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“COMMON GOOD” AND “LOYALTY TO THE STATE” SECTION: DISCUSSIONS ABOUT BORDER CLAUSE TO FUNDAMENTAL RIGHTS AND FREEDOMS IN ESTONIAN CONSTITUTION OF 1937

Key words: 1937 Estonian Constitution, Fundamental Rights and Duties, “common good”, “loyalty to the state” section, authoritarian regime of Konstantin Pats

Summary

In comparison to the Estonian Constitution of 1920, in the Estonian of 1937, the basic rights were restricted to a greater extent, in particular through its general orientation and attitude. A particular part in it was performed by the “loyalty to the state” section (§ 8), being a general border clause. The article analyses the contemporary discussions at the drafting of the section. Firstly, it contained a “common good” clause, which was at the time used in Nazi Germany to restrict person’s rights and interpret law. Despite of the authoritarian state, the desire to limit arbitrariness of the state as much as possible is eminent in the debates.

Introduction

The drafters of the 1920 Constitution believed in the rule of law and the possibility of democracy. They tried to do everything possible to distance themselves from the legacy of Tsarist Russia and to be accepted into the family of European democracies. The Constitution and its dissemination as widely as possible was seen as a means of raising awareness of the existence of the new

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Estonian Republic, equal to other democratic states.² Estonia's new Constitution was considered to be very liberal and democratic, *inter alia*, because of its chapter on fundamental rights.³ Although there were discussions in the Constituent Assembly in 1919 and 1920 about the necessity of including the basic rights in constitution at all, both the right-wing and left-wing parties demanded that the basic rights should be enshrined in the pre-constitutional acts, as well as the Constitution.⁴

This article explores the discussions about the restrictions of fundamental rights in the most important law in a modern constitutional state – namely, constitution – during the Estonian interwar period. There are different possibilities for legal restriction of fundamental rights and freedoms. Some of them are typical to the democratic constitutions as legal reservations (German: *Gesetzesvorbehalt*), where the constitutional provision contains a possibility to limit its application by law, or the prohibition of certain conduct in constitutional norm itself (German: *Grundrechtsschranke*). Naturally, the exercise of personal freedoms and rights is restricted by the rights and freedoms of others. There is also a possibility of fundamental duties that arise from the needs of the society that person belongs to – for instance, the obligation to pay taxes.⁵

In the authoritarian states, often vague and undefined clauses in constitutions have been and still are used to enable a broad interpretation, while restricting

² E.g. Estonian lawyers and officials of the Ministry of the Interior, Eugen Maddison and Oskar Angelus published the text of the constitution with commentary: Maddison E., Angelus O. Das Grundgesetz des Freistaats Estland vom 15. Juni 1920. Uebersetzt und mit Erläuterungen und Sachregister [The Constitution of the Republic of Estonia of 15 June 1920. Translated and with explanations and subject index]. Berlin: Carl Heymanns Verlag 1928. Palvadre A. [review:]. Prof. Dr. Stephan v. Cseky: Die Verfassungsentwicklung Estlands 1918–1928. Oigus [The Law], 1929, No. 1, pp. 24–27.

³ Clark R. T. Baltic Politics: the Esthonian Constitution. *New Europe*, 12.08.1920, p. 109. Clark R. T. The Constitution of Estonia. *Journal of Comparative Legislation and International Law*, 1921, No. 4, pp. 249–250. Headlam-Morley A. *The New Democratic Constitutions of Europe. A Comparative Study of Post-War European Constitutions with Special Reference to Germany, Czechoslovakia, Poland, Finland, The Kingdom of The Serbs, Croats and Slovenes and the Baltic States*. London: Oxford University Press, 1929, pp. 149–150.

⁴ Laaman E. Isik ja riik Eesti põhiseadustes [Person and state in Estonian Constitutions]. *Oigus*, 1937, No. 3, pp. 102–103, 106 (in Estonian); Siimets-Gross H. Social and Economic Fundamental Rights in Estonian Constitutions Between World Wars I and II: A Vanguard or Rearguard of Europe? *Juridica International*, No. 10, 2005, pp. 136–137; about historical context Luts-Sootak M; Siimets-Gross H. Die “menschenuerdige Existenz” im Grundrechtskatalog des Grundgesetzes von 1920 der Estnischen Republik [The “existence in accordance with human dignity” in the catalog of fundamental rights of the Basic Law of 1920 of the Estonian Republic]. In: *Wege zur Rechtsgeschichte: Die rechtshistorische Exegese*. Wien-Koeln: Boehlau, 2022, pp. 204–210; and about establishing the first fundamental rights in general Siimets-Gross H, Leppik M. Estonia: First Landmarks of Fundamental Rights. In: *First Fundamental Rights Documents in Europe*. Cambridge-Antwerp-Portland: Intersentia, 2015, pp. 295–308.

