estonian president may seem substantial, maybe even excessive concerning the fact that he/she is not being elected directly, but by the parliament (*Riigikogu*), or by the special electoral body that is being convened to elect the president if *Riigikogu* fails to do so (Art. 79). However, most of these powers have significant limitations. Most of them are practiced in accordance with some other article that by rule narrows the scope and power of application, or stipulate the use of countersignature. The countersignature requirement in Estonia is stipulated in case of decree-laws exclusively, in Latvia however the principle of “the negative form enumerating exclusions” has been adopted, while the Constitution of Lithuania uses the system of “positive countersigning” (Olecho, 2012, p. 3)

Estonian Constitution proclaims the President of the Republic to be “the head of state of Estonia” (Art. 77), which is not so common in comparative constitutions, contrasting the doctrinal stance on this issue.¹ The President of Estonia represents the Republic of Estonia in international relations; appoints and recalls diplomatic agents of the Republic

¹ From the comparative perspective, the president of the republic is much more often not referred to as the “head of the state”, even in countries where the president has much more power compared to Estonia. Although still being supported by a significant part of the doctrine, the use of this term is also somewhat disputed, when it comes to the countries with non-presidential or strong semi-presidential system of power – especially in those ones where the president is being elected indirectly. Some German scholars suggest even avoiding the term altogether (Schlaich, 1987, pp. 579-580).

of Estonia, on the proposal of the Government of the Republic, and receive the credentials of diplomatic agents accredited to Estonia; declare regular and extraordinary elections to the *Riigikogu*; convenes the new membership of the *Riigikogu* and opens its first session; proposes to the Chairman of the *Riigikogu* to convene an extraordinary session of the *Riigikogu*; proclaims laws (or vetoes them – Art. 107) and signs instruments of ratification; issues decrees; may initiate amendment of the Constitution; designates the candidate for Prime Minister; appoints to and release from office members of the Government; makes proposals to the *Riigikogu* for appointments to the offices of Chief Justice of the Supreme Court, Chairman of the Board of the Bank of Estonia, Auditor General and Chancellor of Justice; on the proposal of the Board of the Bank of Estonia, appoints to office the President of the Bank of Estonia; on the proposal of the Supreme Court, appoints judges; confers state awards, and military and diplomatic ranks; is the supreme commander of the national defense of Estonia; makes proposals to the *Riigikogu* to declare a state of war, to order mobilization and demobilization, and may declare a state of emergency; declares, in the case of aggression against Estonia, a state of war and order mobilization; by way of clemency releases or grants commutation to convicts at their request; initiates the bringing of criminal charges against the Chancellor of Justice (Art. 78).

Estonian doctrine generally establishes three positive general qualifications of the role and the position of the President of the Republic and one negative – particular flaw or loophole in the system. Positive ones include the fact that the essence and development of the presidential institution in a parliamentary form of government show that the Estonian political system is in accordance with widely understood democratic beliefs and that the principle of the separation of powers is overwhelmingly accepted among different political powers and is supported by the general public in actual politics. The role of the president in both politics and society is clear and there is practically no pressure to change to a presidential political system. The legal framework that regulates the actions of the president has been relatively stable. The respective constitutional framework may however have certain destabilizing effect on the society in case of the concurrence of several conditions, because of the two loopholes in legislation, one of them being connected to the complex, electoral system of the president and the second one referring to the potential of presidential removal procedures (Toomla, 2013, pp. 189-190). Still, Estonian constitutional system, including the role and position of the president remains stable and presents a solid example of good transitioning of a state from the former Eastern bloc.

3. Latvia

Similarly to Estonia, the President of the Republic in Latvia is also not being elected on direct election. Latvian constitution proclaims that the parliament (*Saeima*) shall elect the President for a term of four years by secret ballot with a majority of the votes of not less than fifty-one members of the *Saeima* (Art. 35-36). Public pressure to introduce the direct election of the president of the Republic was and still is to some extent present nowadays. “However, the majority of parliamentary parties, as well as Latvia’s most influential legal

thinker and judge at the European Court of Justice, Egils Levits, are opposed to a popularly elected president. The issue regularly appears on the political agenda because there is a tremendous amount of public support for it” (Auers, 2015, p. 55). Levits is at the moment the President of this country.

The Constitution of Latvia stipulates that the President shall represent the State in international relations, appoint the diplomatic representatives of Latvia, receive diplomatic representatives of other states and implement the decisions of the *Saeima* concerning the ratification of international agreements (Art. 41). He or she is the Commander-in-Chief of the armed forces of Latvia (during wartime, the President appoints a Supreme Commander), has the right to initiate legislation, is entitled to propose the dissolution of the *Saeima* (triggering a referendum), grant clemency etc. (Art. 45-54). By summarizing his constitutionally given powers and their real-life manifestations, the President of Latvia stands somewhere in-between presidents of Estonia and Lithuania.

It is also often stated that there is a strong anti-party feeling in Latvia that remains, traditionally resulting in strong support for independent presidential candidates. Literature describes Latvian presidents as “weak, compromise candidates” (Auers, 2015. p. 57), because of the way of their election. On the other hand, in practice, their power sometimes seems to be greater than the one that would be expected from the indirectly elected president. One of the reasons for that may, among other factors, also be the quite potent presidential power of suspensive veto, which will be explained in more detail later in this paper.

4. Lithuania

As already mentioned within the introductory remarks, the Lithuanian system belongs to semi-presidential ones, but the presidential powers are actually relatively weak and comparable to those of Estonian and Latvian heads of state. The real source of political power comes for the most part from the way how the president is being elected, since direct election assumes much more public exposure and hence popular political influence. Actually, the major difference between the Lithuanian presidency and its Baltic counterparts is the nature of their election. “The head of state in Lithuania is considered to hold substantial powers in practice, regardless of whether this is regulated in detail by law. Still, the Lithuanian president is not an omnipotent ruler as he or she is a part of a dual executive within the semi-presidential system.” (Krupavičius, 2013, p. 232). Although he possesses, comparatively speaking, significant “nonlegislative” powers, “ironically he is among the weakest semipresidential presidents” (Roper, 2002, p. 269).

The President of the Republic gets elected by the citizens of the Republic of Lithuania for a five-year term by universal, equal, and direct suffrage by secret ballot. Powers of the president include: representation of the State; conducting of foreign policy (together with the Government); appointing and recalling (upon submission of the Government) of the diplomatic representatives of the Republic of Lithuania to foreign states and international organization (and other related diplomatic functions); appointment and dismissal, upon the assent of the *Seimas*, of the Prime Minister and other Ministers (upon the submission

by the Prime Minister); submitting candidates for Supreme Court justices, Court of appeal, judges and presidents of regional and local courts, appointment and dismissal of the Prosecutor-General of the Republic of Lithuania (all with assent of *Semias*) among other electoral duties; making of annual reports to *Seimas*; conferring the highest military ranks and has a role in declaring state of emergency and making decisions concerning defense against such armed aggression; promulgating laws and having the right of presidential veto, right to grant pardons and citizenships, confer State awards etc. (Art. 84 of the Constitution of Lithuania). The President of the Republic, implementing the powers vested in him, also issues acts-decrees, which however require countersignature to be valid, significantly limiting their reach and scope of power.

Naturally, the president's affiliation with political parties and consequently to parliamentary majority is often regarded as one of the major sources of informal presidential power, because of the fact that the presidents who have been well-connected to major political parties and/or strong parliamentary majorities in most cases enjoyed higher political influence and cohabitation with other institutions (Krupavičius, 2013, p. 216). The personal characterizes of the office holder play important role in the actual political influence of the holder of the presidential office.

5. Unique Constitutional Solutions of the Baltic States – Presidential Veto Power

The Baltic States demonstrate some inherent differences when it comes to the role and position of the president of the republic. One individual constitutional institute however especially stands out and exhibits not only different solutions when these states are compared to each other, but also some unique characteristics in the scope of general comparative constitutional law.

The most notable curiosity in this sense is one quite unique constitutional-legal institute that can be found in Latvian constitutional system: the so-called “*suspensive veto*”, that is in many regards very similar, but also different from the “classical” presidential veto power – the power of the President of the Republic to conditionally deny the act of promulgation to the voted bill, until the final decision is made by another (constitutional) body (Đorđević, 2020, p. 198). In the first place, a possible *linguistic confusion* here is to be noted and avoided. In many European countries and languages the presidential veto is regarded as the “suspensive veto”, deriving etymologically from the Latin verb *suspendo*, *suspendere*, *suspendi*, *suspensus* (to hold or delay something), while “veto” comes from *vetare*, *vetavi*, *vetatus* (to prohibit, deny). Hence, a list of European languages uses those two words to name the institute of suspensive veto, since it effectively puts the legislative on hold by the will of the president, at least for some time (French: *veto suspensiv*; Russian: *суппензивное veto*; Serbian: *суппензивни veto*, etc.).

However, in Anglo-American constitutional law and political science literature (as in most English written texts in general²), the common use for the traditional power

² Exceptionally, it can also be found used in the meaning of presidential veto, though not in a legal-technical, but more descriptive manner. For example: Pritchett, 1959, p. 307.

of the president is “presidential veto”³, while the term “suspensive veto” is being used to describe another legal institute, that, as aforementioned, exists as a *sui generis* constitutional peculiarity, in Ecuador, Latvia, and, debatably, in some form in Finland.⁴ Unlike the presidential veto, the suspensive veto’s main purpose is not to “check” if the proposed bill is unconstitutional (constitutional veto) or politically unfit (political veto) to be promulgated, but to literary suspense a bill for a specified period of time. “During this period, the veto power is, in effect, absolute, since it cannot be overridden. Override becomes possible, however, when the period of suspense has elapsed. [...] The rationale behind this rule is that the president’s veto acts as a delaying power to provide time for political passions to cool and for wider deliberation to take place. The suspensive veto is rather unusual in the world’s contemporary constitutions, but it might have advantages in some situations, especially when it is combined with a relatively low threshold requirement (such as an absolute majority). It could filter out hasty legislation motivated by sudden and momentary passions, and allows more time for public debate to influence the direction of legislation, but it does not allow the minority to thwart the settled will of the majority” (Bulmer, 2017, p. 16). The most distinctive type of this particular solution is to be found in Ecuador, where the bill remains suspended for one whole year.

In Latvia, the President has the right to suspend the proclamation of a law for a period of two months, if he/she decides to do so, or if requested by not less than one-third of the members of the *Saeima* (within ten days of the adoption of the law by the *Saeima*). The law thus suspended shall be put to a national referendum if so requested by not less than one-tenth of the electorate. If no such request is received during the aforementioned two-month period, the law shall then be proclaimed after the expiration of such period (Art. 72). Apart from the suspensive veto, the “traditional” presidential veto exists as well and these powers of the President are in Latvian literature considered to be “one of his most powerful functions” (Abolina, 2018, p. 471).

In Estonia, another quite unique solution regarding the presidential veto is to be found. Comparatively speaking, presidents either use their vetoes for the reasons of suspected unconstitutionality or political inadequacy. In some countries the path of the vetoed bills remains the same regardless of the reason for its use (either way they go to the parliament again – e.g. in Russia, Italy, Czech Republic, Ukraine, etc.), while in some others, the separate procedure is stipulated by constitution and laws (constitutional vetoes go to constitutional courts, while political ones go back to the parliament – e.g. Hungary, Poland, France, Romania, etc.). However, in Estonia, if the proposed bill is suspected to be unconstitutional, the President first has to send the bill to the parliament (*Riigikogu*), and

³ The English term, unlike the German (*das Prüfungsrecht des Bundespräsidenten*), Serbian (*суспензивни veto*) or Russian (*суспензивное veto*), does not indicate the legal nature of this institute. It can only be seen from it that some power of the President of the Republic is in question and that it is a matter of a veto. The only drawback of this term is that it does not show what kind of veto it is – the “temporary” or the absolute one, but since the latter is today more or less a historical category and exists only as a curiosity, that fact could not be considered as a serious shortcoming.

⁴ The existence of suspensive veto in Finland could be somewhat disputed, since the respective constitutional solution resembles both the presidential and suspensive veto and could exhibit the characteristics of both or only of one, depending on the concrete case (Đorđević, 2020, p. 132).

only if it gets passed again, he may send it to the Supreme Court (Estonia does not have a separate constitutional court). The Constitution states: “The President of the Republic may refuse to proclaim a law passed by the *Riigikogu* and, within fourteen days after its receipt, return the law, together with his or her reasoned resolution, to the *Riigikogu* for a new debate and decision. If the *Riigikogu* again passes the law which is returned to it by the President of the Republic, unamended, the President of the Republic shall proclaim the law or shall propose to the Supreme Court to declare the law unconstitutional. If the Supreme Court declares the law constitutional, the President of the Republic shall proclaim the law.” (Art. 107) This is essentially a way for the parliament to realize its mistake and give up the unconstitutional bill before its adoption is prevented by the constitutional court. Hence, on one hand, the reputation of the parliament is preserved in this way, and on the other hand, it facilitates the work of the constitutional court by discouraging unnecessary, politically motivated disputes over constitutionality.⁵

Finally, the Constitution of Lithuania (Art. 72) stipulates that “[t]he *Seimas* may consider anew and adopt the law which has been referred back by the President of the Republic”. Hence this is not “a must” for the parliament to reconsider the vetoed bill – MPs may, but they do not have to do it. This type of solution is comparatively speaking unusual (apart from Lithuania, it exists in one form only in the Republic of Serbia) and can be hardly justified from both the theoretical and practical perspective. If the parliament decides to abandon the bill by simply doing nothing, such (in)action still remains the sovereign decision of the parliament. Although it may seem that if the parliament “decides not to reconsider”, the presidential veto becomes *de facto* absolute – that is not the case, because the parliament solely made such decision. From the practical perspective, the consequences of “refusing to reconsider” and “accepting to reconsider” but then denying the necessary majority to the vetoed bill are in essence identical and this constitutional solution therefore only unnecessarily complicates the procedure in the parliament.

6. Concluding Remarks

All Baltic States can be described as examples of successful transition and post “Iron Curtain’s” fall building up of a democratic constitutional system. Presidents of these countries for the most part did not try to “examine the limits” of their constitutional powers like in some other former Eastern bloc countries (e.g. Poland or Hungary) and remained, with occasional natural oscillation depending on the personality of the office holder, within the expected framework of presidential powers and role. Estonia and Latvia have presidents that are being elected indirectly, according to parliamentary system tradition, while Lithuanian Constitution stipulates the direct election of the president, though still remaining among the weaker ones in the semi-presidential category. Among the specifics that these countries exhibit, the regulation of the presidential veto power/suspensive veto stands out as being the especially prominent and unique in comparative perspective when all the Baltic States are being considered.

⁵ Constitutions of Columbia (Art. 167) and Salvador (Art. 137-138) stipulate similar solutions.

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Dr Miroslav Đ. Đorđević

Naučni saradnik, Institut za uporedno pravo, Beograd, Srbija

e-mail: m.djordjevic@iup.rs

PREDSEDNICI BALTIČKIH DRŽAVA – UPOREDNI PREGLED

Sažetak

Estonija, Letonija i Litvanija su tri zemlje koje obuhvataju raznorodna i kreativna ustavna rešenja kada je u pitanju sistem podele vlasti i ustavni inženjering uloge predsednika republike. Deleći istu sovjetsku istoriju, ove suverene države nastavljaju da održavaju visok nivo međusobne saradnje, ali takođe i da razvijaju svoje ustavne sisteme u različitim pravcima. Dok je Litvanija usvojila jedan oblik polupredsedničkog sistema, Estonija i Letonija su se opredelile za parlamentarni. Razlike su posebno izražene kada su u pitanju pojedina predsednička ovlašćenja, npr. ovlašćenje suspenzivnog veta, gde ustavna rešenja ovih zemalja ispoljavaju attribute koji se ne samo značajno međusobno razlikuju već su neki od njih i unikatni posmatrano kroz opštu komparativnu perspektivu, kao i sa teorijskog gledišta. Pojedina od ovih ovlašćenja takođe omogućavaju (ili imaju potencijal da to učine) predsednicima Estonije, a posebno Letonije da ostvare mnogo značajniju ulogu u odnosu na onu koja se od predsednika očekuje u parlamentarnom sistemu. U ovom radu autor analizira ključne elemente predsedničke vlasti u sve tri baltičke države, njihove ustavne osnove i okvire, kao i realnu manifestaciju u političkom životu, posebno ističući *sui generis* ustavna rešenja koja baltičke države po ovim pitanjima ispoljavaju.

Ključne reči: baltičke zemlje, predsednik, predsednička ovlašćenja, ustav, Estonija, Letonija, Litvanija.

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ERRORS OF PUBLIC AUTHORITIES IN PERFORMING THE PUBLIC ADMINISTRATION DUTIES: EVOLUTION OF APPROACHES TOWARDS HUMAN RIGHTS IN THE COURT PRACTICE OF THE REPUBLIC OF LITHUANIA

Abstract

The article points to the problem of a lack of adequate mechanism for correcting errors of state institutions in their performance of public administration functions. It analyses the legal regulation and case law on the above issue. The analysis of court cases identified in the paper shows that for a long time there was a tendency to place on the citizens the burden of correcting the mistakes made by state institutions. In this way, property rights on legally acquired property were restricted or invalidated. This problem was in the Lithuanian context broadly discussed by the international courts. The aim of the article is to present the scale of the problem and the evolution of legal regulation and case law aimed at remedying it.

Keywords: *public administration, Lithuania, human rights, property law, case law, state responsibility.*

1. Introduction

The state, when implementing the responsibilities vested in it by the Constitution, such as ensuring a safe environment, in a broad sense creates control mechanisms that should ensure the safety of persons, the safety of buildings, safe traffic conditions, etc. Understandably, the state implements its functions *via* the relevant institutions, and institutions delegate tasks to employees, to the concrete natural persons who cannot avoid mistakes. The state's governance bodies must have clear and specific mechanisms for correcting such errors and compensating for damages.

The state must be mature and responsible enough to assume responsibility for mistakes made by the public authorities and not to correct errors at the expense of its citizens. In this article, the author will analyse the evolution of the legal regulation and court practice of error correction and compensation for damages in the Republic of Lithuania. The article will analyse the following cases: i) case law on the revocation of a building

* Legal adviser, lecturer; SMK University of Applied Social Sciences, Lithuania, e-mail: Sofia.khatsernova@smk.lt

permit; (ii) case law on the annulment of restitution decisions.¹

In the domestic scientific doctrine, perhaps the only theoretical scientific work directly related to the topic is Dr U. Gailiūnienė's dissertation *Liability for Damage Done to Individuals by the Public Administration in Lithuania* (Gailiūnienė, 2013). Other authors have only fragmentarily examined in their works the issue of correcting state errors in the performance of public administration functions. The problem of state errors committed during the execution of justice and in the restoration of citizens' rights has been studied widely at the theoretical level by prof. Dr R. Valutytė (Valutytė, 2010). The problem of both state duties and mistakes was analysed in the context of criminal procedure law (e.g. Goda, 2021). This article will not address the issue of tort liability of the state and/or legal remedies based on an application for damages by the injured citizen.

This article will mainly use the methods of document analysis, comparative analysis and case analysis, as its purpose is to analyse and compare the change in legal regulation and national case law on the issue at hand. The correction of mistakes made by the Republic of Lithuania has been repeatedly examined in the case law of the European Court of Human Rights (hereinafter: ECtHR). Consequently, the case law of this court will also be the subject of the analysis.

It should be noted that the subject of the article was discussed most extensively in the judicial doctrine of the Court of Justice of the European Union, the ECtHR, and national courts. Hence, the article focuses on the judicial doctrine. It should be also noted that this article, as mentioned, will be focused on property rights guaranteed by Article 23 of the Constitution of the Republic of Lithuania, Article 17 of the Charter of Fundamental Rights of the European Union and Article 1 of Protocol No. 1 to the European Convention on Human Rights. The indicated property rights of citizens will be examined in the context of illegal (erroneous) activities of public administration entities related to the issuance of construction permits and/or the process of privatization of the real estate nationalized during the Soviet occupation.

2. Context of the Problem

Discussions on the inadequate resolution of state errors were widespread, with large enough number of cases against Lithuania before the ECtHR. Many cases concern the annulment of state decisions authorising construction and restitution of property rights, which *de facto* meant compulsory demolition of the real estate or its removal, in some cases even without compensation. Namely, the Supreme Court of the Republic of Lithuania in its 2015 annual report, clearly pointed out to the existing problems related to improperly corrected state errors, to the increase in the number of such cases before the national courts and to the cases which Lithuania lost before the ECtHR. According to Sigita Rudėnaitė, former head of the Civil Cases Division of the Supreme Court of Lithuania, the state's mistakes are an acute problem and it is therefore necessary to "not only recognise

¹ For more information see: Ruling of Constitutional Court of Lithuanian Republic on the restoration of the ownership rights of citizens to land, 1994.

but also correct them properly and learn how to avoid them”. In addition, she pointed out that, *inter alia*, state’s mistakes undermined confidence in the state in international context, referring to the 16 cases pursued against Lithuania before the ECtHR which involved property rights on real estate (see: Press release: Supreme Court of Lithuania talks about dangerous growth trend and state errors, 2016).

