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CONTROL OVER LEGALITY OF PARLIAMENTARY ELECTIONS IN A STATE GOVERNED BY THE RULE OF LAW

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Summary

The article examines the genesis of control over the legality of the *Saeima* (the parliament of the Republic of Latvia) elections, particularly focusing on the judicial review of the *Saeima* elections. The particularities of the control over elections, which differentiate them from typical administrative legal proceedings, are highlighted in the publication. The article presents findings of the case law regarding the limits of controlling the legality of elections and the cases when the court could revoke a decision by the Central Election Commission on approving the results of the *Saeima* elections. In view of the fact that sometimes the regulation set out in the *Saeima* Election Law has been criticised in the Latvian legal science, namely, that the legality of elections is controlled by the Department of Administrative Cases of the Supreme Court's Senate rather than the Constitutional Court, the authors examine the models of controlling the legality of elections found in various states and provide their assessment of whether the control functions should be transferred into the jurisdiction of the Latvian Constitutional Court.

Introduction: Importance of the parliamentary elections in the state

Elections are an integral element in forming the state institution of political representation. Political representation, in turn, is the core of democracy.¹

¹ Wessels B., Schmitt H. Meaningful Choices: Does Parties' Supply Matter? In: Elections and Democracy: Representation and Accountability. Thomassen J. (ed.), Oxford: Oxford University Press, 2014, p. 38.

Moreover, democratic elections are an important form of citizens' participation in governing of the state², which, *inter alia*, builds persons' trust in the public power and also in the state in general. One can uphold the statement that elections without democracy are possible, but it is hard to imagine democracy without elections.³

Elections cannot be regarded as democratic, nor their results as legitimate if elections are held by ignoring the constitutional principles of democratic elections and by violating electoral procedures.⁴ However, as practice shows, sometimes elections are held by violating legal norms. This, in turn, means that legal remedies must be in place that would help to prevent possible violations.⁵

In general, elections are amongst the oldest legal institutions; however, they are constantly developing. For example, in view of all the digital challenges and possibilities, the transfer of elections to the digital environment has become one of the topics debated in Europe and worldwide.⁶ Still, the issue of controlling the legality of elections, which is an indispensable part of the rule of law, has always remained relevant.

The choice of legal remedies for the resolution of election disputes is under the state's discretion. At the same time, the state's choice in defining legal remedies must be compatible with its international commitments. At this point, it is important to foreground the European regional system of fundamental human rights, which is binding upon Latvia, more precisely, the European Convention for the Protection of Fundamental Human Rights and Freedoms as "the constitutional instrument of European public order" in the field of human rights⁷ and the case law of the European Court of Human Rights on Art. 3 of Protocol No. 1. Namely, it provides that the existence of a domestic system for effective examination of individual complaints and appeals in matters concerning electoral rights is one of the essential guarantees of free and fair elections.⁸ Such a system ensures effective realization of the rights to vote and to stand for elections, maintains general confidence in the state's administration of the electoral process and constitutes an

² Conclusion of the Constitutional Court of the Republic of Lithuania on 10 November 2012, para. III. Available: <https://www.lrkt.lt/en/court-acts/search/170/ta1047/content> [viewed 15.10.2021.].

³ Pildes R. H. Elections. In: The Oxford Handbook of Comparative Constitutional Law, Rosenfeld M. and Sajó A. (eds.). Oxford: Oxford University Press, 2012, p. 529.

⁴ Conclusion of the Constitutional Court of the Republic of Lithuania on 7 November 2008, para. III. Available: <https://www.lrkt.lt/en/court-acts/search/170/ta1421/content> [viewed 15.07.2021.].

⁵ See, for example, ECHR judgement of 8 April 2010 in Case *Namat Aliyev v. Azerbaijan* (Application No. 18705/06).

⁶ European Commission Democracy through Law. Principles for a fundamental rights-compliant use of digital technologies in electoral processes. Opinion No. 974/2019, CDL-AD(2020)037-e, pp. 7–8. Available: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)037-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)037-e) [viewed 15.07.2021.].

⁷ ECHR judgement of 30 June 2005 in Case *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (application No. 45036/98), para. 156.; ECHR judgement of 13 July 2021 in Case of *Fedotova and others v. Russia* (application No. 40792/10), para. 52.

⁸ ECHR judgement of 20 December 2016 in Case *Uspaskich v. Lithuania* (application No. 14737/08), para. 93.

important device at the state's disposal in achieving the fulfilment of its positive duty under Art. 3 of Protocol No. 1 to hold democratic elections.⁹

The European Commission for Democracy through Law of the Council of Europe (hereafter – the Venice Commission) has repeatedly focused on the regulation on reviewing the legality of elections in the Member States of the Council of Europe. The Venice Commission has published, for example, “Code of Good Practice in Electoral Matters”, presenting the criteria for democratic elections. It is noted in the Code that two variants of reviewing election results are possible – appealing before a court (general, specialised or constitutional) or contesting at the election commission (noting that, in this case, further appeal before a court is desirable).¹⁰ As regards reviewing the election results before the parliament, it is noted that in some countries such a procedure has been envisaged; yet it is admissible in those countries where it has been established a long time ago and also in such cases further appeal before a court should be envisaged. In addition, it has been recognised in the opinion prepared by the Venice Commission “Europe’s Electoral Heritage” that appealing before a parliament could be a safe solution in old democracies; for all that, new democracies should avoid this procedure and, undoubtedly, appealing before a court is the best choice¹¹; however, appealing before an independent and objective election commission is also admissible.

It has been recognised also in the German constitutional law doctrine that election control should be considered as being an imperative manifestation of the principle of democracy, since it ensures legal review with respect to the composition of the parliament compatible with the electors’ will. At the same time, it ensures the right of voters and candidates to equal opportunities for being elected.¹²

This publication will proceed to examine the Latvian legal regulation on controlling the outcome of the parliamentary elections, assessing in a comparative context also the models of election control encountered abroad in order to (possibly) initiate a discussion on some changes in this area in Latvia. Since the establishment of the Constitutional Court, proposals have often been made to transfer election control to the Constitutional Court, as conclusions have been made that the jurisdiction,

⁹ ECHR judgement of 10 July 2020 in Case *Mugemangango v. Belgium* (application No. 310/15), para. 69.

¹⁰ European Commission for Democracy through Law (Venice Commission). Code of good practice in electoral matters. Adopted guidelines and draft explanatory report, pp. 29–30. Available: <https://rm.coe.int/090000168092af01> [viewed 30.08.2021.]; Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 31 October 2014 in Case No. SA-5/2014, para. 15. Available in Latvian: <http://at.gov.lv> > files > files > sa-5-2014 [viewed 31.10.2021.].

¹¹ Council of Europe. European electoral heritage – 10 years of the Code of Good Practice in Electoral Matters, p. 15. Available: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-STD\(2013\)050-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(2013)050-e) [viewed 03.08.2021.].

