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ON THE UNCONSTITUTIONALITY OF THE LEGAL REGIME REGARDING CONFERRAL OF A PH.D. AND ASSESSMENT OF QUALIFIVCATIONS AS PROFESSOR/ASSOCIATE PROFESSOR IN LAW

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by
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1. The legal regime

The legal regime for the conferral of a Ph.D. and for the qualifications for the position of professor / associated professor is laid down in two statutes and subsequent of regulations:

1.1 The law "On Scientific Activity" states:

Section 10. Levels of academic education and scientific qualifications

(2) A person with an academic education may apply to acquire a doctor's or doctor habilitus degree in science, observing the provisions of this Law and the procedures prescribed by Cabinet.

Section 12. Promotion (Conferral of a Doctor of Science Degree) Procedure

The right to confer a Doctor of Science degree shall be delegated by the Latvian Council of Science to institutions of higher education or State science centres. The collegial administrative body of the institution of higher education shall approve the conditions and programmes for the conferral of a science degree in specific science disciplines or of the State science centre; the Latvian Council of Science, which shall decide on the granting of the right to promote, shall review them. The procedures and criteria for promotion shall be set out in by-laws approved by Cabinet.

On the basis of this delegation the Cabinet of Ministers has passed regulation no.134 of 06.04.1999: **"Regulation on the Procedure and Criteria of Promotion"**, which, *inter alia*, states:

5. The main results of the promotion paper must be published (or accepted for

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publication) in minimum five generally recognized edited scientific journals (publications), which are included in the list, affirmed by the Council[2].

12. Promotion paper is evaluated by the following promotion criteria:
12.4. are the results of the promotion paper published in generally recognized scientific journals (publications).

1.2 The "University Law" states:
Article 34. Assessment of scientific and pedagogical qualifications
(1) Scientific and pedagogical qualifications of applicants for the position of professor and associate professor are assessed by the professor council of the research area as prescribed by the Cabinet.

On the basis of this delegation the Cabinet of Ministers has passed regulation no. 391 of 04.09.2001: **"Procedure for Assessment of the Scientific and Pedagogical Qualifications of Applicants for the Position of Professor and Associate Professor"**, which*, inter alia*, states:

4. Scientific and pedagogical qualification, as well as organizational skills are evaluated by the professor council of the relevant field according to the following criteria:
4.1. in estimating the scientific qualification:
4.1.1. scientific articles in the publications that have been included in the list affirmed by the Science Council of recognised scientific publications (professors – five publications, associate professors – three publications).

The lists of recognized scientific publication affirmed by the Science Council referred to under point 5 of Cabinet of Ministers regulation No 134 and point 4.1.1. of Cabinet of Ministers regulation No. 391 are the same and include a number of Latvian and international editors and journals[3].

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[2] Article 3 of these Cabinet of Ministers regulations states that the Council is the Latvian Council of Science

[3] see http://www.lzp.lv/latv/journ.htm:
1) Publications included in worldwide quotation indexes (ISI)
2) Scientific journals and collection of articles by the following publishing houses:
Academic Press, ACM Press, Addison-Wesley, American Mathematical Society, Artech House, Birkhäuser Verlag, Cambridge University Press, Chapman & Hall, Digital Press, Ellis Horwood, Elsevier Science, Gordon and Breach, IEEE Press, Kluwer Academic Publisher, Lange and Springer, London Mathematical Society, McGraw-Hill, MIT Press, North-Holland, Oxford University Press, Prentice Hall, Society for Industrial and Applied Mathematics, Springer-Verlag, Walter de Gruyter, John Wiley & Sons, World Scientific Publishing, Yourdon Press, Zinātne, Nauka (krievu val.), MAIK "Nauka" (krievu val.), Interperiodika (krievu val.)
3) Proceedings of international conferences (international = more than 3 countries)
4) Journals financed by the Council:
LZA Vēstis, LZA FEI "Latvian Journal of Physics and Technical Sciences", LU FI žurnāls "Magnitnaja gidrodinamika" (krievu val.), LU EDI žurnāls "Avtomatika vičislitelnaja tehnika" (krievu val.), LU PMI žurnāls "Mechanics of Composite Materials", LOSI žurnāls "Chemistry of Heterocyclic Compounds", RTU NĶI žurnāls "Latvijas Ķīmijas žurnāls", LU LVI Latvijas Vēstures institūta žurnāls LU žurnāls "Latvijas Vēsture. Jaunie un jaunākie laiki", LU žurnāls "Humanities and Social Sciences. Latvia", LU žurnāls "Letonika", Balt-LASA "Baltic Journal of Laboratory Animal Science", "Silava" Baltijas valstu mežzinātnes žurnāls "Baltic Forestry"
5) Scientific monographs
6) Basic scientific journals of foreign Academies of Science
7) Regular scientific publications of Latvian universities that fulfil certain criteria.
8) Other publications that are considered according to the following criteria:
a) The first year of publication and the regularity of publication
b) The members of the editorial board