On the other hand, the listed negative trends are not the only ones in the analysed area. Sometimes, improper prosecution of a particular state official becomes another negative tendency, where the state categorically refuses to assume responsibility, and adverse consequences of such mistake are corrected at the expense of natural persons (citizens, permanent residents). In such cases, the property right of persons is restricted or persons are even deprived of them, which means that both the principles of legitimate expectations and proportionality are violated, and financial interests of natural persons are harmed. It is considered that in the national law this aspect began to be examined in the case law more widely after the ECtHR adopted several decisions unfavourable to the Republic of Lithuania, such as *Albergas and Arlauskas v. Lithuania*, *Paplauskienė v. Lithuania* and *Digrytė Klibavičienė v. Lithuania*.

3. The Concept of a Public Administration Entity and Its Activities in the Lithuanian Legal Framework and the Case law of Its Courts

The Republic of Lithuania, as a state, implements the functions assigned to it by the Constitution through the state institutions, including the provision of various services to citizens, such as the issuance of construction permits or decisions to restore property rights. In one case, the creation of a new object of real estate is allowed, in another case, property rights that were forcibly taken away from relatives (only in direct lineage²) during the Soviet occupation are returned. In order to implement the property rights, it is necessary to ensure high-quality public services.

In this chapter, the Law on Public Administration of the Republic of Lithuania (hereinafter: “the LPA”) and its regulation of the concept, duties and activities of a public administration entity will be reviewed.

In this context, the terms used in LPA should be first defined. A public administration entity is defined as a public legal entity, a collegial or one-person institution without legal personality, or a natural person with a special status established by law, authorized to perform public administration services through the procedure established by this Law (Art. 2, para. 20). An administrative service is understood as an activity related to the issuance of documents or the provision of information (Art. 2, para. 1). The administrative procedure is understood as the obligatory action performed by a public administration entity under the LPA in examining *inter alia* a complaint about a possible violation of the rights and legitimate interests of a person named in the complaint, caused by actions,

² Article 3.132 part 1 of the Civil Code of the Republic of Lithuania: “There is a direct lineage between the ancestor and the descendants (great-grandparents, grandparents, parents, children, grandchildren, great-grandchildren, etc.)”.

omissions or administrative decisions of a public administration entity (Art. 2, para. 2). An administrative decision, understood as *ad hoc* obligation of a public administration entity regarding the application of the law, expressed in a manner and/or form regulated by legal acts, is binding and addressed to a specific person or an individually defined group of persons (Art. 2, para. 5). Thus, the definitions provided by LPA allow us to understand that the institutions of the Republic of Lithuania issuing documents authorizing the construction of real estate and the institutions deciding on the issue of restoration of real estate ownership rights are to be treated as public administration entities.

Accordingly, the Constitutional Court of the Republic of Lithuania has imperatively clarified in this respect that strict legal requirements for honesty and legality of activities are binding as well on the specified institutions, such as entities of public administration. The court has also ruled that a literal application of legal acts can be formally lawful, but it can be incorrect in constitutional terms. The principle of justice, enshrined in the Constitution of the Republic of Lithuania, coupled with the rule that justice is administered by the courts, implies that the constitutional value is not the adoption of a decision by the court, but the adoption of a just court decision. The constitutional concept of justice presupposes not a formal, nominal justice administered by the court, nor the external appearance of justice administered by the court, but, primarily, such court decisions which are not incorrect in terms of their content; justice administered formally by a court alone is not the justice that is enshrined, protected and defended by the Constitution.³

Thus, the problem in question, which has been a consequence of the formalistic application of the law, was widespread. The development of the doctrine of administrative courts and, ultimately, the development of the constitutional concept of justice in ordinary law, are believed to have contributed to the resolution of this problem, and state errors are no longer being corrected at the expense of citizens' property and non-property interests on such a large scale.

4. Finding a Balance between Public and Private Interest

It should be noted that the essence of the analysed problem is not the fact that public administrations make mistakes which harm the public and/or private interest, but rather the legal measures and their effectiveness in trying to defend mistakes of the state administration bodies at the expense of citizens and the general inconformity of the given mechanism with recognized human rights standards.

In this article, the human rights' guarantees include the human rights catalogue contained in the Constitution of the Republic of Lithuania (1991) and the rights laid down in the European Convention on Human Rights (1950) and its protocols to which the Republic of Lithuania is a signatory.

According to doctrine, the liability of the state against citizens for damage arises from the general constitutional principles inherent to the legal systems of the EU member states:

³ Ruling of Constitutional Court of Lithuanian Republic on the restoration of property rights in state parks and reserves 2007, para. 5.1

“Based on its right to interpret Community law and to develop uniform practice, to ensure the *effet utile* of Community law, the Court of Justice has completed the EC Treaty *lacuna legis* on the protection of individuals and in *Francovich* the doctrine of violations. The ‘sources of inspiration’ of the Court of Justice include the principle of state liability for non-compliance with international obligations, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the victim’s right to fair compensation based on the principle of effective judicial protection. Article 10 of the EC Treaty has been chosen as the legal basis for the intervention in national procedural autonomy” (Tamavičiūtė, 2007).

According to the Constitutional Court of Lithuania, “[t]he constitutional principle of the rule of law is inseparable from the principle of justice and *vice versa*; it follows from the constitutional principle of a state under the rule of law and other provisions of the Constitution that a person who believes that his or her rights or freedoms are violated has the right to an independent and impartial court that would resolve the dispute; if the constitutional rights of a person to apply to a court were not ensured, the universally recognized general principle of law ‘*ubi ius, ibi remedium*’ would be disregarded – if there is any right (freedom), there must be a means of its protection” (Ruling of Constitutional Court of Lithuanian Republic, 2020).

In this context, it should be noted that there is no legal remedy in the Lithuanian legal doctrine regulating the correction of errors of state institutions due to the revoked construction permit or the revoked decision to return the Soviet-era nationalized real estate. Meanwhile, the general rules on the invalidity of a transaction and the protection of the public interest are non-harmonized legal rules which allow the court to *de facto* divest somebody of a property without even reimbursing its value according to the market prices at the time when the decision is passed, or to revoke the building permit and order the mandatory demolishing of the built structure.

In the event of a dispute over state errors affecting the right to property, the problematic aspects are as follows: (i) the annulment of a document authorizing the construction of the real estate, lawfully obtained, together with an order to remove at own expense any buildings which were constructed on the basis of this document, *i.e.* to demolish such buildings; (ii) the forfeiture of restored property rights through the actual deprivation of a real estate, without any compensation, or with a compensation that does not correspond to the market value of a real estate.

In either scenario, in all the cases analysed below: (i) the property rights holders acted *bona fide*: no illegal actions have been identified in the process of restoring the building permit or property rights; (ii) the public authorities cancelled decisions on granting a building permit or a decision on the restoration of property rights.

In order to form an overall picture, it is worth looking at the statistics from 2014 until now, which show that 25 cases have been brought against Lithuania for violation of property rights and/or legitimate expectations in the analysed context. In most of the

ECtHR judgments (17)⁴ it was found that Lithuania had violated the Convention. In 8⁵ cases no infringements were found, and the reasoning was essentially that the holder of the property rights himself was not sufficiently active or that he himself committed some of the allegedly illegal acts found by the public authority.

Despite the first lost cases and flawed practice, the lower Lithuanian courts continued to rule contrary to the ECtHR judgments. It can be assumed that the percentage of cases brought before the ECtHR and the amounts of compensation paid under the decisions of the ECtHR resulted in fewer costs than it would have been the case if the fair compensation for property damage was awarded to the affected individuals.

The errors of the state, in themselves, are an exception to the general principles of public administration and presuppose a violation of legitimate expectations: “The principle of protection of legitimate expectations presupposes the obligation of the state. This principle also implies the protection of acquired rights, *i.e.* persons have the right to reasonably expect that the rights acquired by them by the laws or other legal acts in force, which are not in conflict with the Constitution, will be maintained for a specified time and may be realistically exercised” (Ruling of Constitutional Court of Lithuanian Republic, 2010). Thus, the mere annulment of a building permit or a decision to restore property rights infringes legitimate expectations. Whether such an infringement may be justified in the public interest, the length of time since such an act is justified and how citizens’ rights should be restored or compensated is another issue (Beliūnienė *et al.*, 2015).

According to the settled case law of the ECJ, even though any institution of the European Union which finds that a measure which has recently been adopted is unlawful has the right to revoke it retroactively within a reasonable time, that right may be limited by the need not to impinge on the trust in its legitimacy, or on legitimate expectations (Beliūnienė *et al.*, 2015). The duration of reasonable time can vary considerably. The scholars indicate that the concept of a reasonable time should be clarified in the case law of the Court of Justice in order to ensure legal certainty. For example, in the case law of the ECJ, two and a half months has been deemed as an unreasonable term. When it comes to delays in dealing with agricultural support, concerning the time within which the Commission would decide whether the aid was lawful, the reasonable time was recognized to amount to as much as two years. In the area of social security for officials the deadlines are much shorter in the ECJ case law – in the *De Compte* case, for example, deadlines of almost three months were considered as an unreasonable delay. In this context, it should be noted that the ECtHR has reviewed cases in which irregularities occurred more than five years, in some cases ten years from the adoption of the administrative acts granting the rights. Thus, *de facto* a person lives in a 10-year-old dwelling and then receives a one-day notice stating

⁴ *Albergas, Arlauskas v. Lithuania*, 2014; *Paplauskienė v. Lithuania*, 2014; *Digrytė, Klībavičienė v. Lithuania*, 2014; *Paukštis v. Lithuania*, 2015; *Noreikienė, Noreika v. Lithuania*, 2015; *Tunaitis v. Lithuania*, 2015; *Žilinskienė v. Lithuania*, 2015; *Grigaliūnienė v. Lithuania*, 2016; *Misiukonis v. Lithuania*, 2016; *Grigolovič v. Lithuania*, 2017; *Činga v. Lithuania*, 2017; *Beinarovič v. Lithuania*, 2018; *Geglis v. Lithuania*, 2018; *Truchanovič v. Lithuania*, 2018; *Bykova v. Lithuania*, 2018; *Veromej v. Lithuania*, 2019; *Puišys v. Lithuania*, 2021.

⁵ *Valančienė v. Lithuania*, 2017; *Britaniškina v. Lithuania*, 2018; *Bartkus, Kulikauskas v. Lithuania*, 2018; *Tumeliai v. Lithuania*, 2018; *Palevičiūtė ir Dzidzevičienė v. Lithuania*, 2018; *Kristiana LTD v. Lithuania*, 2018; *Černiak v. Lithuania*, 2018; *Kaminskas v. Lithuania*, 2020.

that the building permit has been revoked and that the dwelling is to be demolished at his or her own expense. The person is then forced to initiate a lawsuit resulting in a process that lasts for many years.

With regards to the “correction” of errors, the case law of the ECtHR emphasizes that, when errors made by public authorities are corrected, it is important to ensure during the restitution process that their correction does not lead to disproportionate new infringements (*Moskal v. Poland*). State errors must be detected and corrected through appropriate legal procedures – the restriction of a person’s right to unimpeded use of property resulting from its deprivation must be enforced under “conditions laid down by law” prohibiting arbitrary action by national authorities, “in the public interest”, and by finding a fair balance between the rights of the owner and the public interest. In other words, public authorities that fail to implement or follow the procedures should not be allowed to benefit from their mistakes or evade their duties. The need to rectify an old “injustice” should not disproportionately restrict a new right acquired by a person in good faith, based on the lawfulness of the authority’s actions (*Lelas v. Croatia*). The required balance will not be established if a person incurs an individual and excessive burden as a result of the correction of state errors. The risk of mistakes made by the state and a mistake itself should not be corrected at the expense of individuals (*Gashi v. Croatia*; *Trgo v. Croatia*).

5. *Status quo* and Regulatory Perspectives

The problematic relationship reviewed to date shows that there is no legal regulation governing the elimination of the consequences of the revocation of a construction permit; however, general non-specialized legal norms apply, and they are in turn individualized by the courts. It must be noted that, in the present case, the national courts have an excessive margin of appreciation, and that the absence of regulation must be regarded as a legislative omission.

As the Constitutional Court has repeatedly held, the constitutional principle of a state under the rule of law is universal; its content is revealed in various provisions of the Constitution; the essence of this principle is the rule of law; the constitutional principle of a state under the rule of law is extremely broad in scope and it includes many different interrelated imperatives; it must be followed in both the creation and implementation of the law. The Constitutional Court has also held that one of the essential elements of the principle of a state under the rule of law entrenched in the Constitution is legal certainty. The imperative of legal certainty presupposes mandatory requirements for legal regulation: they must be clear and coherent, legal norms must be formulated precisely, they must not contain ambiguities (see: Ruling of Constitutional Court of Lithuanian Republic, 2008; Ruling of Constitutional Court of Lithuanian Republic, 2009; Ruling of Constitutional Court of Lithuanian Republic, 2010). Meanwhile, the lack of legal regulation leads to varying solutions and balances between public and private interests.

Following the case law that full compensation and restitution for damage caused by the state should be required only if it does not cause undue harm to the citizen, the

issue of costs has been decided and resolved. Again, the issue of reimbursement of costs was raised following ECtHR finding of an infringement by the non-award of such costs. In the case of *Černius v. Lithuania* in 2020, the ECtHR concluded that by refusing to reimburse individuals for legal costs (irrespective of the amount of such costs) incurred in administrative proceedings in which they challenged fines and won a dispute, Article 6, para. 1 of the Convention was violated. In 2021, this interpretation prompted the Constitutional Court of the Republic of Lithuania to clarify the duty of awarding litigation costs, both in administrative and criminal cases, if it is established that there are no signs of administrative misconduct or of a criminal act being committed. Until this decision of the Constitutional Court, after the state acknowledged its mistakes, the costs of proceedings in the administrative or criminal proceedings (revoked fines, acquittals) were not reimbursed to the person unreasonably persecuted. This decision of the Constitutional Court is to be considered a progressive and self-critical approach of the state as to the mistakes made by the public administration bodies and provides hope for the development of this line of the practice of ordinary courts in areas other than criminal or administrative liability.

6. Conclusion

It is therefore worthwhile outlining the key issues analysed in the paper. From the case law of the ECtHR it clearly stems that absence of specific rules on the abolition of building permits and decisions on the restoration of property rights is incompatible with the property rights guaranteed by Protocol 1 to the ECtHR, and the principle of legitimate expectations.

In the context of the national law of the Republic of Lithuania, the absence of rules that should govern the application of the general principles of the Constitution is considered a legislative omission used by public administration entities in the analysed area and renders administrative decisions incompatible with legitimate expectations and the rule of law.

However, recent decisions of the Supreme Court of the Republic of Lithuania offer hope for the “establishment” of a mechanism for correcting state errors, at least in precedent-setting court practice. This may raise questions about the implementation of the principle of separation of powers, but this issue was not addressed in the case law so far.

It should also be noted that the correction of errors by state institutions, *inter alia*, at the account of business entities, may damage Lithuania’s international reputation and reduce investment in the Lithuanian industry. This is an issue that should be taken into account in moving forward with both in practice and in potential further regulatory interventions.

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Sofia Khatsernova

Pravni savetnik, predavač, SMK univerzitet primenjenih društvenih nauka, Litvanija
e-mail: *Sofia.khatsernova@smk.lt*

**GREŠKE ORGANA JAVNE VLASTI U VRŠENJU OVLAŠĆENJA JAVNE UPRAVE:
EVOLUCIJA PRISTUPA LJUDSKIM PRAVIMA U SUDSKOJ PRAKSI U
REPUBLICI LITVANIJU**

Sažetak

U radu se ukazuje na problem nedostatka odgovarajućeg mehanizma za ispravljanje grešaka državnih organa koje načine u vršenju svojih ovlašćenja iz domena javne uprave. Rad analizira pravni okvir i praksu u vezi sa navedenim pitanjem. Analiza sudskih predmeta identifikovanih u radu pokazuje da je dugo dominantna tendencija bila prebacivanje tereta ispravljanja grešaka koje načine državni organi na građane. Na taj način su imovinska prava na zakonito stečenoj imovini ograničavana ili poništavana. Ovaj problem je u kontekstu Litvanije bio predmet široke rasprave pred međunarodnim sudovima. Cilj ovog rada je da ukaže na razmere ovog problema i da se predstavi evolucija propisa i prakse usmerenih na njegovo rešavanje.

Ključne reči: javna uprava, Litvanija, ljudska prava, imovinska prava, sudska praksa, odgovornost države.

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ADMINISTRATIVE PROCEDURE LAW AND E-SERVICES IN LATVIA

Abstract

The Article provides an insight in the scope of regulation of the Latvian Administrative Procedure Law and the use of e-services and other means of electronic communication in administrative procedure. The scope of regulation of the Latvian Administrative Procedure Law is mainly determined by the definition of an administrative act, which, in turn, is derived from the German administrative law. The adoption and application of the Administrative Procedure Law is generally regarded as very successful example of transformation of the legal system. For the past ten years the government has introduced various e-services and other electronic tools designed to facilitate electronization of administrative procedure. The article outlines basic legal regulation of these tools, as well as gives a short insight towards recent impact of the pandemic of COVID-19 on use of electronic communication between the government and private persons.

Keywords: *administrative procedure, e-services, electronic identification, pandemic.*

1. General Characteristics of Administrative Procedure Law in Latvia

The Administrative Procedure Law (hereinafter: APL) was adopted in 2001 and it came into force in 2004. The APL is designed to regulate procedure of adoption of administrative acts and performance of real acts as well as to provide judicial review thereof. The scope of application of APL is determined by the main legal concept under it – an administrative act. The concept of administrative act is mainly derived from the German Administrative Procedure Law (*Verwaltungsverfahrensgesetz*) and is similar to the German concept of “*der Verwaltungsakt*”. The legal definition of an administrative act is provided in the Article 1, Paragraph 3 of the APL. The definition consists of both positive and negative parts: “An administrative act is a legal act directed externally which is issued by an institution in the field of public law with regard to an individually indicated person or individually indicated persons establishing, altering, determining or terminating specific legal relations or determining an actual situation. The administrative act is also a decision issued by an institution in the cases provided for in the law with regard to an individually

* Dr.iur., Assistant Professor, University of Latvia, Faculty of Law, Department of Constitutional and Administrative Law, Latvia, e-mail: edvins.danovskis@lu.lv

undetermined range of persons who are under specific and identifiable circumstances (general administrative act). The administrative act is also a decision on the establishment, alteration or termination of the legal status of an official or a person specially subordinate to the institution, or the disciplinary punishment of this person, and also any other decision if it significantly restricts the human rights of the official or the person specially subordinate to the institution. Within the meaning of this Paragraph an official is not an employee of the institution with whom employment relationships are to be established in accordance with laws and regulations. The administrative act is not the following:

- 1) a decision or another action of an institution in the field of private law;
- 2) an internal decision of an institution which only affects the institution itself, an institution subordinate to it or a person specially subordinate to it;
- 3) an interim decision (including a procedural decision) within the framework of administrative proceedings, except for the case where it in itself affects significant rights or legal interests of a person or significantly impedes the exercise thereof;
- 4) a political decision of the *Saeima*, the President, the Cabinet or a local government council (a political statement, declaration, invitation, and notification of the election of officials, etc.);
- 5) a court ruling, a decision in criminal proceedings, and also a decision taken in the proceedings of an administrative offence case.

Although the wording of the positive part of the definition is more explicit, the positive definition of an administrative act contains five mandatory elements: 1) externality (i.e., it affects private persons, and not the “inner” organization of the government or individuals working in the government (with the exception of recruitment, dismissal, disciplinary actions or other decisions that significantly affect human rights of public officials)); 2) an institution (any legal person, its department or official) which is empowered with executive functions, including private persons which have been authorized to use public power; 3) the field of public law (as opposite to the field of private law; the difference is whether an institution in a respective case uses public powers (exclusive rights or obligations provided in the legal provisions solely for public entities) or acts as any other private individual could act; 4) individually indicated person or persons (excludes normative acts); 5) creates final legal consequences (Danovskis, 2019, pp. 232-233; Briede, Danovskis, & Kovaļevska, 2021, pp. 96-107).

The negative part of the definition in addition to positive part clearly states which decisions are not administrative acts. The most important decisions included in the negative definition are political decisions (the content of a decision is not ruled by legal provisions, for instance, a decision to elect or dismiss from office a chairman of a municipal council or a chairman of the Parliament), criminal procedural decisions (all decisions adopted in accordance with the Criminal Procedure Law), judgments and decisions of courts and decisions adopted in administrative offence cases (all decisions adopted in accordance with the Law on Administrative Liability).

In addition to administrative acts, the APL also regulates performance of real acts and conclusion of contracts of public law. A real act is a concept similar to administrative act and is based on same elements as administrative act, with the exception that the real act is not a decision, but an action (usually physical actions or inaction, when the legal provisions demanded physical action), and creates actual consequences rather than rights and obligations. Typical instances of real action are use of force by the police to detain a person, or a case when a deviated missile gun destroys a building or a failure by a detention facility to provide food for prisoner.

The APL regulates basic provisions of administrative procedure within authorities, judicial review procedure and execution of administrative acts and court judgments. In general, the Latvian administrative procedure is stable and well developed both in legal provisions and case law, cherishing the principle of rule of law in the relationships between administration and individuals. If 20 years ago such principles as proportionality, prohibition of arbitrariness, fair procedure and rule of law were almost unheard of in Latvian administration, then today adoption and implementation of APL is widely seen as a “success story” (Danovskis, 2019, pp. 234-234).

In addition to the APL, which regulates submissions of individuals when they have subjective rights to an administrative act or real act, the Law on Submissions regulates submissions of private individuals in situations where a private person does not have subjective rights to ask for an action, but rather the submission contains a general complaint, a question or proposal with regard to activities of the government. In this case a person is entitled to receive a reply in a month's time. However, a person is not entitled to receive “a likeable” answer, i.e., no further claims or petitions regarding the answer are available.