¹² Brocker L. In: Epping V., Hillgruber C. (Hrsg.). Beck’scher Online-Kommentar. Grundgesetz. 48th edition, München: C. H. Beck, 2021, GG. Art. 41; Judgment of the Federal Constitutional Court of the Federal Republic of Germany of 15 January 2009 in Case No. 2 BvC 4/04.

currently granted to the Supreme Court to review the correctness of elections is incompatible with the *Satversme* [Constitution].¹³ The Constitutional Court has recognised that, although the election issues are the matters of constitutional law rather than of administrative procedure, the *Saeima* has the right to transfer into the jurisdiction of an administrative court also review of such cases, the nature of which is not narrowly that of administrative law.¹⁴

It must be noted that, in Latvia, persons are also made criminally liable for violations of election law, and these issues are examined by courts of general jurisdiction (belonging to the system of courts). Section 90 of the Latvian Criminal Law defines liability for the hindrance to exercise the right to vote, whereas Section 92 envisages criminal liability for falsification of election documents, miscount of votes and violations of secret ballot,¹⁵ however, criminal offences related to elections will remain outside the range of issues researched in this publication.

1. Control over the legality of parliamentary elections in Latvia

In Latvia, the basic rules on parliamentary elections are included in the *Saeima* Election Law, which was adopted in 1995.¹⁶ Pursuant to this law, the Central Election Commission (hereafter – CEC), the court and also the *Saeima* are involved in the supervision and control of the course of elections in various stages and with different tasks.

CEC is the institution, which is responsible for organising and holding elections in the state and ensures implementation of the *Saeima* Election Law, ensures uniform and correct application of this law and controls accurate enforcement of it.¹⁷ Likewise, CEC, on its own initiative, examines the election results in some electoral districts or polling stations, examines complaints and submissions in respect of the decisions and work of election commissions and revokes unlawful decisions thereof. The *Saeima* Election Law sets out, in addition, that in those cases where a court has delivered a convicting judgement regarding violations of election law, CEC, pursuant to Section 52¹, has to perform a more complicated task, i.e., examine, whether these violations had influenced the allocation of

¹³ See Pleps J. Saeimas vēlēšanu rezultāti: kā tos pārsūdzēt? [*Saeima* election results: How to appeal them?]. <https://providus.lv/raksti/saeimas-velesanu-rezultati-ka-tos-parsudzet/> [viewed 21.10.2021.]; Pastars E. Spriedums par Saeimas vēlēšanām: vai tā ir juridiska kļūda [Judgment on the *Saeima* elections: Is it a legal mistake]. *Jurista Vārds*, 2016, No. 50 (453).

¹⁴ Judgement of the Constitutional Court of the Republic of Latvia of 18 December 2013 in Case No. 2013-06-01, para. 15.1. Available: <https://www.satv.tiesa.gov.lv/en?s=2013-06-01> [viewed 20.10.2021.].

¹⁵ Criminal Law. Available: <https://likumi.lv/ta/en/en/id/88966-criminal-law> [viewed 20.10.2021.].

¹⁶ *Saeima* Election Law. Available in Latvian: <https://likumi.lv/ta/id/35261-saeimas-velesanu-likums> [viewed 20.10.2021.].

¹⁷ On the Central Election Commission. Art. 4; 6. Available: <https://likumi.lv/ta/id/S7703-par-centralo-velesanu-komisiju> [viewed 20.10.2021.].

mandates in the respective elections and make a decision on whether to re-allocate or not the mandates among the candidates registered for the respective elections.

Art. 18 of the *Satversme* of the Republic of Latvia, in turn, provides “The *Saeima* itself shall review the qualifications of its members”, retaining the traditional form where the parliament itself reviews the results of parliamentary elections.¹⁸ This means that the mandate of a Member of the *Saeima* should not be approved for a person, who has been elected by violating the provisions of regulatory enactments and would not have the right to become a Member of the *Saeima* due to requirements set in regulatory enactments (e.g., does not have the required proficiency level in the official language or, on the date when the mandate needs to be approved, a convicting sentence with respect to this person had entered into force). Hence, it is possible to differentiate between the competence of CEC, the court and the *Saeima* in reviewing the mandate of the *Saeima* Member – CEC and the court review the legality of the course of election procedure and determination of results, whereas the *Saeima* acquaints itself with the results of CEC and the court’s review, and makes a decision on approving the mandates of deputies on the basis thereof.¹⁹

However, the courts are the ones that perform the most direct and detailed review of the legality of elections. In 1995, when the parliament adopted the *Saeima* Election Law, neither the administrative courts nor the Constitutional Court existed, and Section 51 of the *Saeima* Election Law provided that the submitter of the list of candidates and the announced candidates had the right to appeal, within seven days from the day when the decision by an election commission had been made, a decision by the Central Election Commission before a court in accordance with the location of the election commission.²⁰ Thus, at the time, this competence had been granted to courts of general jurisdiction.

In February of 2004, after the Administrative Procedure Law entered into force, administrative courts commenced their work in Latvia, and a couple of years later, in March of 2006, amendments were introduced to the *Saeima* Election Law²¹, entrusting in the future the control over the legality of elections to the Department of Administrative Cases of the Supreme Court’s Senate. Shortly afterwards, already on 3 November 2006, the Department of Administrative Cases of the Supreme Court’s Senate delivered its first judgement on election matters, i.e., on the legality of the election of the 9th *Saeima* (Case No. SA-5/2006), stating important findings and establishing still relevant principles regarding election control, which will be examined in the next section. Also, over the coming years,

¹⁸ Rodiņa A., Kļaviņa I., Plepa D. Latvijas Republikas Satversmes 18. panta komentārs [Commentary on Article 18 of the *Satversme* of the Republic of Latvia]. LR Satversmes komentāri. II nodaļa. Saeima. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2020, p. 293.

¹⁹ *Ibid.*, p. 299.

²⁰ *Saeima* Election Law. Available in Latvian: <https://likumi.lv/ta/id/35261-saeimas-velesanu-likums> [viewed 20.10.2021.].

²¹ Amendments to the *Saeima* Election Law. Available in Latvian: <https://likumi.lv/ta/id/131058-grozījumi-saeimas-velesanu-likuma> [viewed 20.10.2021.].

after elections applications regarding alleged violations of election law have been submitted to courts, and the Supreme Court has already established judicature on these cases.

1.1. The subject-matter of appeal

The *Saeima* Election Law transfers into the competence of the Senate's Department of Administrative Cases three types of applications relating to the *Saeima* election for review:

Firstly, reviewing the legality of the decision by which the Central Election Commission has dismissed an applicant's claim regarding the vote-counting minutes (Section 35¹(2));

Secondly, an application contesting the CEC's decision to approve the election results (Section 51 (1));

Thirdly, an application contesting CEC's decision on whether, in connection with a convicting sentence in a criminal case on violations of election law, reallocation of mandates is required (Section 52¹(2)).