Thus, the existing legal regime requires from a person qualifying for the academic degree of Ph.D. or professor / associate professor (hereinafter – academic qualification), to fulfil several formal criteria as laid down in the relevant legislation, inter alia, to provide a certain number of publications edited by publishing houses, in journals or in conference proceedings as listed and recognized by the Latvian Council of Science (hereinafter – recognised publications). Consequently, if the person has the required number of scientific publications, but not edited in the recognised publications, he does not qualify academically. The legal regime leads to the situation that the academic qualification is determined not on evaluation of the substance and merits of the publication, but on the status of the edition in which it is published.

Hereby fundamental rights guaranteed by Satversme are violated:

- scientific freedom in Article 113 of Satversme, and
- freedom of profession, in Article 106 of Satversme,

2. Unconstitutionality of the legal regime

2.1 Scientific freedom

Article 113 Satversme states: "The state recognizes scientific […] freedom […]". In interpreting the constitutional provisions, due regard must also be taken of the relevant

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c) The procedure of review of manuscripts
d) The language of publications and summaries
e) The availability in Latvian and foreign scientific libraries
f) In what quotation indexes and reference journals the edition is included

They are, originally:

Acta Baltica. Izd. Letonikas centrs Kauņā, Lietuva. , Acta et Commentationis Universitatis Tartuensis. Igaunija. , Acta Medico-Historica Rigaensia. Izd. Paula Stradiņa Medicīnas vēstures muzejs un LMA Medicīnas vēstures institūts, Latvija. , Arheoloģija un etnogrāfija. Izd. LU Latvijas Vēstures institūts, Latvija. , ASLE Transactions. Izd. American Society for Lubrication Engineering, ASV. Baltic Review. Izd. Viļņas Pedagoģiskā universitāte, Lietuva. , Baltistika. Izd. Viļņas universitāte, Lietuva. Chemical and Biochemical Engineering. Izd. Horvātijas inženieru-ķīmiķu b-ba, Slovēnijas ķīmiķu b-ba un Austrijas bioprocesa tehnoloģijas sav., Horvātija. , Cryptogramica Estonici. Izd. Igaunijas dabas pētnieku b-ba, Igaunija. , EJB Electronic Journal Biotechnology. Izd. Valparaiso Katoļu universitāte Čīle. , Food Tehnology and Biolotehnology. Izd. Zagrebas Universitāte, Horvātija. , IEEE Transactions. Izd. Institute of Electronic and Electrical Engineers (IEEE), ASV. , Journal of Baltic Studies. Izd. AABS, ASV. , Journal of the Optical Society of America. Izd. Optical Society of America, ASV. , Journal of Waterway, Port, Coastal and Ocean Engineering. Izd. American Society of Civil Engineering, ASV. , Latvia. Human Development Report. Izd. United Nations Development Programme, Latvija. , Latvijas entomologs. Izd. Latvijas Entomoloģijas b-ba, Latvija. , Lietuvos Matematikos Rinkinys. Izd. "TEV', Lietuva. , Linguistica Lettica. Izd. LU Latviešu valodas institūts, Latvija. , Lithuanian Journal of Cardiology. Izd. Lietuvas kardioloģijas institūts, Lietuva. Man and World. An International Philosophical Review. Izd. University of New Hampshire, ASV. Mathematical Modelling and Analysis. Izd. "Tehnika", Lietuva. , Phenomenological Inquiry. Izd. Modernās fenomenoloģijas pētījumu un mācību pasaules institūts, ASV. , Proceedings SPIE . Izd. The International Society for Optical Engineering, ASV. , Putni dabā. Izd. Latvijas Ornitoloģijas b-ba, Latvija. , The Ring . Izd. Polijas Zooloģijas b-ba, Polija. , Ugdymo psihologija. Izd. Viļņas Pedagoģiskā universitāte, Lietuva. , Svaročnoe proizvodstvo. Izd. "Tehnologija mašinostrojeņija", Krievija.