The APL and the Law on Submissions are the most important laws regulating procedure of communication between government institutions and private individuals. However, since the time of their adoption the use of electronic devices like smartphones, tablets and laptops as well as advances of software technology and availability of internet have drastically increased. Therefore, as explained below, the electronic communication has gradually been introduced in legal relationships between the government and private individuals.

2. Evolution of e-Services in Administrative Procedure and Other Legal Relationships

The legal framework to facilitate use of internet technologies in communication between the government and private individuals in Latvia has developed gradually and on a step-by-step basis.

The first normative enactment aimed to facilitate e-communication was the Electronic Documents Law, adopted in 2002. The law is intended to grant to electronic documents the same legal status as “paper documents” and provide conditions for acknowledgment of legal force of an electronic document. The law originally was intended to harmonize the Latvian law with the EU law by introducing the Directive 1999/93/EC

of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures. In general, in order to acknowledge the legal status of an electronic document, it should contain a secure electronic signature (Article 3, Paragraph 2). Regarding obligations of the state institutions to accept electronically submitted documents, Article 6, Paragraph 4 provides: "State and local government institutions shall develop internal circulation instructions for electronic documents which comply with this Law and the regulations of the Cabinet referred to in Paragraph two of this Section, as well as the work specifics of the institution, and shall ensure the possibility of natural persons and legal persons to submit and receive State and local government institution documents, their copies, true copies, extracts and duplicates electronically or in another form according to the choice of the person." The law also obliges the State and local government institutions to accept electronic documents from natural persons and legal persons no later than 1 January 2004 (Point 1 of Transitional Provisions). Therefore in the administrative procedure and other communication between the government and private persons the use of electronic documents was legally allowed as early as 2003, when the law came into force. However, the technological solutions had fallen behind the legal regulation and the first electronic document was signed only in 2006 by Prime Minister Aigars Kalvītis (see E-paraksta vesture). During the first ten years the electronic signature was used rarely. In 2012 there were only around 26,000 users of e-signature (Četrkāršojies e-paraksta lietotāju skaits, 2012). However, the use of e-signature has gradually increased and in 2021 the signature has been used 38,000 times daily and at least one fifth of the population above 15 years of age has used the e-signature (Kādas priekšrocības sniedz e-paraksta izmantošana?, 2021).

The concept of e-services, including possibilities to submit a request for an administrative act or perform other procedural actions in administrative procedure, has developed gradually and initially without any uniform legal regulation. In 2015 the Law on Electronic Identification of Natural Persons was adopted. Article 2, Paragraph 1 stated that the purpose of the law, inter alia, is to prescribe requirements for electronic identification in order to ensure a possibility for a natural person to demand or receive the electronic service provided by a public person while performing the assigned functions or tasks thereof and types of electronic identification that are equivalent to on-site verification of the identity of a natural person by presenting a personal identification document. As was explained in the annotation of the law, no uniform legal framework existed that would regulate the already existing means of identification of private persons used in praxis (Likumprojekta "Fizisko personu elektroniskās identifikācijas likums" sākotnējās ietekmes novērtējuma ziņojums (anotācija), 2015). In general, the law was designed to "legalize" the already existing government e-services, using as a tool for authentication internet banks.

Many of e-services were available in the state service portal www.latvija.lv. The site was designed as early as 2006, but its development and popularity increased only gradually. Although there were laws that contained references to the e-services available in the portal, in 2016 amendments to the State Administrative Structure Law were adopted, cementing the status of the portal in Article 100, Paragraph 1 as follows:

“The portal of State administration services is a website which ensures accessibility to State administration services and information related thereto in one place for private individuals and State administration, access to e-services and electronic communication between private individuals and State administration.” As of 2021, the portal offers 123 e-services, for instance, e-services to submit requests for various social security benefits, enterprise registration, several permissions as well as options to make tax payments and receive information from government data bases (Dārziņa, 2021a). Besides e-services available in the portal, there are other government institutions, which offer services in their websites. For instance, the website <https://e.csdd.lv/> of the Road Traffic Safety Directorate offers various e-services, such as change of an owner of a car in the register, tax payments and submissions for various on-site services (technical examination, driving licence exam etc.).

A notable e-service administered by the State Revenue Service is the Electronic Declaration System. It has been designed to submit various tax declarations in electronic form as well as to announce administrative acts of the State Revenue Service. The Law on Taxes and Fees, as well as other laws provide that for some taxpayers (legal persons and physical persons, who perform economic activity) the use of Electronic Declaration System is mandatory and there are no other means to submit information to the State Revenue Service, but through this system. However, in 2019 controversial amendments to the Law on Taxes and Fees were submitted by the Cabinet of Ministers, which intended to make the use of various submissions to the State Revenue Service, including tax declarations, as the only means of submissions for all tax payers. The annotation to the law explained that nearly one fifth of all declarations submitted by natural persons are still submitted in paper form and that processing of such declarations is a financial and time consuming burden (Likumprojekta “Grozījumi likumā ‘Par nodokļiem un nodevām’” sākotnējās ietekmes novērtējuma ziņojums (anotācija), 2019). However, after the Legal Office of the Parliament objected to such proposal, arguing that such regulation would disproportionately limit the rights protected in the Articles 90 and 104 of the Constitution to “know one’s rights” and “petition rights” (Atzinums par likumprojektu “Grozījumi likumā ‘Par nodokļiem un nodevām’”, 2020), the Parliament decided to exclude from the obligation to use the Electronic Declaration System for any submissions natural persons, who are not registered as performers of economic activity. However, with the amendments to the Law on Taxes and Fees of 6 July 2021, all submissions addressed to the State Revenue Service by all other taxpayers are to be submitted only by using the Electronic Declaration System.

The above mentioned proposals regarding mandatory use of electronic systems in administrative procedure had raised a constitutional issue – whether the state can oblige private persons to use electronic forms of communication in legal relationships. At least at the moment the reply from the Latvian legislator is – yes, but limited to legal persons and to natural persons only in instances, when their field of operation inevitably demands use of electronic means of communication. Total electronization at least in the area of tax administration would be disproportionate for natural persons, who for one or another reason prefer submitting documents in paper form.

The above mentioned possibilities to use e-services demand a legally valid expression of will. Most e-services are available if authentication, either using e-signature, internet bank or other means of authentication, has been performed. In general, the function of a signature as a proof of will expressed in paper form is being replaced by “authentication of person” and its will. Indeed, if the identity of a person has been determined by using means of electronic authentication, it is sufficient to acknowledge the respective expression of will to submit legally valid requests to issue administrative acts and perform other legally valid activities. Although instances of fraud might occur, at least in Latvia there are no publicly known instances, when electronic means of authentication have been used malignantly. In this regard, electronic authentication seems to be even more trustworthy than a signed submission in a paper form, when a person, who has signed the document as its author, is rarely verified by other means.

Another tool used to facilitate electronic communications between the government and private persons is the official electronic address. This instrument is regulated in the Law on the Official Electronic Address, adopted in 2016. The official electronic address is an e-service which, similarly as e-mail, grants access to an account of official electronic address. The law provides that all state institutions are obliged to create and use the official electronic address account. The law also provides, that for legal entities registered in the records (for instance, limited liability companies, stock companies, associations, etc.), the official electronic address account shall be activated to 31 December 2022. A legal entity registered in the registers, if it has an activated electronic address account, shall be contacted using electronic means, and an electronic document shall be sent using the official electronic address. Natural persons are entitled to choose whether or not to create electronic address account. But when the account is created, the State institution is bound to send all correspondence in administrative proceedings, including an administrative act, as well as any other correspondence to the official electronic address account. The private person, in turn, is presumed to have received all such correspondence. Therefore, this tool is used to diminish paper correspondence between the government and private persons. However, until 2021 only 13,000 private persons have created an electronic address account. It is thought, that at least for the moment private persons do not feel the need to change the already used communication with government institutions by e-mail or other e-services (Dārziņa, 2021b).

The Latvian tactics to electronization in administrative procedure has been to gradually introduce various legal instruments that facilitate the use of electronic communication between the government and private persons. The legal framework of electronic documents, electronic services, electronic identification and official electronic address has been introduced without any legal hurdles. The legal framework is intended not only for use in administrative proceedings, but in all other e-services and cases of communication between the government and private persons. However, the habits of private persons are not always changed easily. Though, as explained in the next chapter, the perspectives of the use of e-services have been widened during the pandemic of COVID-19.

3. The Impact of the Pandemic of COVID-19 on the Electronization of Administrative Procedure

The pandemic of COVID-19 has facilitated the use of the above-mentioned e-services as well as drawn new perspectives of use of digital technology in communications between the government and private persons.

Direct communication is important in several phases of the administrative proceedings. Article 56 of the APL provides that a person is entitled to submit a request for an administrative act orally. In this case the institution writes down the oral submission and the person signs it. Oral communication is also important when gathering information, hearing opinions and also in administrative court procedure. During the pandemic, there have been adopted various restrictions for availability of services in-person, which significantly reduced access of private persons to government institutions. On 3 April 2020 the Parliament adopted the Law on the Operation of State Authorities during the Emergency Situation Related to the Spread of COVID-19. The adoption of the law was necessary to provide legal solutions for situations where epidemiological restrictions imposed by the government made many government services inoperative, at least in person. For instance, contrary to the right to submit oral submission provided by the APL, the Article 3, Paragraph 1 of the law stated that “a submission for the issuing of an administrative act, [...] or a submission for contesting an administrative act may only be submitted in writing. During the emergency situation an institution may, in specific cases, accept a submission for the issuing of an administrative act via telephone if the institution has other possibilities of identifying the submitter and the request made thereby.” This law was later replaced by the Law on the Management of the Spread of COVID-19 Infection, which additionally provided that court hearings may be organized using a videoconference (Article 10¹). In administrative proceedings this procedure has been used rather frequently and without any substantial legal problems.

Although the use of videoconferences has in no way been prohibited before the pandemic, in practice government institutions did not use this tool to communicate with private persons. However, the widespread use of various video call software have inspired ideas to use this technology more often and create a digital platform that could ensure all functionality similar to in-person communication, including electronic identification, video calls, and submission of documents. Such a concept has been elaborated in legal science in a state financed project (see Danovskis, 2021). A pilot project testing the use of video calls in servicing clients of the State Social Security Agency as well as other state service institutions has been launched in mid-2021, thus providing new opportunities for digital communication in administrative procedure (VARAM uzsāk pilotprojektu valsts pakalpojumu sniegšanai jaunā veidā, 2021). However, the overall impact of the pandemic towards expansion of e-services is yet to be evaluated.

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Dr Edvins Danovskis

Docent, Univerzitet u Letoniji, Pravni fakultet, Katedra za ustavno i upravno pravo, Letonija
e-mail: edvins.danovskis@lu.lv

ZAKON O UPRAVNOM POSTUPKU I E-USLUGE U LETONIJI

Sažetak

U radu se pruža uvid u domašaj odredaba letonskog Zakona o upravnom postupku i odredaba o upotrebi e-usluga i drugih sredstava elektronskih komunikacija u upravnom postupku. Domen primene odredaba letonskog Zakona o upravnom postupku je uglavnom određen definicijom upravnog akta koja potiče iz nemačkog upravnog prava. Donošenje i primena Zakona o upravnom postupku se načelno smatraju veoma uspešnim primerom

transformacije pravnog sistema. U toku poslednjih deset godina, država je uvela različite e-usluge i druge elektronske alate namenjene olakšavanju elektronizacije upravnog postupka. U radu se prikazuju osnovni pravni propisi kojima se regulišu ovi alati i pruža kratak uvid kakav je uticaj pandemija kovida 19 imala na upotrebu elektronskih komunikacija između subjekata privatnog i javnog prava.

Ključne reči: upravni postupak, e-usluge, elektronska identifikacija, pandemija.

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CRIMINAL LIABILITY OF LEGAL ENTITIES IN LATVIA – GENERAL INSIGHT, PECULIARITIES AND TOPICALITIES

Abstract

The path that the Latvian normative regulation in criminal law and the Latvian criminal law doctrine took to arrive at the possibility of turning against legal entities by criminal law measures was neither fast nor simple. The initial position was that regulation like this would be incompatible with the basic principles of Latvian criminal law since, historically, psychological understanding of guilt has been characteristic in the Latvian criminal law, guilt is identified with a person's mental attitude towards the criminal offence, and guilt also is one of the grounds for criminal liability. It was not clear how this understanding of guilt could be compatible with punishing such "legal fiction" as a legal person in the framework of criminal law. Ways, in which Latvia could adjust its legal regulation to various international normative documents that Latvia had acceded to, at the same time leaving the dominant basic institutions of the Latvian criminal law theory unaffected, were sought rather reluctantly. Discussions that lasted for years resulted in the inclusion into the Criminal Law coercive measures, existing outside the system of criminal penalties, applicable to legal persons, likewise, several criteria were defined as the grounds for applying these coercive measures to legal persons, the central of which was a criminal offence, committed by a natural person who was connected to the legal person, in the interests of the legal person or as the result of insufficient control by this legal person. Accordingly, criminal procedural regulation was created, which to a large extent equalled a legal person to an accused natural person in criminal proceedings. Although the criminal law and criminal law regulation, which provides for the possibility to apply criminal law coercive measures to legal persons in the framework of criminal proceedings has existed in Latvia for already 16 years, these criminal law instruments have started taking their place in the practice of applying law only in recent years, simultaneously also revealing deficiencies in the legal regulation, already now providing sufficient material for analysis to be used for improving these legal norms.

Keywords: *criminal law, criminal procedure, liability of legal entities.*

* Dr. iur., Professor, Dean of the Faculty of Law, University of Latvia, Latvia, e-mail: strada@lu.lv

** Dr. iur., lecturer, Faculty of Law, University of Latvia, Chairman of the Latvian Council of Sworn Advocates, Latvia, e-mail: janis.rozenbergs@advokatura.lv

1. Introduction – On the Genesis of Legal Regulation

Since regaining its independence in 1990, when Latvia set on its course to join the European Union, NATO, and other international organisations, harmonisation of the Latvian national law with various international legal acts and requirements set by various international organisations has been one of the priorities for the Latvian legislator. Respecting the strict or less strict requirements of various international normative acts, amendments have affected both the area of criminal law and criminal procedure, as well as the related normative acts. In this respect, already since the end of the 1990s, a discussion has been ongoing among the Latvian experts and scholars of criminal law regarding the need and the possibility of expanding the circle of subjects of criminal liability, including in it also legal entities.

Basically, the introduction of criminal liability of legal entities in Latvia was not linked to any practical problems in applying law, the majority of legal community did not see any practical need to add the institution of legal person's liability to the Criminal Law. At that time, the discussion regarding legal persons' liability in criminal law was rather linked to meeting the international commitments undertaken by Latvia, harmonising the Latvian Criminal Law with such international legal acts as the UN Convention against Transnational Organised Crime (UNODC, 2000), the Council of Europe Criminal Law Convention on Corruption (CETS, 2000), the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CETS, 1990), the Convention on the Protection of the European Communities' Financial Interests (PIF Convention) (1995), the Resolution of the Council of 28 May 1999 on increasing protection by penal sanctions against counterfeiting in connection with the introduction of the euro, the Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, as well as Recommendations of the Council of Europe Financial Action Task Force (FATF) (2012).

Search for the possible solutions took several years. On the first occasion, at the beginning of the 2000s, the idea of legal persons' criminal liability did not go beyond discussions at the Ministry of Justice because it did not gain support in the legal community. At the second attempt, the Cabinet returned the draft law to the Ministry of Justice. The draft law on establishing criminal liability of legal entities was supported by the Cabinet's decision only on 8 March 2004 (Krastiņš, 2004, p. 9). This draft law envisaged making legal persons directly criminally liable in the cases envisaged in the Special Part of the Criminal Law. In the second reading in the *Saeima* [the Parliament] (on 11 November 2004) this draft law was radically transformed, providing that coercive measures instead of criminal penalties could be applied to legal persons for all criminal offences provided for in the Special Part of the Criminal Law if these had been committed in the interests of the legal person. These provisions were formulated like this thanks to the conceptual variant for the solution of the problem, offered by Dr. habil. iur. U. Krastiņš, Head of the Criminal Law Department of the Faculty of Law, the University of Latvia. I.e., the discussions that had lasted several years on whether a legal person can be made criminally liable had ended

with a clear conclusion that a legal person did not and could not have a subjective attitude towards the committed criminal offence, thus, in such a case, guilt could not be spoken of (Gratkovska, 2005, p. 5). And since the psychological understanding of guilt has become enshrined in the Latvian criminal law and guilt is part of the grounds for applying criminal liability and criminal penalty, a conclusion was made that a legal person as an independent subject of criminal liability would not fit into the Latvian system of criminal law. The approach recognised as acceptable at the same time was that, within the framework of criminal proceedings, a legal entity could be subjected to coercive measures, which were not criminal penalties and did not belong to the system of sentences. It seems that all those, who once have been interested in this problem and were engaged in discussions, are satisfied with the solution chosen in Latvia for impacting legal entities in the framework of criminal law. I.e., on the one hand, Latvia has honoured its international commitments, envisaging the possibility for our State to create adverse consequences for legal entities also in the framework of criminal law. On the other hand, several basic institutions that are essential for the Latvian criminal law have been kept intact, such as the subject of criminal liability, guilt and the total constitutive elements of a criminal offence. This “compromise” solution is based on the finding that, within the framework of criminal law, apart from applying a criminal penalty, it is possible to apply also other coercive measures, which should not be regarded as a criminal sentence.

No substantial amendments were made to this draft law during the third reading in the *Saeima* (on 5 May 2005), and these amendments to the Criminal Law were promulgated on 25 May 2005 and entered into force on 1 October 2005.

At this point, the possibility to bring proceedings against a legal entity by applying coercive measures to them has existed for sixteen years already. It could be considered as being a sufficiently long period, allowing to assess the practical need, applicability and workability of these legal provisions. During the first five years after these provisions entered into force, there were almost no criminal proceedings in Latvia, in the framework of which these norms had been applied, apparently, officials at the investigative institutions and the prosecution office lacked understanding of the application of these forms. The first few proceedings regarding the application of coercive measures to legal entities were initiated only in 2011-2012.

The regulation of both the criminal law and criminal procedure law pertaining to the proceedings on the application of coercive measures to legal entities could be assessed as initially incomplete. In 2012 and 2013, the existing legal regulation was assessed at the Ministry of Justice, leading to the conclusion that this regulation was ineffective and was not applied in practice. As the result, the next amendments to the Criminal Law were drafted, correcting and specifying the provisions regarding the coercive measures applicable to legal persons. Pronouncedly incomplete in the initial version, improved in 2013 and 2016, and yet, still problematic – this is how the Latvian criminal procedural legal model for the procedure of applying coercive measures to a legal entity could be described.

It can be noted that, over time, a trend of an increasing number of such criminal proceedings can be observed. Thus, in 2017, 8 criminal proceedings were initiated against legal entities, 14 in 2018, 32 in 2019, and 38 in 2020 (LRIMIC, 2020).

2. The Currently Valid Regulation

Currently, Section 12 of the Criminal Law includes the general regulation (liability of a natural person in the case of a legal person), which provides that a natural person who has committed a criminal offence acting in the interests of a legal person governed by private law, for the benefit of the person or as a result of insufficient supervision or control thereof is to be held criminally liable, but the coercive measures provided for in this Law may be applied to the legal person.

Section 70¹ of the Criminal Law, in turn, defines the grounds for applying coercive measures to a legal person, stating that for the criminal offences provided for in the Special Part of this Law, a coercive measure may be applied to a legal person governed by private law, including a State or local government capital company, as well as a partnership, if a natural person has committed the offence in the interests of the legal person, for the benefit of the person or as a result of insufficient supervision or control, acting individually or as member of the collegial authority of the relevant legal person:

- 1) on the basis of the right to represent the legal person or act on the behalf thereof;
- 2) on the basis of the right to take a decision on behalf of the legal person;
- 3) in implementing control within the scope of the legal person.

Thus, currently, the principle that a legal person is not an independent subject of criminal liability has been enshrined in the Latvian criminal law, a legal person's liability is subordinated to and is derived from a criminal offence committed by a natural person.

At present, four coercive measures applicable to legal entities have been defined in the Criminal Law – liquidation (compulsory termination of activities, all property of the legal person being alienated in the ownership of the State), restriction of rights (the deprivation of specific rights or permits or the determination of such prohibition which prevents a legal person from exercising certain rights, receive State support or assistance, participate in a State or local government procurement procedure, to perform a specific type of activity for a period of one year and up to ten years), confiscation of property (confiscation of property is the compulsory alienation of the property owned by a legal person to the State ownership without compensation), and recovery of money (depending on the severity of the criminal offence, amounting to from 5 to 100,000 prescribed minimum monthly wages, which, in 2021, constitute the amount from EUR 2,500 to 50 million EUR).

The criminal procedural regulation allows establishing that the process of applying coercive measures is characterised by the following important features:

- 1) it is usually initiated in the framework of criminal proceedings brought against a particular natural person;
- 2) may be initiated during the pre-trial proceedings;
- 3) is initiated by a reasoned decision by the official in charge of the proceedings;
- 4) is initiated against a particular legal person.