⁵ See for the general theory and for the constitutional restrictions Hofmann H. *Grundpflichten und Grundrechte*. *Handbuch des Staatsrechts [Fundamental duties and fundamental rights. Handbook of Constitutional Law]*. Vol. 9, 3rd edition. Heidelberg: Muller, 2011, pp. 699–730. Wildhaber L. *Limitations on Human Rights in Times of Peace, War and Emergency: A Report on Swiss Law*. In: *The Limitation of Human Rights in Comparative Constitutional Law*. Yvon Blais, 1968, p. 55.

person's rights and freedoms. Furthermore, authoritarian regimes have borrowed strategies and ideas from each other – contemporary political scientists call it “authoritarian learning”.⁶ In Estonia, this borrowing concerned, *inter alia*, two concepts: “common good” and “loyalty to the state”. In a most radical and elaborate way the “common good” principle was used in Germany.⁷ For both concepts, the direct example for the Estonian Constitution of 1937 was the Polish Constitution of 1937.⁸ Estonian authoritarian State Elder, Konstantin Pats, went to Poland himself specially to study it.⁹ The section about loyalty to the state in the Polish Constitution was formulated in following manner: “It is the duty of the citizens to be loyal to the State and faithfully to discharge obligations imposed upon them by it” (Art 6)¹⁰. It was preceded by the border clause of “common good”: “The limit of these liberties [of citizens] is the common good”.

The desire to restrict citizens' rights for the benefit or good of the state or, what seems to be even less harmful, for the common good, once more emerges today, one example being the so-called “common good constitutionalism” of “classical tradition” by Adrian Vermeule to combat the “legitimate societal threat of modern liberal individualism” and reintroduce the “spiritual common good”.¹¹

On the basis of Estonian constitutions of interwar period, the author in the present paper analyses, first of all, the title of the basic rights chapter as the first indicator of the fundamental rights policy of the relevant constitution. Secondly, she exemplifies the risks of such a constitutional provision on the basis of the formulations of the drafts of “common good” and “loyalty to the state” section of the Estonian Constitution of 1937, as well as on the contemporary discussions.

⁶ See for further references and background Veski L. Interwar transnational authoritarianism and the case of “social solidarity”. *Peripheral Histories*. 2023. Available: [Interwar transnational authoritarianism and the case of “social solidarity” \(peripheralhistories.co.uk\)](http://peripheralhistories.co.uk) [viewed 27.11.2023.].

⁷ How this principle of “common good” has been implemented in the Nazi-German private, public and administrative law has profoundly shown Michael Stolleis in: Stolleis M. *Gemeinwohlformeln im nationalsozialistischen Recht* [Common good formulas in National Socialist law]. *Muenchener Universitaetsschriften, Juristische Fakultae, Abhandlungen zur rechtswissenschaftlichen Grundlagenforschung*, Bd. 15. Berlin: J. Schweitzer Verlag, 1974.

⁸ See a thorough analysis of the similarities and differences with further references: Siimets-Gross H. *Duty of Loyalty to the State or the ‘Polish Section’ in the 1937 Estonian Constitution*. *Miscellanea Historico-Juridica*, 2021, Vol. XX, z. 2, pp. 113–128.

⁹ 01.05.1935. *Laamani paevik 1922–1940* [Laaman's Diary 1922–1940]. *Akadeemia* 2004, Vol. 2, p. 2777.

¹⁰ Translation into English used here and afterwards from: *Constitution of the Republic of Poland 1935*. Available <http://libr.sejm.gov.pl/tek01/txt/kpol/e1935-r1.html> [viewed 25.10.2023.]. A provision that “Fidelity to the Republic of Poland is the first duty of a citizen” existed already in Article 89 of Poland's 1921 Constitution. The text of the Polish Constitution of 1921 has been used here and afterwards from: *Constitution of the Republic of Poland, 17 March 1921*. In: *The new constitutions of Europe*, Garden City-New York: Doubleday, Page & Company 1922, pp. 405–425. Available: <http://libr.sejm.gov.pl/tek01/txt/kpol/e1921.html> [viewed 06.11.2023.].