Added:

Revue Baltique. Izd. Igaunijas, Latvijas un Lietuvas Zinātnieku savienības, Viļņa. Apstiprināts LZP, sēdē 21.12.99.g., protokols Nr.10. , Vārds un tā pētīšanas aspekti. Liepājas Pedagoģijas akadēmija. Zinātnisko rakstu krājuma turpinājumizdevums. Iznāk kopš 1997.g. Apstiprināts LZP sēdē 16.05.2000.g., protokols Nr.5. , Aktuālas problēmas literatūras zinātnē. Liepājas Pedagoģijas akadēmija. Zinātnisko rakstu krājuma turpinājumizdevums. Iznāk kopš 1995.g. Apstiprināts LZP sēdē 16.05.2000.g., protokols Nr.5. , *Ceļš*. Latvijas Universitātes Teoloģijas fakultātes ikgadējo teoloģisko un kultūrvēsturisko rakstu krājums. Apstiprināts LZP sēdē 16.10.2001.g., lēmums Nr. 6-2-1. , *Vēsture*. Latvijas Valsts vēstures arhīva žurnāla "Latvijas Arhīvi" regulārā sadaļa. Apstiprināts LZP sēdē 9.07.2002.g., lēmums Nr. 3-6-1.

international instruments (Satversme Court judgment No. 2000-03-01), in this case Article 15 (3) of the International Covenant on Economic, Social and Cultural Rights, that states: "The State Parties to the present Covenant undertake to respect the freedom indispensable for scientific research […] ".

2.1.1. Scope of scientific freedom

First of all, there is the individual aspect to scientific freedom, i.e. the right of the individual to engage in "discovery and dissemination of knowledge" (BVerfGE 35, 79). It includes the right to carry out research as well as the right to publish the results of the scientific research work. The freedom necessary for scientific activity also implies that "[s]cientific researchers should have the right to publish the results obtained" (Eide: Cultural Rights as Individual human Rights, in: Eide / Krause / Rosas (ed.), Economic, Social and Cultural Rights. A Textbook. 2nd revised edition, Martinus Nijhoff Publishers, Dordrecht / Boston / London 2001, p.298).

Secondly, there is an institutional aspect to scientific freedom, i.e. the right of the universities as institutions of higher education and research to hold a considerable and indispensable degree of independence in the scientific affairs, including the university regulations on academic qualification. This principle has been included in the Magna Charta of the European Universities stating that "[f]reedom in research and training is the fundamental principle of university life, and governments and universities, each as far as in them lies, must ensure respect for this fundamental requirement[4]". It is also recognized in Article 4 (3) 4) of the "University law", which leaves the university competence as an open one, unless there is a specific prohibition to the contrary[5].

Furthermore, the obligation on the state "to recognize" scientific research needs to be assessed in two ways. This wording is quite distinct from formulations of other fundamental rights provision included in Satversme.

The first aspect of this obligation is a negative one. It is a "defensive right against every state encroachment" enjoyed by the individual researcher as well as the research institution, since "the world of scholarship is one of personal and autonomous responsibility for the individual scholar, and the state may not dictate in this realm" (BVerfGE 35, 79). The Committee on Economic, Cultural and Social Rights has adopted a similar interpretation in defining the obligation under Article 15 (3) of the Covenant to be self-executable and "capable of immediate application" (Third General Comment on the Nature of States Parties' Obligations, p.5). The doctrine also affirms the view that the freedom of science is one, which basically calls for the non-intervention by the state (Harris: Cases and Materials on International Law, 5th edition, Sweet & Maxwell, London 2000, p.695). The Charter of the Fundamental Rights of the European Union in its Article 13 also states that "scientific research shall be free of constraint" and that in this context "[a]cademic freedom shall be respected".

