

**What is the Status of Liberal Constitutional Democracy in
Lithuania and Latvia? A Two Country Study in the Context of
Democratic Backsliding in Eastern and Central Europe**

Beatrice Monciunskaitė, B.C.L., LL.M.

Thesis Submitted for the Award of Doctor of Philosophy

School of Law and Government, Dublin City University

Supervisor: Professor Federico Fabbrini

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Declaration

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Signed: Beatrice M.

Name: Beatrice Monciunskaitė

ID Number: 15328601

Date: 21/08/2023

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List of Abbreviations

AS	United List (Latvia)
CEE	Central and Eastern Europe
CoE	Council of Europe
CPI	The Transparency International Corruption Perceptions Index
DK	The Path of Courage party (Lithuania)
DP	Labour Party (Lithuania)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EGP	European Green Party
EKRE	Estonia's Conservative People's Party
EU	European Union
JP	New Party (Latvia)
KDNP	Christian Democratic Party (Hungary)
KNAB	Corruption Prevention and Combating Bureau (Latvia)
KPV LV	Who Owns the State? (Latvia)
KRS	National Council of the Judiciary (Poland)
LFGU	Lithuania's Farmers and Greens Union
LGBTQ+	Lesbian, Gay, Bisexual, Transgender, Queer and others
LPP	Latvia's First Party
LSDP	Social Democratic Party (Latvia)
LTS	Lithuanian Nationalists Union party
LuV	For Latvia and Ventspils party
NA	National Alliance party (Latvia)
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organisation
PiS	Law and Justice Party (Poland)
PLL	For a Good Latvia Party
TB-LNNK	For Fatherland and Freedom-Latvian National Independence Movement

TP Peoples Party (Lithuania)
UN United Nations
US United States
VL All for Latvia!
VL United for Latvia Party

Abstract

What is the Status of Liberal Constitutional Democracy in Lithuania and Latvia? A Two Country Study in the Context of Democratic Backsliding in Eastern and Central Europe

Beatrice Monciunskaitė

This thesis explores the status of liberal constitutional democracy in Lithuania and Latvia through the lens of democratic regression in Poland and Hungary, which has developed during the last decade. The primary focus of this thesis is Lithuania and Latvia. However, democratic backsliding in Poland and Hungary is used to frame the discussion around liberal constitutional democracy and how it can falter. This thesis will open with a critical literature review that details the distinct modes in which liberal constitutional democracy is eroded according to the prevailing theory in this area of research. Comparative case study methodology and doctrinal analysis are then used to determine the similarities between Hungary and Poland on the one hand and Lithuania and Latvia on the other. The body of this thesis will employ an inductive approach to facilitate a normative and empirical analysis of the nature of liberal constitutional democracy in Lithuania and Latvia. The benchmark of Poland and Hungary's illiberal turn will be used to elucidate some of the common features of democratic deficit in the two member states under study and to understand whether Lithuania and Latvia are also at risk of authoritarian reversal. This comparative analysis shows that Lithuania and Latvia are also in the throes of their own democratic deficits. To explain these findings, this thesis distinguishes between democratic hollowness and democratic backsliding to differentiate the two concepts within the taxonomy of democratic 'illnesses'. Hollowness is framed as a distinct feature of a low-quality democracy but one that can threaten democratic stability. This thesis also uses the agentic theory to illustrate the influence of political actors over the democratic trajectory of a country. Finally, the response of EU institutions to these threats is critically analysed before preventative measures are recommended to safeguard liberal constitutional democracy in Lithuania and Latvia.

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Errors and omissions, of course, remain my own. I have endeavoured to state the law correctly as of 24th April 2023.

1. Introduction and Research Design

1.1. Introduction

As the 21st century approached and communism collapsed, Francis Fukuyama famously spoke of the “end of history”.¹ Although the content of the future was unclear, it was assumed the future could only get better, that liberal democracy would further evolve as liberal consensus, faith in the rule of law and technocracy would lead the way towards the end of history.² Now the shape of the future is shrouded in doubt, as many scholars have identified that liberal constitutional democracy is on the decline around the world.³ There are many reasons cited for this decline, including the economic recession of 2008 and the recent migration crises, although a definitive cause is not clear.⁴ Nevertheless, the decline in constitutionalism, liberalism, the rule of law and democracy is undeniable. Democracy has been in decline in countries every year since 2006, and the rise of populist rhetoric used by political parties has been noted as the enabling force for democratic backsliding.⁵ Therefore, populism despite the overuse and misuse of the term, is linked

¹ Francis Fukuyama, ‘The End of History?’ [1989] *The National Interest* 3.

² Tom Gerald Daly, ‘Contemplating the Future in the Era of Democratic Decay’ (*ICONnect: Blog of the International Journal of Constitutional Law*) <<http://www.iconnectblog.com/2017/09/contemplating-the-future-in-the-era-of-democratic-decay/>> accessed 4 March 2023.

³ Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (Paperback edition 2020, The University of Chicago Press 2020) 12–14; Nancy Bermeo, ‘On Democratic Backsliding’ (2016) 27 *Journal of Democracy* 5; Tom Ginsburg, ‘Democratic Backsliding and the Rule of Law’ (2018) 44 *Ohio Northern University Law Review* 351; Steven Levitsky and Lucan Way, ‘The Myth of Democratic Recession’ (2015) 26 *Journal of Democracy* 45.

⁴ Kim Lane Scheppelle, ‘The Party’s Over’ in Mark A Graber, Sanford Levinson and Mark V Tushnet (eds), *Constitutional democracy in crisis?* (Oxford University Press 2018); Ginsburg and Huq (n 3) 171–172.

⁵ Freedom House, ‘Freedom in the World 2022: The Global Expansion of Authoritarian Rule’ (2022) 1–2 <https://freedomhouse.org/sites/default/files/2022-02/FIW_2022_PDF_Booklet_Digital_Final_Web.pdf> accessed 3 January 2022.

to the recent phenomenon of democratic backsliding.⁶ This is particularly relevant given the fact populism has emerged as a major feature of politics in both its right-wing and left-wing incarnation in much of Europe.⁷ Thus, the election of Donald Trump as United States President in 2016 and the European Union's evident struggle to reinforce key values of democracy and the rule of law, did not occur so close in time by coincidence.⁸ Rather, democratic regression across the world can be understood as what Balkin calls a collective "democratic rot" which has been on the horizon for a while now.⁹

A defining characteristic of this new democratic regression is its renewed means of achieving semi-authoritarian states. They are notably different from the modes used by authoritarians of the 20th century; they are much more subtle and legalistic than the classic military coups and revolutions.¹⁰ Democratic backsliding today has therefore been called 'stealth authoritarianism' as it is significantly more difficult to identify than its older predecessors.¹¹ Today, populist leaders use legal changes to laws and constitutional amendments to subvert their country's democratic core, but still parade around under the façade of democracy.¹² However, upon closer inspection, both 'old' and 'new' authoritarian leaders share the same characteristics and goals to varying degrees; they are illiberal and anti-pluralist, they seek control of democratic institutions, such as courts, in order to undermine constitutional checks on their power and overall, to concentrate power in a strong executive branch.¹³ In many ways, the subtle modes of democratic erosion utilised by populist leaders, do not on their own equal a dramatic assault on constitutional democracy, however as Roznai and Brandes note, many small and

⁶ Yaniv Roznai and Tamar Hostovsky Brandes, 'Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine' (2020) 14 *Law & Ethics of Human Rights* 19, 19–21.

⁷ Paul Blokker, 'Populism and Illiberalism' in András Sajó, Renáta Uitz and Stephen Holmes, *Routledge Handbook of Illiberalism* (1st edn, Routledge 2021) 261–266.

⁸ Tom Gerald Daly (n 2).

⁹ Jack Balkin, 'Constitutional Crisis and Constitutional Rot' in Mark A Graber, Sanford Levinson and Mark V Tushnet (eds), *Constitutional democracy in crisis?* (Oxford University Press 2018) 101.

¹⁰ Ginsburg (n 3) 351.

¹¹ Ozan Varol, 'Stealth Authoritarianism' [2015] *Iowa Law Review* 1673.

¹² Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85(2) *The University of Chicago Law Review* 545, 571.

¹³ David Prendergast, 'The Judicial Role in Protecting Democracy from Populism' (2019) 20(2) *German Law Journal* 245, 246–250; Ginsburg (n 3) 363–365.

incremental assaults on democracy mean that “the whole is greater than the sum of its parts.”¹⁴

For most of the 20th century the Central Eastern European (CEE) region, including Lithuania, Latvia, Poland and Hungary was deemed to be the “unfinished part of Europe”.¹⁵ Decades of occupation stifled democratic growth and integration with the rest of Europe. Therefore, their return to Europe seemed even more momentous due to their tumultuous history and communism. Of course, the euphoria of liberation from the Soviet Union, transition to democracy and accession to NATO and the EU did not last long. It took only six years after Hungary acceded to the EU for Fidesz to rise to power and swiftly begin dismantling key pillars of Hungarian constitutional democracy.¹⁶ Five years later, the Law and Justice Party (Prawo I Sprawiedliwosc, PiS) emerged as the winners of the Polish general election and promised to follow in the footsteps of their Hungarian counterparts. Ever since, the EU has been fighting a losing battle to save liberal constitutional democracy in these two countries and in turn, preserve the integrity of the EU legal order.