Hereafter, due to the limited scope of the article, only the judicial review, based on Section 52 (2) of the *Saeima* Election Law, will be examined, i.e., cases, in which the CEC's decision to approve the election results is contested. Pursuant to Section 51 (1) of this law, the person who has submitted a list of candidates and the announced candidate may turn to court. This provision indicates that the applicant has to submit an application not regarding the correctness of election results as such but has to request repealing of CEC's decision, by which the election result has been approved, as an administrative act. Regulatory enactments do not provide a concrete answer regarding the exact jurisdiction of the Supreme Court in election cases, and the Supreme Court, in the course of examining applications, has had to interpret legal norms with respect to the scope of its mandate on issues of election control. For example, in its first judgement in the area of election control, i.e., the judgement of 2006 in Case SA-5/2006, the Department of Administrative Cases of the Supreme Court's Senate has recognised that the Senate's jurisdiction included not only examining the correctness of CEC's decision formally (e.g., errors in vote-counting, in drafting the decision, etc.) but also reviewing the legality of the election process, i.e., its compliance with the election principles, included in Art. 6 of the *Satversme* and documents of international law.²²

Considering the incomplete regulation of Section 51 (1) of the *Saeima* Election Law, the Department of Administrative Cases recognises that "in establishing its jurisdiction, in examining applications regarding CEC's decision

²² Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 3 November 2006 in Case No. SA-5/2006, para. 8.4. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.]; Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 23 May 2017 in Case No. SA-3/2017, para. 8.1.; Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 31 October 2014 in Case No. SA-5/2014, para. 8. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

on approving election results, the said legal provision shall be interpreted within the scope of Article 1 of the *Satversme*, which means that the Court's jurisdiction includes reviewing the legality of CEC's decision on approving the election results, ensuring that human rights, including a person's electoral rights, are exercised.²³ In a democratic state order, stakeholders should be ensured the possibility to turn to a court to examine in legal procedure the legality of the election process. Judicial review of the legality of the election process is a necessity for a democratic state order. Judicial review of the legality of CEC's decision on approving the election results is the only one, in the framework of which a court is able to examine the legality of the election process, and, in accordance with the standards of a democratic state, the institution, which examines complaints about election, should have the right to review, *inter alia*, also the legality of the election process.²⁴ Just as the administrative court does it in other cases, which are examined in administrative procedure, also in this case, the Supreme Court has the right to decide on the appealed decision on its merits.²⁵ Similarly, it has been noted also in the German legal science that the entire procedure of elections is considered to be the subject-matter of election review, starting with preparation for elections and the process of elections, until establishing the election results and allocation of mandates or seats. This encompasses the actions of both election bodies and third persons, insofar these persons perform certain obligations related to organisation of elections, in compliance with law. Hence, violations of the general principles of election law and other imperative legal provisions, committed by election bodies or third persons, are considered to be election errors or violations, irrespectively of whether the respective violation pertains to preparation, process of elections or establishing the election results.²⁶

Several cases are possible, where an applicant could turn to a court in the context of the *Saeima* elections. For example, these can be applications regarding violations committed in the process of elections, which have affected the election results, and, hence, elections had been contrary to the election principles, enshrined in the *Satversme*, and the statutory requirements. Likewise, errors may be made in the process of vote-counting or an error has been made in drafting the CEC's decision on approving the election results. In its case law thus far, the Supreme Court, in reviewing election disputes, has examined, for example,

²³ Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 3 November 2006 in Case No. SA-5/2006, para. 8.3.

²⁴ European Commission for Democracy through Law (Venice Commission). Code of good practice in electoral matters. Adopted guidelines and draft explanatory report, pp. 29.–30. Available: <https://rm.coe.int/090000168092af01> [viewed 30.08.2021.]; Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 23 May 017 in Case No. SA-3/2017, para. 8.1. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

²⁵ Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 31 October 2014 in Case No. SA-5/2014, para. 12. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

²⁶ Brockler L. In: Epping V., Hillgruber C. (Hrsg.). Beck'scher Online-Kommentar. Grundgesetz. 48th edition, München: C. H. Beck, 2021, GG. Art. 41, Rn. 2–3.

the issue whether different duration of airtime allocates to large and small political parties during TV pre-election debates should be regarded as unlawful, as well as whether violation of regulation on financing of political parties and advertising has affected the election results and whether there would be grounds for revoking the CES's decision on approving the election results.

1.2. Particularities of legal proceedings in matters of election control

On the whole, in the course of legal proceedings, the general rules of administrative procedure on reviewing cases in court are applicable to cases, where a court reviews the legality of the *Saeima* elections; however, the reviewing of election issues also differs significantly from general administrative proceedings. These special proceedings sometimes have been criticised (mainly by persons submitting the lists of candidates) because, in these cases, the application to a court must be prepared quite promptly, which, of course, may be cumbersome. As noted in legal doctrine, this approach, which differs from the regular approach in administrative proceedings can be justified by the special nature of elections, which, as noted above, is both an institution of constitutional law and also citizens' fundamental rights.²⁷

First of all, in cases of election control, the term, in which a person may submit an application to court, is shortened; i.e., Section 51 of the *Saeima* Election Law provides that the person who has submitted the list of candidates and the announced candidate may appeal the CEC's decision to approve the election results within three weekdays. Although the short terms for submitting complaints may cause certain concerns as to whether it is at all possible to prepare, within this term, appropriate reasoning for the complaint, obtain the evidence required for effective examination of the case, although setting of such shortened term in election cases may be justified because long terms for submitting applications could be the grounds for uncertainty regarding the correctness and legality of election results, as well as hinder the functioning of democracy. It follows also from international standards that complaints regarding the legality of election process must be submitted to a court within short terms to avoid prolonged uncertainty regarding election results, and also making the decision regarding election results should not take too long.²⁸

Secondly, usually in general administrative proceedings, submission of an application to a court suspends the operation of an administrative act²⁹, however,

²⁷ Levits E. Nozīmīgs spriedums par vēlēšanām [An important judgement on the election]. Jurista Vārds, 2006, No. 50 (453).

²⁸ European Commission for Democracy through Law (Venice Commission). Code of good practice in electoral matters. Adopted guidelines and draft explanatory report, p. 28. Available: <https://rm.coe.int/090000168092af01> [viewed 30.08.2021.].

²⁹ See. Art. 185 of Administrative Procedure Law. Available: <https://likumi.lv/ta/en/en/id/55567-administrative-procedure-law> [viewed 03.11.2021.].

Section 51 (2) of the *Saeima* Election Law sets out clearly that the filing of an appeal in court does not nullify the CEC's decision to approve the election results.

Thirdly, traditionally, administrative proceedings in court comply with the principle of objective investigation, pursuant to which the court, within the limits of the claim, in order to establish actual circumstances of the case and achieve legal and fair examination of the case, gives instructions and recommendations to the participants of administrative proceedings and also collects evidence on its own initiative. However, Section 54 (4) of the *Saeima* Election Law sets out clearly that in a case of election control the applicant provides the justification for the appeal and that the applicant carries the burden of proof. This means that, if cases belong to these categories, the applicant is obliged to present to the court credible arguments that might prove the unlawfulness of elections and also submit evidence at the applicant's disposal that justifies their reasoning, and also must indicate in the application what evidence the court should collect.³⁰ The Supreme Court's Senate has noted – "this means that the submission of an application should be based, on part of the applicant, on sufficiently serious and justified circumstances that cause objective doubts regarding the respective decision made by the election commission. If the applicant does not have in their disposal sufficient justification and evidence or indications regarding such, which must be immediately verified, the applicant will not stand the chance of having such an application reviewed in depth and of having an outcome favourable to them. Neither does the right to submit an application envisage an automatic need to recount the votes nor an obligation to do so."³¹

Fourthly, the court must adopt the decision on approving the election results in an urgent procedure. Pursuant to Section 54 (3) of the *Saeima* Election Law, in the case referred to in its Section 51 (1), the court examines and adopts the ruling within seven days after the receipt of the application. The Department of Administrative Cases of the Supreme Court is of the opinion that the court's obligation to establish the circumstances of the case and obtain evidence should be assessed in conjunction with the limited term for reviewing the case and, thus, the court's objectively limited possibilities to collect evidence on its own initiative.³² In this regard, the Venice Commission also has noted that excessively long terms for examining the cases in court could subject the court to political and public pressure, as well as hinder the legislative process and exercise of the executive

³⁰ Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 3 November 2006 in Case No. SA-5/2006, para. 9. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.]; Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 31 October 2014 in Case No. SA-5/2014, para. 27. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

³¹ Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 31 October 2018 in Case No. SA-3/2018, para. 26. Available in Latvian: <http://at.gov.lv> [viewed 02.11.2021.].

³² Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 3 November 2006 in Case No. SA-5/2006, para. 9. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

power.³³ The International Institute for Democracy and Electoral Assistance also has noted in its election standards (*International Electoral Standards*), which are intended as guidelines for reviewing legal regulation, that appropriate terms for examining complaints should be defined in legal norms. Depending on the nature of the complaint, it may be reviewed immediately, within a couple of hours or a couple of days. Fast examination of a complaint often prevents a minor complaint turning into a major problem.³⁴ Thus, it can be concluded that the shortened term for reviewing election cases, set in the *Saeima* Election Law, complies with the international standards of election law.

Fifthly, pursuant to Section 54 (2) of the *Saeima* Election Law, the Department of Administrative Cases of the Supreme Court's Senate examines a case regarding a CEC's decision on approving the election results as a court of first instance composed of three Judges, and, pursuant to Section 54 (6), the court's ruling, as well as other decisions, which are taken while conducting the procedural activities related to examining an application or an initiated case, are not subject to appeal. The fact that these decisions are unappealable complies with the internationally recognised practice and also the principle of legal certainty.³⁵ The State needs a parliament that is capable of functioning, and litigations in several instances would considerably prolong the process of forming the parliament. Granting the right to a person to repeatedly initiate full review of the legality of the election process in a court would also increase the risk that a person would not exercise their procedural rights and obligations during the first legal proceedings in good faith and in full.³⁶ Moreover, that would be contrary to the principle of *res judicata*, which aims to ensure stability of legal relations and, pursuant to which, nobody has the right to re-examine a final and valid judgement with the aim of achieving repeated adjudication in the case.³⁷ Likewise, from the perspective of the right to a fair trial, the fact that election violations are examined by the Supreme Court as the first and the final instance does not mean that a person's right to a fair trial

³³ Report on the cancellation of election results, adopted by the Council for Democratic Elections at its 31st meeting (Venice, 10 December 2009) and by the Venice Commission at its 81st plenary session (Venice, 11–12 December 2009), paras 56 and 60. Available: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2009\)054-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)054-e) [viewed 30.08.2021.].

³⁴ Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 23 May 2017 in Case No. A-3/2017, para. 8.4. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.]; *International Electoral Standards*, p. 94. Available: <https://www.idea.int/sites/default/files/publications/international-electoral-standards-guidelines-for-reviewing-the-legal-framework-of-elections.pdf> [viewed 30.08.2021.].

³⁵ Judgement of the Constitutional Court of the Republic of Latvia of 29 April 2016 in Case No. 2015-19-01, para. 12.2. Available: [https://www.satv.tiesa.gov.lv/cases/?search\[number\]=2015-19-01](https://www.satv.tiesa.gov.lv/cases/?search[number]=2015-19-01) [viewed 29.08.2021.].

³⁶ Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 23 May 2017 in Case No. SA-3/2017, para. 8.3. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

³⁷ Judgement of the Constitutional Court of the Republic of Latvia of 29 April 2016 in Case No. 2015-19-01, para. 12.2. Available: [https://www.satv.tiesa.gov.lv/cases/?search\[number\]=2015-19-01](https://www.satv.tiesa.gov.lv/cases/?search[number]=2015-19-01) [viewed 29.08.2021.].

would be infringed upon – the legislator has the right to determine, in how many instances cases of certain categories are to be reviewed,³⁸ and the arguments presented above regarding prompt examination of election violations and formation of a parliament capable of functioning justify examination of the matter of election control on its merits only in one judicial instance.

The procedural aspects of election control, referred to above, allow concluding that the procedural regulation on contesting elections is quite complicated since the burden of proof is imposed on the applicant, the shortened terms for appeal and the condition that the operation of the appealed decision is not suspended make cancelling of elections into a quite complicated mechanism to be applied in genuine emergency situations.

1.3. Findings in the case law on the significance of election violations

Neither the *Satversme*, nor the *Saeima* Election Law provides clear regulation on the kind of rulings that a court may adopt in a case of election control. Furthermore, in foreign legal science it is often debated how substantial election violations should be in order for courts to declare elections as being void, to announce new elections, etc.

The Supreme Court's Senate, commenting on the legal grounds for contesting the results of the *Saeima* elections, has noted that "a violation of legal provisions *per se* is neither the decisive nor the sufficient pre-condition for considering the election results to be affected to the extent that it would be the grounds for recognising the entire process of elections as being unlawful. In reviewing the legality of the election process, it is not enough to identify a violation, the substance and consequences of the particular violation need to be examined".³⁹

In the course of discussing and adopting the draft *Satversme* at the Constitutional Assembly, in deciding on the possible wording of Art. 18, it was pointed out that, in general, that elections might be regarded as being unlawful if due to the violations committed the election results would be different.

Analysis of the Supreme Court's rulings in election cases allows concluding that several findings in these cases have been taken from the practice of the German constitutional law; i.e., the Department of Administrative Cases, referring to a judgement by the German Federal Constitutional Court,⁴⁰ notes that "only a serious, significant, repeated, large-scale, generally known violation in election fight is sufficient to recognise it as affecting the elections. Only in those

³⁸ Neimanis J. *Satversmes* 82. panta komentārs [Commentary on Article 82 of the *Satversme*]. Latvijas Republikas *Satversmes* komentāri. VI nodaļa. Tiesa. VII nodaļa. Valsts kontrole. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2013, p. 47.

³⁹ Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 3 November 2006 in Case No. SA-5/2006, para. 12. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

⁴⁰ Judgment of the German Federal Constitutional Court in BVerfGE, 103.111, paras 89 and 91.

cases, where the designation “election terror”, i.e., coercing all or the largest part of electors to vote for a particular political organisation without the possibility of turning against it, one can speak about substantive impact on the election result, i.e., distortion of the voter’s political will”.⁴¹ The Department of Administrative Cases, referring to the findings expressed in the German legal doctrine, has noted also that “it cannot be recognised that the principle of free elections has been violated of any if the organisations involved in political fight has committed violations but these are publicly discussed during the pre-election period. Thus, for the elector to make their choice, the violations are known and are identifiable”.⁴²

The Constitutional Court has noted in several of its judgements that “a violation should be recognised as being such that affects the election results if it significantly influences the outcome of elections, i.e., if it is established that the election results do not reflect the genuine (free) will of electors”. One could speak of unlawfulness of elections as a whole if the election results would be different due to the violations committed. Otherwise, unhindered and effective functioning of the parliament as well as the general stability of the political system in the state would be made impossible.⁴³ It has been noted also in the German doctrine that it is not enough to identify an election error or a violation to arrive at any conclusion on the validity of the *Bundestag* election. Alongside the principle of reflecting the electors’ will correctly, the principle of providing utmost protection to the existence of the parliament must also be complied with. Both these principles, which may collide, are equally closely linked to the democratic principle of the Basic Law, and in each particular case they need to be duly balanced.⁴⁴

Since the *Saeima* Election Law provides that the entire territory of the state is divided into constituencies, whereas voting takes place in polling stations, this division must be taken into consideration also in reviewing cases of election violations. If it can be established that the election results have been affected in a certain polling station, the legality of the election results in the particular polling stations must be decided on. If the unlawfulness of election results can be recognised in a constituency, there are grounds for deciding on the constituency. If it is concluded that the election results have been affected in the entire territory of the state, there are grounds for deciding on the entire election results approved

⁴¹ Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 3 November 2006 in Case No. SA-5/2006, para. 13.1. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

⁴² *Ibid.*, para. 13.3.