The second aspect of the state obligation is a positive one, which obliges the state not only not to encroach upon but rather actively support a system of free scholarly inquiry and "to affirmatively provide for an institutional framework in which such an inquiry can

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[4] The Magna Charta of the European Universities adopted by the Rectors of European Universities 1998 in Bologna, Fundamental Principle 3, http://www.reko.ac.at/mcharta_e.htm

[5] Article 4. University Autonomy
(3) The University shall have the right:
4) to engage in other activities that do not contravene the principles and tasks of the university activities as stated by its founders and this law.

be carried out" (BVerfGE 35, 79). In this context "[s]tates are expected to create conditions and facilities for scientific research and creative activities, to guarantee the freedom of exchange of scientific, technical and cultural information, views and experiences between scientists […] and their respective institutions" (Eide: Cultural Rights as Individual human Rights, in: Eide / Krause / Rosas (ed.) Economic, Social and Cultural Rights. A Textbook. 2nd revised edition, Martinus Nijhoff Publishers, Dordrecht / Boston / London, 2001, p.299). Consequently, an assessment of state intervention into scientific freedom has to be viewed with regard to the comprehensive positive obligations on the state to support scientific freedom. Thus, *prima facie*, an infringement on scientific freedom is incompatible with its constitutional guarantee. Scientific freedom is "unconditionally protected"; it is considered an "absolute freedom of interference by public authority" (BVerfGE 35, 79). "The state should confine itself to regulate the 'external affair' of universities, in particular their financial support from the general budget, and to a general administrative supervision to assure the observance of the fundamentals of state policy. […] Whereas legislative powers to shape affairs, which are 'science related', is limited" (BVerfGE 35, 79).

2.1.2. Infringements of freedom of science

Against this constitutional background the legal regime on academic qualifications constitutes infringements on scientific freedoms in several aspects:

Firstly, in determining formal requirements, i.e. the number of recognized publications, it has an impeding impact on the decisions of the scientist. The individual researcher is unable to concentrate solely on the scientific content of his research work, but has to take into account whether and which recognized publishers will edit it. A person, who wants to make use of his scientific freedom to publishing the results of his research, is restricted to the recognised publications. Even if other, non-recognised publications would be more appropriate for the objective of informing the public of his research, the person has to disregard his interest and rather decide in favour of a recognized publication. Thus, if the Science Council has not recognised any or has recognised only one particular publication in a defined area of science, the individual has either to publish in a publication specific to another area, facing the most probable result of not reaching his potential audience, or he is restricted to a specific publication, perhaps even less available to the reader.

Secondly, in authorizing the Science Council to recognize publications, outside institutions are furnished with the powers to decide on the scientific nature of the work and eventually on academic qualifications. Apart from the Science Council itself the decision depends on the board of editors of recognized publications accepting or rejecting the submitted research papers. The Science Council and/or the editors are actually deciding on what is academic qualification and science and what is not. This disregards self-determination of universities to assess the academic qualification of their Ph.D. candidates and faculty, and thereby is not supportive to scientific freedom of the universities.

2.1.3. Violations of scientific freedom

The infringements caused by these restrictions on scientific freedom are not justified under constitutional law but constitute violations of constitutional principles. Although Article 113 is not mentioned in Article 116 of Satversme, the Satversme Court has ruled that, in principle, restrictions of a fundamental right not listed in Article 116 are not excluded. However, any restriction still has to pass the traditional test of constitutionality: it has to be prescribed by law, it has to pursue a legitimate state interest, and it has to be proportionate (Satversme Court judgment No. 2002-04-03).

2.1.3.1 Statutory reservation

First of all, it is doubtful whether the restrictions fulfil the formal requirement to be "prescribed by law", since the Science Council introduces the restrictions based on regulations by the Cabinet of Ministers. Although the requirement "prescribed by law" may be interpreted broadly, so as to include not only statutes passed by Saeima, but also other normative acts, this interpretation cannot be applicable in the current situation.

Satversme distinguishes between three types of fundamental rights as far as restrictive reservations are concerned: reservation of qualified statutory restrictions for those fundamental rights listed in Article 116, reservation of simple statutory restrictions as provided for in Articles 94 (freedom rights) and 101 (participation rights), and no reservation on restrictions like in Articles 93 (right to life) and 113 of Satversme. It follows from this differentiation that the threshold for restrictions on fundamental rights should be highest in cases where no reservation of restrictions are foreseen in the wording of the constitutional provision. The *ratio legis* of this is that restrictions on freedom of science granted in Article 113 of Satversma are only admissible if at least the formal requirement for statutory reservation is met, i.e. a law passed by Saeima.