International and scholarly attention has been firmly fixed on Hungary and Poland for their violations of the rule of law and democratic principles. However, little attention has been spared for the Baltic states of Lithuania and Latvia. Scholars cite these states as having taken to democracy particularly well after Soviet collapse.¹⁷ Major indices of democracy have traced the success of the democratisation project in Lithuania and Latvia with both countries achieving solid levels of electoral democracy by 1994.¹⁸ V-Dem’s Liberal Democracy index and Freedom House have also found high levels of democratic consolidation and classify these two countries as free, despite their scores

¹⁴ Roznai and Brandes (n 6) 19.

¹⁵ Bojan Bugarič, ‘A Crisis of Constitutional Democracy in Post-Communist Europe: “Lands in-between” Democracy and Authoritarianism’ (2015) 13(1) *International Journal of Constitutional Law* 219, 222.

¹⁶ Renáta Uitz, ‘Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary’ (2015) 13 *International Journal of Constitutional Law* 279, 285.

¹⁷ Kjetil Duvold, *Making Sense of Baltic Democracy: Public Support and Political Representation in Nationalising States* (Universitetsbiblioteket 2006) 6–13; David J Galbreath, ‘Still “treading Air?” Looking at the Post-Enlargement Challenges to Democracy the Baltic States’ (2008) 16 *Demokratizatsiya* 87.

¹⁸ Vello Pettai, ‘The Baltic States: Keeping the Faith in Turbulent Times’ (2020) 13(2) *Canadian Journal of European and Russian Studies* 39, 40–41.

dipping slightly in recent years.¹⁹ However, this thesis demonstrates that the democratic climate in these two Baltic states is far from settled and indeed, backsliding of constitutional democracy and liberal values is also evident from empirical analysis. Furthermore, democratic hollowness is another complicating factor that is also considered when assessing the democratic status of Lithuania and Latvia. Despite democratic hollowness being less headline-worthy than democratic backsliding, it is argued that this phenomenon is equally damaging and a risk factor for democratic backsliding. These findings demonstrate the complexity of the status of liberal constitutional democracy not only in the two states under study but also in the rest of the CEE region. The empirical research presented in this thesis on the state of liberal constitutional democracy in Lithuania and Latvia is intended to contribute to the literature on the democratic health of the CEE region and the EU. It is hoped the conclusions and recommendations drawn from this thesis will help shape scholarship and policy through advocating for the development of responsible EU enlargement criteria and to offer tentative solutions for protecting the fundamental principle of the rule of law.

1.2. Objectives and Scope of Research

Democratic backsliding has been particularly prevalent in the Central European countries of Poland and Hungary since 2010. The actions of populist governments in these two countries have been well documented by scholars; however, little attention has been spared for the Baltic states of Lithuania and Latvia. This thesis aims to address this gap in the literature on the decay of liberal constitutional democracy. As democratic backsliding continues to be a pressing issue in academia and global affairs, looking at two understudied countries offers a different perspective on democratic ‘illnesses’ and helps us to better understand the nature of this phenomenon.

¹⁹ Freedom House, ‘Freedom In the World 2022 Report, Lithuania’ (2022) <<https://freedomhouse.org/country/lithuania/freedom-world/2022>> accessed 20 April 2023; Freedom House, ‘Freedom in the World 2022 Report, Latvia’ (2022) <<https://freedomhouse.org/country/latvia/freedom-world/2023>> accessed 20 April 2023; Our World in Data, ‘V-Dem Liberal Democracy Index 1789-2022, Report on Lithuania, Latvia, Poland and Hungary’ (2 March 2023) <<https://ourworldindata.org/grapher/liberal-democracy?tab=chart®ion=Europe&country=LTU~LVA~POL~HUN>> accessed 19 April 2023.

The central aims of my research are to, first, show the differences between Latvia and Lithuania on the one hand and Poland and Hungary on the other, by explaining why democracy in the two former countries is performing better. Second, I aim to establish the risks of democratic backsliding in Latvia and Lithuania respectively, in a comparative manner with reference to Hungary and Poland and occasionally other Eastern European states. I will examine this using four research questions which are based on existing literature in the field: First, what is the state of liberal constitutional democracy in Lithuania and Latvia? This question will be answered in chapters four and five using empirical analysis under the headings of political party landscape, judicial independence, media freedom and respect for minority rights. The second question can be separated into two parts: is democracy in Lithuania and Latvia backsliding? What factors contribute to the different experience of democracy in Lithuania and Latvia, as compared to Poland and Hungary? These questions are addressed at length in chapter six which concludes that both Lithuania and Latvia display features of democratic backsliding similar to that of Poland and Hungary, but to varying extents. Democratic hollowness, the role of charismatic political leaders and institutional checks on political power are also identified as important factors in determining democratic resilience in Lithuania and Latvia. Third, what recommendations can be drawn from research into the state of liberal constitutional democracy in all four states under study, including what steps might be taken at national and European level to reduce the risk of backsliding and halt regression of the rule of law in individual member states? These questions are addressed in chapter seven which focuses on the shortcomings of the democratisation process and the EU accession criteria and argues that these processes were essentially flawed and have contributed to the regression of constitutional democracy and liberalism. This chapter also discussed some practical solutions to the ongoing rule of law crisis in the EU including the use of the Conditionality Mechanism and the Commission's Annual Rule of Law Reports.

1.3. Methodology

This thesis employs a mixture of methodological tools to answer the research questions outlined above. Advanced legal research methodology such as analysis of relevant

primary and secondary legal material was used as the foundation for research in this project. This library-based research allowed me to engage with a vast amount of case law, legislation and academic commentary from each of the countries under study. Analysis of existing academic commentary on democratic backsliding was used to identify gaps in this area of research and formed the basis of chapters two and three.

Comparative case study methodology is also utilised as the process through which the present research was carried out. Comparison was conducted on two axes i.e. between Poland and Hungary on the one hand and Lithuania and Latvia on the other. This corresponds to the fact that Poland and Hungary are the two best-known examples of democratic and rule of law backsliding within the EU so they are used as the benchmark for analysing the state of liberal constitutional democracy in Lithuania and Latvia. The second axis of comparison is to compare the experience of democratic backsliding and the surrounding factors between Poland, Hungary, Lithuania and Latvia individually.

This thesis also engages in interdisciplinary research methodology. In particular, although this thesis is grounded in comparative constitutional law and EU law analysis, it was also necessary to engage with political science literature in order to comprehensively answer the research questions posed. Therefore, this thesis draws from aspects of political science research as a way to contextualise the vast legal changes that have occurred during the process of democratic regression in the countries under study. In particular, discussions of electoral laws, the political party landscape in each jurisdiction and the influence of prominent political leaders on the processes of checks and balances and ideological trajectory of policies, necessitate this thesis to draw from political science literature. This is a common approach in the field of research addressing the decline of liberal constitutional democracy that has emerged within comparative constitutional law scholarship in the last decade or so.

This thesis will be engaging with the 'most similar system design' (MSSD) method as it compares countries with a host of common characteristics in an effort to neutralise some

differences while emphasising others.²⁰ This method is based on a formulation of J.S. Mill's method of difference where he seeks to identify the significant characteristics that are different amongst similar countries which explain an outcome under study or lack thereof.²¹ MSSD is particularly well suited for area studies as an area will generally share similar characteristics whether they are historical, cultural, linguistic or religious.²² The idea is that choosing countries with the most similarities in respect to many features result in the most reliable results.²³

Lithuania and Latvia were chosen as case studies through a process of classification, by identifying similar characteristics that are present in Lithuania and Latvia and Hungary and Poland.²⁴ This is because most literature on democratic backsliding has focused on the latter two countries. Both Lithuania and Latvia have a similar historical background to Poland and Hungary including Soviet occupation, being former communist states and being part of the 2004 EU enlargement. Therefore, the choice of similar countries reduces the complexity of the issue under study. Seeking out common factors in this group of countries allows for cross-national phenomenon such as democratic backsliding to be identified more easily. Subsequently, once each country is described and classified the theories that have been developed by scholars around democratic backsliding can be tested to see if they also exist in Lithuania and Latvia without rival explanations interfering.²⁵ Choosing Lithuania and Latvia to compare against Poland and Hungary will also allow the findings of this research to be generalisable and useful in predication. Using the outcomes that have emerged from this research will allow for predictions of future

²⁰ Carsten Anckar, 'On the Applicability of the Most Similar Systems Design and the Most Different Systems Design in Comparative Research: International Journal of Social Research Methodology: Vol 11, No 5' (2008) 11(5) Int. J. Social Research Methodology 389, 389–390 <<https://www.tandfonline.com/doi/abs/10.1080/13645570701401552>> accessed 13 March 2023; Todd Landman, *Issues and Methods in Comparative Politics: An Introduction* (4th edition, Routledge, Taylor & Francis Group 2017) 70.

²¹ John Stuart Mill, *A System of Logic, Ratiocinative and Inductive: Being a Connected View of the Principles of Evidence, and the Methods of Scientific Investigation*, vol 1 (John Parker 1843) 455–456; Landman (n 20) 70.

²² Landman (n 20) 71.

²³ Adam Przeworski and Henry Teune, *The Logic of Comparative Social Inquiry* (Wiley Interscience, John Wiley & Sons 1970) 32–33.