¹¹ Vermeule A. *Common Good Constitutionalism*. Medford, MA: Polity Press 2022. The short presentation of arguments and counterarguments with further references see Casey C., Vermeule A. *Myths of Common Good Constitutionalism*. *Harvard Journal of Law and Public Policy*, Vol. 45, No. 1, 2022, pp. 103–146, Harvard Public Law Working Paper No. 22–09, Available at SSRN: <https://ssrn.com/abstract=4030763> [viewed 28.11.2023.].

1. Title of the Fundamental Rights Chapter as a litmus test

While the title of a constitutional chapter does not *prima facie* seem to be of the paramount importance, it actually yields the first hint concerning the role of fundamental rights and their relationship with restrictions or obligations in a concrete document. The author illustrates this with an example of the Estonian Constitution of 1920¹², where the chapter was entitled: “About Fundamental Rights”, which was very characteristic of the general aim and essence of it. Basic duties were not mentioned, although some of them were provided in later chapters.

The word “duties” was left out from the title quite by chance: almost at the final stage of the procedure of adopting the Constitution, during the second reading of the text at the plenary session in the Constituent Assembly, the Labour Party member and an advocate, Karl August Baars, proposed that the word “duties” – which was then included into the text – should be deleted:

*I think that the word “duties” in the title of this chapter is completely superfluous. The whole chapter is only about the rights that citizens of the Republic of Estonia have, and, if I am not mistaken, the manuscript issued by the first and second commission did not contain this word. My proposition is to leave this word “duties” out.*¹³

Karl A. Baars was correct, there were no obligations listed in the chapter. At first, there were some counterarguments, e.g., that any concept of a right contains within itself a concept of obligation as well. After discussing the chapter to the end, the proposal of Baars was accepted.¹⁴

At that time, such a title of the fundamental rights chapter was quite unique¹⁵ and characterises the overall liberal orientation and emphasis of that constitution. Just a few examples. In the Fundamental Laws of the Russian Empire

¹² Riigi Teataja [State Gazette; hereinafter – RT]. RT 1920, 113/114, 243. English translation in: The Constitution of the Estonian Republic (passed by the Constituent Assembly on 15 June 1920). Tallinn (Reval): Uhiselu 1924.

¹³ Sitting of the Constituent Assembly 03.06.1920. Minutes No. 136. In: Asutawa Kogu protokollid nr. 120–154. IV. istungjark [Minutes of the Constituent Assembly No. 120–154. 4. Session]. Tallinn: Taht, 1920, rows 712–713.

¹⁴ Ibid., row 713.

¹⁵ Of the states that got their independence after the First World War, the Finnish Constitution or Form of government (as it was called) of 1919 stressed the legal protection of citizens in the chapter “General Rights and Constitutional Protection of Finnish Citizens”. Text used from: The new constitutions of Europe. Garden City-New York: Doubleday, Page & Company 1922, pp. 468–486. Also the Constitution of Lithuania of 1922 did not mention the obligations in the title of the fundamental rights chapter: “The Lithuanian Citizens and their Rights”. Available *Verfassung des Litauischen Staates (1922)* (verfassungen.eu) [viewed 25.11.2023.].

of 23 April 1906¹⁶ the chapter was called: "Rights and Obligations of Russian Subjects" in which the obligations were listed first. The importance of duties was even bigger in the Polish Constitution of 1921, where the chapter had the following title: "General Duties and Rights of the Citizen" and after two articles about the citizenship stated six duties before citizen's rights. First of them was fidelity to the Republic of Poland (Art. 89). The German Weimar Constitution had a chapter called "Fundamental Rights and Duties of Germans".¹⁷

In the context of the same Weimar constitution, Joachim Rueckert, Professor Emeritus at the University of Frankfurt am Main, draws attention to the "Janus-face" of such a regulation technique. In a case where the rights and duties stand next to each other, the problem arises, how to determine the cases when do the rights apply, and when the obligations do – and which of those were to be preferred in legal practice. Both cannot be preferred at the same time. Whether to give preference to obligations or rights as judge is weighing them, will remain for him to decide and it will only become clear in hindsight.¹⁸ However, if rights – and only rights – have the priority, it is much more difficult to restrict fundamental rights using the obligations. Nevertheless, if both are equal, the scope of rights, as well as obligations and their relationship remains unclear and depends on the personal conviction of the court or judge.¹⁹ In conclusion, this seemingly quite unimportant aspect gives a lot of information about the general aim and trend of the fundamental rights policy.