⁴³ *Ibid.*, para. 12; Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 29 November 2005 in Case No. SKA-468/2005, para 14.; Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 31 October 2014.in Case No. SA-5/2014, para. 24. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

⁴⁴ Brocker L. In: Epping V., Hillgruber C. (Hrsg.). Beck’scher Online-Kommentar. Grundgesetz. 48th edition. München: C. H. Beck, 2021, GG. Art.41, Rn. 4.

by the Central Election Commission.⁴⁵ Member States of the Council of Europe have reached consensus on the fact that cancelling the election results in the entire territory of state is not the only option, partial cancellation is also possible.⁴⁶ This allows avoiding two extremes – cancelling election results as a whole, although errors can be found in a small territory, and refusing to cancel the results as a whole because the affected territory is too small.⁴⁷

Although aspects of election control have been rather extensively analysed in the German doctrine, it must be noted that, in this state, just as in Latvia, the results of parliamentary (*Bundestag*) elections have never been declared void,⁴⁸ although the land of Schleswig-Holstein had this experience with the 17th *Landtag*, the election results of which the Constitutional Court of this land has recognised as being void (alongside it, recognising the respective provision in the Election Law of Schleswig-Holstein as being incompatible with several articles of the Constitution of this federal land).⁴⁹

One can uphold the finding expressed in legal science that in elections, in which the majority of citizens participate and in the organisation of which thousands of persons are involved, “some violations of law will always be found – violations made by private persons or (much more dangerous) also by officials. This cannot be totally excluded. If every violation would lead to the cancellation of election results, normal functioning of the parliament would be impossible”, and one could speak of a constitutional crisis in the state.⁵⁰ Currently, when the Constitutional Court has not revoked a single decision by CEC on approving the election results, discussions in legal science on the consequences of such decisions have been rather minimal; however, if such a decision was at some point adopted, it can be expected that the current laconic regulation on this matter and the provisions of the *Saeima* Election Law in the context of the provisions of the *Saeima* Rules of Procedure and of the *Satversme* could cause extensive polemics.

⁴⁵ Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 31 October 2014 in Case No. SA-5/2014, para. 21. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

⁴⁶ Electoral Law, Report on electoral law and electoral administration in Europe – Synthesis study on recurrent challenges and problematic issues, 234. punkts. Available: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)023-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)023-e) [viewed 30.08.2021.].

⁴⁷ Judgement of Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 31 October 2014 in Case No. SA-5/2014, para. 21. Available in Latvian: <http://at.gov.lv> [viewed 31.10.2021.].

⁴⁸ Winkelmann H. Wahlprüfungsgesetz [Election Examination Act]. NomosKommentar. 1. Auflage. Baden-Baden: Nomos, 2012, § 11, Rn. 4.

⁴⁹ Judgment of the Constitutional Court of Schleswig-Holstein of 30 August 2010 in Case No. LverfG 1/10 (ECLI:DE:LVGSH:2010:0830.LVERFG1.10.0A), para. 1.

⁵⁰ Levits E. Nozīmīgs spriedums par vēlēšanām [Important judgement on the election]. Jurista Vārds, 2006, No. 50 (453).

2. Constitutional Court as a legal remedy for solving election disputes

Although, as the experience of various countries shows, the so-called election disputes predominantly are resolved both before election commissions and courts of general jurisdiction, as well as before special (*ad hoc*) election courts⁵¹, states grant the right to become involved in resolution of such disputes also to constitutional courts.

Various studies prove that a single correct mechanism for resolving election disputes does not exist. It is neither right nor wrong that the constitutional court engages in the resolution of these disputes. Each state chooses a model that is most suitable for its legal system (e.g., taking into account the institution which approves the election results) and the system for the protection of rights (e.g., respecting the jurisdiction of courts). One of these may be granting this jurisdiction for the national constitutional court.

At the same time, the involvement of constitutional courts in the resolution of election disputes cannot be examined narrowly. The Constitutional Court of the Republic of Latvia can review, *inter alia*, an issue relating to the constitutionality of a legal norm, which directly defines and affects exercising the right to vote. Hence, the involvement of constitutional courts of the world in the resolution of election disputes is twofold: both by directly resolving and reviewing issues related to violations committed in elections and also by creating election environment that is compatible with the constitution.

2.1. Involvement of the constitutional court in resolving election disputes: Experience of other countries and potential for enlarging the competence of the Constitutional Court of Latvia

Involvement of constitutional courts in resolving election disputes is included among the functions that have the aim of ensuring the integrity of political office and related process.⁵² Information collected by the Venice Commission shows that in 31 countries the Constitutional Court or a special election court (e.g., in the United Kingdom) have the right to review the so-called election disputes.⁵³

⁵¹ European Commission Democracy through Law. Report on electoral law and electoral administration in Europe. Synthesis study on recurrent challenges and problematic issues. Study No. 965/2019, CDL-AD(2020)023-e, p. 39. Available: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)023-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)023-e) [viewed 15.07.2021.].

⁵² De Visser M. Constitutional Review in Europe. A Comparative Analysis. Oxford and Portland, Oregon: Hart Publishing, 2014, p. 168.

⁵³ European Commission Democracy through Law. Report on election dispute resolution. Opinion No. 913/2018, CDL-AD(2020)025-e, p. 13. Available: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)025-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)025-e) [viewed 15.07.2021.].

Constitutional courts have been entrusted with the resolution of election disputes in, for example, Albania, Austria, Bulgaria, Germany, Malta, Slovakia, etc.

For example, the Constitutional Court of Lithuania makes conclusions on whether there have been violations of election laws during the elections of the members of the *Seimas*, as well as elections of the President of the Republic.⁵⁴ In such cases, an application, not later than within three days of the official publication of the final election results in the constituency concerned or the official publication of the decision of the Central Electoral Commission on the availability or filling of a vacant seat of a member of the *Seimas*⁵⁵, may be submitted only by the *Seimas*, as well as the President of the State. The Constitutional Court of Lithuania examines also the decisions of the Central Electoral Commission or its refusals to examine complaints concerning the violation of election laws in cases where such decisions are adopted or other actions are carried out by the said commission after the voting closes in the election.⁵⁶ Moreover, the Constitutional Court must examine such inquiry within 120 hours of its filing with the Court.⁵⁷ It is important that the final regulation, following the opinion by the Constitutional Court, is adopted by the *Seimas* itself.⁵⁸

The Federal Constitutional Court of Germany, in turn, has the mandate to review disputes related to the *Bundestag* elections – both regarding the validity of elections and violation of rights during elections or their preparation.⁵⁹ The law provides that “application in such a situation may be lodged within two months of the *Bundestag*’s decision by the Member of the *Bundestag* whose seat is disputed, by an individual or group of individuals who are entitled to vote and whose objections were rejected by the *Bundestag*, by a parliamentary group or by a minority in the *Bundestag* comprising at least one tenth of the statutory number

⁵⁴ The Law on the Constitutional Court of the Republic of Lithuania. Article 73. Available: <https://www.lrkt.lt/en/about-the-court/legal-information/the-law-on-the-constitutional-court/1475> [viewed 15.07.2021.].