²⁴ Landman (n 20) 6.

²⁵ *ibid.*

outcomes in other similar countries, such as Estonia. Thus, further strengthen the validity of this initial research.²⁶

It is worth noting at this point that including Estonia as a case study would also be relevant for this project; however, Estonia was excluded from this thesis at this stage for two main reasons. First, Estonia has had a different experience with democratisation compared to the other two Baltic states.²⁷ Estonia has been considered a front-runner during democratisation, being the first Baltic state to be invited by the EU to begin negotiations for EU accession.²⁸ It has also consistently received higher scores in democracy indices compared to the other two Baltic countries.²⁹ Second, from a practical point of view, a comprehensive analysis of the state of liberal constitutional democracy in Estonia remains outside the scope of this thesis due to word-count restrictions. In addition, research into Lithuania and Latvia has been aided by the relative similarity of the two countries' languages. In contrast, the Estonian language is distinct, with the language's historical roots being more comparable with Finnish rather than the other two Baltic countries.³⁰ Therefore, the inclusion of Estonia in this study will take place at the postdoctoral level to ensure that the research into Estonia is thorough and well-articulated.

1.4. Structure

The substantial body of literature detailing how liberal constitutional democracy is being eroded in Poland and Hungary has led to the development of a theory of democratic decay. In short, the theory asserts a certain 'playbook' populist leaders in these countries

²⁶ *ibid* 10–11.

²⁷ Pettai (n 18) 47–49; Mart Laar, 'Estonia's Success Story' (1996) 7(1) *Journal of Democracy* 96 <http://muse.jhu.edu/content/crossref/journals/journal_of_democracy/v007/7.1laar.html> accessed 24 April 2023.

²⁸ Pettai (n 18) 47.

²⁹ Our World in Data, 'V-Dem Liberal Democracy Index 1789-2022, Report Estonia, Latvia, Lithuania' (2 March 2023) <<https://ourworldindata.org/grapher/liberal-democracy?tab=chart®ion=Europe&country=EST~LTU~LVA>> accessed 22 April 2023; Freedom House, 'Freedom in the World Report 2022, Estonia' (2022) <<https://freedomhouse.org/country/estonia/freedom-world/2022>> accessed 4 October 2023.

³⁰ Editors of Encyclopaedia, 'Estonian Language', *Encyclopedia Britannica* (2023) <<https://www.britannica.com/topic/Estonian-language>> accessed 20 April 2023.

have followed to entrench their political power.³¹ These actions include dismantling the separation of powers and institutional checks and balances, eroding media freedom, limiting civil society and biasing electoral laws. The first half of this thesis will consist of a critical literature review that details the precise modes in which liberal constitutional democracy is eroded according to the prevailing theory in this area of research. Once the features of democratic backsliding are identified, comparative case study methodology and doctrinal analysis will be used to identify the similarities and differences of the experience of liberal constitutional democracy in Hungary and Poland on the one hand, and Lithuania and Latvia on the other. The second half of this thesis will employ an inductive approach to facilitate a normative analysis of the nature of liberal constitutional democracy in Lithuania and Latvia as compared to Poland and Hungary. As well as outlining some recommendations for preventing democratic and rule of law regression and halting further regression where it has already started.

Chapter two will introduce the concepts and theories of democratic backsliding and identifies the key characteristics of liberal constitutional democracy that uphold the democratic order. Judicial independence, respect and cooperation between the political and judicial branches of the state, media freedom, respect for minority rights and a stable political party system are identified as the main pillars of liberal constitutional democracy. Chapter three builds on the theoretical framework created in the previous chapter by describing the precise methods populist leaders in Poland and Hungary have used to subvert liberal constitutional democracy. This chapter identifies a distinct 'playbook' that populist leaders follow to undermine the fundamental principles of democracy.

Chapters four and five establish the current state of liberal constitutional democracy in Lithuania and Latvia, respectively. Chapter four on Lithuania highlights the issues of the executive branch intimidating and interfering with the independence of the

³¹ Kim Lane Scheppele and Laurent Pech, 'What is Rule of Law Backsliding?' (*Verfassungsblog*, 2 March 2018) <<https://verfassungsblog.de/what-is-rule-of-law-backsliding/>> accessed 13 March 2023; Renáta Uitz, 'Constitutional Practices in Times "After Liberty"' in András Sajó, Renáta Uitz and Stephen Holmes, *Routledge Handbook of Illiberalism* (1st edn, Routledge 2021) 447.

Constitutional Court and the Supreme Court and systemic attempts to undermine media freedom. Lithuania also displays features of a volatile political party landscape, with populist rhetoric a key feature of most mainstream and protest parties. Chapter five on Latvia identifies that populist parties are gaining support in recent elections, and there are also significant issues with judicial independence and respect for minority rights. This chapter argues that the Latvian political party system shows volatility and that judicial independence is under attack. Moreover, the chapter highlights the deeply rooted issue of inequality between ethnic Latvians and the country's sizable Russophone minority.

Chapter six will reflect in a comparative perspective on the complex reality of the state of liberal constitutional democracy in Lithuania and Latvia by building on the analytical case studies of Lithuania and Latvia in chapters four and five. Using the benchmark of the well-documented democratic regression in Poland and Hungary, the goal is to answer the overall research question: 'are Lithuania and Latvia undergoing democratic backsliding right now?' In short, based on the empirical research conducted in chapter four and five, the answer is yes. However, chapter six introduces nuance to these findings by acknowledging that there are different types of democratic deficits besides just backsliding including democratic hollowness which is a significant phenomenon in the countries under study.³² Both concepts are unpacked to fully understand the democratic reality in Lithuania and Latvia as it is different from that of Poland and Hungary even though they can be put under the same umbrella term of 'democratic backsliding'. Chapter six will first compare the experience of Lithuania and Latvian with that of Poland and Hungary using the framework adopted throughout this thesis and then move on to explaining the difference between democratic hollowness and democratic backsliding and how these two different phenomena interact to create a unique risk for democracy in Lithuania and Latvia. This chapter also addresses the agentic theory of democratic breakdowns to explain why Lithuania and Latvia have experienced an array of crises and

³² Béla Greskovits, 'The Hollowing and Backsliding of Democracy in East Central Europe' (2015) 6 *Global Policy* 28; Licia Cianetti, 'Consolidated Technocratic and Ethnic Hollowness, but No Backsliding: Reassessing Europeanisation in Estonia and Latvia' (2018) 34 *East European Politics* 317.

attacks on democratic institutions but they have not yet turned into outright authoritarian regression.

Chapter seven will critically analyse the EU Commission's response to the rule of law crisis and places the discussion of the risks to liberal constitutional democracy in the countries under study within the EU context. This chapter analyses the EU Commission's only substantive accounts of the rule of law situation in Lithuania and Latvia, the annual Rule of Law Reports. It is argued that the first three reports have been inadequate but that the reporting framework under the Rule of Law Mechanism has promising deterrent potential for future rule of law breaches within the EU. However, in order for reporting to work, the Commission must reconsider their approach so far and engage in finding ways to strengthen the current blueprint of this tool. Crucially, the Commission needs to learn from the mistakes it has made in dealing with Poland and Hungary and use the rule of law tools it has created effectively. Chapter seven further analyses the pre-accession procedure for EU membership and argues that pre-accession conditionality needs to be taken more seriously by the EU as it has a unique opportunity to shape potential candidates into upstanding and resilient Member States. However, for this to work, criteria such as respect for minority rights and the rule of law need to be demanded by the EU side in a rigorous manner which would avoid superficial adherence that has resulted in serious problems in much of the CEE region today.

2. Theoretical Framework

2.1. Introduction

Liberal constitutional democracy indisputably became the most popular regime by the end of the 20th century.³³ At the end of World War II there were a total of twelve constitutional democracies in the world and by 2003 this number jumped to 121.³⁴ Therefore, liberal constitutional democracy as a concept has held significant weight in recent global history. However, there has been a clear turning point in this trend in the last decade or so as Freedom House reported that declines in democratic standards have outgrown democratic gains for sixteen consecutive years now.³⁵ This trend highlights a fundamental issue with the concept of liberal constitutional democracy on a structural and normative level as the dramatic decline in the concept's popularity is indicative of how difficult liberal constitutional democracy is to maintain. What has been driving the rejection of liberal constitutional democracy is a decisive shift towards executive aggrandisement and authoritarian tendencies in governance as a quick-fix for the plethora of crises modern democracies face such as economic inequality, migration crises, cultural and ethnic division amongst many other challenges.³⁶

In response to these emerging challenges authoritarian-leaning leaders have adopted more subtle modes of undermining liberal constitutional democracy compared to the traditional military coups that dominated during the 20th century.³⁷ The new ways in which authoritarian regimes are born have led to scholars adopting various labels to make sense of the changing landscape of regime transformation and fluctuation. Labels such as 'democratic rot', 'democratic decay' and 'democratic backsliding' have been used to

³³ Claudio Corradetti, 'Liberal Constitutional Democracies in Times of Crisis' (2022) 4(1) *Jus Cogens* 1, 1.

³⁴ Martin Loughlin, 'The Contemporary Crisis of Constitutional Democracy' (2019) 39 *Oxford Journal of Legal Studies* 435, 436; Corradetti (n 33) 1.

³⁵ Freedom House, 'Freedom in the World 2022: The Global Expansion of Authoritarian Rule' (n 5) 1–2.