At the time of the second Constitution of Estonia of 1937, the political and social situation was quite different. On 12 March 1934, the authoritarian coup d'état had taken place under the leadership of the State Elder Konstantin Pats.²⁰

¹⁶ 27805. In: "Polnoe sobranie zakonov Rossijskoj Imperii" [Full collection of laws of the Russian Empire], Sob 3, T. XXVI, Otdelenie 1, Sankt Peterburg 1906. It was actually the redaction of the constitutional laws of 1832 ("Osnovnyye Gosudarstvennyye Zakony Rossiyskoy Imperii" [The main State Laws of the Russian Empire]) that were published in Svod Zakonov Rossiyskoy Imperii. Tom pervyi. Osnovnyye Gosudarstvennyye Zakony. Sankt Peterburg. I could use the edition of 1857, pp. 1–20. See about the constitutional history of Russia of 20th century: Schulz L. Das Verfassungsrecht Russland [The constitutional law of Russia]. In: Russlands Aufbruch ins 20. Jahrhundert, Freiburg: Walter-Verlag 1970, p. 47.

¹⁷ Constitution of the German Reich of 11 August 1919. In: The new constitutions of Europe, Garden City-New York: Doubleday, Page & Company, 1922, pp. 176–212 (here p. 198).

¹⁸ Rueckert J. Weimars Verfassung zum Gedenken [In memory of Weimar's Constitution]. Rechtshistorisches Journal 1999, No. 18, p. 218.

¹⁹ Siimets-Gross H. Pohioiguste ja pohikohustuste vahekord Eesti ja Poola pohiseadustes – paralleelne voi vastandlik areng? [The Relationship between Basic Rights and Basic Duties under the Estonian and Polish Constitutions: Parallel or Divergent Development?]. Riigioiguse Aastaraamat [Annual Book of Constitutional Law], 2021, No. 2, p. 62.

²⁰ Kasekamp A. I. The Rise of the Radical Right, the Demise of Democracy, and the Advent of Authoritarianism in Interwar Estonia. In: War, Revolution, and Governance: The Baltic Countries in the Twentieth Century, Boston: Academic Studies Press, 2018, pp. 76–100. See also Luts-Sootak M., Siimets-Gross H. Eine rechtmässige Diktatur? Estlands Verfassungsentwicklungen in der Zwischenkriegszeit des 20. Jahrhunderts [A legitimate dictatorship? Estonia's constitutional developments in the interwar period of the twentieth century]. Parliaments, Estates and Representation, 2021, Vol 41:2, pp. 201–225, DOI: 10.1080/02606755.2021.1928863.

When the Constitution was proclaimed on 17 August 1937, the change brought by State Elder's politics was also reflected in the changed title of the chapter on basic rights and it now contained obligations as well: "Rights and Duties of Estonian Citizens".²¹ One of the main authors of the first drafts of the constitution, Johannes Klesment proudly noted:

*For the first time the duties are stressed in our Constitution and they are not left hidden in comparison with the large scope of the rights of citizens.*²²

The Constitution of 1937 is characterised generally by the restriction of fundamental rights and the increase of fundamental obligations, but the most unpredictable clause of the Constitution was the section about the loyalty to the state or common good, which was to affect the whole chapter by its very nature, because it was formulated as a general border clause on fundamental freedoms.

2. Common good and loyalty to the state: Struggles about the wording in the committees

K. Pats first set up an informal committee to draft the Constitution, three members of which were lawyers and had a quite close relationship with State Elder. State Elder Pats demanded that the new constitution of Poland of 1935 should serve as the model.²³ In December 1936, the six members of the Committee on the Development of the Official Draft Constitution were appointed by State Elder and that included all three members of the informal committee. One of the members in both committees, lawyer and Editor-in-Chief of the *Vaba Maa* newspaper, Eduard Laaman²⁴, turned out to be one of the biggest critics of common good clause and its wording. The draft was essentially completed by mid-February 1937.

In the beginning, the idea was to formulate the section in a very short and "imperative mood": "[citizens] are loyal to the state and will fulfil [the duties]". After another member of the committee, lawyer and Counsellor of the Ministry of

²¹ RT 1937, 71, §90. Constitution of the Republic of Estonia with the Decision of the Estonian People for convening the National Constituent Assembly and the Law for the Transition Period. Official edition, Tallinn 1937.