When criminal proceedings have been initiated with respect to the fact of a criminal offence, and if, within the framework of these criminal proceedings, substantive law grounds for applying coercive measures to a legal person are found, then the investigator or prosecutor during the pre-trial proceedings may adopt a decision to

initiate proceedings also against a legal person within the framework of the existing criminal proceedings. Basically, this criminal procedural arrangement is determined by the theoretical position, prevailing in the Latvian criminal law, that a legal person's liability is subordinate in its nature and follows from the particular criminal offence committed by a particular natural person, which simultaneously comprises the substantive law grounds, described above, for applying a coercive measure to a legal person. Thus, in regular circumstances in court, within the framework of one criminal proceeding, the issue of the existence of the accused natural person's guilt and applying a criminal sanction to them as well as the issue of applying a coercive measure to a legal person would be decided on simultaneously.

Paras. 3 and 3¹ of Section 439 of the Criminal Procedure Law, however, provide for some exceptions when proceedings against a legal person may exist in isolation from the criminal proceedings against a natural person. This norm envisages situations, where there are objective obstacles to conducting or continuing criminal proceedings against a natural person and the proceedings against a natural person are terminated on non-exonerating grounds.

And yet, also circumstances that prevent from clarifying or holding liable a particular natural person are envisaged among the grounds for conducting proceedings against a legal person outside the criminal proceedings against a natural person. This reference allows posing the question – are criminal proceedings against a legal person and application of coercive measures to it actually possible if a natural person, who has committed the criminal offence, has not been identified.

It is likely that in the absolute majority of cases the answer to this question would be negative. It is based on the conclusion that the grounds for applying the coercive measures cannot be even established without identifying the person who has committed the particular criminal offence. This should be linked to the opinion enshrined in the substantive criminal law provisions, pursuant to which, in order for the required grounds for applying coercive measures to exist, the “connection” between the natural person, who has committed the criminal offence, to the legal person (acted on the basis of the right to represent the legal person, act on the behalf thereof, to take a decision on behalf of the legal person or to implement control on its behalf over the legal person) and the purpose of committing the criminal offence (in the interests of or on behalf of the legal person) or circumstances – as the result of insufficient supervision or control, must be mandatorily identified. At the same time, one cannot deny that an exception to this strict requirement could be possible. I.e., if the grounds for applying coercive measures can be established without identifying a particular person. This would be possible only when, although a particular person is not clarified, it is established beyond reasonable doubt that such a person had existed and, while being in a certain way connected to the legal person, actually acted in the name of, on behalf of the legal person, or that a criminal offence had been committed as the result of insufficient control or supervision. In the Latvian case law, such cases are usually linked to violations of copyright and neighbouring rights, as well as tax evasion.

It must be noted that, as regards the scope of criminal procedural rights, a legal entity to which coercive measures are applied is equalled to an accused natural person; a

legal person also is viewed as a person with the right to defence. The limits of the criminal law accusation brought against a legal person during the pre-trial proceedings are set in the decision adopted by the official in charge of the proceedings (an investigator or a prosecutor) on initiating proceedings against a legal person. Actually, requirements set for the content of this decision and the scope of information to be included therein, comply with the requirements set for the charges brought against a natural person in criminal proceedings. It follows from this, in turn, that in cases, when the charges brought against the accused are changed due to newly established circumstances, the decision adopted with respect to the legal person should also be changed accordingly.

Also, as regards the basic principles of criminal procedure, it should be recognised that, exactly as in the proceedings against a natural person, also with respect to a legal entity all basic principles of criminal procedure, to the extent these can be applicable to it, must be respected. Assumably, the application of such principles as the language of criminal proceedings, the right to have proceedings completed within a reasonable term, the right to have one's case adjudicated by a court, etc. to a legal person is not doubted. At the same time, undeniably, there are grounds for a discussion as to how far such principles that until now have been to a larger extent associated with a natural person are applicable to a legal person, e.g., the presumption of innocence or *ne bis in idem*. It is clear that these two subjects differ as to their nature; therefore, objectively, it would be impossible to grant to them exactly the same rights. Admittedly, these issues are far from simple and no uniform answer can be provided. This matter has attracted attention also on a larger scale. To mention just a few examples: in 2014, the fundamental study "Regulating Corporate Criminal Liability" (Brodowski *et al.*, 2014) was published, in which these issues have been highlighted as being topical, important, problematic and, currently, unresolved both in the article by D. Brodowski, representing the German legal school, in his article on the minimum procedural rights that should be applicable to legal persons (Brodowski, 2014, pp. 211-226) and by Neira Pena, representing the Spanish academic circles, in her article dedicated to topical aspects of corporate responsibility (Neira Pena, 2014, pp. 197-210). This circumstance has also been focused on the level of the EU law-making. Thus, for example, the Meijers Committee, in its comments on the draft Directive on the presumption of innocence and the right to be present at trial at the end of 2014 has noted, *inter alia*, that the guarantees included in this Directive should be applicable also to a legal person, insofar it is possible in connection with its nature (Meijers Committee, 2014). One must agree to Brodowski, who notes that the level of procedural guarantees for legal persons "first of all is a matter of criminal policy. However, there are limits to it, determined by constitutional and human rights, which protect also legal persons" (Brodowski, 2014, p. 211). At present, the Latvian legislator, intentionally or unintentionally, has chosen, within the process of applying coercive measures, to equal, in terms of the scope and content of rights, the legal person with the accused, thus applying to it a comparatively high level of procedural guarantees. Although this does not exclude problems as such either (e.g., defining those subjects who have the right to refuse to give testimonies, see below in this article); however, this clearly shows that Latvia has declared a high level of protection for a legal person.

Continuing to explore the issue of applying the basic principles of criminal proceedings to the proceedings against legal entities, the issue of the mandatory nature of criminal proceedings that is essential and needs to be resolved precisely can be singled out as one of the basic principles of criminal proceedings. The mandatory nature of criminal proceedings as one of the basic principles of criminal proceedings has been enshrined in Section 6 of the Latvian Criminal Procedure Law, which provides that the official who is authorised to conduct criminal proceedings has an obligation, within their competence, to conduct criminal proceedings in each case where the reason and grounds for initiating criminal proceedings have become known.

This approach raises the question whether the application of coercive measures to legal persons is mandatory. One must agree that “the issue, whether these proceedings can be called criminal proceedings, is open for discussions”, as well as with the finding “that it seems peculiar that proceedings, which are not criminal proceedings, are regulated in the Criminal Procedure Law” (Baumanis, 2012). It can be assumed that also the process of applying coercive measures to legal entities is to be viewed as criminal proceedings, which, consequently, leads to the conclusion that also the mandatory nature of criminal proceedings applies to it. This is indirectly confirmed by the reference included in Section 439(1) of the Criminal Procedure Law, that if it has been ascertained during the course of criminal proceedings that, most likely, there are grounds for the application of a coercive measure, then the person in charge of the proceedings must take a reasoned decision that proceedings are initiated for the application of a coercive measure to a legal person.

The formulation of this norm suggests that the official in charge of the proceedings, upon identifying grounds for applying coercive measures to a legal person, has not been granted the right to decide whether to initiate proceedings against a legal person or not but a mandatory model of action has been established – initiation of proceedings.

3. The Prospects of Development for the Normative Regulation

Regarding the effectiveness of proceedings for applying coercive measures to legal persons, it is usually linked to the effectiveness of the security measures applied during the pre-trial proceedings. Of course, this thesis is not applicable to all situations. There may be cases, where the property of a legal person is insignificant already at the beginning of the proceedings or is non-existent, in such cases, most probably, the legal person will terminate its existence faster than the proceedings against it develop. Likewise, cases are possible where proceedings are conducted against large companies, to which these proceedings and the possible coercive measure causes adverse financial consequences, but these are not so serious as to make the company conceal or alienate its property.

In accordance with the current legal regulation, if proceedings regarding application of coercive measures to a legal entity have been initiated, its property may be seized to ensure the application of the eventual coercive measure (Section 361(2) of the Criminal Procedure Law). At present, the Criminal Procedure Law does not envisage the application of any other restrictions during the proceedings conducted against a legal person.

The Ministry of Justice views this regulation as insufficiently effective, thus, a draft law on the next amendments to the Criminal Procedure Law is being prepared (LRTM, 2021). The Ministry of Justice, having analysed the practice of applying the norms and consulting with the investigative institutions and prosecution office, has established that not always seizing the property ensures that the aim of the proceedings conducted against a legal person is reached. Practitioners have indicated that representatives of legal entities are counteracting investigation, avoid providing information, etc. Practitioners also indicate as one of the risks “targeted raiding attacks” on legal persons aimed at overtaking the company’s management, replacing the company’s council and board, thus gaining control over the company’s assets, encumbering or alienating them. Likewise, natural persons can, on behalf of a legal person, with the aim of avoiding the enforcement of the applied coercive measure, transfer the company’s assets to another legal person or liquidate the legal person, or register changes in the registers maintained by the Enterprise Register of Latvia, as the result of which the aims of criminal proceedings cannot be reached.

To prevent such situations, draft amendments to the Criminal Procedure Law have been prepared, envisaging to establish three types of security measures: 1) prohibition of certain activities, 2) prohibition to introduce changes into the registers maintained by the Enterprise Register without the permission of the official in charge of proceedings, 3) prohibition to transfer the totality of assets of the legal person.

The prohibition of certain activities is the restriction, imposed by a decision of the official in charge of proceedings, to engage temporarily in certain commercial activities or other types of activities if the criminal offence is linked to the particular activity. It is envisaged to apply this security measure in cases when it must be ensured that the criminal offence is not continued, as well as in cases when significant public interests are at risk. For example, if the actions of a legal person cause substantial harm to the environment, with respect to which criminal proceedings have been initiated, and discontinuation of such actions needs to be ensured.

The prohibition to introduce changes into the registers maintained by the Enterprise Register without the permission of the official in charge of proceedings means that an entry, established by the decision of the official in charge of the proceedings, is made, prohibiting the registration in the registers maintained by the Enterprise Register reorganisation, liquidation of the legal person, change of members or shareholders or registration of a commercial pledge. If, after this entry has been made in the Enterprise Register, an application is received requesting to register changes that are prohibited by the registered security measure, then the requested changes will be registered only after the permission by the official in charge of the proceedings is received.

The prohibition to transfer the totality of assets owned by the legal person is a restriction, established by the official in charge of the proceedings, to take such actions without the permission of the official in charge of proceedings. This security measure is applicable to ensure that the legal entity does not transfer in civil law procedure the property owned by the company (tangible and intangible) to another person, as the result of which it would be impossible to reach the aim of the criminal proceedings.

The intention is that the official in charge of legal proceedings regarding the application of coercive measures to a legal person will be able to apply these in the case where one or several of the grounds set it – counteractions are taken to prevent reaching the aim of criminal proceedings or the statutory procedural duties are not fulfilled, as well as in cases where the official in charge of proceedings has grounds to assume that the course of criminal proceedings will be hindered or that the natural person will commit a new criminal offence in the interests of this legal person, on behalf of this person or as the result of insufficient supervision or control by it.

4. Concluding Remarks

In conclusion, it can be recognised that the criminal law and criminal procedure law that allows, within the framework of criminal law, to bring proceedings against legal persons is still in the stage of development in Latvia. At the time when the institution the liability of the legal person was introduced in the Latvian criminal law, scepticism prevailed and the dominant attitude in the legal community was that these amendments to the law were needed only to align the national legal acts with the international legal acts binding upon Latvia, not to combat criminal activities effectively; however, during the last decade, the mood has significantly changed. The coercive measures applicable to legal persons already are seen as an effective or, at least, potentially effective measure for combatting and preventing crime, therefore, also law enforcement institutions have engaged in more active communication regarding problems in the application of this legal institution with the representatives of the Ministry of Justice and the legislator, and also the Ministry of Justice and the legislative power have undertaken serious improvements of the legal provisions regulating this issue to achieve as effective as possible application of these norms. This path is never fast, and the outcomes of work can be assessed only after many years have passed; however, the current progress allows believing that this process to improve the law has not been wasted.

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Dr Kristīne Strada-Rozenberga

Profesor, dekan Pravnog fakulteta Univerziteta u Letoniji, Letonija
e-mail: *strada@lu.lv*

Dr Jānis Rozenbergs

Predavač, Pravni fakultet Univerziteta u Letoniji, Letonija;
predsednik Letonskog saveta advokata, Letonija
e-mail: *janis.rozenbergs@advokatura.lv*

**KRIVIČNA ODGOVORNOST PRAVNIH LICA U LETONIJI – NAČELNI UVIDI,
OSOBNOSTI I AKTUELNOSTI**

Sažetak

Put koji su prošli letonsko normativno regulisanje i letonska krivičnopravna doktrina kako bi došli do mogućnosti primene krivičnopravnih mera protiv pravnih lica nije bio ni brz ni jednostavan. Početno stanovište je bilo da ovakva mogućnost ne bi bila u skladu sa osnovnim načelima krivičnog prava Letonije budući da, istorijski gledano, psihološko razumevanje krivice predstavlja karakteristiku letonskog prava, te se krivica opredeljuje kao psihološki stav nekog lica prema krivičnom delu, a krivica je takođe jedan od elemenata krivične odgovornosti. Stoga nije bilo jasno kako bi ovakvo određenje krivice bilo u skladu sa kažnjavanjem jedne „pravne fikcije” kao što je pravno lice u krivičnopravnom kontekstu. Način na koji je Letonija mogla da prilagodi svoje propise različitim međunarodnim normativnim dokumentima kojima je pristupila, a da istovremeno ne utiče na dominantne osnovne institute svog krivičnog prava, tražen je prilično nevoljno. Dugogodišnje diskusije dovele su do toga da su u krivično pravo uvedene prinudne mere, koje postoje izvan sistema krivičnih sankcija, a koje se mogu izreći u odnosu na pravna lica. Shodno tome, definisani su i kriterijumi za primenu tih mera na pravna lica, od kojih se kao ključni kriterijum izdvaja izvršenje krivičnog dela od strane fizičkog lica povezanog sa pravnim licem, a koje je u interesu pravnog lica ili koje je posledica nedovoljne kontrole od strane pravnog lica. Posledično, razvijene su i odgovarajuće procesne norme, kojima se pravna lica u značajnoj meri izjednačavaju sa optuženim fizičkim licima u krivičnom postupku. Iako krivičnopravni propisi kojima se omogućava primena krivičnopravnih prinudnih mera u odnosu na pravna lica postoji u Letoniji već šesnaest godina, praksa primene ovih krivičnopravnih instrumenata počela je da se razvija tek u poslednjih nekoliko godina. To je za posledicu imalo i identifikovanje određenih nedostataka u normiranju, te se već sada može pristupiti analizi koja bi poslužila za unapređenje pravnog okvira.

Ključne reči: krivično pravo, krivično procesno pravo, odgovornost pravnih lica.

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SPECIAL INVESTIGATIVE ACTIONS IN BALTIC COUNTRIES

Abstract

The authors in this paper deal with special investigative actions in Baltic countries. Special investigative measures today represent one of the most important measures in the fight against serious criminal offences, but its improper use endangers fundamental human rights, especially the right to privacy and the right to a fair trial. The article is divided into three main parts. After the introductory remarks, the authors elaborate the Lithuanian criminal procedure legislation, which influenced development of the European Court of Human Rights's jurisprudence in the field of the undercover investigator. Latvian solutions are explained in the next part and its main characteristic are numerous special investigative measures. Finally, the authors explain Estonian legislation. The authors specifically consider and analyse the positions of the European Court of Human Rights through judgments rendered in this field. A wide range of special investigative actions indicates their diversity, but mostly the solutions of all three legal frameworks are in line with the standards of the European Court of Human Rights.

Keywords: *special investigative actions, right to privacy, right to a fair trial, Baltic countries, incitement.*

1. Special Investigative Measures in the Light of the Case Law of the European Court of Human Rights – Introductory Remarks

Special investigative measures today represent one of the most important measures in the fight against serious criminal offences. Almost every country prescribes some form of these investigative measures. The Baltic countries are no exception. However, these states (Lithuania, Latvia and Estonia) have one common characteristic, and that is that in addition to the codes of criminal procedures, this matter is regulated by certain legal texts dedicated exclusively to special evidentiary actions. The improper use of special investigative measures endangers fundamental human rights. For these considerations, particularly important are the right to privacy and the right to a fair trial.

* PhD, Associate Professor, Faculty of Law, University of Kragujevac, Kragujevac, Serbia, e-mail: vturanjanin@jura.kg.ac.rs

** LLM, Trainee, Kragujevac, Serbia, e-mail: stanisavljevicjelena06@gmail.com

The European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR) in Article 8 prescribes four aspects of the right to respect for private and family life: the right to private life, right to family life, right to home, and right to correspondence. As stated in the second paragraph of this article, no public authority may interfere with the exercise of this right unless it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or economic well-being, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of others' rights and freedoms. There are many aspects of Article 8, so relating case-law is very comprehensive (de Hert, 2005, p. 73). Interception of communications is a type of invasion of the privacy of correspondence, which is guaranteed under the Article 8 of the ECHR. In the well-known case *Klass and Others v. Germany*, the European Court of Human Rights (hereinafter: ECtHR) stressed that telephone conversations are protected by the principles of "private life" and "correspondence" as defined by Article 8. It was repeated in *Malone v. The United Kingdom* and countless other decisions (Turjanin, 2022).

Another, for these considerations, important article, is Article 6, which, in the criminal limb, applies to persons subjected to a criminal charge (Toney, 2002, p. 434). Article 6 consists of three paragraphs: the first of these establishes a set of broad rules that apply to the two primary types of trials in modern judicial systems: civil and administrative trials and criminal trials. Furthermore, the right to a "fair and public hearing within a reasonable time before an independent and impartial tribunal constituted by law" is enshrined in paragraph 1, while second and third provision of Article 6 solely apply to criminal proceedings: the presumption of innocence is acknowledged in paragraph 2, while in paragraph 3 a list of minimum guarantees for criminal trials is provided (Schabas, 2015, pp. 270-271).

As the ECtHR stated in *Ibrahim* judgment, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case. In each case, the ECtHR's primary concern is to evaluate the overall fairness of the criminal proceedings. Compliance with the requirements of a fair trial must be assessed in each case in light of the whole progress of the proceedings, rather than on the basis of a single feature or incident (*Ibrahim and Others v. the United Kingdom*, paras. 250-251). However, the application of special investigative measures may endanger aspects of Article 6 of the ECHR (Pajčić & Valković, 2012, p. 756; Schabas, 2015, p. 320). However, the use of special investigative methods cannot in itself infringe the right to a fair trial. The national law regulates the admissibility of evidence, so, the national courts have to assess the evidence before them (Turjanin, 2020). The ECtHR, however, must ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (Turjanin, 2022; see also Čvorović, 2016, pp. 43-53).

In this paper, it will be dealt with the criminal procedure legislation of the Baltic countries pertaining to special investigative actions, starting with the Lithuanian one, which had a significant impact on the development of the jurisprudence of the ECtHR. The relevant ECtHR jurisprudence applicable to special investigative actions in those three countries will be also examined.

2. Special Investigative Actions in Lithuania

2.1. General Remarks and ECtHR's Position

In Lithuania, the country of origin of fictional Hannibal Lecter, the Law on Operational Activities (2002) (hereinafter: LOA) regulates the matter of operational activities. Through this legal text among other things, principles and tasks of operational activities are regulated, as well as rights and duties of the bodies that perform them, participation in operational activities, the use of collected information, funding and control of these activities, and scrutiny over them (Article 1 of the LOA). The term *operational activities* includes the overt and covert intelligence activities. These activities are performed by entities of operational activities, while the procedure is laid down by the LOA. The LOA also defines targets of operational activities (Article 3 of the LOA).

According to Article 6 of the LOA, operational activities shall be performed without violation of rights and freedoms of an individual and citizens. Particularly important is that provoking a person into committing criminal offence is prohibited. This is a provision that exists almost in every criminal procedure law, and under this legal text the provocation is pressure as well as active incitement or instigation to commit a criminal offence. Under the provocation, the person has no freedom of choice and it results in committing or attempting to commit a criminal offence in a situation in which this was not a plan. This is one of the key provisions for special investigative actions, and, particularly, for an undercover investigator.

The ECtHR in a few cases against Lithuania dealt with this issue.¹ The ECtHR in *Ramanauskas v. Lithuania* defines entrapment as an action that is opposed to a legitimate undercover special operation. This is a situation in which the involved officers do not essentially passively investigate a potential criminal activity. In fact, they exert an influence to a person to incite him to commit a criminal offence. Without incitement this person would not have committed this offence, but under the incitement they have a possibility to establish a criminal offence and provide evidence for further prosecution. It is not of importance if they are members of the police or security agency or persons acting on their instructions (*Ramanauskas v. Lithuania*, para. 55; Bronitt & Roche, 2000, p. 85).² In this sphere Article 6 of the ECHR and the requirement for a fair trial (Turanjanin, 2021, pp. 73-87) are extremely important. The admissibility of such evidence does not depend on the nature of the criminal offences, but numerous and various elements have a role in its determination (Deprez, 2017, p. 513). The right to a fair trial demands a fair and suitable justice administration (Floinn, 2017, pp. 104-105).

¹ Lithuania developed its criminal procedure law under ECtHR influence. One of the most famous cases is *Drelingas v. Lithuania*. See more in: Minervini, 2020.

² This case concerned typical corruption matters with undercover elements (see more in Potulski, 2011, p. 613; Constantinou, 2017, p. 489; Keane & McKeown, 2012, p. 71; Easton, 2014, p. 102; Meese, 2017, p. 307; Glas, 2018, p. 58; Skorupka, 2021, p. 112). Particularly important is the fact that the burden of proof in a case based on the argument that the applicant was incited to commit the crime must be on prosecution. See more in Viebig, 2016, pp. 249-250.