As established by German constitutional doctrine, restrictions on human rights are to be formulated only by the legislature in the form of laws, but not by the executive power on the basis of ambiguously delegated competence. "Today our established case law makes clear that the legislature is obliged … to make all crucial decisions in fundamental normative areas, especially in those cases where basic rights become subject to governmental regulation. […] [One] must also use similar criteria to judge whether the legislature has established the essential legal standards for the matter to be regulated … and has not left this for the administration to determine" (BVerfGE 49, 89). Therefore fundamental rights may only be limited specifically and expressly by parliament; the executive branch may only specify the details of the restriction within the scope defined by the legislator. The executive power thus may not restrict the individual rights on its own initiative in the absence of absolutely clear delegation by the legislator. The so-called "parliamentary reservation" reserves the important questions to the decision of the legislator.

But even if the delegation of competences to imposed restrictions on freedom of science would be considered to meet the constitutional requirements, in this case the regulations no. 134 and 391 of the Cabinet of Ministers are exceeding the delegated competences and is *ultra vires*.

2.1.3.2 Ultra vires

Regulation no 134 "on the Procedure and Criteria of Promotion" has been adopted on the basis of Article 12 of the law "On Scientific Activity". The specific delegation states,

"The procedures and criteria for promotion shall be set out in by-laws approved by Cabinet".

The legislative delegation was designated to set the criteria and procedures for the work of the Science Council. The criteria therefore had to be formulated and defined by the Cabinet of Ministers itself. However the Cabinet of Ministers has overstepped its competence by sub-delegating the right to specify the criteria. The administrative sub-delegation falls outside the competence and as measures *ultra vires* cannot be consider being valid law in the meaning of the criterion of the constitutional restriction.

The regulations "Procedure for Assessment of the Scientific and Pedagogical Qualifications of Applicants for the Position of Professor and Associate Professor" have been adopted on the basis of Article 34 of "University Law" that states, "Scientific and pedagogical qualifications of applicants for the position of professor and associate professor are assessed by the professor council of the research area as prescribed by the Cabinet". In comparison to the regulations above this delegation concerns the formulation of the procedure of the work of the professor council. Even if it could be argued that the criteria could also be set, the Cabinet of Ministers itself, not sub-delegating this task to the Science Council, should specifically formulate them.

The regulations "Procedure for Assessment of the Scientific and Pedagogical Qualifications of Applicants for the Position of Professor and Associate Professor" are contradicting a fundamental principle of the "University law", specifically stated in Article 4 (3) 4) of the "University Law"[6]. This provision frames the university competency as an open one, and states that the universities may engage in other activities, not explicitly provided for, as long as they do not contravene the principles and tasks as laid down in the "University Law" or by the founders. Since the general competence both in the decisions on the Ph.D. and the professor/ associate professor rests with the universities themselves, i.e. in promotion councils and professor councils respectively, and in the absence of any specific prohibition, it can reasonably be assumed that the evaluation of the scientific quality of the research should also be left in the hands of the universities exercised by the promotion / professor councils.

As a general rule the provisions and clauses of a specific law should be interpreted in conformity with objectives and purposes of the specific legislative instrument, as well as the general principles and, if existing, the principles specific to the law. In the case, the will of legislator to include as a principle the broad competency of universities themselves is clearly detectable from the text.

2.1.3.3 Foreseeability

In addition, these regulations lack the necessary clarity and foreseeability as required by the rule of law. The principle of legality, which forms an essential part of the rule of law, demands, *inter alia,* that "the legislator is obliged to formulate its norms as precise as the nature of the facts of life to be regulated permit, considering the objective of the norm" (BVerfGE 93, 213). It also has been stated by the ECHR that one of the criteria of fulfilling the principle of legality is the criterion of predictability (Svensson - McCarthy: The International Law of Human Rights and States of Exception, Martinus Nijhoff Publishers, Dordrecht / Boston / London, 1998, p.81). The ECHR has explicitly stated, "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision" (Sunday Times judgment, Series A, No. 30, p.31, para.49). It generally means that the provisions that affect the individual rights must be stated in normative acts, not in

[6] See footnote 5

internal regulations and decisions of institutions. The aspect that the provisions of the regulations only ambiguously mention "the list", which is not specified in any other regulation or law, renders the regulations unforeseeable and thus they do not fulfil the principle of legality and the criterion "prescribed by law". The precision of the legal command is left to the arbitrariness of the Science Council.