⁵⁵ The Law on the Constitutional Court of the Republic of Lithuania. Article 74. Available: <https://www.lrkt.lt/en/about-the-court/legal-information/the-law-on-the-constitutional-court/1475> [viewed 15.07.2021.].

⁵⁶ The Law on the Constitutional Court of the Republic of Lithuania. Article 77, para. 2. Available: <https://www.lrkt.lt/en/about-the-court/legal-information/the-law-on-the-constitutional-court/1475m> [viewed 15.07.2021.].

⁵⁷ The Law on the Constitutional Court of the Republic of Lithuania. Article 77, para. 3. Available: <https://www.lrkt.lt/en/about-the-court/legal-information/the-law-on-the-constitutional-court/1475> [viewed 15.07.2021.].

⁵⁸ The Constitution of the Republic of Lithuania. Article 107, part 4. Available: <https://www.lrs.lt/home/Konstitucija/Constitution.htm> [viewed 15.07.2021.]; See more Birmontiene T. Konstitucionālā vēlēšanu doktrīna [Constitutional election doctrine]. In: Rinkimų teisės ir kitos konstitucinės jurisprudencijos problemos. Vilnius: Lietuvos Respublikos Konstitucinis Teismas, 2011, pp. 127–161.

⁵⁹ Basic Law for the Federal Republic of Germany. Article 41. Available: http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0204 [viewed 15.07.2021.].

of Members.”⁶⁰ In a case like this, as can be seen, the Constitutional Court will assess the constitutionality of the *Bundestag*’s decision.

The example of France needs to be highlighted in particular. Art. 59 of the Constitution of France provides: “The Constitutional Council shall rule on the proper conduct of the election of Members of the National Assembly and Senators in disputed cases.”⁶¹ To put it differently, in France, the disputes of parliamentary elections are examined only by *Conseil Constitutionnel*.⁶² In France, neither the election commissions nor the parliament has this jurisdiction. That is why J. Bell calls *Conseil Constitutionnel* “election court”.⁶³ Moreover, the rights to contest election results are vested in all persons registered on the electoral roll for the constituency in which the election was held and by all persons having declared their candidacy.⁶⁴ In France, the results of electing both the Members and the Senators can be contested within ten days after the election results have been announced. Moreover, *Conseil* may examine also issues related to the election process itself if any violations are detected before or during elections (e.g., violations of campaigning rules).⁶⁵ The Constitutional Council of France has the mandate to both annul the election that is contested or rescind the decision of the census commission and itself declare the proper candidate elected.⁶⁶

Although the common element for these three states is the involvement of the constitutional court (in France – *Conseil Constitutionnel*) in the resolution of election disputes, the jurisdiction granted to the institution highlights some differences. Both the legal act to be reviewed and the circle of persons having the right to submit applications differ, as well as the matters that are decided on at the constitutional review institution. This, in turn, indicates that the legal regulation in each state is unique, based on its individual legal situation. And this means that the comparative method can be used as “an experienced friend”⁶⁷, but

⁶⁰ Act on the Federal Constitutional Court. Section 48. Available: http://www.gesetze-im-internet.de/englisch_bverfgg/englisch_bverfgg.html#p0238 [viewed 16.07.2021.].

⁶¹ Constitution of October 4, 1958. Article 59. Available: <https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958> [viewed 16.07.2021.].

⁶² Daugeron B. Le contrôle des élections parlementaires avant le Conseil constitutionnel: la “vérification des pouvoirs”, histoire et théorie. Available: <https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/le-controle-des-elections-parlementaires-avant-le-conseil-constitutionnel-la-verification-des> [viewed 16.07.2021.].

⁶³ Bell J. French Constitutional Law. Oxford: Clarendon Press, 2005, p. 30.

⁶⁴ Institutional Act on the Constitutional Council, Section 33. Available: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/texts.pdf [viewed 16.07.2021.].

⁶⁵ Bell J. French Constitutional Law. Oxford: Clarendon Press, 2005, p. 30.

⁶⁶ Institutional Act on the Constitutional Council. Section 41. Available: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/texts.pdf [viewed 16.07.2021.].

⁶⁷ Barak A. Response to The Judge as Comparatist. Comparison in Public Law. *Tulane Law Review*, 2005, Vol. 80, p. 196.

in this situation comparative law should be used very carefully, as in the analysis of comparative rights one has to take into account the functional context.⁶⁸

The jurisdiction of the Constitutional Court of Latvia is defined by Art. 85 of the *Satversme* and Section 16 of the Constitutional Court Law, which do not envisage the possibility of reviewing the so-called election disputes, i.e., the possibility to examine violations committed in the election process.⁶⁹ Likewise, the Constitutional Court does not review the constitutionality of individual legal acts. Although, purely theoretically, the possibility of granting this jurisdiction to the Constitutional Court could be considered. Some considerations in particular could suggest reflecting on this possibility. First of all, it would be relatively more simply to broaden the Constitutional Court's jurisdiction – by amending the Constitutional Court Law rather than the *Satversme* because Art. 85 of the *Satversme* provides for the so-called “open” constitutional regulation on jurisdiction. Secondly, the Constitutional Court's jurisdiction has been often assessed as being narrow, which provides the possibility to consider broadening of its jurisdiction. Thirdly, the theory of constitutional review, which must be always respected in considering the possibilities for expanding jurisdiction, theoretically does not exclude the possibility of involving also the constitutional court in the resolution of these disputes.⁷⁰

Nevertheless, the constitutional court's jurisdiction cannot be expanded mechanically. When thinking about it, other arguments also should be considered. For example, the normative regulation of the proceedings, the number of judges in the court's composition. However, the most important aspect that should always be assessed is expedience or whether these changes are truly necessary. Taking into account Latvia's legal system and the fact that a well-established system for resolving election disputes exists, as well as the fact that administrative courts deal with their tasks effectively, there is no need to consider the possibility of transferring the resolution of such disputes to the Constitutional Court. No arguments can be found that would prove that the existing system does not function or has deficiencies. Thus, at this point, any considerations regarding changes to the jurisdiction would only be a theoretical assessment of this possibility without a practical and understandable need.

⁶⁸ Judgement of the Constitutional Court of the Republic of Latvia on 8 June 2007 in Case No. 2007-01-01, para. 24.1. Available: http://www.satv.tiesa.gov.lv/wp-content/uploads/2007/01/2007-01-01_Spriedums_ENG.pdf [viewed 17.07.2021.].

⁶⁹ Constitutional Court Law. Available: <http://www.satv.tiesa.gov.lv/?lang=2&mid=9> [viewed 17.07.2021.].

⁷⁰ See more Rodiņa A. The Jurisdiction of the Constitutional Court. Theoretical Assessment. Possibilities of Expansion. In: Konstitucionālās tiesas kompetence: robežas un paplašināšanas iespējas. Rīga: Latvijas Republikas Satversmes tiesa, 2014, pp. 125–139.

2.2. Involvement of Constitutional Court in building of legal environment for elections

Pursuant to the theory of constitutional review, constitutional courts not only resolve a particular dispute by providing their assessment of the constitutionality of the contested legal provision but their rulings are of great importance for subsequent or the so-called future disputes, which means that, in creating legal relations, the court's rulings are respected in accordance with *erga omnes* nature of the judgement. The Constitutional Court of Latvia, similarly to other constitutional courts, in examining cases, constantly defines the content of the norms of the *Satversme*, explaining what has been encoded in them. In other words, the judgements of the Constitutional Court have become a reflection of the concise text of the *Satversme*.