²² Minutes No. 4. The meeting of the General Committee to review the draft Constitution of the First Chamber of the National Assembly, on 5 Mai 1937. In: Rahvuskogu Esimese Koja pohiseaduse eelnoo labivaatamise uldkomisjoni koosolekute protokollide arakirjad [The copies of the minutes of the meetings of the General Committee to review the draft Constitution of the First Chamber of the National Assembly]. In: National Archives, (further "NA") ERA.4408.1.91, p. 12.

²³ See more Siimets-Gross H. Duty of Loyalty to the State or the 'Polish Section' in the 1937 Estonian Constitution. 2021, pp. 117–118.

²⁴ See about Laaman and his ideas in 1930s: Veski L. Towards stronger national unity: statist ideas in Estonian nationalism during the "Era of Silence" (1934–1940). *Journal of Baltic Studies*, 2023, pp. 16–17. DOI: 10.1080/01629778.2023.2190991; thoroughly – Veski L. Towards a stronger national unity: organic-statist ideas in 1930s Estonia. Doctoral Theses. Glasgow: University of Glasgow, 2021 [manuscript used with permission of author], pp. 185–186.

Justice, Johannes Klesment, compared the wording to Hitler's order: "*Die deutsche Frau raucht nicht*" [A German lady does not smoke]²⁵, propositions were made to formulate the article in a milder way.

Firstly, the emphasis was on obligations imposed by the state:

*§ 9. It is the supreme duty of Estonian citizens to be loyal to the state and to fulfil all the obligations imposed on them by the state. Estonian citizens exercise their freedoms and rights in accordance with the common good of the state and the people.*²⁶

According to this, freedoms and rights could also be exercised only if they were in accordance with the common good²⁷, which actually opens a gateway to arbitrariness. The questions what the content and scope of the "common good of the state and the people" is and which exercise of freedoms and rights is in accordance with them are left open (German: *Generalklausel*²⁸). Accordingly, those questions are left to the state officials or courts to decide on the basis of values or "guiding principles"²⁹ – as was in Nazi-Germany. In reality, it will be the question of the power of the state to rule without restriction over citizen's rights and freedoms.³⁰

From the discussions in the committees, one can see that Pats was not the only one who favoured restricting rights and freedoms and an authoritarian type of constitution – even if this stance was denied openly.³¹ The first discussions were described by Laaman in his diary on 26 January:

I [Laaman] propose that the clause on the common good of § 8 be omitted altogether from the basic rights of a citizen, or that it would be defined more concretely, because otherwise it will render the Constitution authoritarian. Kukke and Klesment got upset. Kukke says that without the imposition of duties, there will be a disorder, Klesment says that if this § [section] is to be deleted, then the whole Constitution must be redone. Also Palvadre thinks there is no staying with the liberalist constitution. Klesment notes that they

²⁵ Minutes No. 14. The meeting of the Committee for the Elaboration of the Draft Constitution, appointed by the State Elder, midweek on 30 December 1936 at 5 p.m. in the meeting room of the State Chancellery. In: NA ERA.31.3.735, p. 83.

²⁶ Minutes No. 22. The meeting of the Committee for the Elaboration of the Draft Constitution, appointed by the State Elder, on Saturday 9 January 1937 at 5 p.m. in the meeting room of the State Chancellery. In: NA ERA.31.3.735, p.125. This is also the case in the minutes of 17.1.1937, p. 155.

²⁷ See for the common good clauses Stolleis M. 1974.

²⁸ About the general clauses and methodology of using them in private law see, with further references, Haferkamp H.-P. On the German History of Method in Civil Law in Five Systems. German Law Journal, 2016, Vol. 17, No. 4, pp. 543–578.

²⁹ For "guiding principles" see Haferkamp H.-P. 2016, p. 560 ff.

³⁰ About the use of "*Generalklauseln*" as back-doors see Stolleis M. 1974, pp. 87–93. About the methods of interpretation in national socialist time: Ruethers B. Die Unbegrenzte Auslegung [The Unlimited Interpretation]. 9. Aufl. Tuebingen: Mohr Siebeck, 2022.

³¹ About discussions at the period see Veski L. Towards stronger national unity: statist ideas in Estonian nationalism during the "Era of Silence" (1934–1940). 2023, pp. 1–23.