³⁶ Corradetti (n 33) 4–6.

³⁷ Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 *UCLA Law Review* 78, 117–120; Scheppele, 'Autocratic Legalism' (n 12) 571–575.

describe the rise of this phenomenon globally.³⁸ The scholarly focus on the multitude of different labels describing the recent trend of democratic backsliding has led to some confusion as to the proper labels to adopt in describing this worrying trend.

The concept of liberal constitutional democracy is adopted in this thesis to encompass all the features that are currently under attack by populist leaders in the CEE region. As described in detail below, this concept goes beyond the simple requirement for competitive elections to satisfy the test for democracy and instead adopts a thicker and more realistic conceptualisation of democracy including freedom of association and speech and the rule of law.³⁹ Therefore, this chapter will provide a theoretical and conceptual frame of what democratic backsliding is and introduce the key pillars of liberal constitutional democracy that are under attack in Poland and Hungary. This will allow for the subsequent chapter to build on these concepts by explaining how democratic backsliding has been unfolding since the Fidesz government took office in Hungary in 2010 and the PiS party came to power in Poland in 2015. Both chapters two and three will create the basis of the critical literature review that will be used to assess the state of liberal constitutional democracy in Lithuania and Latvia.

This chapter will begin by delving into the concept of liberal constitutional democracy and explain its significance in the context of recent democratic regression. Section 2.3 will address some common labels and concepts associated with democratic backsliding. Section 2.4 will explain how democratic backsliding has evolved since the 20th century and why it is so difficult to understand and address this new subtle form of democratic regression. Section 2.5 will break down the four key features of liberal constitutional democracy, namely the role of political parties and civil society in democratic stability, the importance of judicial independence for upholding the rule of law and the stabilising role of free media and respect for minority rights. This framework of understanding

³⁸ Corradetti (n 33) 4; Huq and Ginsburg (n 37) 108.

³⁹ Tom Ginsburg and Aziz Huq, 'Defining and Tracking the Trajectory of Liberal Constitutional Democracy' in Mark A Graber, Sanford Levinson and Mark V Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 35–36.

liberal constitutional democracy will be used throughout this thesis to analyse the status of liberal constitutional democracy in Lithuania and Latvia.

2.2. Liberal Constitutional Democracy as a Concept

The term liberal constitutional democracy is a particularly useful conceptualisation of the phenomenon at the heart of this thesis as it encompasses all of the key principles that have been attacked by populist leaders.⁴⁰ This could be called a ‘thick’ definition of democracy as more than just competitive elections are required.⁴¹ Along these lines, Robert Dahl also refers to democracy as a complex system of electoral freedom and fairness combined with political and social rights that together form a polyarchy.⁴² Therefore, the term liberal constitutional democracy incorporates the ideals of constitutional and liberal values into democracy. These values were particularly important after the Cold War where countries in the CEE region transitioned from communism to democracy while being supported and encouraged by the West. Infamously, this transition was heavily influenced by United States-style constitutional democracy as teams of American lawyers were sent to various CEE countries to help with the drafting of their new constitutions.⁴³ Therefore, liberal and constitutional values were central to the rapid democratisation process of the CEE region, including Lithuania, Latvia, Poland and Hungary. Liberal constitutional democracy is also an important benchmark for all Member States of the EU as the fundamental values the EU is founded on directly corresponds to the essence of liberal constitutional democracy. Article 2 TEU reads:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the

⁴⁰ Ginsburg and Huq (n 3) 9–15.

⁴¹ Huq and Ginsburg (n 37) 86–87.

⁴² Robert Alan Dahl, *Democracy and Its Critics* (Yale University Press 1989) 221.

⁴³ James Silkenat, ‘The American Bar Association and the Rule of Law’ (2014) 67 *SMU Law Review* 745, 753 <<https://scholar.smu.edu/smulr/vol67/iss4/7>>; Tyler Jager, ‘The Role of Law: American Rule of Law Reform Abroad and the Central and East European Law Initiative’ (*The Yale Review of International Studies*, November 2016) <<http://yris.yira.org/essays/1911>> accessed 20 May 2022.

Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”⁴⁴

The automatic assumption of this provision that all Member States respect freedom, democracy, human rights and the rule of law evokes the notion that liberal constitutional democracy is woven into the very fabric of what it means to be an EU member. This is also not surprising as the origins of liberal democracy can be traced back to 17th century Europe and the invention of the constitution can be linked back to the French and American Revolutions.⁴⁵ Furthermore, the concept of the rule of law in Western Europe predated the invention of democracy and governmental accountability by many centuries.⁴⁶ Indeed, the concept of the ‘Rechtsstaat’ took hold in 19th century Prussia and denoted a country that follows the rule of law.⁴⁷ Therefore, it is natural for the EU to position itself as a beacon of democracy, freedom and the rule of law and confidently declare that these values form the foundations the EU is built upon.

Of course, it has now become evident that these foundations are shaking given the actions of the Polish and Hungarian political leaders in the last decade or so.⁴⁸ This brings Jan-Werner Müller to contemplate whether the EU took this promise for granted. He explains that although the Euro crisis of 2008 seemed testing for the EU, it might not be as profound as what the rule of law crisis might entail.⁴⁹ This is “a crisis of fundamental values which all Europeans had been assumed to share”.⁵⁰ Before the rule of law crisis, countries were presumed to be conducting politics within “shared liberal democratic

⁴⁴ Article 2, Consolidated Version of the Treaty on European Union [2012] OJ C326/01.

⁴⁵ Corradetti (n 33) 1–3; Jeffrey Kopstein, Stephen E Hanson and Mark Lichbach (eds), *Comparative Politics: Interests, Identities, and Institutions in a Changing Global Order* (Fourth edition, Cambridge University Press 2014) 37–39.

⁴⁶ Francis Fukuyama, ‘Transitions to the Rule of Law’ (2009) 21(1) *Journal of Democracy* 33, 36; Bugarič (n 15) 238–239.

⁴⁷ Bugarič (n 15) 238.

⁴⁸ Jan-Werner Müller, ‘Protecting the Rule of Law (and Democracy!) In the EU: The Idea of a Copenhagen Commission’ in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 207–208.

⁴⁹ *ibid.*

⁵⁰ *ibid* 207.

parameters” and although the Euro crisis was a promulgation of bad policies, at least it was not a dispute over foundational beliefs.⁵¹

The democratic element in liberal constitutional democracy suggests that there should be free and fair elections that yield an actual handing over of power to the elected party.⁵² While, the ‘liberal’ element of liberal constitutional democracy refers to traditional “first generation” rights of freedom of speech, assembly and association which are important for the everyday functioning of a democracy.⁵³ These rights are often contained as negative rights in constitutional documents as a means of protecting the individual from the state. The protection of these rights are essential for “meaningful political competition” as without them, people would not have the “free ability to organize and offer policy proposals, criticize leaders, and demonstrate in public without official intimidation.”⁵⁴

Huq and Ginsberg also note that these rights are crucial to facilitate the important relationship between civil society and the state, political parties being the most important incarnation of civil society.⁵⁵ Multi-party competition, where parties strive to achieve a common agenda are particularly important for democracy to survive.⁵⁶ Liberal rights of free speech, assembly and association ensure that power is handed down peacefully between parties after elections. If the losing party is confident that they will have a meaningful voice even in opposition, they are free to organise themselves safe in the knowledge that they will “live to fight another day”.⁵⁷ If the electorate loses faith in the main political parties and the electoral system itself, this leaves the stage of democracy

⁵¹ *ibid* 207–208.

⁵² Huq and Ginsburg (n 37) 88; Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (1st edn, Harper & Brothers 1942) 269; Larry Diamond, *Developing Democracy: Toward Consolidation* (Johns Hopkins University Press 1999) 8–10.

⁵³ Ginsburg and Huq (n 3) 10.

⁵⁴ *ibid* 11.

⁵⁵ *ibid*.

⁵⁶ Nancy L Rosenblum, *On the Side of the Angels: An Appreciation of Parties and Partisanship* (Princeton University Press 2008) 356–358.

⁵⁷ Ginsburg and Huq (n 3) 11.

open to abuse. Fragmented political party systems have been proven to facilitate a populist hijacking of government which will be discussed further in chapter three.

Lastly, the constitutional element of liberal constitutional democracy suggests that democracy is based on legal integrity and faithfulness to the rule of law to allow for “democratic engagement without the fear of coercion”.⁵⁸ Most importantly the rule of law ensures both elections and the day to day execution of political power is conducted within the procedural requirements of the constitution and statutes.⁵⁹ However, crucially laws and the constitution are now considered to be fair-game by populist leaders that aim to entrench their power. Strategic changes to the constitution and statutes is an important tool populist governments use to subvert democracy, so the law becomes a double-edged sword for the longevity of a democracy.⁶⁰

2.3. Understanding the Various Labels Surrounding ‘Backsliding’

There have been varying labels put on the phenomenon of rule of law, liberal, constitutional and democratic values regressing in popularity. Much of the literature in this area of research adopts the labels of either ‘rule of law’ or ‘democratic’ backsliding , the former being more popular with lawyers while the latter often adopted by political scientists. However, in the present project neither of these labels alone are completely adequate to describe the state of events; rather than following only one, it is important to acknowledge the relevance of both. Thus, this thesis will always remain loyal to the thick definition of democracy, as the concepts of liberalism, constitutionalism and democracy, in this context, do not stand alone, but are intertwined. Afterall, legal and constitutional integrity are in trouble in the CEE region just as much as civil liberties and the freedom and fairness of elections.