The Satversme Court has stated, "if the restriction of fundamental rights is not prescribed by law, it is not constitutional. Therefore it is not necessary to additionally consider whether [...] the objective is legitimate and whether it is proportional" (Satversmes Court judgement No. 2002-01-03). Thus, if the Satversme Court accepts any of the abovementioned arguments, the Cabinet regulations in the challenged scope are unconstitutional for having not fulfilled the formal "prescribed by law"- criterion. However the challenged provisions are unconstitutional in their substance as well, as will be proved by further analysis.

2.1.3.4 Legitimate interest

As to the legitimate state interest, from the *ratio legis* stated above (2.1.3.1) for not including Article 113 in Article 116 of Satversme it follows the application of stricter criteria for restrictions on Article 113 of Satversme. Satversme Court commenting on a similar provision stated that it could be restricted in order to protect other constitutional values, like fundamental rights of other people and the democratic system of the state (Satversme Court judgment No. 2000-03-01). Since thereby only the most important of the reasons for restriction listed in Article 116 were mentioned, it has to be concluded that the others do not qualify as criteria for restricting fundamental rights not listed in Article 116 of Satversme. Such approach is also supporter by German jurisdiction, which holds that the legitimate interests for restriction could be "the right to life, bodily integrity or property of fellow citizens, as well as the academic freedom of other researchers" (BVerwG NJW 1997, 1996-1997). There is no indication that any one of these interests is to be pursued by the restrictions.

Even if Article 113 might be restricted on the basis of any of the legitimate interests listed in Article 116 of Satversme, it is in no way evident which interest could possibly be invoked to justify the restriction. At the utmost, the objective of the restrictions might be to assure academic quality in the promotion process for Ph.D. and in the assessment of applications for the position of professor and associate professor. However, in the context of a proportionality check the restrictions are neither suitable, nor necessary or adequate.

2.1.3.5 Proportionality

The Satversme Court has stated,"to consider, whether the provision adopted by the legislator conforms with the proportionality principle, the following must be determined:
firstly, whether the means employed by the legislator, are suitable for achieving the legitimate objective;
secondly, whether such actions are necessary, i.e., is it not possible to achieve the objective with other means, less restricting for the rights and legitimate interests of the individual;
thirdly, whether the actions of the legislator are proportionate or adequate, i.e., whether the good that the society will gain, is greater than the loss done by the restrictions to the rights and legitimate interests of the individual.
If, considering the provision, it is admitted that it does not fulfil at least one of these criteria, then it does not fulfil the criterion of proportionality and is unconstitutional". (Satversme Court judgement No. 2001-12-01)

2.1.3.5.1 Suitability

The first criterion of proportionality, the notion of suitability, has not been fulfilled. Even the most superficial review of the list of recognised publications shows that in the field of legal science many world-wide recognised publishing houses (e.g. Sweet& Maxwell, Butterworths, Manchester University Press, Martinus Nijhoff Publishers, Harvard University Press, Yale University Press, C.H.Beck-Verlag, Dunker & Humblodt, Mohr Siebeck, C.F.Müller etc.) and world famous journals (e.g. Harward Law Review, American Journal on International Law are not included. Indeed, no specific foreign law journals have been named as having satisfied the criteria of the Council. In addition, the situation in Latvia is unsatisfactorily reflected, as virtually no general publications in the field of legal science are listed (e.g. Latvijas Vēstnesis, Likums un Tiesības). This is particularly grave if taken into account that to a large extent legal science is a national science and the great bulk of research is carried out in the Latvian language on the Latvian legal system.

Furthermore, according to the existing legal regime the candidate for a Ph.D. or the applicant for a professorship academic does not qualify academically on the basis of the substance of the publication, but on the basis of the formal status of the edition in which it has been published. Thus even the most exhaustive list would not be suitable to assess the academic quality, since the purely formal requirement, neglecting the substance, is unsuitable *per se*.

2.1.3.5.2 Necessity

The second criterion of proportionality, the notion of necessity, has not been fulfilled either, since other, equally effective but sensibly less restrictive measure could have been chosen (BVerfGE 30, 292).

First of all, the universities themselves, acting through the promotion / professor councils respectively, could make the decision on the status of the publications. That would have a similar effect and would be in line with the institutional guarantee of the freedom of science.

Secondly, the universities themselves, solely on the basis of the merits of each research work separately, could make the decision, regardless where it was published. That would neither infringe upon the individual nor the institutional aspect of the freedom of science.