*did not think of an authoritarian order but agrees with me that this [wording of the section] recalls Nazi [principle] Gemeinnutz vor Eigennutz (the good of community has priority over the good of individuals).*³²

The Estonian word *huvang* used in those drafts generally means “welfare”, “well-being”, “prosperity”, but in the context of state and people it is translated into English as “benefit” or “common good”. It seems to me that Laaman intentionally called the section “common good” section, in order to draw the attention of others to the similarity of the clause to Nazi-German *Gemeinwohl*.

In 1936/37, there were steady awareness and comparison with the Nazi Germany and the will to avoid it. The aim was to have an “guided democracy”, which should be an illiberal democracy with firm authority of the state based on democracy and human rights, not a national-socialist or fascist state.³³

How the transformation of private interests into the public happen was described by Michael Stolleis: “All activities of the state, organised groups and individuals find their reason and justification in the orientation towards the “good of the nation”. Where this link cannot be established, legitimacy is missing and therefore the possibility of public enforcement”.³⁴ At the time when the Nazis came to power, they did not want to change much the legal structures, so the “common good clauses” were used in Germany as non- and anti-legal categories for restricting or cancelling those clauses of the norm that protect an individual (normative *Schutzbereiche*). So, the legal order in force with its articles of law was still hindering the direct enforcement of the “common good” clauses.³⁵ In the case of the “common good” clause as constitutional norm, according to the hierarchy of norms the normal legislation would not hinder its influence and applicability. Even more, it could be seen as “highest principle of law” that derogates all other norms in force. Both principles, the “loyalty” and “common good” were identified as “core” values of Nazi-Germany.³⁶

Due to some contra-arguments, “again by Mr. Laaman”, the wording was changed and the imposition of obligations by law was added. As a consequence,

³² 26.01.1937, Laamani paevik 1922–1940, p. 459. See the *Gemeinnutz vor Eigennutz* in National Socialist Programme (25-Punkte-Programm). Available: <http://www.documentarchiv.de/wr/1920/nsdap-programm.html> [viewed 28.11.2023.].

³³ See for the “guided democracy” ideas and debates more in Veski L. Towards stronger national unity: statist ideas in Estonian nationalism during the “Era of Silence” (1934–1940). 2023, pp. 14–17. For the official attitude about the Fascism: Napolitano R. Italian cultural diplomacy in Estonia during the interwar period: from the de jure recognition to the Molotov-Ribbentrop pact (1921–1939). *Journal of Contemporary Central and Eastern Europe*, 31.10.2023. DOI: 10.1080/25739638.2023.2275889, pp. 6–10 [viewed 28.11.2023.].

³⁴ Stolleis M. 1974, p. 301.

³⁵ Stolleis M. 1974, pp. 295–305, esp p. 301.

³⁶ So Lange H. Mittel und Ziel der Rechtsfindung im Zivilrecht [Means and goal of legal determination in civil law]. *Zeitschrift der Akademie fuer Deutsches Recht*, 1936, p. 924.

some reference to the requirements of the rule of law was introduced and the previous restriction on the exercise of freedoms and rights has been deleted:

*It is the supreme duty of Estonian citizens to be loyal to their state and to fulfil all obligations imposed on them by law in the interest of the state and society, and to contribute to the benefit of the state and of the people*³⁷.

Although the formulation was softened, there was still the risk of arbitrary use of means by the state, if the supreme duty "to contribute to the benefit of the state and of the people" was not fulfilled. The cases when this consideration comes up, are decided by the state – the officials or courts. In fact, under the pretext of anti-statism, it could make the exercise of fundamental rights impossible.

Finally, the common good clause was still included in the draft presented to the State Elder on 29 January 1937. After that, State Elder Pats himself with Klesment and state secretary Karl Terras worked on the draft and it became "corrected and complemented according to the instructions" of State Elder.³⁸ On 8 February 1937, it was formulated, as follows:

*§9: It is the supreme duty of Estonian citizens to be loyal to the state and to conduct their entire activities in accordance with the benefit of the state and the people.*³⁹

Before the draft was presented to National Assembly, the government worked on the draft for four days and "more than 30 hours".⁴⁰

3. Without "common good" clause: Discussions in the National Assembly

As State Elder presented the draft to the National Assembly on 23 February 1937, the section no longer included the "common good", but only contained "loyalty to the state":

§ 8. It is the duty of Estonian citizens to be loyal to the state, to defend the state and to contribute to the development of the state. Every citizen must bear the obligations imposed on him or her by law. Any act detrimental to

³⁷ Minutes No. 41. The meeting of the Committee for the Elaboration of the Draft Constitution, appointed by the State Elder, on Thursday 28 January 1937 at 5 p.m. in the meeting room of the State Chancellery. In: NA ERA.31.3.735, p. 237.