⁵⁸ *ibid* 10.

⁵⁹ *ibid* 9–15.

⁶⁰ David Landau, ‘Abusive Constitutionalism’ (2013) 47 *University of California, Davis Law Review* 189, 189–195.

The word ‘backsliding’ implies that a country was once “better” at keeping democratic standards, but is now failing and slowly receding into something that is worse.⁶¹ In the context of Hungary and Poland and the wider CEE region where liberal constitutional democracy is under threat, this regression is shocking. After all, the post 1989 democratic project that was implemented in the post-communist region was showing incredible promise around the turn of the century. There was a growing feeling that liberal constitutional democracy was here to stay as we approached the ‘end of history’.⁶² But it was not to be. Renata Uitz identifies that a certain complacency about the health of constitutional democracies emerged as the 21st century arrived. Comparative constitutional scholarship was so fixated on finding basis for a global constitution that strong confirmation bias led many to miss abusive constitutionalism that was in plain sight.⁶³ Ivan Krastev and Stephen Holmes have argued that the universalist approach to democratisation led to countries in the CEE region to ‘imitate’ Western-style liberal democracy because there was no viable alternative available at the time.⁶⁴ This lack of choice and forced imitation has contributed to the illiberal counter-revolution we are living through today.⁶⁵

Deliberate “constitutional engineering”, erosion of checks and balances of political power and an “express lack of genuine willingness to comply with minimum standards of constitutionalism” at the hands of populist leaders, is a key characteristic of democratic backsliding.⁶⁶ While David Landau uses the term “abusive constitutionalism” to explain the same phenomenon, the use of constitutional change to subvert democracy.⁶⁷ Therefore, democratic backsliding has a definite constitutional and legalistic characteristic. Jan-Werner Müller calls this phenomenon a “constitutional capture” denoting the ways in which populist leaders try to entrench their power through changes

⁶¹ Licia Cianetti, James Dawson and Seán Hanley, ‘Rethinking “Democratic Backsliding” in Central and Eastern Europe – Looking beyond Hungary and Poland’ (2018) 34 *East European Politics* 243, 247–248.

⁶² Tom Gerald Daly (n 2).

⁶³ Uitz, ‘Can You Tell When an Illiberal Democracy Is in the Making?’ (n 16) 280–282.

⁶⁴ Ivan Krastev and Stephen Holmes, *The Light That Failed: A Reckoning* (Penguin Books 2020) 21–23.

⁶⁵ *ibid.*

⁶⁶ Uitz, ‘Can You Tell When an Illiberal Democracy Is in the Making?’ (n 16) 280–281.

⁶⁷ Landau (n 60) 189–192.

to the constitution. This ranges from formal changes such as amendment or outright constitutional replacement as seen in Hungary, to socio-political constitutional capture. The latter form is seen in Turkey and in Poland as it involves leaving the codified constitution more or less unchanged but attacks “the state apparatus” through packing courts and changes to ordinary laws.⁶⁸

Interestingly, both the Polish and the Hungarian governments profess to this day their adherence to the rule of law and democracy, despite the abundance of evidence to the contrary.⁶⁹ It seems that Poland and Hungary are insisting they still follow democratic and rule of law principles to avoid the consequences of departing from the rule of law and democracy club. Amongst other reasons, this charade has been integral for the political success of both Fidesz and PiS as it avoided being ‘cut-off’ from vital EU funding for years.⁷⁰ However, the EU has been catching up with these tactics and has implemented the Conditionality Mechanism in 2020 to tackle this insincere devotion to the rule of law in an effort to protect the Union budget.⁷¹ Another reason why flouting these values may be politically unsavoury is geo-political. The resignation from the rule of law and democracy club may also result in countries being left exposed to interference by other states or even invasion.

Indeed, populist leaders interpret democracy and the rule of law in a peculiar way. Viktor Orbán, Prime Minister of Hungary, has now famously said that he has taken the ‘liberal’ out of liberal democracy, calling his country an ‘illiberal democracy’.⁷² However, the term ‘illiberal democracy’ is an oxymoron as it cannot conceptually exist.⁷³ Kim Lane Scheppele

⁶⁸ Müller (n 48) 207–208.

⁶⁹ *ibid* 211.

⁷⁰ Kim Lane Scheppele, ‘Enforcing the Basic Principles of EU Law through Systemic Infringement Actions’ in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 126–128.

⁷¹ Niels Kirst and Beatrice Monciunskaitė, ‘Establishing a Link between Solidarity and Responsibility – The Court’s Judgment on the Conditionality Regulation’ (2022) 24 *Irish Journal of European Law* 203.

⁷² John Shattuck, ‘How Viktor Orban Degraded Hungary’s Weak Democracy’ (*The Conversation*, 11 January 2019) <<http://theconversation.com/how-viktor-orban-degraded-hungarys-weak-democracy-109046>> accessed 4 March 2023.

⁷³ Michael Meyer-Resende, Finn Heinrich and Nils Meyer-Ohlendorf, ‘False Frames. How We Undermine Democracy with Careless Language | Democracy Reporting International’ (11 December 2017)

and Gábor Halmai contend that the term is wrong and simply unhelpful as it lends political legitimacy to something that is nothing more than a “power grab”.⁷⁴ Constitutionalism is an idea inherently grounded in liberal values of humanism and enlightenment which places human rights above state sovereignty.⁷⁵ Illiberalism is “inherently hostile” to the essence of constitutionalism as it undermines such pillars as the separation of powers, respect for human and minority rights and constraints on majoritarian will.⁷⁶ A democracy is not made by simply holding elections. After all, there were elections in communist Russia and Nazi Germany but we abstain from calling these regimes democratic. A real democracy requires free elections held on a level playing field, with free public media and civil society.⁷⁷ Democracy also needs free institutions such as courts to protect freedoms. Therefore, packed courts, such as those in Poland and Hungary, are unable to protect the fundamental pillars of democracy. Democracy can only exist on a liberal basis as without the protection of individual freedoms there cannot be an ‘illiberal democracy’ as these countries cease to be democratic at all.⁷⁸ Both the Polish and Hungarian governments have opposed the EU’s conception of the rule of law on ideological grounds claiming that there is no universal definition of the rule of law and that each Member State should be allowed to define what the rule of law is for itself.⁷⁹ This formulation has been rejected by the European Court of Justice (ECJ).⁸⁰

<<https://democracy-reporting.org/en/office/global/publications/false-frames-how-we-undermine-democracy-with-careless-language>> accessed 4 March 2023.

⁷⁴ Kim Lane Scheppele and Gábor Halmai, ‘The Tyranny of Values or the Tyranny of One-Party States?’ (*Verfassungsblog*, 25 November 2019) <<https://verfassungsblog.de/the-tyranny-of-values-or-the-tyranny-of-one-party-states/>> accessed 4 March 2023.

⁷⁵ Zoltán Fleck, Nóra Chronowski and Petra Bárd, ‘The Crisis of the Rule of Law, Democracy and Fundamental Rights in Hungary (Paper I)’ (Centre for Social Sciences – MTA Centre of Excellence 2022) MTA Law Working Papers 2022/4 2.

⁷⁶ Gábor Halmai, ‘Illiberalism in East-Central Europe’ in András Sajó, Renáta Uitz and Stephen Holmes, *Routledge Handbook of Illiberalism* (1st edn, Routledge 2021) 813.

⁷⁷ Jan-Werner Müller, *What Is Populism?* (University of Pennsylvania Press 2016) 1–2; Meyer-Resende, Heinrich and Meyer-Ohlendorf (n 73); Blokker (n 7) 263.

⁷⁸ Meyer-Resende, Heinrich and Meyer-Ohlendorf (n 73).

⁷⁹ *Case C-157/21 Republic of Poland v European Parliament and Council of the European Union* ECLI:EU:C:2022:98 [312].

⁸⁰ *ibid* 324.

2.4. The Recent Decline of Liberal Constitutional Democracy

The wave of democratic decline described so far was achieved by drastically different means if compared to authoritarianism of the 20th century. During the Cold War, military coups made up nearly three out of four democratic breakdowns. This is how people have learned to identify the start of a democratic crisis, when men with guns enter the picture.⁸¹ Instead of a sudden democratic break such as a coup d'état, modern democratic crises start with far less obvious but equally destructive tactics.⁸² These undemocratic changes are often brought about by legal means – by approval of both the legislature and the court. However, little by little, a series of small legal alterations lead to a gradual decline in democratic standards.⁸³

It is precisely this mode of gradual slipping towards authoritarianism that makes catching regression in time such a difficult task. For example, constitutional courts are often equipped with the doctrine of unconstitutional constitutional amendment, which harnesses the power of 'constitutional unamendability'. This follows the idea that certain constitutional rules, principles and institutions are immune from change even at the hands of heightened political majorities.⁸⁴ The potential for this doctrine to act as a shield against this new slower form of rule of law backsliding is clear.⁸⁵ However, even this doctrine is powerless against gradual constitutional erosion as it is intended to allow slight adjustments to the constitution, ensuring the text keeps up with a polity's evolving identity.⁸⁶ As will be seen throughout this thesis, populist leaders in Poland and Hungary abuse this feature by introducing undemocratic change gradually, often disguising it as completely necessary democratic improvements. Indeed, often it is not the constitutional

⁸¹ Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (First edition, Crown 2018) 9.