This would correspond with the German legal regime, implemented, for example, at the University of Tübingen. § 54 and 55 of the University law of the Land Baden-Württemberg[7] state the general requirements for Ph.D. and professorship and grant the right to confer Ph.D.-degrees and the right to assess qualifications as professors to the universities. On this basis the University of Tübingen has adopted a by-laws stating in detail the requirements for qualifying as Ph.D. (regulations on promotion[8]) or professor (regulations on habilitation[9]). § 8 of the regulations on promotion of lawyers states, "the dissertation has to be scientifically noteworthy, and has to show, that the candidate is capable to solve legal problems independently and from a critical perspective". § 7 para.1 of the regulation on habilitation states, "the written contribution for habilitation may be submitted in form of one single publication or a number of scientific publications or

[7] See:http://www.mwk-bw.de/Online_Publikationen/Uni-Gesetz.pdf
[8] See: http://www.jura.uni-tuebingen.de/studber/normen/promo.htm
[9] See: http://www.jura.uni-tuebingen.de/studber/normen/habilo95.htm

manuscripts ready for publication ", the latter referred to as "cumulative habilitation" in § 5 para.1 point 3. § 7 para.2 and 3 of the same regulation specify, „the publication for habilitation has to be an independent scientific contribution to at least one area of specialization for which habilitation is requested. It has to show, that the candidate is qualified to carry out research as expected from a university professor, and it has to be a convincing contribution to scientific knowledge.[…] If instead of one publication for habilitation several scientific publications are submitted each of them or the publications on the whole have to fulfil the requirements stated [above] ." According to § 2 para.2 of the regulation on promotion and § 7 para.4 of the regulation on habilitation, university committees composed of professors carry out the evaluation of the publications for dissertation or habilitation.

2.1.3.5.3 Adequacy

This sub-principle of proportionality requires that "the seriousness of the intervention and the gravity of the reasons justifying it be in adequate proportion to each other" (BVerfGE 61, 126). "This principle requires a proper balance between the injury to the individual and the gain to the community, caused by a state measure; it prohibits measures whose disadvantage to the individual clearly outweighs the advantage to the community" (Emilion: The Principle of Proportionality in European Law. A Comparative Study, Kluwer Law International, London / The Hague / Boston, 1996, p.32). "The injury to the individual" is the violation of the negative obligation of the state of non-intervention. "The advantage of the community", either existent or potential, are not at all apparent. Paraphrasing the Federal Constitutional Court, "the chosen means and the desired ends are not in a reasonable relationship to each other" (BVerfGE 35, 401), thus not fulfilling the criterion of adequacy.

In conclusion, non-fulfilment of even one criterion brings about the non-fulfilment of the proportionality principle as a whole (Satversme Court judgment No. 2001-12-01) and thus makes the challenged provisions, at the very least on this ground, unconstitutional.

2.2. Freedom of occupation

2.2.1. Scope of freedom of occupation

Article 106 of Satversme guarantees that "any person has the right to choose freely his/her occupation and job according to his/her ability and qualifications". The subject of the freedom of occupation is "every individual [who] has the right to take up any activity which he believes himself prepared to undertake as a 'profession' – that is, to make [the activity] the very basis of his life". Moreover, "the idea of a 'profession' […] embraces not only those occupations identified by custom or law, but also freely chosen activities that do not correspond to the legal or traditional concept of trade or profession". (BVerfGE 7, 377) It follows from this that the constitutional concept of profession fully includes but is in no way limited to the traditional concept of profession. The associate professor/ professor is in no doubt an "occupation and job" within in the meaning of Article 106 of Satversme. This conclusion is supported by the "University law", which in Articles 29 and 31 respectively refers to the positions of professors and associate professors.

The scope of freedom of occupation to choose an occupation also includes higher education related to a professional qualification (see Pieroth / Schlink: Grundrechte – Staatsrecht II, 14th edition, C.F.Müller, Heidelberg 1998, para.819 pp). The "occupation" of professors, associate professors and docents requires a doctoral degree of the applicant (see: Article 28 (1), 30 (1), 32 (2) of "University law"). Thus, the fulfilment of

the requirements for the conferral of a doctoral degree is an indispensable step towards becoming a professional academic.