³⁸ Klesment J. to Mr. State Elder on 8 February 1937. In: Eesti Vabariigi põhiseaduse eelnou [Draft of the Constitution of Estonian Republic]. NA ERA.31.3.735 [not paginated]. The author thanks Hannes Vallikivi for the reference.

³⁹ Eesti Vabariigi Põhiseadus [Constitution of the Republic of Estonia]. In: NA ERA.31.3.735. (not paginated, p. 1 of the draft).

⁴⁰ Klesment J. Uue põhiseaduse algeelnou [The initial Draft of new Constitution]. In: Põhiseadus ja Rahvuskogu [The Constitution and the National Assembly]. Tallinn: Rahvuskogu 1937, p. 83. The author thanks Hannes Vallikivi for the reference.

*the state and its development shall be prevented by the state by means of legal remedies*⁴¹.

After a referendum about drafting the new constitution, bicameral Estonian National Assembly convened between 18 February 1937 and 17 August 1937. On the election of 80 members of the First Chamber, the opposition parties were not allowed to participate. The Second Chamber consisted of 40 representatives of corporate chambers.⁴²

According to E. Laaman, the introduced changes still could not hide the fact that this section was similar to

*the section 10 of the new Polish Constitution, which gives normative shape to the declaration in section 5(3) of the same Constitution that the limits of citizens' freedoms are determined by the general interest, thus making the governmental power authoritarian*⁴³.

Compared to the previous, more declaratory version proposed by Laaman, this wording has been aimed directly at restricting the exercise of basic rights or preventing any detrimental conduct that could be harmful to the state. Since the prevention of harmful acts is in the same section as the duty to bear obligations and the duty of the loyalty to the state, non-fulfilment of those obligations can be easily interpreted as an act which is detrimental to the state, as it is again vague and left open to interpretation.

Eduard Laaman also criticised the third phrase of this draft: “Any act detrimental to the state and its development is hindered by the state power by means of legal remedies.” His following remark shows that Estonian lawyers of the time were well aware of contemporary German theory and practice. Laaman argued that “the general interest, the common good of the state and the people [...] is one of the high moral norms”, but not legal, since the legal content of the norm includes both obligation and “demand”. According to Laaman, the problematic question is who determines the general interest, who is justified to demand for the implementation of the general interest and what the general interest is. It should be done by the government or a parliamentary majority. However, “this clause stands in authoritarian constitutions, and there it has a definite point. The authoritarian principle itself is expressed here. An authoritarian government is

⁴¹ Laaman E. Kodaniku põhioigused ja kohused [Fundamental rights and obligations of a citizen]. In: Pohiseadus ja Rahvuskogu [The Constitution and the National Assembly]. Tallinn: Rahvuskogu, 1937, p. 358. In depth with similar conclusions – Veski L. Towards a stronger national unity: organic-statist ideas in 1930s Estonia. Doctoral Thesis, pp. 184–202.

⁴² See about the referendum and National Assembly more Luts-Sootak M., Siimets-Gross H. 2021, pp. 218–221.

⁴³ Laaman E. 1937, p. 358.

at every moment empowered to explain what the general interest is"⁴⁴. In Laaman's opinion, in the case of a democratic regime, this is not possible.

According to the journalist Eduard Salurand, the loyalty to the state section "stresses [...] only the obligation of citizens against the state and is therefore one-sided and should be complemented by the phrase stating the obligations of the state."⁴⁵

*It cannot [...] be accepted that citizens' duties have the priority over all, so that the state as an abstraction can absorb all the rights of the citizen. After all, the state is there for the sake of the citizens, not the citizens for the sake of the state.*⁴⁶

He did not consider the final phrases of loyalty to the state section concerning the fulfilment of obligations imposed by law and the prevention of harmful activities necessary.⁴⁷ Likewise, the Chairman of Workers Union, Eduard Riisna remarked that such a clause in constitution "is lowering of our own value, if [...] we have to underline it", and proposed to delete the first phrase.⁴⁸ Laaman and Professor of International Law and Representative of the University of Tartu at the National Assembly Ants Piip voiced a warning about the consequences of the in such manner formulated section during the discussions in the National Assembly and asked to reconsider its inclusion in the constitution.⁴⁹

⁴⁴ Second joint meeting of the Committees on draft parts of the Constitution of the First and Second Chambers of the National Assembly. On 2 March 1937. In: Rahvuskogu uldkoosolekute ja pohiseaduse eelnou-osade komisjonide uhiste koosolekute stenograafilised aruanded [Stenographical reports of the general meetings of the National Assembly and of the joint meetings of the Committees on draft parts of the Constitution]. Tallinn, 1938, p. 35. See similarly, later – Schubert G. The public interest, a critique of the theory of a political concept. Glencoe, Ill: Free Press, 1960, p. 200f.