The important issue is when an investigation is conducted in an “essentially passive” manner. The ECtHR in every case has to examine the reasons subjacent the covert operation as well as the conduct of the authorities carrying it out. There has to be objective suspicion that the suspected/accused person is entangled in criminal activity or predisposed to commit a criminal offence.³

The ECtHR has clarified in numerous decisions its position regarding the use of undercover investigators and the use of their evidence in criminal proceedings (Stariene, 2009, p. 266). It observed that it was aware of the problems that the police had in their search for and gathering evidence in order to detect and investigate criminal offences. They are increasingly needed to deploy undercover agents, informers, and covert tactics to carry out this mission, particularly in the fight against organized crime and corruption (*Ramanauskas v. Lithuania*, para. 49; Brady, 2014, p. 39).⁴ The ECtHR’s approach in *Teixeira de Castro* was endorsed later in *Ramanauskas v. Lithuania* (Pitcher, 2018, p. 46). Additionally, the ECtHR emphasized that corruption today is one of the major problems. The judicial sphere is not an exception, which is confirmed by EU regulations.⁵ The use of undercover techniques has to be kept within clear and defined limits. There is a clear risk of police incitement here, although the use of undercover investigators cannot in itself infringe the rights guaranteed by Article 6 of the ECHR (*Ramanauskas v. Lithuania*, para. 51).⁶

In the preliminary investigation stage, the use of different sources, such as anonymous informants, can be justified. However, it is a different matter to use such sources at the trial phase of the criminal procedure. Only if proper and sufficient protections against misuse are taken, such usage can be justified. Among other, there has to exist a clear and foreseeable system for authorizing, implementing, and supervising the investigative procedures (*Ramanauskas v. Lithuania*, para. 51; Burda & Trellova, 2019,

³ The ECtHR considers a variety of issues before making the decision. For instance, in the early seminal case of *Teixeira de Castro v. Portugal* (see paras. 37-38) the ECtHR took into account, among other things, the applicant’s lack of criminal record, the fact that no investigation into him had been opened, that he was unidentified to law enforcement personnel etc. (Puscasu, 2010 (on drug cases before the ECtHR see Golichenko, Stolz, & Ezer, 2018)). It was determined that the agents’ conduct went beyond those of undercover agents since they initiated the crime and there was no evidence that the crime would have occurred without their assistance. A previous criminal record does not necessarily indicate a proclivity to perpetrate a crime (*Constantin and Stoian v. Romania*, para. 55). However, the applicant’s familiarity with the modalities of the offence (*Virgil Dan Vasile v. Romania*, para. 53) and his failure to withdraw from the deal despite a number of opportunities to do so or to report the offence to the authorities have been considered by the ECtHR to be indicative of pre-existing criminal activity or intent (*Gorgievski v. the former Yugoslav Republic of Macedonia*, para. 53; *Matanović v. Croatia*, paras. 142-143).

⁴ It is worthy to say here that judge Costa noted similarities between the case of *Bykov v. Russia* and *Ramanauskas*. See Gonta, 2011, p. 130.

⁵ Numerous EU documents deal with the corruption, such as Protocol to the Convention on the Protection of European Communities’ financial interests, Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the EU, Framework Decision 2003/568/JHA on Combating Corruption in the Private Sector, Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the EU, Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law etc. (see more in Klimek, 2017, pp. 550-554 and Banović, Bejatović & Turanjanin, 2020, pp. 291-492).

⁶ See further Balsamo, 2018, p. 109; Ažubalyte & Fedosiuk, 2021, p. 449.

p. 65). The ECtHR in *Bannikova v. Russia* and *Tchokhonelidze v. Georgia* emphasized that the judicial supervision was the most appropriate mean, but the supervision by a prosecutor also could be appropriate (*Bannikova v. Russia*, para. 50; *Tchokhonelidze v. Georgia*, para. 51 (Levanon, 2016, p. 36)).⁷ Furthermore, police incitement is a matter of public interest, which cannot justify the use of such illegal evidence (Youngs, 2014, p. 191). This can expose the suspected/accused to the risk of complete deprivation of a fair trial (*Ramanauskas v. Lithuania*, para. 54; Aqubardia, 2020, p. 211; Chedraui, 2010, p. 219; Ramos, 2016, p. 412; Turanjanin, 2022, p. 44).⁸

In *Ramanauskas v. Lithuania*, the ECtHR concluded that simply arguing by national authorities that the officers were acting “in a private capacity” was not a reason for exemption from liability under the ECHR. Human rights violations are perpetrated by individuals who do not implement state policy but rather exceed their official authority (Kálin & Künzli, 2019, p. 70). Such actions are nevertheless attributable to the state, provided the perpetrators are acting not in their private but in an official capacity or pretend to do so. Furthermore, the undercover agents could be State agents or private individuals acting on their orders and under their supervision. A complaint about the inducement to commit an infraction by a private party who was not acting under the orders or direction of the officials, on the other hand, is investigated under the basic norms of evidence administration rather than as an issue of entrapment.

The case of *Malininas v. Lithuania* highlights the problems of controlling police involved in secret operations (Žunić & Dukić, 2012, p. 580) in which the ECtHR recalled *Ramanauskas* judgment. It defined entrapment as a violation of Article 6 paragraph 1 of the ECHR, as opposed to the employment of lawful undercover techniques in criminal investigations, for which proper safeguards against abuse were required. It determined that its task was to analyse the quality of the domestic courts’ evaluation of the alleged entrapment and ensure that the defendant’s rights of defence, including the right to adversarial procedures and equality of arms, had been sufficiently protected. Really interesting is the fact that the ECtHR distinguishes *agent provocateur* from undercover investigator. Additionally, the entrapment could be direct and indirect (*Miliniene v. Lithuania*).

2.2. On Individual Special Evidentiary Actions

In the first place, the LOA defines the covert monitoring of postal items, document items, money orders and documents and the use of technical means thereof. The request for this special investigative measure is submitted by the prosecutor. This application should be approved by the chairmen of regional courts or the chairmen of the criminal divisions of these courts. It is a special procedure prescribed by law. It shall be permissible to take out these activities pursuant to a decision by the prosecutors in urgent instances when a threat

⁷ The ECtHR highlighted in *Bannikova* that where an accused asserts that he was incited by police agents – and the assertion is not clearly false – the prosecution must provide evidence that there was no entrapment. See more in Gorlitz *et al.*, 2019, p. 500.

⁸ The second *Ramanauskas* judgment is quite different (*Ramanauskas v. Lithuania* (no. 2)). See Wallace, 2009, p. 514; Moonen, 2010, p. 132.

to human life, health, property, public or state security exists. In such circumstances, the prosecutor who made the decision must make an application to a judge within 24 hours for confirmation of the lawfulness or the justifications of the acts by a reasoned ruling. If the deadline falls on a day off or a holiday, the application must be filed the day after the holiday or a day off. The actions will be discontinued if the court does not affirm the reasons of the actions with a reasoned judgement, and the information obtained in the course of actions will be destroyed immediately (Art. 10, paras. 1-3 of the LOA).

This special investigative action will be permitted for a maximum of 3 months, but this period may be extended, using the same procedure as for the approval of these activities. The number of extensions is not limited, but each extension must be for a specific amount of time (Art. 10, paras. 5 and 6 of the LOA).

Upon handing down a reasoned ruling on this special investigative action, the head of an entity of operational activities or his authorised deputy shall immediately send one copy of the ruling to the Prosecutor General or the Deputy Prosecutor General authorized by him. If a prosecutor refuses to submit an application for the permission of the special investigative action, the head of the operational activities entity or his authorised deputy has the right to refer the matter to a superior prosecutor who has the authority to submit such application. The prosecutor's refusal must be documented in writing. The prosecutor who has decided not to file an application for permission of the aforementioned acts must notify the Prosecutor General or the Deputy Prosecutor General to whom he has delegated authority. The superior prosecutor's decision will be final. When the chairman of a regional court's criminal division issues a reasoned decision refusing to authorize the acts, the prosecutor who submitted the application has the right to appeal to the regional court's chairman. The chairman of the regional court's decision will be final (Art. 10, paras. 7-9 of the LOA).

An institution authorised by the Government shall notify a telecommunications operator or provider of telecommunications services upon the handing down of a ruling by a court and, in urgent cases, upon the taking of a decision by the prosecutor, indicating the application number, date of the ruling and the court that has handed down the ruling or the date of the decision of the prosecutor, the prosecutor who has taken the decision, as well as the duration. The officer filing the notification in line with the legal procedure has responsibility for the content of the notification intended for the telecommunications operator or supplier of telecommunications services conforming to the court judgment. The telecommunications operator or service provider must provide the technical capability to implement the monitoring of information transmitted across telecommunications facilities. Technical commands sent to a telecommunications operator's network to start or stop wiretapping or other monitoring of information transmitted across telecommunications networks must be kept in a secure manner that prevents the data of the commands sent or received from being modified by the entity of operational activities that sent the command or the telecommunications operator that received the command. The Prosecutor General or a prosecutor authorized by him must have access to the data (Art. 10, paras. 10-11 of the LOA).

The next important special investigative measure is covert entry in residential and non-residential premises and vehicles as well as inspection. This special investigative measure authorises the chairmen of regional courts or the chairmen of criminal divisions of these courts, based to the reasoned applications of the Prosecutor General or the Deputy Prosecutors General. This special investigative measure can be used for a maximum of three months.

The authorized actions formally having the characteristics of a criminal act or other infringement and carried out with the goal of defending individual rights and freedoms, property, public and state security as protected under law against criminal encroachment are referred to as “mode of conduct imitating a criminal act” (Article 3 point 19 of the LOA). On the basis of a reasoned application by the head of an entity of operational activities or his authorised deputy, the Prosecutor General or a Deputy Prosecutor General authorised by him, or the chief prosecutors of regional prosecutor’s offices or the deputy chief prosecutors authorised by them, shall authorise the mode of conduct imitating a criminal act. A manner of action simulating a criminal act prepared by an entity of operational activities may be authorized for a period of not more than six months. This time frame could be extended (Art. 12 paras. 1-3 of the LOA).

Prior to undertaking actions in the mode of conduct that imitates a criminal act, a person must be familiarized with the defined action limitations for the mode in line with the method established by the primary institutions of operational activities (Art. 12 of the LOA). This operation was a subject in cases *Malininas v. Lithuania* and *Lalas v. Lithuania*, in conjunction with an undercover agent.

Finally, the LOA defines a controlled delivery, as the approved action that allows illicit or goods that appear to be illicit and other objects to transfer into, through, or out of the Republic of Lithuania’s territory under the supervision of a unit of operational activities with the goal of detecting criminal acts and identifying those who are preparing, committing or have committed them (Art. 3 point 20 of the LOA). The Prosecutor General or the Deputy Prosecutor General authorised by him, or the chief prosecutors of regional prosecutor’s offices or the deputy chief prosecutors authorised by them, may authorize controlled delivery if the head of an entity of operational activities or his authorised deputy submits a reasoned application.

The provisions about duration extension, procedure upon handing down a reasoned ruling on operational activities and cases of prosecutor’s refusal to submit a request for the authorization are the same for all operational activities.

3. Special Investigative Actions in Latvia

3.1. General Remarks

Latvia has developed a very interesting system of special investigative measures. In the first place, it is worthy to mention that the Latvian Law of Criminal Procedure (hereinafter: LCP) regulates the admissibility of evidence. Section 130 of the LCP states

that factual information obtained during criminal proceedings is admissible if it was obtained and authorized in line with the LCP's procedures. Section 11 of the LCP lays out a comprehensive list of special investigative measures (*speciālās izmeklēšanas darbības*). Undercover activities were, for years, regulated exclusively by the Operational Activities Law (hereinafter: OAL), but the LCP from 1 October 2005 supplements the existing framework.

If the acquisition of information about facts is required to identify conditions to be proven in criminal proceedings, special investigative operations must be carried out without telling the person involved in the criminal proceedings or others who could supply such information (Section 210). Only information obtained in connection with a criminal offence that: 1) is necessary for ascertaining conditions to be proven in criminal proceedings; 2) indicates the commission of other criminal offences, or the conditions of their commission; or 3) is necessary for the prevention of immediate and significant threats to public security shall be recorded during the course of a special investigative action (Section 211).

Except in defined situations, special investigative actions must be carried out on the basis of an investigating judge's decision. The evidence obtained as a product of a special investigative action may not be used in the evidence process if the person managing the proceedings has not followed the procedures for obtaining permission. The judge will rule on the admissibility of the collected evidence as well as the activities with removed objects if the investigative action was not authorized or was carried out illegally (Section 214). There are 11 types of special investigative actions, which will be elaborated below (Section 215).

3.2. Special Investigative Actions

In the first place, the LCP regulates control of legal correspondence. According to the LCP, if there are grounds to believe that the consignment contains or may contain information regarding facts included in the circumstances to be proven, postal institutions or persons who provide consignment delivery services shall perform control of a consignment placed under their liability, without the knowledge of the sender and addressee, based on a decision of an investigating judge, if the acquisition of necessary information is impossible or hindered without the knowledge of the sender and addressee (Section 217).

Secondly, if there are grounds to believe that the conversation or transferred information may contain information regarding facts included in circumstances to be proven, and if the acquisition of necessary information is not possible without a warrant, the control of telephones and other means of communications without the knowledge of the members of a conversation or the sender and recipient of information shall be performed, on the basis of an investigating judge's decision. If there are grounds to believe that a criminal offence may be directed against such persons or their immediate family, or if such person is involved or may be enlisted in the committing of a criminal offence, the control of telephones and other means of communication with the written consent of a member of a conversation, or the sender or recipient of information, shall be performed (Section 218).

At the third place is control of data located in an automated data processing system. This special investigative measure shall be performed if there are grounds to believe that the information in the specific system may contain information regarding facts included in circumstances to be proven. As in previous measures, an investigating judge's decision is required, except in defined circumstances (Section 219).

Fourth, without the knowledge of the owner, possessor, or maintainer of such system, the interception, collection, and recording of data transmitted with the assistance of an automated data processing system using communication devices located in Latvian territory can be carried out (Section 220). At the fifth place is the regulated audio-control or video-control of a site (Section 221). Furthermore, if there are grounds to believe that the person's conversations, or other sounds, may contain information about facts included in circumstances to be proven, and if the acquisition of necessary information is not possible without such operation, the audio-control of the person without the person's knowledge shall be carried out, on the basis of a decision of an investigating judge (Section 222).

Surveillance and tracking of a person without his/her knowledge may be carried out if there are reasonable grounds to believe that the person's behaviour, as well as contact with other people, may contain information important for criminal procedure, for a period of up to 30 days, which an investigating judge may extend if necessary (Section 223). Surveillance of an object or a place may be carried out on the basis of an investigating judge's decision if there are reasonable grounds to assume that information about facts relevant to the circumstances to be established could be obtained as a result of surveillance (Section 224).

Section 225 regulates investigative test, which is, firstly, created for designing a situation or characteristic circumstances of the person's daily activities that are conducive to the criminal intent disclosure. Secondly, it is important to record the person's actions in those circumstances. These tests are performed on the basis of an investigating judge's decision in case there are grounds for suspicion that a person is preparing to engage in criminal activity or he/she has previously committed a criminal offence or has already began the same criminal activities; then, an actual criminal offence may be interrupted within the context of on-going criminal proceedings or information about the facts to be proved may be obtained by means of the operation, or the gathering of information about these facts. Inciting a person to commit a certain conduct, influencing a person by violence, threats, or extortion, or taking advantage of a person's weakness are all forbidden under Section 225 (3). However, as the ECtHR concluded in *Baltinš v. Latvia*, this element lied in the investigative tests' nature and it appeared that there existed rather small distinction between provocation and legitimate undercover techniques (*Baltinš v. Latvia*, para. 61).⁹

In the tenth place, the LCP regulates the acquisition of comparative samples in a special manner (see more in Stanisavljević, 2021). These samples may be provided on the basis of an investigating judge's decision if the interests of the criminal proceeding

⁹ The introduction of evidence gathered as a result of police instigation, according to the ECtHR, would jeopardize the requirement of trial fairness enshrined in Article 6 (see *Teixeira de Castro v. Portugal*, para. 36, *Bannikova v. Russia*, paras. 33-65; Turanjanin, 2022).

require that suspicions about a person's involvement in the commission of a criminal offence not be disclosed to that person (Section 226). Finally, if a separate stage of a single criminal offence or mutually connected criminal offences is determined on the basis of an investigating judge's decision, but immediately discontinuing such stage eliminates the opportunity to prevent another criminal offence, or ascertain all involved persons, particularly the organisers and commissioning parties, or all the purposes of the criminal activity, control of the criminal activity may be performed (Section 227).

The LCP elaborates how the results of special investigative actions can be used for other purposes, how to familiarize it with materials that are not related to a criminal case, how to take actions with the results of a special investigative action that are not relevant to criminal proceedings, how to protect information in criminal proceedings, and how to protect information contained in materials that are not related to a criminal case.

The Latvian OAL establishes the legal foundation, principles, tasks, objectives, and substance of operational activities, the process, forms, and types of such activities, the official status, rights, responsibilities, and responsibilities of officials of bodies performing operational activities, the financing, supervision, and monitoring of such operations. According to Section 1, operational activities include the overt as well as covert activities of specially authorised officials whose goals are to protect people's lives and health, their rights and freedoms, their honour, dignity, and property, as well as the Constitution, the political system, national independence and territorial integrity, the state's defence, economic, scientific, and technological capabilities, and state official secrets (Section 1 of the OAL). As it can be seen, all operations, covert or otherwise, of specially authorised State institutions aimed at protecting individuals, the State's independence and sovereignty, the constitutional system, the country's economic and scientific potential, and classified information from external or internal threats are referred to as *operational activities* (Section 2 of the OAL). The substance of operational activities is operational activities' measures and the methods of their implementation, while the activities are regulated by Section 6.

Permission to carry out such operational activities measures may be granted for a period of up to three months, with the ability to be extended for another three months if justified. The above-mentioned authorisation may be extended an unlimited number of times; nevertheless, performance of the relevant operational activities measures is only permitted while the investigation is underway. Operational activities measures may be carried out with the approval of a prosecutor in cases where immediate action is required to prevent or detect terrorism, murder, gangsterism, riots, or other serious or especially serious crime, as well as where the lives, health, or property of people are in real danger. A judge's approval must be acquired the next working day, but no later than 72 hours afterwards. The permission of a court is not required where the body executing the operational activities is wire-tapping the conversations of a specific individual based on a written submission by that person (Section 7 of the OAL). In the case of *Meimanis v. Latvia*, the ECtHR found that the *ex post facto* authorisation by the President of the Supreme Court, or a judge authorized for that, of the operational measures was required, notwithstanding that the interception of the telephone conversations was terminated in less than 72 hours. Having found that the *ex post facto* approval was never sought in this

case, the ECtHR did not consider it necessary to examine whether other conditions set out in the domestic law were met and it concluded that the interception of the applicant's telephone conversations was not "in accordance with the law". Consequently, there has been a violation of Article 8 (*Meimanis v. Latvia*, paras. 64-66).

4. Special Investigative Actions in the Republic of Estonia

4.1. General Conditions for Conduct of Surveillance Activities

The Criminal Procedure Code of the Republic of Estonia (hereinafter: Code) establishes the rules for pre-trial and court procedures for criminal offences, as well as the procedure for enforcing criminal judgments. This Code also lays forth the groundwork and procedures for conducting surveillance activities (Art. 1 of the Code). Permission for surveillance activities is provided by a judge who is not the head of the court and is determined by the division of tasks plan (Art. 24, para. 4 of the Code). The necessary condition is the request of the Public Prosecutor's Office (Art. 27, para. 2 of the Code).

Surveillance actions are governed by the chapter 3² of the Code. Article 126¹ lays out the ground rules for conducting surveillance activities. The phrase *surveillance activities* refers to the processing of personal data in order to fulfil a legal obligation while concealing the fact and substance of data processing from the data subject. Surveillance activities are permissible under the Code if the collecting of data or the taking of evidence by other procedural acts is impossible, unattainable on time, or particularly difficult, or if this would jeopardize the criminal proceedings' interests (Art.126¹, paras. 1-8 of the Code).

Grounds for conducting surveillance activities are stated in Article 126² of the Code. Agencies that carry out these activities may conduct surveillance only in a case of existence of four bases. Firstly, if it is necessary to collect information regarding the preparation of a criminal offence in order to detect and prevent it. Secondly, in carrying out a court order declaring person a fugitive. Thirdly, in confiscation proceedings, when there is a requirement to gather information. Fourthly, when there is a requirement to gather information concerning a criminal offence in a criminal procedure. Surveillance activities can be carried out just for criminal offences listed in the Penal Code (Penal Code of the Republic of Estonia, 2002).

Surveillance may be carried out only with the written approval of the prosecutor's office or a preliminary investigation judge. The preliminary investigation judge will issue the grant of authorization based on the Prosecutor's Office's reasoned application. This judge must promptly consider a Prosecutor's Office's reasoned request and issue a decision granting or denying permission to conduct surveillance activities. Surveillance operations needing the authorization of a prosecutor's office may be carried out in an emergency with the Prosecutor's Office's consent granted in a manner that may be duplicated in writing. Within 24 hours as of the commencement of monitoring activities, a written consent must be obtained.