2.2.2. Infringement of freedom of occupation

The constitutionality of these restrictions has to be judged, especially taking into account that the restrictions address "[…] the citizen's freedom in an area of particular importance to modern society […]" (BVerfGE 7, 377). Freedom of occupation is considered to be a defensive right against restrictions on freedom of education for a particular profession (BVerfGE 33, 303). "As a rule, education is the first step in taking up a profession; both are integral parts of a coordinated life process. […] This close relationship also leads us to conclude that [we shall] judge any restrictions to the admission to a course of study stringently as restrictions on the choice of the occupation" (BVerfGE 33, 303). From this follows that regulations No. 134 and 391 of the Cabinet of Ministers together with the list of recognised publications adopted by the Science Council are of infringing nature on freedom of occupation.

2.2.3. Violation of freedom of occupation

Admittedly, freedom of occupation is not absolute and unlimited, but subject to restrictions according to the same principles established by Satversme Court as referred to above (see above 2.1.3). However, as far as the formal requirements on the constitutionality of valid restrictions is concerned the same objections have to be invoked, i.e. regulations No. 134 and 391 of the Cabinet of Ministers and the decision on the lists of recognized publications by the Science Council do not meet the criterion "prescribed by law", since they are not fulfilling the principle of statutory reservation, are *ultra vires,* and are not fulfilling the principle of legality in terms of foreseeability of the law (see above 2.1.3.1 to 2.1.3.3). In particular, the theory of essentials in the context of freedom of occupation requires that only regulations of modalities concerning the exercise of an occupation may be delegated, whereas the legislator would have to regulate the requirements for the choice of an occupation itself by statutory enactment (BVerfGE 33, 125 and BVerfGE 94, 372). As to the legitimate state interest justifying the restriction, it could, at the utmost, be to assure academic quality. But even if conceded this interest as legitimate and sufficient to justify restrictions on freedom of occupation, the means applied to achieve this objective are not proportionate.

"The freedom to choose a profession may only be regulated if the protection of very important public goods so compels. If such restriction is unavoidable, the legislator must always choose the form which least infringes the basic right". As a general principle to be applied when considering restrictions to freedom of occupation is that "in the event that an encroachment on freedom of occupational choice is unavoidable, lawmakers must always employ the regulative means least restrictive of the basic rights" […] "If the freedom to choose a profession is being restricted by conditions to start that profession, subjective and objective conditions have to be distinguished: for subjective conditions (particularly for education and training), the principle of proportionality is applicable in the sense that the conditions may not be out of proportion to the purpose of achieving an orderly conduct of the profession. To prove the necessity of objective conditions for admission, exceptionally strict prerequisites have to be present; generally, only the defence against ascertained and highly probable dangers for a public good of paramount importance will justify such a measure" (BVerfGE 7, 377). This means, that subjective criteria, i.e. on personal aptitude, qualification, and proven achievements, would be justified only, if to protect a paramount value of society of constitutional ranking; objective admission criteria justified only in exceptional cases to prevent actual danger to a paramount value of society originating from fundamentals of constitutional law (see

Pieroth/Schlink, Grundrechte – Staatsrecht II, 14th edition, C.F.Müller, Heidelberg 1998, para.855).

In applying this doctrine to the current case, the Science Council on the bases of regulations No. 134 and 391 of the Cabinet of Ministers has in fact established objective criteria restricting the choice of an academic profession. The criterion of submission of a definite number of recognized publications is not one which can be fulfilled by the candidates or applicants subjectively merely on the basis of personal aptitude, qualification, and proven individual achievements. On the contrary, it depends on the formality of acceptance of the academic work for publication by listed editors arbitrarily selected by the Science Council.

But neither as an objective nor as a subjective criterion the sheer number of publication can ever be a suitable indicator of academic qualification. Editors or publishing houses surely cannot verify quality of an academic work solely through its acceptance for publication. Whether or even when to accept is up to the discretion of the editor guided primarily by the policy of the publishing house without having to put any particular emphasis on or even to take into account the academic value of the work nor the urgency of its publication.

To conclude, the restrictions on freedom of occupation imposed by regulations No.134 and 391 of the Cabinet of Ministers and its implementation by the Science Council are not proportionate, and thereby unconstitutional, since they are neither suitable nor necessary, let alone adequate, to ensure "the orderly conduct of a profession".

3. Result

Regulations No.134 and 391 of the Cabinet of Ministers establishing the legal regime regarding the conferral of a Ph.D. and the assessment of qualifications as professor / associate professor are not in compliance with Articles 113 or 106 of Satversme.

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