⁴⁵ Salurand E. Kodanike põhiõiguste ja kohustuste küsimusi [Issues of citizen's basic rights and obligations]. ERK, 1937, Vol 2., p. 31.

⁴⁶ Ibid.

⁴⁷ Ibid., p.34.

⁴⁸ Riisna E. II reading in the National Assembly. Rahvuskogu. Esimene koda. Stenograafilised aruanded [The National Assembly. First Chamber. Stenographic reports]. From 19 February to 13 August 1937. Tallinn, 1938, p. 88.

⁴⁹ Laaman E. Rahvuskogu Esimese ja Teise Koja Pohiseaduse eelnou-osade komisjonide 2. uhine koosolek. 2. martsil 1937 [Second joint meeting of the Committees on draft parts of the Constitution of the First and Second Chambers of the National Assembly. On 2 March 1937]. In: Rahvuskogu uldkoosolekute ja pohiseaduse eelnou-osade komisjonide uhiste koosolekute stenograafilised aruanded [Stenographical reports of the general meetings of the National Assembly and of the joint meetings of the Committees on draft parts of the Constitution], Tallinn: Rahvuskogu 1938, p. 35 and Piip A. Rahvuskogu Esimese ja Teise Koja Pohiseaduse eelnou-osade komisjonide 3. uhine koosolek. 3. martsil 1937 [Third joint meeting of the Committees on draft parts of the Constitution of the First and Second Chambers of the National Assembly. On 3 March 1937], ibid., p. 46.

The so-called “Loyalty to the State Section” was not entirely excluded from the 1937 Constitution, ultimately remaining worded, as follows:

§ 8. The supreme duty of every citizen is to be loyal to the Estonian State and to its constitutional order. Legal obligations and duties devolve upon the citizen in consequence of his membership in the Commonwealth. This membership also gives rise to the citizen’s legal rights and freedoms.

Conclusions

1. During the debates in different committees and the National Assembly the wording of “the Loyalty to the State Section” became more precise. Firstly, the “best” ideas of Polish and Nazi-German law were introduced into the Estonian Constitution of 1937. Apparently, during the sittings of government, before the draft was presented to National Assembly on 23 February 1937, the vague clause “for the benefit of the state and the people” was omitted.
2. In addition, the possibility for the state to use legal remedies in the event of damage to the state and its development was deleted from the section. As such, it would have given the courts and the executive power a free hand to interpret the damage to the state and its development broadly.
3. It is this part of the provision that changed the most during the discussions and, once again, the rights and obligations arising from the national society were added for the sake of balance. Although the possibility to interpret the expression “loyalty to the state and to the constitutional order” as restricting the basic rights remained, the wording of Section 8, which was finally included in the Constitution, gave far fewer possibilities for abuse of power than the earlier versions, which used the concept of the common good of the state and of the people. However, there was still an emphasis on obligations, which clearly had been given an advantage over rights. Nevertheless, how the Section 8 as a whole was applied in practice has not yet been examined and, in any case, the period of application was too brief.
4. The “common good” or “loyalty to the state” section was one of the most debated fundamental rights clauses of the 1937 Constitution – in the committees, as well as in the National Assembly. Both were largely trying to avoid arbitrariness of the state and authoritarian governance, which could be exercised on the basis of this section. One of the main critics of the clause was journalist and lawyer Eduard Laaman who actually belonged to the inner circle State Elder Konstantin Pats. Taking into account his closeness to State Elder, this is surprising. However, it seems to indicate that within the trusted circle of people – when opposition was excluded – a free discussion was possible and even influential. The omission of the “common good” part of the section could be explained by the desire to create the impression that that

Konstantin Pats' authoritarian regime was intent on abandoning authoritarian rule.⁵⁰ At the same time, without direct pressure from State Elder, the debates followed his general guidelines and wishes, e.g. regarding the amendment of the chapter on fundamental rights.

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