As noted above, elections in general are broader processes. They do not affect solely those fundamental human rights, which can be read into the constitutional principles of elections (Art. 6 of the *Satversme* in the context of Art. 1 of the *Satversme*) – they are linked to and their process depends upon other fundamental human rights, e.g., the right to association, the right to assembly, the freedom of speech⁷¹. Respecting all these rights is essential to legitimate *Saeima* elections.⁷² Therefore, it is important that the normative regulation of elections complies with the *Satversme*.

In its 25 years of existence, the Constitutional Court has contributed significantly to determining the content of the constitutional election principles, included in the *Satversme*. For example, the Constitutional Court of Latvia, similarly to the Federal Constitutional Court of Germany, the Constitutional Court of Czechia⁷³, has assessed the system of proportional representation in elections, providing its opinion on the compliance of 5% election barrier with Art. 6 of the *Satversme*.⁷⁴

Those judgements have revealed the principle of general elections, i.e., examined the content of the passive and active electoral rights.

⁷¹ Judgement of the Constitutional Court of the Republic of Latvia of 22 February 2010 in Case No. 2009-45-01. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/07/2009-45-01_Spriedums_ENG.pdf#search=2009-45-01 [viewed 19.07.2021.].

⁷² Joint report of the Venice Commission and of the Directorate of information society and action against crime of the Directorate General of Human Rights and Rule of Law (DGI) on the Use of digital technologies and elections, Opinion No. 925/2018, CDLAD(2019)016, para. 142. Available: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)016-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)016-e) [viewed 17.07.2021.].

⁷³ Pildes R. H. Elections. In: The Oxford Handbook of Comparative Constitutional Law, Rosenfeld M. and Sajó A. (eds.). Oxford: Oxford University Press, 2012, p. 538.

⁷⁴ Judgement of the Constitutional Court of the Republic of Latvia of 23 September 2002 in Case No. 2002-08-01. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2002/06/2002-08-01_Spriedums_ENG.pdf#search=2002-08-01 [viewed 19.07.2021.].

The right to vote is an essential aspect of all democracies.⁷⁵ In this context, one might even say that the Constitutional Court has played an important role in decreasing the restrictions on active electoral rights in particular.⁷⁶ Tracing the development of the Constitutional Court's case law in assessing the restrictions included in Section 2 of the *Saeima* Election Law allows drawing this conclusion. The first case, in which the Constitutional Court reviewed a restriction on the active electoral rights, dates back to 2003. The Constitutional Court had to review the compliance of para. 2 of Section 2 of the *Saeima* Election Law, i.e., a provision which prohibited from voting the suspect, the accused or the defendant if the security measure detention had been applied to them, with Arts 6, 8 and 91 of the *Satversme*.⁷⁷ The Constitutional Court recognised this restriction as being anti-constitutional and it became void *ex nunc*.

Following that, in 2009, the *Saeima*, taking into account, *inter alia*, findings expressed in the Constitutional Court's judgement in case No. 2002-18-01, as well as the case law of the European Court of Human Rights, deleted from the *Saeima* Election Law a provision (para. 1 of Section 2 of this Law), which prohibited from voting persons who were serving their sentences in institutions for deprivation of liberty.⁷⁸ Taking into account these amendments to the *Saeima Election Law*, the Constitutional Court terminated legal proceedings in a case that was initiated exactly regarding the compliance of this para. 1 of Section 2 of the *Saeima* Election Law with the provisions of the *Satversme*.⁷⁹ Thus, (after these amendments of 2009) the law set out prohibition to vote only for persons, who had been recognised as being incapable in a procedure prescribed in law. Later, in 2014, the *Saeima* amended the *Saeima* Election Law, excluding from it Section 2, which defined

⁷⁵ Singh M. P. Elections and electoral systems in constitutional regimes. In: Tushnet M., Fleiner T., Saunders C. (eds.). *Routledge Handbook of Constitutional Law*. London: Taylor & Francis Group; 2012, p. 135.

⁷⁶ Alongside the cases analysed here, a case regarding the restriction that prohibited a judge from standing for elections, included in the *Saeima* election law, was initiated at the Constitutional Court. The contested norm of the law provided that, upon announcing a judge as candidate, they had to leave the judge's office. The *Saeima* amended the contested norm, and legal proceedings in this case were terminated. See: Decision of the Constitutional Court of the Republic of Latvia of 29 March 2011 to terminate a Case No. 2010-68-01. Available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2010-68-01_Lemums_izbeigsana.pdf#search=2010-68-01 [viewed 17.07.2021.].

⁷⁷ Judgement of the Constitutional Court of the Republic of Latvia of 5 March 2003 in Case No. 2002-18-01. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2002/10/2002-18-01_Spriedums_ENG.pdf#search=2002-18-01 [viewed 19.07.2021.].

⁷⁸ Grozījumi Saeimas vēlēšanu likumā [Amendments to the *Saeima* Election Law]. *Latvijas Vēstnesis*, No. 43, 18.03.2009.

⁷⁹ Decision of the Constitutional Court of the Republic of Latvia of 9 April 2009 to terminate a Case No. 2008-41-01. Available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2008-41-01_Lemums_izbeigsana_dala.pdf#search=2008-41-01 [viewed 19.07.2021.].

the restrictions on passive electoral rights. Hence, only restrictions on the active electoral rights are in force, defined in Art. 8 of the *Satversme*.⁸⁰

As regards constitutionality review pertaining to the passive electoral rights, the matter of restrictions, included in para. 5 and para. 6 of the *Saeima* Election Law, has become relevant before the Constitutional Court, these provisions define the prohibition to stand for the *Saeima* elections for persons who belong or have belonged to the salaried staff of the state security, intelligence or counterintelligence services of the USSR, the Latvian SSR or another country (para. 5) or, after 13 January 1991, have been active in the Communist Party of the Soviet Union (the Communist Party of Latvia), the International Front of the Working People of the Latvian SSR, the United Board of Working Bodies, the Organisation of War and Labour Veterans, the All-Latvia Salvation Committee or its regional committees (para. 6).

In total, these restrictions on the passive electoral rights, whose aim, substantially, is to protect the democratic state order, national security and also the territorial unity of Latvia⁸¹, have been examined by the Constitutional Court three times, which reveals the sensitivity of this issue and always has raised the question whether it is necessary to retain such restrictions in Latvia now, more than 25 years after independence was regained.

On the first occasion, an application to the Constitutional Court (in 2000, when persons did not yet have the right to submit a constitutional complaint) was submitted by members of the *Saeima*. Although the Constitutional Court recognised the restrictions (both para. 5 and para. 6) as being compatible with provisions of the *Satversme* (Art. 89 and Art. 101 of the *Satversme*), the Court already mentioned that “the legislator, periodically evaluating the political situation in the state as well as the necessity and validity of the restrictions should decide on determining the term of the restrictions in the disputable norms, as such restrictions to the passive election rights may last only for a certain period of time.”⁸² The Constitutional Court returned to examination of this issue in reviewing a case⁸³ in 2006. Also, this time, the Constitutional Court recognised the restrictions as being compatible with the provisions of the *Satversme*, at the same time making other considerations with respect to the submitter of the constitutional complaint J. Bojārs, in particular, taking into account his merits

⁸⁰ Grozījumi Saeimas vēlēšanu likumā [Amendments to the *Saeima* election law]. Latvijas Vēstnesis, No. 38, 21.02.2014.