4.2. On Individual Special Evidentiary Actions

In the first place, the legislator regulates the covert surveillance of persons, things or areas, covert collection of comparative samples and conduct of initial examinations and covert examination or replacement of things. This special investigative measure can be issued for up to two months. Permission may be extended for a period of up to two months at a time. Information gathered during surveillance activities must be video captured, photographed, copied, or recorded in some other way if necessary (Article 126⁵ of the Code).

Secondly, the legislator provides a covert examination of postal items. The information gained from the inspection of a postal item is collected during a covert investigation of the item. A postal item must be sent to the addressee after subjected to a covert examination. For up to two months, which can be extended, a preliminary investigation judge authorizes the monitoring actions described in this section (Article 126⁶ of the Code).

In the third place, wire-tapping or covert observation of information is regulated. Namely, data collected by wire-tapping or covert observation of conversations or other information carried over a public electronic communications network or by any other means must be recorded. For a period of up to two months, a preliminary investigation judge authorizes the monitoring actions described in this section. The preliminary investigation judge has the authority to extend the stipulated term by up to two months after it has expired (Article 126⁷ of the Code).

Staging of a criminal offence is the commission of an act containing elements of a criminal offence with the permission of a court, subject to the conditions that the activity does not endanger people's lives or health, cause unjustified property and environmental damage, or infringe on other people's rights. A staged criminal offence should be photographed, videotaped, or audio or video recorded if at all possible. The permission is granted by the preliminary investigation judge for a period of up to two months. After expiry of the term, the preliminary investigation judge may extend it by up to two months (Article 126⁸ of the Code).

Finally, there is police agent. Under the Code, a police agent is someone who uses a false identity to gather evidence in a criminal case. The use of police agents requires formal authorisation from the prosecutor's office. Permission to deploy a police agent is granted for a period of up to six months, with the possibility to extend the period by six months at a time. Insofar as the requirements do not entail disclosure of the false identity, a police agent has all the obligations of a surveillance agency official (Article 126⁹ of the Code).

An official of the entity that performed surveillance activities or applied for surveillance operations must prepare a report on surveillance activities based on the information gathered by surveillance activities. A surveillance file must include a summary of surveillance actions as well as photographs, films, audio and video recordings, and other data recordings taken during surveillance (Article 126¹⁰ of the Code). The surveillance file shall contain every piece of information collected by surveillance activities (Article 126¹¹ of the Code).

The obligation to notify the person who has been subject to supervision is prescribed in article 126¹³, with some limitations. Article 126¹⁵ contains the provisions of supervision over surveillance activities. A prosecutor's office is responsible for ensuring that surveillance actions are carried out in accordance with the law. The *Riigikogus* committee is responsible for overseeing the actions of surveillance agencies. At least once every three months, a surveillance agency must provide a written report to the committee through the appropriate ministry.

Estonia has a Surveillance Act (hereinafter: Act), which provides the necessary conditions and procedure for surveillance activities in order to ensure the security of the state and citizens as well as to detect and prevent criminal offences and to ensure the constitutional rights of such persons. Particularly important is emphasizing the fact that surveillance activities can be performed only if the objective pursued cannot be obtained in a manner that infringes the fundamental rights of a person at the smaller percentage, which is in line with the ECtHR's standards. Surveillance agencies conduct surveillance directly and through agencies, subdivisions and persons under their administration and authorized for that purpose, as well as persons involved in secret co-operation (paragraph 6).

In *Liblik and Others v. Estonia*, the ECtHR found no violation of Article 6 (regarding the length of the procedure), but it found a violation of Article 8. In this case, the domestic courts had introduced a possibility of providing reasons retrospectively in instances where the authorising bodies had initially failed to do so. It was exactly this practice of circumventing the requirement to provide reasons at the initial authorisation stage and accepting that they could also be provided later during the proceedings which opened a door to arbitrariness contrary to the guarantees under Article 8 of the Convention. With respect to the practice of accepting retrospectively provided reasoning, the ECtHR noted that the effectiveness of the safeguard of prior scrutiny and obligation to provide reasons may not be the same where the obligation of prior scrutiny and provision of reasons is replaced with the possibility to provide such reasons later at the trial stage, where the courts inevitably have more information about how the alleged offences were committed. It is not merely the lapse of time, but the different procedural context in which such reasons would be provided, which calls for such caution (*Liblik and Others v. Estonia*, paras. 140-141).

In *Leas v. Estonia*, the applicant wanted to know if the monitoring methods were legal, and he claimed that the principle of equality of arms obliged him to have the same opportunity to choose evidence from the surveillance file as the prosecution. The ECtHR found a violation of Article 6. In this case, the applicant learnt from the prosecutor after the fact that the surveillance materials had been examined by the court. He was not informed of the grounds for non-disclosure, the nature of the unreleased materials, or whether the surveillance file contained any unreleased material evidence. The ECtHR found that the judicial authorities' procedure did not appropriately compensate for the difficulties that the defence faced as a result of its limited access to surveillance materials (*Leas v. Estonia*, para. 88).

5. Conclusion

The role of special investigative actions is of paramount importance in proving the organised crime, corruption or economic criminal offences. Although very significant, these special actions enter deeply into the sphere of guaranteed human rights. For that reason, the application of these actions must strictly be prescribed by law. It is essential that national law provides a regulatory frame for special investigative actions, and it is equally important that the framework created thereby satisfies the requirements of the ECtHR.

The Baltic countries have a special approach to regulating these measures. In addition to the codes of criminal procedure that provide a general framework for this type of acting in criminal procedure, all three countries have particular laws governing it. In Lithuania, the LOA regulates the matter of operational activities and through this legal text, among other, are regulated the principles and tasks, rights and duties of the bodies that carry out these actions, participation in said actions, the use of collected data and financing, control and scrutiny of operational activities.

Latvia has developed a very interesting system of the special investigative measures. The Latvian Law of Criminal Procedure lays out a comprehensive list of special investigative measures. Undercover activities were, for years, regulated exclusively by the Operational Activities Law, but the LCP from 1 October 2005 supplements the existing framework. The Latvian OAL establishes legal foundation, principles, tasks, objectives, and substance of operational activities, the process, forms, and types of such activities, the official status, rights, responsibilities, and responsibilities of officials of bodies performing operational activities, as well as the financing, supervision, and monitoring of such operations. The lawmaker provides a list of operational activities measures, which can be changed or expanded only by law.

The Criminal Procedure Code of the Republic of Estonia establishes the rules for pre-trial and court procedures for criminal offences, as well as the procedure for enforcing criminal judgments. This Code also lays forth the groundwork and procedures for conducting surveillance operations. Permission for surveillance activities is provided by a judge who is not the head of the court and is determined by the division of tasks plan. The Surveillance Act has an important role in this sphere.

The influence of ECtHR in development of regulation of special investigative actions is best reflected in the Lithuanian Criminal Procedure Code, which, under the influence of the ECtHR, implemented the provisions about incitement to commit a crime, which is one of the key provisions for special investigative actions. The judgment of *Ramanauskas v. Lithuania* laid the foundations for the prohibition of incitement to commit a criminal offence in the field of special evidentiary actions, and also served as the basis for a number of standards in the use of undercover investigators. Due to the restriction of human rights during the implementation of these measures, it is necessary to take into account the principle of legality, proportionality and necessity during the implementation of special investigative actions. One of the most important provisions concerns the admissibility of evidence based on police entrapment, more precisely, the obligation of state officers to act passive or prohibition of operational activities from

provoking persons into committing criminal acts. In order for the evidence obtained by these actions to be lawful, the investigative bodies must act in accordance with the established principles of passive manner. Otherwise, there will be a violation of Article 6 of the ECHR and the right to a fair trial.

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Dr Veljko M. Turanjanin

Vanredni profesor, Pravni fakultet Univerziteta u Kragujevcu, Kragujevac, Srbija
e-mail: *vturanjanin@jura.kg.ac.rs*

Jelena V. Stanisavljević, master

Advokatski pripravnik, Kragujevac, Srbija
e-mail: *stanisavljevicjelena06@gmail.com*

POSEBNE DOKAZNE RADNJE U BALTIČKIM ZEMLJAMA

Sažetak

U radu autori se bave posebnim dokaznim radnjama u baltičkim zemljama. Posebne dokazne radnje danas predstavljaju jednu od nezaobilaznih dokaznih mera u istragama teških krivičnih dela. Istovremeno, posebne dokazne radnje znatno više zadiru u ljudska prava u poređenju sa drugim, redovnim dokaznim radnjama. Njihova nepravilna upotreba ugrožava ljudska prava, a naročito pravo na privatnost i pravo na pravično suđenje. Rad je podeljen na tri dela. Nakon uvodnih razmatranja autori objašnjavaju litvansko zakonodavstvo, koje je u značajnoj meri uticalo na razvoj judikature Evropskog suda za ljudska prava u području prikrivenog islednika. Letonsko zakonodavstvo je obrađeno u drugom delu, a karakteriše ga veći broj posebnih dokaznih radnji. Na kraju, autori razrađuju zakonodavstvo Estonije u pogledu posebnih dokaznih radnji i daju zaključna razmatranja. Autori naročito ističu stavove Evropskog suda za ljudska prava koji su na ovom polju doneti protiv baltičkih zemalja. Širok dijapazon posebnih dokaznih radnji ukazuje na njihovu različitost, ali se može izvesti zaključak da su zakonski tekstovi pretežno u skladu sa standardima Evropskog suda za ljudska prava.

Ključne reči: posebne dokazne radnje, pravo na privatnost, pravo na pravično suđenje, zemlje Baltika, podstrekavanje.

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THE REFORM OF THE CRYPTO LICENSES SYSTEM IN ESTONIA AND THE REGULATION ON MARKETS IN CRYPTO ASSETS PROPOSAL**

Abstract

As part of the EU's Digital Finance Strategy, the European Commission's proposed Regulation on Markets in Crypto Assets is currently going through its first readings in the Council. The goals of this regulation include protection of the customers, promoting innovation, unification of the regulation of cryptocurrencies at the EU market, etc. However, in parallel with this normative initiative, Estonia is already mulling the overhaul of its entire system of crypto-licensing. A Danske bank scandal demonstrated weaknesses of the current crypto-licensing and it is now on the Estonian government, as the first EU government to encounter this kind of situation, to try to improve current regulation. In this article, both MiCA and the roots of the potential overhaul of crypto-licensing in Estonia will be analysed.

Keywords: *crypto, Estonia, bitcoin, MiCA, license, Danske bank, Estonian Financial Intelligence Unit (FIU).*

1. Introduction

Cryptocurrencies and digital assets, in general, have been ignored in the first several years of their appearance by jurisdictions and states throughout the world. However, since 2013 legal regulation throughout the world has increased, either by banning crypto in China (BBC, 2013) or by regulating its taxation in countries such as Canada (Wilkins, 2014). European countries have tackled crypto regulation at a different pace, at a different time, and in different manners. Even in Western Balkans there are substantial differences. On the one side, North Macedonia banned cryptocurrencies investment for its residents (Jozipović, Perkušić & Ilievski, 2021) and on the other side, most recently Serbia has adopted Law on Digital Assets (Sovilj, 2021) that applies as of 29 June 2021. However, Estonia stands out among trailblazers in the area of cryptocurrencies. The fact that Estonia

* PhD, Senior Research Fellow, Institute of International Politics and Economics, Belgrade, Serbia, e-mail: marko@diplomacy.bg.ac.rs

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is one of the pioneers of crypto-regulation does not come as a surprise since more often than not Estonia is a frontrunner in digital technology and innovation. It is hard to keep up with Estonia's implementation of modern and digital technologies, particularly in public institutions since it is one of the world leaders in this domain, but a good example of that digital leadership is the fact that Estonia was the first country to implement blockchain technology into operational use in various registries (Castaños, 2018). However, in the instances of cryptocurrencies, pioneering the regulation and providing a particularly welcoming environment for the digital cryptocurrency businesses backfired due to a massive Danske bank scandal that involved numerous cryptocurrency businesses in Estonia. Consequently, Estonia is heading towards a complete remodeling of the crypto-licensing system and this process is going parallel with the adoption process of the new Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets (hereinafter: MiCA).

2. Legal Framework of Cryptocurrencies in the European Union

The proposed MiCA will replace existing legal frameworks applicable to digital assets that are not covered by existing EU legislation on financial services, and will also establish specific rules for so-called "stable coins". The proposed regulation is divided into nine titles. As this is a document of almost 170 pages, which is still in the reading phase and does not represent the focus of the analysis of this paper (although MiCA itself deserves not only an article dedicated to it but a series of the same), it is impossible to analyze it coherently in one article of this size.

MiCA primarily aims to extend legal coverage and improve legal certainty for crypto-assets, with a particular focus on filling the gaps in EU regulations on financial services. One important feature of MiCA is defining the most important terms and expressions in the field of cryptocurrencies. While cryptocurrency terminology is not new *per se*, it is a field that changes rapidly, and providing appropriate and up-to-date definitions is a prerequisite for any legal regulation. Apart from its own definitions, there are instructions for defining crypto-related terms by country. A good example of that is a recommendation regarding e-tokens. It is stated that "in order to avoid circumvention of the rules laid down in Directive 2009/110/EC, any definition of 'e-money tokens' should be as wide as possible to capture all the types of crypto-assets referencing one single fiat currency that is legal tender" (MiCA, 2020).

This leads to the second goal of this comprehensive regulation provided by MiCA – uniformity. Uniformity is aimed both at the existing rules and in the creation of the new rules for service providers and issuers of crypto-assets at the EU level. First of all, the most important crypto-industry terms are defined, but they also introduce some new definitions such as asset-referenced tokens, e-money tokens, etc. This is a welcomed guideline both to citizens and service providers, through the already sufficiently complicated and dynamic crypto-world. Apart from uniformity, transparency is also one of the areas of particular interest. The so-called "White paper", which is a mandatory document, will have to contain

detailed data, all with the aim of providing consumer protection, informing potential buyers of crypto-property about the characteristics, functions, and risks of crypto-property they intend to buy. This directive also extends the effect to all types of assets that are not currently regulated (utility tokens, stablecoins, etc.) provided that different rules and obligations are applied even between different groups of the same type of cryptocurrency (e.g. on different types of stablecoin different rules will apply). It is proposed to introduce the so-called Pan-European passport for cryptocurrency trading. To obtain a passport, service providers will be subjected to a mini-MiFID mode.¹ As stated in the Proposal, crypto-property publishers will need to publish a harmonized information document known as the White Paper (Proposal Regulation, 2020). At the same time, as Wöckener *et al.* (2020) noted, MiCA provides exemptions for small issuances of crypto-assets. Similar to the bond prospectus, the white paper for tokens to which assets and e-money apply will require the approval of the competent national authorities (NCAs). National competent agencies will also monitor cryptocurrency issuers unless they are marked as significant. In this case, the supervision of significant issuers is entrusted to the European Banking Authority. MiCA intends to require all issuers of crypto-assets to be incorporated in the form of a legal entity, which should be established in the EU in the case of token-related assets (Wöckener, 2020).

It is clear that the idea of increased transparency and transparent regulation of issuance, operation, organization, and management of crypto-property service providers is the main motive, all as a need to establish clear rules on consumer protection and measures to prevent market abuse. However, it is also evident that this proposal significantly favors large institutions over smaller ones, especially Fintech start-ups. This discrepancy, on the one hand, is not surprising, given the institutions behind these proposals, but on the other hand, it can be an obstacle to the EU's competitiveness in the crypto market in the long run.

Hence, the purpose of the MiCA can be summed up as follows:

- 1) Customer protection was the main motive behind this regulation. European Securities and Markets Authority and European Banking Authority several-year-long process of noting and researching both opportunities and problems regarding crypto-assets. Following reports by EBA and ESMA in 2019 that specified recommendations that the European Commission regarding applicability and suitability of the EU financial services regulatory framework on crypto-assets, the work of this regulation was intensified. These reports were based on the mandate given to them under the Commission's FinTech action plan, published in March 2018 (European Commission, 2018). Both the EBA and ESMA argue that while some crypto-assets could fall within the scope of EU financial services legislation, most of them do not. Further, even where crypto-assets are within the scope of financial services legislation, effectively applying the legislation to these assets

¹ The Markets in Financial Instruments Directive (MiFID) is a European regulation that increases the transparency across the European Union's financial markets and standardizes the regulatory disclosures required for firms operating in the European Union.

- is not always straightforward, and some provisions may inhibit the use of DLT².
- 2) EU countries have different awareness, technical development and generally have various ways of crypto-regulation. This kind of fragmentation is further deepened by more tailored-made regulations being adopted throughout EU countries recently.
 - 3) A particular novelty that appeared in the regulation – so-called ‘stablecoins’, has attracted much attention, due to the potential to achieve widespread adoption. Like other crypto-assets, stablecoins come in many forms, some of which may fall outside the current regulatory framework (MiCA, 2020). This purpose is likely to be proven as a constant necessity – a need for improvement and adjusting regulation to the crypto-assets. This is due to the nature of the crypto market and the fact that it is constantly changing and evolving rather fast.

However, the first goal proclaimed by MiCA is laying down uniform rules regarding “transparency and disclosure requirements for the issuance and admission to trading of crypto-assets” (MiCA, 2020). This transparency and hence anonymity issue of cryptocurrencies is definitely a point that should be addressed by estimating to what extent it is really a threat.

3. (Pseudo)anonymity of Cryptocurrencies

Since the introduction of bitcoin, cryptocurrencies have been considered as a tool used by criminal organizations. This caused grave concerns by governments, which is best depicted in the statement by U.S. Treasury Secretary Janet Yellen in which she pointed out the extent to which cryptocurrencies are dangerous (Stein, 2021). Anonymity is one of the main reasons why cryptocurrencies are considered to be used for illicit activity. It is clear that anonymity is especially tempting for people who operate in illegal spheres, but anonymity can also be important for people who want to stay safe from potential threats that the fact that they own a large amount of money can pose to them. A good example of this is authoritative countries, such as China or India, which tend to have control and knowledge about the amount of money, especially among “unsuitable” residents. Without further entering into the question of whether (and to whom) the anonymity of cryptocurrency is a problem and to whom the benefit, it is necessary to establish if anonymity is the real characteristic of the cryptocurrencies.

However, stating that for cryptocurrencies, particularly bitcoin that has been in the focus of legislators and authorities in recent years, is simply not true. While there are some cryptocurrencies, such as Monero, that are aiming for total anonymity, bitcoin, as the most renowned one, is simply not focusing on that issue.

One of the main reasons for this is the very nature and way of functioning of blockchain technology, which means that data cannot be deleted, but only changes can be made, but previous “versions” remain forever written. Recent studies demonstrate that

² Distributed ledger technology or ‘DLT’ means a technology that enables the operation and use of distributed ledgers.

real-life identities can be linked to addresses of these cryptocurrencies and transactions which use them. Therefore, it is safe to say that most cryptocurrencies are pseudonymous rather than anonymous (Hazar, 2020). Even this pseudo-anonymity disappears when trading through exchanges that are subject to AML (Anti-Money Laundering) and other rules, and through which 99% of crypto transactions are performed. Bitcoin addresses may not have registered names, but in practice, they can be associated with real-world identities. This is because every investor is required to record their personal information before buying a cryptocurrency. Precisely because of this factual situation, it is clear that there is another reason for fear of cryptocurrencies, and it concerns their very nature – they represent a new and revolutionary way of paying, without state control. As such, cryptocurrencies clearly pose a threat to traditional financial institutions, which operate under state control, and often with a greater degree of anonymity. This is obvious from the comparison between transparency of cryptocurrency trading, and above all bitcoin, and the transparency of traditional financial institutions. In addition to the issue of anonymity, it is necessary to investigate the extent to which cryptocurrencies are used for illegal activities in practice.

In the following chapter, it will be demonstrated at the example of Estonia that risks are not lying exclusively or even primarily within the anonymity of cryptocurrencies. The Danske scandal demonstrated that financial markets are much more complicated and that primary treats are still lying within traditional financial institutions.

4. Legal Regulation of Cryptocurrencies in Estonia

Matt Reynolds described Estonia (E-stonia, more precisely) in his article in *Wired* as the world's most digitally advanced society (Reynolds, 2016). In its continuous search for the implementation of digital technologies, as already pointed out, Estonia was also a pioneer of cryptocurrency regulation.

The first official Government policy regulating cryptocurrencies, namely Bitcoin, was published on March 13, 2014. This publication and regulation proposed in it were in line with EU regulation of the crypto-market. According to an analysis of this document prepared by the International Bureau of Fiscal Documentation, in terms of its legal status Bitcoin in Estonia can be seen as an alternative means of payment. Bitcoin was not viewed by Estonian financial regulators and tax authorities as any form of security or e-currency (Herm, 2014).

Based on the 4AMLD (4th Anti-Money Laundering Directive, Directive No. 2015/849 of the European Parliament and of the Council), in November 2017 a Law on the Prevention of Money Laundering and the Financing of Terrorism entered into force in the Republic of Estonia. Estonia failed to implement 4AMLD appropriately initially since it did not transpose its measures regarding the treatment of politically exposed persons, beneficial owners, the performance of risk assessments and risk management systems, and information access rights of national financial intelligence units correctly (Step, 2020). A then-new law enabled companies to provide clients with various crypto-services, including exchange, transfer, and storage of crypto and virtual currencies. Two types of licenses

were introduced: License of the provider of services of exchange of virtual currency for fiat currency and License of the virtual currency wallet service provider.