⁸² *ibid* 7–11.

⁸³ Arch Puddington, 'Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians' (Freedom House 2017) 5

<https://freedomhouse.org/sites/default/files/June2017_FH_Report_Breaking_Down_Democracy.pdf> accessed 3 April 2023.

⁸⁴ Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017) 15–71.

⁸⁵ Samuel Issacharoff, 'Constitutional Courts and Democratic Hedging' (2010) 99 *Georgetown Law Journal* 961, 1002.

⁸⁶ Roznai (n 84) 222–224.

or legal change that is inherently illiberal, but the results such changes produce on the ground are and this is the ambiguity would-be autocrats hide behind.⁸⁷

The current perceptions of the threat of authoritarianism were shaped by the events in the 20th century, however, today the threat of authoritarianism is very different. Modern authoritarianism is much more subtle and incremental, meaning responses to authoritarianism designed to fight against the types of would-be autocrats from the 20th century, are not as useful today. Huq and Ginsburg explain that the danger right now is not so much a sudden breakdown of democracy, rather, it is its gradual erosion facilitated by a chain of minor individual steps that, by themselves, may not raise any major concerns until it is too late.⁸⁸ In other words, instead of a state being brought under monopolistic political control that relies heavily on martial law, modern authoritarianism utilises a milder form of autocracy which retains most features of democracy but seeks to control them. This creates the illusion of a democratic state but internally, it is under autocratic siege.⁸⁹

Scheppele explains that authoritarian threats are still understood by the public in the form that was popular in the 20th century. This interpretation is informed by the atrocities committed during World War II and the leaders such as Hitler and Stalin, who enabled them. This preconception persists today in the 21st century with populist leaders exploiting the outdated stereotype to consolidate their own power. These new legalistic autocrats distance themselves from this stereotype to “avoid the unflattering comparison” while still achieving anti-democratic goals.⁹⁰

The way Adolf Hitler executed his power as German Chancellor has created perhaps the most notorious authoritarian stereotype. Led by his ideology, he orchestrated a national emergency in order to grasp on to power by breaking down institutional checks.⁹¹ He also

⁸⁷ Uitz, ‘Constitutional Practices in Times “After Liberty”’ (n 31) 447.

⁸⁸ Ginsburg and Huq (n 3) 43–46.

⁸⁹ Puddington (n 83) 5–6.

⁹⁰ Scheppele, ‘Autocratic Legalism’ (n 12) 571.

⁹¹ *ibid.*

villainised a section of the population and suspended their human rights.⁹² Similarly, Joseph Stalin also gravely violated human rights and ruled callously by extinguishing institutional checks and balances and sources of criticism.⁹³ In both these narratives, the power of the authoritarian leaders is absolute and blatantly obvious. They are driven by a strong ideology, they destroy oppositional voices and their secretive paramilitaries and police enable mass human rights violations.⁹⁴ In military dictatorships, the use of force such as military tribunals, arbitrary arrests, political detentions, and summary executions were wide spread.⁹⁵ Once these things begin to occur within a country, people understand it to be an authoritarian revolution.

Scheppele observes that although these authoritarian stereotypes seem too simplistic, she argues that this is precisely the problem, people have learned that *all* authoritarian revolutions share characteristics of 20th century authoritarianism. Today, would-be authoritarian leaders understand this narrative and choose to distance themselves from it, instead opting for less brutal and obvious means to achieve undemocratic ends.⁹⁶ In place of destroying existing institutions they opt to neutralise them, hollowing them out so they become mere rubber stamps for undemocratic policies.⁹⁷ Their chosen weapons are laws, constitutional changes, and institutional reform instead of violence and revolt. In place of eliminating all critics they leave a few NGOs, opposition media outlets and dissidents for decoration, all while sneaking in incremental changes that when put together add up to a system overhaul.⁹⁸

This subtle form of mobilisation towards authoritarianism has been exemplified in Hungary and in Poland in recent years. After the far-right Fidesz party took power in April 2010 they passed ten constitutional amendments by the end of that year by using their

⁹² Clinton Rossiter and William J Quirk, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Routledge 2002) 61–62.

⁹³ Scheppele, 'Autocratic Legalism' (n 12) 572.

⁹⁴ *ibid.*

⁹⁵ *ibid* 573.

⁹⁶ *ibid.*

⁹⁷ Zoltan Simon, 'Orban Tightens Grip Over Hungarian Courts After Chaotic Vote' *Bloomberg* (12 December 2018) <<https://www.bloomberg.com/news/articles/2018-12-12/orban-pushes-hungary-to-point-of-no-return-as-europe-grumbles>> accessed 4 March 2023.

⁹⁸ Scheppele, 'Autocratic Legalism' (n 12) 573–574.

two-thirds super majority in parliament.⁹⁹ Even though the party did not campaign for constitutional change during the election, they wasted no time in issuing these constitutional amendments precisely for the purpose of weakening key institutions that check political power.¹⁰⁰ While in Poland, the PiS party resorted to legislative reforms and sometimes outright illegality to dismantle institutional checks on political power.¹⁰¹

2.5. The Core Features of Liberal Constitutional Democracy

As democracies began to consolidate in the 1990s a set of criteria began to emerge as to what constitutes a liberal constitutional democracy.¹⁰² The core features that continuously emerge from the literature of this field are first, a healthy civil society and stable political party systems which facilitate democratic elections.¹⁰³ Second, judicial independence is accepted as an essential component of the rule of law.¹⁰⁴ Third, media freedom is considered essential for ensuring voters are well-informed in the runup to elections.¹⁰⁵ Media freedom has recently been under attack in faltering democracies in every corner of the world, from the US to the CEE region.¹⁰⁶ This factor is proving essential in a time of widespread misinformation on the internet which has been exploited by populist leaders for their own political gain.¹⁰⁷ Fourth, respect for minority rights is an equally essential component of liberal constitutional democracy. Not only is respect for minority rights listed in Article 2 TEU as a fundamental principle of the EU,¹⁰⁸

⁹⁹ Miklós Bánkuti, Gábor Halmai and Kim Lane Scheppele, 'Hungary's Illiberal Turn: Disabling the Constitution' (2012) 23(3) *Journal of Democracy* 138, 139; Landau (n 60) 208.

¹⁰⁰ Landau (n 60) 208.

¹⁰¹ Wojciech Sadurski, *Poland's Constitutional Breakdown* (First edition, Oxford University Press 2019) 253.

¹⁰² [Corradetti \(n 33\) 3.](#)

¹⁰³ Huq and Ginsburg (n 37) 88–90; Diamond (n 52) 11.

¹⁰⁴ Petra Bárd, 'In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law' (2021) 27 *European Law Journal* 185, 185–186.

¹⁰⁵ Huq and Ginsburg (n 37) 88–90; Diamond (n 52) 10–11.

¹⁰⁶ V-Dem Institute, 'Democracy Facing Global Challenges: V-DEM Annual Democracy Report 2019' (2019) 5 <https://www.v-dem.net/static/website/files/dr/dr_2019.pdf> accessed 22 June 2022; Stephan Haggard and Robert Kaufman, 'The Anatomy of Democratic Backsliding' (2021) 32(4) *Journal of Democracy* 27, 37 <<https://muse.jhu.edu/article/815935>> accessed 21 April 2023; Adam Przeworski, *Crises of Democracy* (Cambridge University Press 2019) 117–118.

¹⁰⁷ Milada Anna Vachudova, 'Ethnopolitism and Democratic Backsliding in Central Europe' (2020) 36(3) *East European Politics* 318, 406.

¹⁰⁸ Article 2, Consolidated Version of the Treaty on European Union [2012] OJ C326/01 2.

theoretically, it is inconceivable to ensure genuine democratic participation if large sections of the population are being marginalised or oppressed.¹⁰⁹ Respect for minority rights has similarly emerged as a concern during this wave of populism as leaders disseminate racial and ethnic hatred toward minority groups within their own country as well as incoming migrants.¹¹⁰ The importance of these four elements will be further elaborated on in this section and will form the basis for analysing the state of liberal constitutional democracy in Lithuania and Latvia which forms the premise of this thesis.

2.5.1. Political Parties and Civil Society

Institutionalised political parties are an important stabilising feature in a democratic system. Institutionalised parties are the “...means for channelling the interests of social groups, promoting actors and attitudes supportive of democracy, and facilitating credible commitment.”¹¹¹ They are more professional and autonomous, better at responding to competing societal challenges effectively and leading citizens by maintaining a clear vision of collective goals.¹¹² Furthermore, institutionalised parties tend to have more predictable patterns of behaviour because they are deeply integrated into society.¹¹³ These deeply rooted parties appear from natural cleavages in society or by recruiting a large base of supporters and members.¹¹⁴ Well-integrated parties tend to rely far less on the charm of a charismatic leader and rely more on strong policies and professional experience for their political success.¹¹⁵

¹⁰⁹ Cianetti (n 32) 318.

¹¹⁰ Erin K Jenne, ‘Is Nationalism or Ethnopolitics on the Rise Today?’ (2018) 17(5) *Ethnopolitics* 546, 549.