⁸¹ Judgement of the Constitutional Court of the Republic of Latvia of 30 August 2000 in Case No. 2000-03-01, para. 6. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2000/03/2000-03-01_Spriedums_ENG.pdf#search=2000-03-01 [viewed 17.07.2021.].

⁸² Judgement of the Constitutional Court of the Republic of Latvia of 30 August 2000 in Case No. 2000-03-01, para. 7. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2000/03/2000-03-01_Spriedums_ENG.pdf#search=2000-03-01 [viewed 17.07.2021.].

⁸³ Case No. 2005-13-0106, which was initiated on the basis of an application by Members of the *Saeima*, which was later joined with the case (No. 2006-06-01), which had been initiated on the basis of J. Bojārs' constitutional complaint.

in restoring independence.⁸⁴ The same matter was examined for the third time in 2018, with regard to the application by T. Ždanoka. Previously, Ms T. Ždanoka had submitted an application to the European Court of Human Rights, which, *inter alia*, had emphasised the necessity to “keep the statutory restriction under constant review”.⁸⁵ In the case decided on in 2018, the Constitutional Court recognised the restriction, set out in para. 6 of Section 5 of the *Saeima* Election Law, as being an instrument of self-defensive (militant) democracy⁸⁶, by which a democratic state governed by the rule of law defends its constitutional bodies and national security institutions against persons who, by their actions, endanger independence of the State of Latvia and the principles of a democratic state governed by the rule of law.⁸⁷ It was concluded that the state, in protecting its democratic order, has the right to constantly assess the degree of threats and decide on retaining the restriction. The Court very carefully evaluated consequences of the occupation, the concept of militant democracy, situation in Europe, objective meaning of the norm and concluded that the public benefit from the restriction included in the contested norm continued to outweigh the adverse consequences caused to persons, who by their actions endanger the independence of the state and the principles of a democratic state governed by the rule of law, as the result of restricting their fundamental rights.⁸⁸ The Court also has recognised that the legislator, upon establishing that the political situation in the state is changing and the foreign policy threats are diminishing, at any point has the duty to review the restriction included in the contested norm and decide on amendments to the *Saeima* Election Law.

⁸⁴ Judgement of the Constitutional Court of the Republic of Latvia of 15 June 2006 in case No. 2005-13-0106. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2005/06/2005-13-0106_Spriedums_ENG.pdf#search=2005-13-0106 [viewed 17.07.2021.].

⁸⁵ ECHR judgement of 16 March 2006 in case *Zdanoka v. Latvia* (Application No. 58278/00); see commentaries for example, in Hoogers, H. *Zdanoka v. Latvia – European Court of Human Rights: The boundaries of the right to be elected under Article 3 of the first Protocol to the European Convention on Human Rights*. Judgment of 16 March 2006, *Zdanoka v. Latvia*, Application No. 58278/00. *European Constitutional Law Review*, 2007, 3(2), pp. 307–323.; Mits M. *Consolidating democratic changes in Latvia: The various roles of the European Convention on Human Rights In: The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives*, I. Motoc & I. Ziemele (eds.). Cambridge: Cambridge University Press, 2016, pp. 222–223.

⁸⁶ See more Malkopoulou A., Norman L. *Three Models of Democratic Self-Defence: Militant Democracy and Its Alternatives*. *Political Studies*, 2018, pp. 442–458.; Accetti C. I., Zuckerman I. *What’s Wrong with Militant Democracy?* *Political Studies*, 2017, Vol. 65 (1S), pp. 182–199.

⁸⁷ Judgement of the Constitutional Court of the Republic of Latvia of 29 June 2018 in Case No. 2017-25-01, para. 13.3. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/10/2017-25-01_Judgment_ENG.pdf#search=2017-25-01 [viewed 17.07.2021.].

⁸⁸ Judgement of the Constitutional Court of the Republic of Latvia of 29 June 2018 in Case No. 2017-25-01, para. 24.4. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/10/2017-25-01_Judgment_ENG.pdf#search=2017-25-01 [viewed 17.07.2021.].

Conclusion

1. The choice of legal remedies for resolution of election disputes is under the discretion of the state itself. A single correct mechanism for resolving election disputes does not exist – each state chooses a model that is most suitable for its legal system (e.g., taking into account the institution which approves the election results) and the system for the protection of rights (e.g., respecting the jurisdiction of courts). At the same time, the state's choice in defining legal remedies must be compatible with its international commitments.
2. In Latvia, after the restoration of independence, the control of the *Saeima* elections was initially entrusted to the courts of general jurisdiction, but since the amendments to the *Saeima* Election Law in 2006, the election control has been performed by the Department of Administrative Cases of the Senate of the Supreme Court. The Constitutional Court of the Republic of Latvia has acknowledged – despite the fact that electoral issues are matters of constitutional law and not of administrative proceedings, the legislator has the right to transfer to the competence of an administrative court also the examination of cases the nature of which is not strictly administratively legal.
3. Although the control of the *Saeima* elections is exercised by the administrative court, i.e., the Department of Administrative Cases of the Supreme Court, there are significant differences in the examination of election issues from the general administrative process. This approach is justified by the special nature of the elections. There are several differences from the general administrative process in the court: in election control cases, there is a shortened period within which a person can apply to the court; the submission of an application to the court does not suspend the decision of the CEC to approve the election results; the burden of proof in election cases lies with the applicant; the court must hear the case under an expedited procedure; and – the Department of Administrative Cases of the Supreme Court hears the case regarding the decision of the CEC on the approval of the election results as a court of first instance consisting of three judges, and these decisions of the Court cannot be appealed.
4. The involvement of constitutional courts in the resolution of election disputes is twofold: both by directly resolving and reviewing issues related to violations committed in elections and also by creating election environment that is compatible with the constitution.
5. The experience of various states in involving the constitutional review institution in resolving election disputes outlines differences: both the legal act to be reviewed and the circle of persons having the right to submit applications differ, as well as the matters that are decided on at the institution. This, in turn, indicates that the legal regulation of each state is unique, based on its individual legal situation, which prohibits automatic use of the comparative method.
6. Taking into account Latvia's legal system and the fact that a well-established system for resolving election disputes exists, as well as the fact that administrative courts deal with their tasks effectively, there is no need to consider the possibility

of transferring the resolution of such disputes to the Constitutional Court. No arguments can be found that would prove that the existing system does not function or has deficiencies. Thus, at this point, any considerations regarding changes to the jurisdiction would only be a theoretical assessment of this possibility without a practical and understandable need.

7. Elections, as a broader totality of processes, affect not only those fundamental human rights, which can be read into the constitutional principles of elections (Art. 6 of the *Satversme* in the context of Art. 1 of the *Satversme*). They are linked to and their process depends upon other fundamental human rights, e.g., the right to association, the right to assembly, the freedom of speech. It is important that the normative regulation of elections complies with the *Satversme*.
8. In its 25 years of existence, the Constitutional Court of the Republic of Latvia has contributed significantly to determining the content of the constitutional election principles, developing, in genera; election environment and procedure compatible with the *Satversme*.

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