However, as of March 10, 2020, virtual currency service providers are considered “financial institutions” in Estonia. Thus, both licenses were merged into a single cryptocurrency license called the Virtual Currency Service Provider License. Crypto companies are required to comply with the same reporting rules and requirements as any other financial institution in Estonia. In less than three years, Estonia has issued more than 2,000 cryptocurrency licenses (400 active as of now), thereby strengthening its position among the most preferred jurisdictions for launching a blockchain project.

4.1. Acquiring a Crypto License in Estonia

In order to (at least formally) reduce the possibility that newly formed companies operating in the crypto-industry will use crypto for illegal activities, it is a standard practice in countries throughout Europe to conduct initial “due diligence” by requiring numerous documents from companies that are aspiring to conduct crypto-related business. Estonia is no exception in this practice and requires several types of documents that are used to spot and potentially prevent companies with the intention to perform fraudulent actions and increase visibility. While all of those preconditions for acquiring crypto license are certainly good-intended, they proved unable to prevent major misuses of crypto companies in illicit activities.

The obligation to register or license crypto-service providers at the EU level can be found at the (amended)³ article 47 of the EU Directive 2018/843, reading: “Member States shall ensure that providers of exchange services between virtual currencies and fiat currencies, and custodian wallet providers, are registered, that currency exchange and cheque cashing offices, and trust or company service providers are licensed or registered, and that providers of gambling services are regulated” (Directive (EU) 2018/843).

Article 47 provides two possibilities for listing companies working in the cryptocurrency business: via registration and via license. These alternative options (registering/licensing) created some confusion, particularly because exchange services between virtual currencies and fiat currencies, and custodian wallet providers have to be registered (without mentioning licensing) and in other cases, there are alternatives of registration and licensing. There is a general difference between registering and licensing, whereas registering implies being a part of some register while licensing focuses on proving that conditions for conducting certain activity are fulfilled and thus license is issued to verify this fulfillment. However, in this case, those alternatives are only provided to accommodate potential differences in the practice of various member states regarding company listing – whether via entering companies in register (registering), issuing the license, or through both registering and licensing cumulatively actions.

When it comes to national Estonian regulation, for obtaining a Virtual Currency Service Provider License in Estonia, several steps are necessary (apart from forming a

³ Amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

company, to begin with). In order to prove the legitimacy of the applicant, documents such as (a rather comprehensive) business plan (including all aspects of planned endeavors for the next two years), the scope of the activities and the planned means to be employed in carrying out these projects, a detailed description of operational, risk, and compliance software, specifics about the source of invested capital, are necessary to be provided by the applicant. One of those documents is also a Certificate of (non)conviction. This document is issued by the Estonian National Criminal Register and it is required for a wide range of persons including shareholders, board members, ultimate beneficiary owners, management, and key personnel. This certificate is required from the applicant that would provide, if not guarantee, then the reasonable expectation of good conduct and integrity in conducting business. While it is rather obvious why a “clean sheet” is required, it is also obvious how easily this condition can be manipulated. Description of strategic planning is another necessary document. This document should convince authorities that forming this company is well planned, with a sound legal reason for investing. Once again, as with every paper, it presents a formality and not a practical method of preventing or red-flagging potential security threats.

The procedure described above presents rather standard practice in the license issuing procedure, and Estonia was one of the first countries that introduced it. However, this rather liberal manner of issuing numerous licenses was substituted in 2018 by rare issuance and often revocation of crypto-licenses.

4.2. Revocation of the Permit in Estonia

On November 8, 2021, the Estonian Financial Intelligence Unit (hereafter: FIU) withdrew authorization from Izibits OÜ, a virtual asset service provider. The FIU stated that they “identified that Izibits OÜ was providing services during the time it did not have the right to; moreover, it also did not meet the requirements of the Money Laundering Act. The company had also failed to respond to the inquiries of the EFIU. These circumstances obliged the Unit to revoke the license, as was proceeded” (FIU, 2021).

The revocation of the license by FIU is by no means an isolated occurrence in Estonia in the last couple of years. On the contrary, it can be said that revocation of licenses for virtual asset service providers is a regular event. According to some accounts over 1,200 crypto licenses were revoked in Estonia in the period between 2017 and 2020. Until today, around 2,000 crypto licenses in total were revoked (Tassev, 2021).

Two main general normative acts regulate both issuing and revoking crypto permits in Estonia and the role of FIU in those processes. Those acts are: General Part of the Economic Activities Code Act and Money Laundering and Terrorist Financing Prevention Act. Article 75 of the Money Laundering and Terrorist Financing Prevention Act is of particular importance and contains a legal basis for the revocation of the permits that occurred (and are still occurring) in Estonia.

Article 75 titled “Revocation of authorization” states: “In addition to the grounds provided for in subsection 1 of § 37 of the General Part of the Economic Activities Code Act, the Financial Intelligence Unit will revoke authorisation specified in subsection

1 of Article 70 of this Act where: 1) the Financial Supervision Authority has granted authorisation to the undertaking; 2) the undertaking repeatedly fails to follow the precepts of the supervisory authority; 3) the undertaking has not commenced operation in the requested field of activity within six months from the issue of the authorisation”.

4.3. Financial Intelligence Unit (FIU)

Operating licenses (including crypto licenses) are issued by the Estonian Financial Intelligence Unit (FIU) – an independent unit operating under the supervision of the Estonian police department and the Border Guard Board. When applying for a cryptocurrency exchange license in Estonia, the proper application form, along with additional documents and pertaining information, ought to be completed and submitted to the Register of Economic Activities. This agency has a crucial role in crypto-regulation, but it is not its sole purpose and function. Since 2014, FIU is in charge of authorizing numerous business activities. This includes issuing authorization for operating as a financial institution, providing trust and company services, providing pawnbroking services, providing services of exchanging a virtual currency against a fiat currency, providing a virtual currency wallet service, and buying-in or wholesale of precious metals, precious metal articles, or precious stones, except precious metals and precious metal articles used for production, scientific or medical purposes.

A particularly interesting case of revocation of crypto license in Estonia occurred in April 2021, after Estonia's security services investigated a company called Shitcoins.club. This company was one of the three companies in Estonia operating 10 ATMs for buying and selling cryptocurrencies and Shitcoins.club was the only one of three companies that have been identified as a clear security risk. The reason for this is the fact that this company used to allow customers to anonymously send up to 10,000 euros-worth of virtual currency per virtual wallet and repeat the transaction for each new wallet number. As a consequence, the license of this company was revoked by the FIU. However, it's revocation was just a singular case on the tail of one of the major financial scandals of this decade that shook the grounds of the crypto license issuing system in Estonia.

Since the main igniter for the above-mentioned numerous revocations was the Danske Bank scandal, it will be elaborated in a bit more detail.

4.4. Danske Bank Scandal

One of the major crypto-related scandals and certainly one of the most significant bank scandals in the last decade occurred in 2017 and 2018 within Danske Bank and its Estonian branch. In this huge money laundering affair, it was estimated that 223 billion US dollars of laundered money had passed through the Estonian branch of Danske Bank. Due to the magnitude of the scandal, it came as no surprise that both regulatory bodies and individual customers of the bank have questioned how much of the issue was an excusable misunderstanding between the branch and Executive Board of the bank and how much was deliberate Board negligence (Logan, 2019). It primarily affected Danske bank

itself – Danske Bank's share price has dropped more than 50% between 2018 and 2020. In addition to this, the scandal also had a significant impact on the bank's P&L (profit and loss) (Wass, 2020). Despite the profound influence on the Danske bank itself, it did not cause major reform or substantial national or regional legislative actions regarding the core of the banking system. This cannot be said for the crypto system in Estonia. While the bank system went through this scandal intact in its essence, the consequences to the crypto-regulation were profound. The scandal had a profound influence on the crypto market and particularly on the entire concept of license and its issuing.

4.4.1. Revoking Crypto Licenses

After the Danske bank scandal, it was necessary for the Estonian authorities to respond, and it was much easier to apply heavy sanctions on crypto exchanges than on the bank system. According to Madis Reimand, who was the head of the Estonian Financial Intelligence Unit (FIU) at a time, the clampdown was not to cripple the sector, but rather tighten regulations to prevent risks associated with money laundering. To date, the FIU has shut down companies that failed to start operations in the Baltic state within six months of getting a license. Regulators are concerned that Bitcoin exchanges and other crypto companies might be inclined to use their platforms to facilitate illegal transfers (Gogo, 2020). Until now, Estonia has been a haven for virtual currency companies. According to Paypers, “the north-eastern European country was among the first on the continent to liberalize crypto in 2017, licensing more than 1,400 entities in a space of three years. According to the new regulations, permits will now be issued after three months at a cost of EUR 3,300. Previously, it took 30 days to obtain the same license for EUR 300” (Paypers, 2020).

While the Danske Bank scandal was the main igniter, it is not the only reason behind the strictening of the rules related to the issuing of crypto licenses, their revocation, and potential change of the entire crypto-license system in Estonia.

4.5. A Complete Overhaul of Crypto License Rules in 2021?

There are several reasons for the further tightening of the rules regarding crypto licenses in Estonia, but two of them stand out.

The first reason is rather obvious since it is related to the Danske bank scandal. A scandal of that magnitude influenced the banking and crypto market not only in the short term. However, the major consequence of this scandal is the fact that it diminished the trust in the general crypto regulation in Estonia, particularly safety and procedures.

Another important reason for this overhaul of the license system for cryptocurrencies lies within the fact that Estonia is not profiting from billions of euros transferred through crypto-businesses operating in this country. This is actually a negative effect of the fact that Estonia has the most convenient license system. As Eglitis & Blomberg (2021) mentioned, while the crypto companies may be registered in Estonia, their client base is international. The sector's top customers are in the U.S., Venezuela, Russia, Vietnam, Indonesia, Brazil, and India, the FIU said earlier this year. The firms

handle transactions equivalent to more than 40% of the Estonian banking sector's cross-border payments – or more than 20 billion euros, according to Matis Mäeker, the director of Estonia's Financial Intelligence Unit. In a 2020 study, only 10% of crypto-service providers licensed in Estonia had accounts with local banks. About 40% banked with Lithuanian institutions and 20% used U.K. lenders (Eglitis & Blomberg, 2021). In other words, Estonia is a victim of its own success, since it is recognized not only throughout the EU but globally as well as a prime destination for establishing a crypto-business. On top of that, Estonia has also been known as a rather favorable jurisdiction for start-ups tax-wise since it is offering a 0% income tax rate. The sheer number of crypto licenses and consequently crypto companies demonstrate this favorable surrounding. Between 2017 and 2020, Estonia issued over 2,000 cryptocurrency licenses. In 2019 alone 667 new licenses were issued (GetID, 2020).

In his bid to impose stricter capital requirements, Matis Mäeker insisted on increasing equity requirements for crypto businesses from 12,000 euros to 350,000 euros — or approximately US\$404,000. — This means that crypto businesses will be mandated to keep at least the required amount of euros in cash or securities (Ghosh, 2021). The new regulations require “virtual currency service” firms to have their registered office, management, and place of business located in Estonia. Such firms include wallets and trading platforms. Although virtual currencies are not subject to securities regulation in the EU, the new rules attempt to address some of the regulatory issues. Firms will be subject to the supervision of the Financial Supervision Authority which will require minimum capital standards, IT standards, audits, and reporting. All current license holders are required to re-apply for a new license. Income derived from cryptocurrencies in Estonia is taxable by the county's Tax and Customs Board (Ehret & Hammond, 2021).

5. Conclusion

Estonia was one of the pioneers in crypto regulation. While it has established its position as one of the most favorable jurisdictions for starting a company that is doing business with crypto assets, it also proved to be rather vulnerable to money laundering and other illicit activities. However, it is important to note that this vulnerability was only a consequence of the banking system's fraudulent activities. This does not mean that crypto markets should not constantly work on improving their security, but the main dangers are still within the “traditional” financial institutions.

The second important conclusion is that states should not only strive to make their jurisdiction the best and most attractive for the potential investors – they should also make sure that at least part of those transactions stay in their country or find other ways to benefit from them.

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Dr Marko S. Novaković

Viši naučni saradnik Instituta za međunarodnu politiku i privredu, Beograd, Srbija
e-mail: marko@diplomacy.bg.ac.rs

REFORMA SISTEMA KRIPTO LICENCI U ESTONIJI I PREDLOG UREDBE O TRŽIŠTIMA KRIPTO IMOVINE

Sažetak

U okviru Strategije za digitalne finansije EU, Evropska komisija donela je predlog Uredbe o tržištima kriptoomovine (MiCA), koji trenutno prolazi kroz prvo čitanje u Savetu. Ciljevi ovog akta uključuju i zaštitu kupaca, promociju inovacija, unifikaciju regulisanja kriptovaluta na tržištu EU i slično. Istovremeno sa ovom normativnom inicijativom, Estonija već razmatra reformu svog sistema kriptolicenciranja. *Danske bank* skandal je pokazao slabosti trenutnog sistema kriptolicenciranja i sada je na vladi Estonije, kao prvoj vladi jedne države članice Evropske unije koja se susrela sa takvom situacijom, da pokuša da unapredi postojeće propise. U ovom radu se analiziraju MiCA i koreni moguće reforme kriptolicenci u Estoniji.

Ključne reči: kripto, Estonija, bitcoin, Uredba o tržištima kriptoomovine (MiCA), licenca, *Danske bank*, Estonska finansijsko-obaveštajna jedinica (FIU).

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INTELLECTUAL PROPERTY RIGHTS AND DIGITAL TRANSFORMATION IN ESTONIA – ASPECTS RELATED TO COPYRIGHT AND PATENT PROTECTION

Abstract

With almost all public services delivered online, functioning system of e-residency and established ‘data embassies,’ Estonia is also home to blooming creative community and numerous companies ranging from small start-ups to tech giants. Apart from being the result of a clear and long-lasting political orientation, this success is strongly correlated with Estonian legislation and, more narrowly, its regulatory framework on both information/digital society and protection of intellectual property rights (IPR). After examining the most relevant features of Estonia’s legislation related to digital economy and society (Chapter 2), this paper analyses the country’s regulatory framework on copyright (Chapter 3) and patents (Chapter 4) in the light of digital transformation. The author argues that there is a direct correlation between, on the one hand, regulatory framework dedicated to IPR protection on both EU and national level and, on the other, development of digital technologies. The study of Estonian legislation and practice in the field of copyright and patent protection has shown that, in numerous aspects, the country is largely dependent on the good functioning of wider EU legal and institutional framework, while, in the near future, the technological advance would require more supranational regulatory mechanisms.

Keywords: Estonia, intellectual property rights, digital transformation, copyright, patents.

1. Introduction

There is a large consensus in scientific, business and IT communities that the way Estonia has, until now, performed the digital transformation of its public and private sectors represents an undoubted success story. According to the centralised platform *e-estonia*, the country has built “an efficient, secure and transparent ecosystem where 99% of governmental services are online”, while the advantages of digitalisation were particularly observable in the context of the long-lasting crisis caused by the COVID-19 pandemic. At the moment, “all but three public services (marriage, divorce and real estate

* PhD, Doctor of the University of Strasbourg; Research Associate, Institute of European Studies, Belgrade, Serbia, e-mail: uros@ies.rs

transactions) are securely delivered online” (Azzopardi *et al.*, 2020, p. 14) facilitating both the everyday life of Estonians and the functioning of country’s central and local public administration. The quasi-totality of Estonia’s surface (45.339 km²) is covered either by a free Wi-Fi signal (public transportation, administration, cultural and leisure venues) or by fast mobile internet. Moreover, the country is attractive not only for digital nomads, but also for big international companies and ICT start-ups (Ericsson, Skype, Monese, TransferWise, TeamDev). In any case, the digital transformation – phenomenon recently often referred to as ‘digital change’ (Iveroth & Hallencreutz, 2021) – considerably depends on the country’s legislation dedicated to the protection of intellectual property rights (IPR). After examining the most relevant features of Estonia’s legislation related to digital economy and society (Chapter 2), this paper analyses the country’s regulatory framework on copyright (Chapter 3) and patents (Chapter 4) in the light of digital transformation. The author argues that – independently of whichever possible value judgment of the very phenomenon of digital transformation and its societal consequences – there is a direct correlation between, on the one hand, general regulatory framework dedicated to IPR protection on EU and national level and, on the other, development of digital technologies.

In this paper, the author has opted for the notion of ‘digital transformation’ and not of ‘digital change’ for three main reasons. First, the term ‘transformation’ appropriately designates the deep societal changes stemming from the wider use of online platforms, cloud computing, artificial intelligence and other related phenomena. Second, the term ‘transformation’ is particularly adequate for a country such as Estonia, which has simultaneously gone through political and economic transition and societal changes brought about by the fourth industrial revolution. Third, the notion ‘digital change’ is too general and can be somewhat misleading.

2. The Main Features of Estonia’s Digital Transformation – Administrative and Legal Aspects

The digital transformation in Estonia is a well-established tendency, given that, according to some sources, it has already started in early/mid 90ies. A recent case study points out that the creation of the governmental *Department of State Information Systems (Riigi Infosüsteemide Osakond – RIO)* in 1993 was the first step in this direction, given that “all ministries’ and agencies’ IT development plans had to demand its approval” (Centre for Public Impact, e-Estonia, the information society since 1997, 2019). There is no doubt that the very act of creation of a central administrative authority such as the RIO stems from a clear political will to progressively establish a society based on cutting-edge information technologies. Moreover, there are two other important indicators confirming this assessment. First, the fact that, already from 1993, the majority of important entities belonging to the Estonian central administration were regularly elaborating IT development plans shows to which extent the idea of information society in the country was not only precocious – especially in comparison with many other

countries of Central and Eastern Europe – but also widely accepted as a societal and political choice. Second, the obligation of those central administrative entities to submit their IT development plans to the RIO for approval indicates the legislator's will to have a coordinated advance of country's technological transformation. Almost three decades from this first step, today Estonia is Europe's leading country¹ in digital public services; according to the latest European Union's *Digital Economy and Society Index* (DESI), Estonia is (before Spain and Denmark) the most successful EU Member State when it comes to the "demand and supply of e-government services [and] open data policies and implementation" (EU DESI Report, 2020, p. 17). However, even if they agree on Estonia's impressive results in digital transformation, some authors have a different approach to the reasons of country's achievements in this respect. Starting from the assessment that "it would be easy to assume that in such a small country these achievements spring from a common biotope of political ideas and actors" they affirm that Estonia's policymakers were "pushing visionary changes without anticipating all the challenges and risks involved upfront, an approach that sometimes results in unexpected learning, creativity and – in this case – success" (Kattel & Mergel, 2018, p. 5). Without pretending to argue about whether the policymakers and legislators were always successfully anticipating the risks and challenges, it seems unquestionable that Estonia's digital transformation is a result of a clear and long-lasting political orientation, widely accepted by the citizens, business community and civil society. Therefore, it is now worth examining how this political orientation was (and still is) articulated in country's legal acts.

In spite of a very clear orientation towards the establishment of functioning information society, in Estonia this issue hasn't been overregulated. As for the national legal acts adopted by the country's National Assembly, the most significant are the Electronic Communications Act and the Information Society Services Act (both adopted in 2004), while the Personal Data Protection Act (adopted in 2018 and entered into force in 2019) and, to some extent, the Media Services Act (adopted in 2013 and entered into force in 2014) contribute to the overall regulatory framework in this field. However, the special attention has to be dedicated to the Information Society Services Act (ISSA), given that it is one of the most important, trans-sectorial legal acts in Estonia contributing to the digital transformation.² Moreover, this act is of a particular importance for the functioning of country's business and creative community, most often the main beneficiaries of the various forms of IP protection (including patents, but also copyright and trademarks).

After its entry into force in July 2004, the ISSA has been, until now, amended at nine occasions, one of them being the consequence of the expiration of a transitional

¹ It is, however, worth noting that, according to the overall Digital Economy and Society Index, Estonia occupies the 7th place in the EU, well behind Finland, Sweden, Denmark, Netherlands, Malta and Ireland (*EU DESI Report 2020*). Moreover, together with Denmark and Luxembourg, Estonia shows a "relatively low progression in digitisation over the last five years, even though they remain amongst the well performing Member States in the overall DESI ranking" (*EU DESI Report 2020*, p. 14).

² The full text of this act is accessible on the website of the Estonian National Assembly (*Riigi Teataja*), both in Estonian and English: <https://www.riigiteataja.ee/en/eli/504112013008/consolide>, (26. 9. 2021).

period of seven years after the Estonia's accession to the EU in May 2004.³ The ISSA defines "information society services" as those "provided in the form of economic or professional activities at the direct request of a recipient of the services, without the parties being simultaneously present at the same location", and they can consist of "processing, storage or transmission of information by electronic means intended for the digital processing and storage of data" (Art. 2-1). Consisting of only 18 succinctly formulated articles – out of which some of the most detailed concern predominantly either issues mainly related to the international private law (Art. 3 on the application of the law in force in the place of business) or to the notification of the European Commission (Art. 4) – the ISSA defines the notion of 'commercial communication' and focalises on the issues of restricted liability and state supervision over compliance with its provisions. It is important to underscore that the law distinguishes between the following possible situations when the liability of service provider is more or less significantly restricted: 1) mere transmission of information provided by a recipient of the service in a public data communication network; 2) temporary storage of information in cache memory and 3) provision of (in technical terms, non-temporary) information storage services. The third of three above mentioned cases is particularly important for cloud computing, which, on its part, plays an increasingly important role in reducing regulatory barriers to relocation and facilitates the functioning of young innovative firms (Azzopardi *et al.*, 2020, p. 14).