¹¹¹ Michael Bernhard and others, ‘Parties, Civil Society, and the Deterrence of Democratic Defection’ (2020) 55 *Studies in Comparative International Development* 1, 6.

¹¹² Philippe Schmitter, ‘Critical Reflections on the Functions of Political Parties and Their Performance in Neo-Democracies’ in Wolfgang Merkel and Andreas Busch (ed), *Demokratie in Ost und West* (Frankfurt am Main: Suhrkam 1999) 477; Samuel P. Huntington, *Political Order in Changing Societies* (New Haven, Yale University Press 1968) 12.

¹¹³ Natasha M Ezrow, ‘Briefing Paper The Importance of Parties and Party System Institutionalization in New Democracies’ (Institute for Democracy and Conflict Resolution (IDCR) 2011) BP 06/11 7 <<https://core.ac.uk/download/pdf/9590212.pdf>> accessed 3 April 2023.

¹¹⁴ Daunis Auers, ‘Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania’ (2018) 11(3) *Fudan Journal of the Humanities and Social Sciences* 341, 343.

¹¹⁵ *ibid* 343.

Therefore, the collapse of traditional political parties that are devoted to democratic standards, has a devastating effect on the stability of a democracy. Scheppele identifies that where a democracy is struggling, the collapse of their traditional political party system is often involved.¹¹⁶ Parties often falter for reasons relating to democratic fatigue as a result of persistent economic difficulties.¹¹⁷ In the context of the CEE region, there is immense pressure on new democracies to deliver stability and prosperity.¹¹⁸ The weight of these expectations eventually become too great to sustain and voters blame poor political performance not only on an elected party, but also democracy itself, which creates democratic fatigue. Trust in democracy is also weakened by the continuous generation of poor quality political parties. Young democracies of the CEE region produce inexperienced political parties with some politicians seeing participating in elections as a way to make quick money.¹¹⁹ The life cycle of these parties is brief, characterised by a short stint of electoral success with their appeal often fizzling out by the time the next elections come around. Because of their short life-span and shallow ideological and policy grounding, these parties fail to entrench themselves within the political landscape.

A collapsing party system opens the door for the election of new political parties with an anti-system stance.¹²⁰ This is particularly dangerous for a democracy as democratic values are often not the central commitment of these new parties. They often have unclear and malleable ideologies which offer a fresh start to voters who are desperate to escape the traditional parties who failed to deliver what they promised.¹²¹ Their anti-democratic anti-institutional stance allows these parties to broaden their electoral reach by the radicalisation of their policies and existing supporters which can further reach new constituencies. This diffusion of anti-democratic norms benefits populist parties by normalising drastic reforms to institutions and laws making resistance from citizens less

¹¹⁶ Scheppele, 'The Party's Over' (n 4) 495–497.

¹¹⁷ Milan W Svobik, 'Learning to Love Democracy: Electoral Accountability and the Success of Democracy' (2013) 57(3) *American Journal of Political Science* 685, 685–686; Scheppele, 'The Party's Over' (n 4) 495–497.

¹¹⁸ Bugarič (n 15) 233–235; Halmai, 'Illiberalism in East-Central Europe' (n 76) 816.

¹¹⁹ Svobik (n 117) 685–686.

¹²⁰ Bernhard and others (n 111) 6.

¹²¹ Scheppele, 'The Party's Over' (n 4) 504–505.

severe.¹²² This process has been called “the socializing role of parties” by Herman who explains that this process of anti-democratic norm diffusion may allow disloyal leaders to remain in power for extended periods of time.¹²³ Therefore, voters do not necessarily vote for democracy to be taken away from them. Rather, the collapse of traditional parties leads voters to choose a party that is offered to them on ballots. But because these new parties tend to be more interested in entrenching their power to serve their own interests, democratic standards take a back seat in favour of personal gain.¹²⁴

Civil society is also essential for the proper functioning of liberal constitutional democracy as it provides a space for citizens to carry out independent activities for the benefit of the public good.¹²⁵ A civil society organisation can be defined as a voluntary and non-profit organised group which “plays an important role in giving voice to the concerns of citizens and in delivering services that meet people’s needs”.¹²⁶ In this sense civil society includes not only non-governmental organisations (NGOs) but also independent mass media, think tanks, universities, social and religious groups. Civil society organisations in a democracy are characterised by their tolerance for pluralism and diversity along with respect for the rights and views of others.¹²⁷

Civil society also has a unique ability to act as an intermediary between the individual and the state, where it can “counterbalance the state’s authority [by] allowing the society to

¹²² Ellen Lust and David Waldner, ‘Unwelcome Change: Understanding, Evaluating, and Extending Theories of Democratic Backsliding’ (USAID 2015) 20 <http://pdf.usaid.gov/pdf_docs/PBAAD635.pdf> accessed 27 July 2022; Lise Esther Herman, ‘Re-Evaluating the Post-Communist Success Story: Party Elite Loyalty, Citizen Mobilization and the Erosion of Hungarian Democracy’ (2016) 8(2) *European Political Science Review* 251, 274–275.

¹²³ Herman (n 122) 274–275.

¹²⁴ Scheppele, ‘The Party’s Over’ (n 4) 497–500.

¹²⁵ Małgorzata Szuleka, ‘First Victims or Last Guardians? The Consequences of Rule of Law Backsliding for NGOs: Case Studies of Hungary and Poland’ (2018) CEPS Paper in Liberty and Security in Europe No. 2018-06 7.

¹²⁶ Commission of the European Communities, ‘European Governance: A White Paper’ (2001) COM 2001 428 14; Beate Kohler-Koch and Christine Quittkat, ‘What Is Civil Society and Who Represents Civil Society in the EU?—Results of an Online Survey among Civil Society Experts’ (2009) 28 *Policy and Society* 11, 15–18.

¹²⁷ Larry Diamond, ‘What Civil Society Can Do to Develop Democracy’ (Convention Centre, Baghdad, 10 February 2004) <<https://diamond-democracy.stanford.edu/speaking/speeches/what-civil-society-can-do-develop-democracy>> accessed 14 October 2022.

manifest its interest and needs, unite around issues of common care and influence... public decisions".¹²⁸ Therefore, an active civil society can make a democracy self-enforcing as it implements safeguards against anti-system and anti-democratic turns.¹²⁹ Active civil societies provide social accountability which links rulers and citizens through informal means.¹³⁰ Therefore, social accountability has powers similar to those of vertical accountability, where the electorate is in a position to remove rulers from office if they are dissatisfied with their performance. Both vertical and social accountability, combined with the healthy functioning of the separation of powers (horizontal accountability), makes democracy a self-enforcing enterprise.¹³¹

Social accountability in particular is essential in insuring that democratic standards are upheld by leaders by incentivising governance that citizens approve of. If citizens are dissatisfied, then the leader risks not being voted into government in the subsequent elections. Therefore, social accountability not only acts on its power of enforcing community values to persuade leaders to act desirably but also supports vertical accountability in between elections by exerting informal pressures on government with protests and rallies, attracting international support and media coverage.¹³² A civil society that is committed to democratic ideals will be alert to any breaches of the rule of law and democratic values by officials and play an important part in preventing and combating breaches. This way anti-system extremists are deterred from subverting democracy due to the fear of such actions being received negatively by an electorate that subscribes to democratic values through civil society groups.¹³³

NGOs are a particular section of civil society which has been targeted by governments in both Poland and Hungary as will be seen in chapter three. The attack on NGOs in Poland

¹²⁸ Szuleka (n 125) 6.

¹²⁹ Bernhard and others (n 111) 2.

¹³⁰ *ibid* 3; Nicole Bolleyer, 'Civil Society, Crisis Exposure, and Resistance Strategies' in András Sajó, Renáta Uitz and Stephen Holmes, *Routledge Handbook of Illiberalism* (1st edn, Routledge 2021) 940.

¹³¹ Bernhard and others (n 111) 3.

¹³² *ibid* 4–5; Doug McAdam and Sidney Tarrow, 'Ballots and Barricades: On the Reciprocal Relationship between Elections and Social Movements' (2010) 8(2) *Perspectives on Politics* 529, 532–533.

¹³³ Bernhard and others (n 111) 2.

and Hungary has an obvious cause when their benefits to the rule of law and democracy are considered. NGOs often take the form of watchdog organisations which monitor and advise on/critique government policy and actions. NGOs together with independent media and courts are a strong force that hold governments accountable and they have a particularly strong presence in post-communist countries such as Hungary and Poland, where they played vital roles in the democratisation process in the 1990s.¹³⁴ In light of the role of NGOs as a non-governmental check on political power it is self-evident why the Fidesz-led government in Hungary and PiS party in Poland have clamped down on NGOs. If citizens are not made aware by NGOs of the draconian policies their governments are implementing then it is more likely that they will be voted back into government. So keeping citizens uninformed by eliminating NGOs, and misinformed by manipulating narratives via captured media outlets are key tactics implemented by PiS and Fidesz to entrench their power.