Adoption of the latest version of the Estonian Personal Data Protection Act (PDPA), in force from 2019, is the consequence of the fact that the EU General Data Protection Regulation (GDPR) (Regulation (EU) 2016/679) has taken effect in May 2018, while Article 63 of the EU Directive 2016/680 – more narrowly dedicated to the processing of personal data in criminal matters – obliges the Member States to transpose it by 6 May 2018. In early 2017, according to its own rules of good legislative practice (see Estonian Rules for Good Legislative Practice and Legislative Drafting), Estonian Government (its Ministry of Justice) has adopted the legislative intent related to implementation of the GDPR and transposition of the Directive 2016/680. This legislative intent has addressed a number of important issues (administrative fines, certification procedures, representation of data subjects) and in some aspects (age limit for the lawfulness of the processing of child's personal data) has opted for the most liberal approach allowed by EU legislation, setting the limit at 13 years of age (Salumaa-Lepik, Kerikmäe & Nisu, 2021, p. 29). This choice has been maintained throughout the process of the adoption of the PDPA, given that its Art. 8-1 provides that "processing of the child's personal data is permitted only in the case the child is at least 13 years old". This example clearly shows that technology-friendly and e-oriented policy aimed to put digital transformation in practice often goes hand in hand with a more liberal approach to personal data protection.

³ It was the sixth time the text of the ISSA was amended and it entered into force on the date (1 January 2011) determined by the Decision of the Council of the European Union regarding the abrogation of the derogation established in respect of the Republic of Estonia on the basis provided for in Article 140 (2) of the Treaty on the Functioning of the European Union (Council Decision 2010/416/EU of 13 July 2010).

3. Some Major Challenges of Copyright Protection in the Digital Era – Estonian Legislation in the Context of EU Regulatory Framework

With its well established place in the system of IPR protection, the existing copyright legislation (on national, but also on EU and international level) is, in many ways, challenged by substantially new ways of creation, distribution (and/or sharing) and storage of various literary, artistic and other creative works. Well before the digital transformation has shown its potential we are witnessing now, some authors (Vaidhyanathan, 2003) argued that the very existence of copyright legislation threatens creativity, while the other (Smiers & van Schijndel, 2009) were bent on elaborating the list of reasons why, according to them, the entire copyright system should be abolished. More moderate and less ideologised approaches to the entire set of legal provisions intended to protect human creativity are inclined to uphold that the existing copyright legislation is obsolete (Mancini, 2006), affirmation that is not only true, but progressively gains in actuality. The Estonian regulatory framework on copyright protection in the context of digitalisation will be analysed in a wider perspective of recent EU legislation on copyright in digital single market.

After long-lasting, laborious, often tense and highly mediatised negotiations, the EU Directive 2019/790 exclusively dedicated to the issue of copyright and related rights in the context of digitalisation was finally adopted in April 2019, while, according to its Article 29, the Member States (hereinafter: MS) were obliged to transpose it in their internal legal orders no later than 7 June 2021. The initial draft version of this act, elaborated by the European Commission in September 2016, has been so substantially modified⁴ that the inherent logic and structure of the initial text, as well as some truly innovative legal solutions, were diluted, mainly as a result of a political compromise reached under the pressure of different economic interests of authors, distributors and other operators. Moreover, the adoption of the Directive 2019/790 has given rise to heated value-centred debates and controversies, complicating the task of EU legislators. In any case, the result was the adoption of an act whose provisions are often imprecise and subject to various possible interpretations. Given that even a superficial analysis of the solutions brought about by the Directive 2019/790 would require significant space, in this chapter the focus will be on two important issues: online content-sharing and fair remuneration of authors and performers.

Digitalisation of various artistic, literary, scientific and other copyright-protected works significantly increased the possibilities for their (both licit and illicit) sharing, searching and storage, while numerous online content-sharing platforms are the major tool allowing the public access to these works. Article 17 of the Directive 2019/790, exclusively dedicated to this issue – apart from being the longest provision of the entire act – has introduced various obligations for the MS, whose objective is to achieve the approximation of national legislations in the EU's digital single market. Moreover, "given

⁴ The draft version of the Directive 2019/790 consisted of 24 articles, while, in September 2019, the European Parliament adopted not less than 86 amendments to its provisions; for the full text of adopted amendments, see <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2018-0337+0+-DOC+PDF+V0//EN>, (3. 10. 2021).

the cross-cutting nature of the law approximation policy” (Ćemalović, 2015, p. 246), the substantive provision of EU’s primary law representing the legal basis for the adoption of the Directive 2019/790 was Article 114 of the TFEU. The pillar of the normative structure of Directive’s provisions on online content-sharing service providers is the obligation of the MS to provide that, “when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users” the service provider “performs an act of communication to the public or an act of making available to the public” (Art. 17-1, para. 1) of those works. This further allows obliging the provider to obtain the rightholder’s authorisation and regulate the issue of liability in the case of its absence. Unfortunately, excessively vague and general terms in which the Directive (Art. 17-4) defined the conditions under which a service provider shall not be considered liable for an unauthorised act of communication have considerably complicated the task of national legislators. It is not difficult to predict that the notions such as ‘best efforts,’ ‘high industrial standards’ and ‘relevant and necessary information’ may significantly vary from one MS to another, potentially undermining the functioning of Digital Single Market. As for Estonia, the country’s last amendments to the national Copyright Act have been adopted in June 2013,⁵ while, as of 1 September 2021, Estonia hasn’t communicated any national transposition measures to the European Parliament.⁶ However, the existing provisions of the Estonian Copyright Act already provide sufficient elements for its application to all online content-sharing providers, given that it covers “communication of the work [...] or direction of the work at the public by other technical devices” (Art. 13-9, dedicated to author’s economic rights and Art. 57-5, for contractual transfer of rights).

The need to establish a set of rules allowing the fair remuneration of authors and performers was one of the major points of contention during the process of adoption of the Directive 2019/790, and this act dedicates an important number of provisions to this issue (Art. 18-23). In principle, the Directive gives to the MS quite a large margin when it comes to the use of different mechanisms and national legal instruments in order to assure that authors/performers receive appropriate and proportionate remuneration for the exploitation of their works/other subject matter. However, as it was the case of previously discussed regulatory framework on online content-sharing platforms, in some important aspects, the provisions of the Directive often allow to the MS to reduce significantly the effects of the principle of fair remuneration. For example, transparency obligation introduced by EU legislation entitles authors/performers to receive “up to date, relevant and comprehensive information on the exploitation of their works and performances” (Art. 19-1). However, there are significant limitations to this principle. First, a MS may decide not to apply transparency obligation when the contribution of an author or performer is “not significant having regard to the overall work or performance” (Art. 19-4). Second, a MS may also provide that, in cases when the observation of transparency obligation would become a disproportionate

⁵ For more information on all modifications to Estonian Copyright Act, see <https://www.riigiteataja.ee/en/eli/525112013002/consolide>, (7. 10. 2021).

⁶ For all national transposition measures communicated until now, see <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32019L0790>.

administrative burden for the licensee, this obligation is limited to certain types or scope of information. Third, the transparency rules within the framework of the existing collective bargaining agreements, in principle,⁷ remain applicable. As it was mentioned above, Estonia, until now, hasn't adopted national transposition measures of the Directive 2019/790, and national Copyright Act regulates the issue of author's right to remuneration (Art. 14) in general terms, without introducing any specific regulation related to the digital environment. However, national provisions specify that, in case of licensed audio-visual works, the author has a right to the right "to obtain equitable remuneration", but this obligation is limited only to the providers of television broadcasting services. Some recent decisions of Estonian national judicial instances (judgment of Tallinn District Court of 30 June 2020) have provoked a significant discontent of authors' associations and their appeal to the Supreme Court,⁸ showing that the issue of fair remuneration progressively gains in actuality in the context of intensified digital transformation.

4. Patent Protection and the Fourth Industrial Revolution – Estonian Legislation in International and European Perspective

The first major international arrangement aimed to ensure the protection of inventions has been adopted already in 1883 (Paris convention for the Protection of Industrial Property - PCPIP).⁹ Moreover, the Patent Cooperation Treaty (PCT, concluded in 1970, amended and/or modified in 1979, 1984 and 2001) with its 153 contracting states¹⁰ significantly facilitates the process of seeking patent protection internationally, allowing, *inter alia*, that inventors, by filing one international patent application, simultaneously seek patent protection in numerous other countries.

As for the European continent, a well-developed and relatively complex mechanism of patent protection, which also includes various administrative¹¹ and legal instruments for its implementation, has been established by the European Patent Convention (EPC, entered into force in 1977). The EPC represents a regional system for patent protection, allowing

⁷ Art. 19-6 of the Directive provides that "transparency rules of the relevant collective bargaining agreement are applicable" if they meet the transparency criteria provided for by the Directive (Art. 19, paras. 1-4). Given the general and often vague terms in which those transparency criteria are defined, it is difficult to imagine that, in the absence of a national act transposing the provisions of the Directive, an authorised national instance would nullify a collective bargaining agreement.

⁸ For an interesting overview of the developments that followed the adoption of the judgment of Tallinn District Court of 30 June 2020, see "Authors' associations dispute copyright compensation at Supreme Court", EER 5 August 2020, <https://news.err.ee/1120577/authors-associations-dispute-copyright-compensation-at-supreme-court> (13.10.2021).

⁹ For the full text of the Convention, in five official languages of the World Intellectual Property Organization, as amended on 28 September 1979, see <https://wipolex.wipo.int/en/treaties/textdetails/12633>.

¹⁰ For the full list of the signatories of the PCT, with the list of accessions and ratifications, see https://www.wipo.int/pct/en/pct_contracting_states.html.

¹¹ The most important administrative entity established by the EPC is the European Patent Office (EPOf), one of the two bodies of the European Patent Organisation (EPO).

covering (up to) 38 European countries¹² by a single patent application. On the other hand, the EU still has a lot of trouble to make operational its so-called 'patent package',¹³ allowing a European (EU) patent with unitary effect, as well as the establishment of a Unitary Patent Court (UPC). The recent ratification by Germany¹⁴ and Slovenia (September 2021) of the Protocol on the Provisional Application of the UPC Agreement¹⁵ gives some hope that the unitary patent protection on the EU level might be operational in the future.

Even a brief overview of the international and European legal instruments applicable to the patent protection clearly shows the presence of numerous, complex and often overlapping (Derclaye & Leistner, 2011) mechanisms for the protection of inventions. However, practically none of the above-mentioned acts (PCPIP, PCT, EPC, EU patent package) can be considered as sufficiently adapted to the realities of the fourth industrial revolution (known under abbreviations 4IR and Industry 4.0).¹⁶ In the same vein, demanding and long-lasting patent granting procedures are not adapted to the rapid technological development dictated by the 4IR, while "guaranteeing a reward for scientific effort and investment in research" (Ćemalović & Petrović, 2015, p. 515) has become even more difficult in the context of a rapid digital transformation. Given the complexity of technological changes dictated by the 4IR and its multifaceted manifestations (robotics, 3D printing, cloud computing, Internet of Things, artificial intelligence), further considerations will focus on one of them: cloud computing. This choice is not arbitrary; Estonia is not only home to numerous cloud computing companies, but the country has also offered an e-residency to all interested individuals and established so-called 'data embassies', decisions highly dependent on cloud technologies.

With its outstanding and internationally recognized results in the functioning on the e-Government, the application of cloud computing (CC) in Estonian public sector and ICT development plans (Kotka & Liiv, 2015, p. 150) is already well developed. However, the CC related innovations in business sector depend more on the effective mechanisms of patent granting than on the successful functioning of the e-Government. The Estonian

¹² For the list of the member states of the European Patent Organisation, see <https://www.epo.org/about-us/foundation/member-states.html> (12. 10. 2021).

¹³ Unlike it is the case of the legal protection of trademarks and designs, in the EU there is still no operational unitary patent protection. For more information on EU unitary patent and, more generally, the entire 'patent package' see https://ec.europa.eu/growth/industry/policy/intellectual-property/patents/unitary-patent_en (12. 10. 2021).

¹⁴ The entire procedure that has led to the German ratification of the so-called PAP-Protocol (Protocol on the Provisional Application of the UPC Agreement) was lengthy and laborious. The ratification was also the subject of two demands (in 2017 and 2020) for preliminary injunctions before the German Constitutional Court, in which the claimants affirmed that the transfer of certain sovereign rights to the UPC would be contrary to the national Constitution.

¹⁵ The Agreement on a Unified Patent Court (OJ C 175 [2013], pp. 1-40) has been signed already in 2013, but it still hasn't been ratified by a sufficient number of EU member states.

¹⁶ Here we will not linger on the complex phenomenon of the 4IR and its numerous manifestations. It suffices to mention that the very notion of the Fourth Industrial Revolution has been made internationally known after Klaus Schwab (founder and director of the World Economic Forum), in 2016, published a book of this title. As for the expression 'Industry 4.0', it globally designates the same phenomenon, but it is particularly widespread in Germany (*Industrie 4.0*).

Patents Act (EPA) was initially adopted in 1994 (amended for the last time in 2011)¹⁷ and there is no doubt that it cannot comprise any provisions specifically adapted to the digital transformation and, more specifically, cloud computing. Moreover, the analysis of CC patent holders has shown that, for some important tech giants like IBM, “most of their cloud computing patents don’t have the phrase *cloud computing* in either the patent title, abstract or claims” (Liang, 2014, p. 3). Consequently, particularly important for the CC related inventions are the provisions of the EPA on criteria for patentability,¹⁸ and, more particularly, on novelty of an invention. Pursuant to Art. 8-2 of the EPA, “an invention is considered to be new if it does not form part of the state of the art”, while the provisions of both paras. 2 and 3 of Art. 8 further specify what the state of art comprises of and how it is determined. On the global level, the big expansion of CC related inventions took place between 2010 and 2013, when the number of granted patents in this field increased from 500 to 2,500 (Liu *et al.*, 2017, p. 80 (graph. 5.18)). In the similar vein, according to the statistical reports published regularly by the Estonian Patent Office (*Patendiamet*), number of filed patent applications during the last ten years varies from 23 in 2020 (*Patendiamet*, 2020) to 77 in 2011 (*Patendiamet*, 2011). Furthermore, over the entire period (2011-2020), the majority of applications (up to 90%) belonged to the category ‘non classified’ (according to the International Patent Classification), allowing the conclusion that they are related to so-called ‘network technology’ (Huang, 2016, p. 45). In any case, the combined analysis of, on the one hand, Estonian regulatory framework and national statistical data, and, on the other, major global tendencies in this field, lead us to three main conclusions. First, Estonian EPA has not recently been amended, but its provisions and national regulatory context in the field of digital transformation (see Chapter 2) are favourable for the inventive activity related to the 4IR. Second, CC-related patents applicants are, most often, seeking patent protection internationally; given the nature of cloud technology, it is predestined to be used in a cross-border (or, more precisely, meta-border) context. Third, Estonia is following a global tendency of stabilisation and decrease of patent applications in this field, showing that CC technology is not so new anymore, having a stabilised and well-developed state of the art.

5. Conclusion

With 99% of governmental services online, e-residency offered to interested foreign individuals and established so-called ‘data embassies’, Estonia has made some giant steps in digital transformation. This success is a result of a clear and long-lasting political orientation, widely accepted by the citizens, business community and civil society. Already from early/mid 90ies, the country started to adapt its public administration to the needs of information society, while the general legal framework (Electronic Communications Act, Information Society Services Act and, to some extent, Media Services Act) provided

¹⁷ For the full text of this act in English language, see <https://www.riigiteataja.ee/en/eli/511112013016/consolide>.

¹⁸ Due to the limited space, here we will not further discuss three conditions for patentability, which are, according to the wording used in the EPA, novelty, inventive step and susceptibility for industrial application.

a regulatory environment suitable for digital society. However, when it comes to the functioning of creative and business communities, the study of Estonia's legislation on two important aspects of IPRs (copyright and patent protection) has shown that, in numerous aspects, the country is largely dependent on the good functioning of wider regulatory and institutional framework in the EU. Still limited success in the establishment EU's digital single market, as well as often vague and general provisions of the Directive 2019/790, have a potential to further complicate the issues such as online content-sharing and fair remuneration of authors. When it comes to patent protection, the regulatory framework on international and EU level (PCPIP, PCT, EPC, and EU patent package) is not always sufficiently adapted to the realities of the 4IR. The study focalised on the issue of cloud technologies has shown that, in spite of globally satisfactory national legislation (EPA) in this field, Estonia is following a global tendency of stabilisation and decrease of cloud related patent applications. If stabilised and well-developed state of the art in the sector of cloud technologies can be an important element contributing to such decrease, there is no doubt that, in the near future, the 4IR would require more supranational regulatory mechanisms.

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Dr Uroš D. Čemalović

Naučni saradnik, Institut za evropske studije, Beograd, Srbija

e-mail: uros@ies.rs

PRAVA INTELEKTUALNE SVOJINE I DIGITALNA TRANSFORMACIJA U ESTONIJI – ASPEKTI VEZANI ZA AUTORSKOPRAVNU I PATENTNU ZAŠTITU

Sažetak

Sa javnom upravom koja je u stanju da gotovo sve usluge građanima pruži *online*, funkcionalnim sistemom e-prebivališta i uspostavljenim „ambasadama podataka“, Estonija je, takođe, država sa brzo rastućim kreativnim sektorom i sedište brojnih tehnoloških kompanija, počevši od malih *start-up*-ova, pa do informatičkih giganata. Pored toga što je rezultat jasne i dugotrajne političke orijentacije, ovaj uspeh je takođe u snažnoj vezi sa estonskim zakonodavstvom i, uže posmatrano, sa regulatornim okvirom koji se odnosi na informaciono/digitalno društvo i zaštitu prava intelektualne svojine. Pošto se osvrne na osnovne odlike zakonodavstva Estonije koje utiče na izgradnju digitalne ekonomije i društva (poglavlje 2), ovaj rad se fokusira na analizu regulatornog okvira posvećenog autorskom pravu (poglavlje 3) i patentima (poglavlje 4) u svetlu digitalne transformacije. Autor brani tezu da postoji direktna veza između, s jedne strane, opšteg regulatornog okvira posvećenog

zaštiti prava intelektualne svojine na nivou Evropske unije i na nacionalnom nivou i, s druge strane, uspeha u razvoju digitalnih tehnologija. Analiza estonskog zakonodavstva i prakse u oblasti autorskopravne i patentne zaštite je pokazala da je država u ovoj oblasti u velikoj meri zavisna od dobrog funkcionisanja regulatornog okvira na nivou Evropske unije, dok će, u bližoj budućnosti, tehnološki napredak zahtevati više nadnacionalnih regulatornih mehanizama.

Ključne reči: Estonija, prava intelektualne svojine, digitalna transformacija, autorsko pravo, patenti.

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ERRATUM

This erratum concerns a correction in the article KONTROLA STRANIH DIREKTNIH INVESTICIJA U PRAVU EU U USLOVIMA KRIZE IZAZVANE PANDEMIJOM published in *Strani pravni život*, Vol 65, no. 3, 2021, pp. 361-374 (doi: 10.5937/spz65-33936).

On page 361 in the course of editorial process a footnote was omitted. The missing footnote should state the following:

** Rad predstavlja rezultat projekta Pravnog fakulteta Univerziteta u Beogradu „Epidemija. Pravo. Društvo“ za 2021. godinu.

The corrected version of the article was published on the website of the journal: <http://www.straniprav nizivot.rs/index.php/SPZ/article/view/837/802>.

The error lies solely on the editorial board, and the author bears no responsibility. We would like to apologise for any inconvenience caused.

INSTRUCTIONS TO AUTHORS

SUBMISSION OF THE MANUSCRIPT

Journal *Strani pravni život (Foreign Legal Life)* (ISSN 0039-2138 (print), ISSN 2620-1127 (on-line)) is a scientific journal in the field of law published by the Institute of Comparative Law. The journal contains previously unpublished scientific papers related to international law and foreign legal systems (law analysis and/or case law comments) - legal comparison. Manuscripts should contain the results obtained by using comparative legal method: domestic law of author's country of origin can be partially analysed, provided that the author compares domestic and foreign law. Exceptionally, when thematic areas or issues are prepared, the authors can analyze domestic law. Authors can publish case law comments (up to 15, 000 characters) or book reviews (up to 7, 000 characters). These manuscript types do not contain summary and keywords.

The journal has long tradition. It has been published since 1956. The journal is open access since 2008. In the journal are published scientific articles, case law comments, book reviews. The journal is edited in accordance with the current journal editing policy. Information on journal's publication policy can be found on: <http://scindeks.ceon.rs/PublicationPolicy.aspx?issn=0039-2138>.

Papers should be submitted in electronic form via on-line platform Aseestant (link: <http://aseestant.ceon.rs/index.php/spz/>). The authors have to register to the system via link <http://aseestant.ceon.rs/index.php/spz/user/register>. Detailed instructions can be obtained from the Editorial Board (e-mail: redakcijaspz@gmail.com).

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1. Articles should be written in Microsoft Word (.doc or .docx format), in Latin script, font Times New Roman, size 12 pt with 1.5 spacing. Left margin 3.5 cm, right margin 3 cm, paper size A4. No hyphenation is allowed.
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- Media and information technologies can offer such spaces to allow different groups to interact with each other, so in Tallin Guidelines on National Minorities and the Digital Age (OSCE, 2019)...

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Model: Surname, name (initials). Year. Title: subtitle. In: Surname, name (initials) of editor (s) (eds.). *Title of the book/collection of papers*. Place of publication: Publisher, page numbers (of the entire paper).

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