2.5.2. Judicial Independence

Assigning the authority to revise executive actions to constitutional courts is an important feature of liberal constitutional democracies that emerged in the second half of the 20th century. Delegating this power to an unelected organ of government was intended to prevent the atrocities that occurred in the first half of the 20th century at the hands of popular sovereignty.¹³⁵ Therefore, judicial independence is central to the concept of the rule of law and ensures that executives act within the confines of their lawful authority.¹³⁶ The judiciary has a unique power to thwart majoritarian erosion by striking down statutes and exercising judicial review of constitutional amendments that may threaten the constitutional democratic order which makes courts a particularly inconvenient obstacle for populist leaders seeking to entrench their power.¹³⁷ If courts are influenced by the other branches of state in any way then there is a real danger that courts might fail to be objective in their assessment of government actions and authority. This would have

¹³⁴ Szuleka (n 125) 7.

¹³⁵ Ginsburg and Huq (n 3) 95–96.

¹³⁶ Paul Craig and Grainne De Búrca, *EU Law : Text, Cases, and Materials* (Seventh edition, Oxford University Press 2020) 48.

¹³⁷ Ginsburg (n 3) 352.

major implications for the rule of law as the judiciary is also charged with giving legal effect to other principles such as the prevention of retrospective and unclear laws as well as access to a fair trial.¹³⁸ If the judiciary is under undue influence, the viability of these other principles besides that of limited government are also in danger.

In particular, judicial review of the strong form has been noted as an important part of democratisation in Eastern and Central Europe. Barak argues that judicial “minimalism” in judicial review is best suited in old and established jurisdictions where the constitutional framework is well settled.¹³⁹ This would apply to countries such as the United Kingdom and the United States.¹⁴⁰ On the other hand, countries that are democratising should employ strong judicial review to bolster counter majoritarian efforts.¹⁴¹ Therefore, judicial activism, in this context, can steer the constitutional order away from the system of centralised political power that it may be accustomed to. However, the historical legitimacy and usefulness of judicial review is being targeted by populist leaders in Poland and Hungary where it is seen more as a hindrance to the executive’s efficiency rather than a necessary safety net preventing overt tyranny. With the populist overhaul of the judiciary that swept across Poland and Hungary in recent years, the Constitutional Courts now stand as a ‘rubber-stamp’ on government policy rather than an independent institution of the separation of powers.¹⁴²

At European level the right to an independent and impartial tribunal is guaranteed by Article 6 of the European Convention on Human Rights. The Consultative Council of European Judges report further recognised the importance of branches of state

¹³⁸ Craig and De Búrca (n 136) 48–49.

¹³⁹ Aharon Barak, ‘A Judge on Judging: The Role of a Supreme Court in a Democracy’ (2002) 116 *Harvard Law Review* 19, 63.

¹⁴⁰ Tom Gerald Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders* (Cambridge University Press 2017) 23.

¹⁴¹ Wojciech Sadurski, ‘Judicial Review in Central and Eastern Europe: Rationales or Rationalizations?’ (2009) 42(3) *Israel Law Review* 500, 512.

¹⁴² Tomasz Tadeusz Koncewicz, “‘Existential Judicial Review’ in Retrospect, “Subversive Jurisprudence” in Prospect. The Polish Constitutional Court Then, Now and ... Tomorrow’ (*Verfassungsblog*, 7 October 2018) <<https://verfassungsblog.de/existential-judicial-review-in-retrospect-subversive-jurisprudence-in-prospect-the-polish-constitutional-court-then-now-and-tomorrow/>> accessed 6 March 2023; Uitz, ‘Constitutional Practices in Times “After Liberty”’ (n 31) 453.

respecting the independence and impartiality of the judicial branch.¹⁴³ While it is important to note that judges are public figures, and so, are subject to public scrutiny, the other branches of state also have a duty to respect the judiciary's independence and impartiality.¹⁴⁴ In democracies, all three branches of state play unique roles and they must operate with "profound respect" for each other while reaching for their common goal of justice.¹⁴⁵ A breakdown in constitutional dialogue occurs when representatives of the executive and legislative branches criticise judges and their decisions in a way that encourages the public to lose trust in their judiciary.¹⁴⁶ It is also unacceptable for the other branches to exert pressure on judges to decide cases in a certain way.¹⁴⁷ It is therefore essential for the healthy functioning of the separation of powers that branches of state power operate "in a climate of mutual respect."¹⁴⁸ It is undeniable that in the last decade there has been an evident breakdown in the interdependent relationship of democratic powers.¹⁴⁹ In particular, the rise in supremacy of the executive branch in much of the EU and beyond has brought into question the legitimacy of the judiciary and more precisely, the legitimacy of apex courts that are involved in supervision of executive actions and decisions.¹⁵⁰

A Member State's obligation to ensure their judicial independence extends further than to provide benefit at national level. Indeed, the requirement for judicial independence is essential for the proper functioning of the EU. Mutual trust between the courts of Member States is vital for the functioning of the Area of Freedom, Security and Justice through the European Arrest Warrant.¹⁵¹ National courts have general jurisdiction over EU law as they are required to conform to and apply EU law within their jurisdiction.¹⁵² They are also essential to the functioning of the Court of Justice of the European Union

¹⁴³ Consultative Council of European Judges, 'The Position Of The Judiciary And Its Relation With The Other Powers Of State In A Modern Democracy' (2015) CCJE-Opinion No. 18 12.

¹⁴⁴ *ibid* 12–13.

¹⁴⁵ Beverley McLachlin, 'Charter Myths' (1999) 33 *University of British Columbia Law Review* 23, 36.

¹⁴⁶ Consultative Council of European Judges (n 143) 12–13.

¹⁴⁷ *ibid* 13.

¹⁴⁸ *ibid*.

¹⁴⁹ *ibid* 1.

¹⁵⁰ *ibid*.

¹⁵¹ Craig and De Búrca (n 136) 49.

¹⁵² *ibid*.

(CJEU) as they facilitate the flow of cases via the regime of preliminary references under Article 267 TFEU. Therefore, if judicial independence is not guaranteed in Member States, the EU's legal system is jeopardised.¹⁵³ Given the importance of judicial independence for the functioning of the EU and in response to the rule of law crisis that has been growing in the Union for the last decade, the EU has sought to elevate the importance of judicial independence within the EU legal nexus to ensure enforceability. The Court of Justice has been at the forefront of this and has played a titular role in bolstering judicial independence through its case law recently. In particular the cases of *Trade Union of Portuguese Judges*¹⁵⁴, *L.M.*¹⁵⁵ and *A.K. and Others v Sąd Najwyższy*¹⁵⁶ which all arose through the preliminary ruling procedure under Article 267 TFEU are important to highlight. These three cases, although not the only ones relevant in the CJEU's rule of law jurisprudence, have had a profound impact on the rule of law battle, and are therefore worth describing in more detail here. Through these cases, the Court has strengthened the role of judicial independence for upholding the rule of law value and has made the rule of law under Article 2 TEU legally enforceable.¹⁵⁷

In *Trade Union of Portuguese Judges*, the Portuguese legislature enacted temporary laws that reduced the salaries of some public sector workers in order to reduce the countries excessive budgetary deficit and allow the Portuguese government to avail of EU financial assistance. Amongst the public sector workers affected were the judges of the Tribunal de Contas (Court of Auditors, Portugal). The Associação Sindical dos Juízes Portugueses (Trade Union of Portuguese Judges), acting on behalf of members of the Tribunal de Contas, brought a case before the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) in order to annul the measures that reduced the judges'

¹⁵³ *ibid.*

¹⁵⁴ *Case C-64/16 Associação Sindical dos Juízes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117.

¹⁵⁵ *Case C-216/18 PPU LM* ECLI:EU:C:2018:586.

¹⁵⁶ *Joined Cases C-585/18, C-624/18 and C-625/18 A K and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy* [2019] ECLI:EU:C:2019:982.

¹⁵⁷ Armin von Bogdandy and others, 'A Potential Constitutional Moment for the European Rule of Law: The Importance of Red Lines' in Armin von Bogdandy and others, *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions*, vol 298 (Springer 2021) 385–386; Panagiotis Zinonos, 'Judicial Independence & National Judges in the Recent Case Law of the Court of Justice' (2019) 25(4) *European Public Law* 615, 615–616.

salary. The Trade Union argued that the budgetary measures interfered with the principle of judicial independence protected in EU law and the Portuguese Constitution.¹⁵⁸ The Supremo Tribunal Administrativo sought an explanation at the Court of Justice on whether the principle of judicial independence as protected under subparagraph two of Article 19(1) TEU, in Article 47 of the Charter of Fundamental Rights of the European Union and in the precedent of the Court of Justice, would allow the exclusion of judges from a reduction of public sector salaries.¹⁵⁹

The Court of Justice decided that the budgetary measures which reduced the salaries of the judges of the Tribunal de Contas did not violate their judicial independence as these reductions were temporary and affected public sector workers in general and were not specific to judges. However, what is crucial in this judgment is the strong wording used by the Court regarding the value of judicial independence within the EU. The Court explains that the rule of law, as expressed in Article 2 TEU, is assumed to be a common value held by all Member States.¹⁶⁰ Article 19 TEU “gives concrete expression” to the value of the rule of law and “entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals”.¹⁶¹ In this case, the Court is highlighting that national courts are part of the EU’s court network as much as the EU courts. Therefore, a breach of judicial independence in a national court is a breach of judicial independence at EU level.¹⁶² Pech and Platon aptly note that *Trade Union of Portuguese Judges* is “the most important judgment on the rule of law since *Les Verts*, where the Court essentially establishes a general obligation for Member States to guarantee *and* respect the independence of their national courts and

¹⁵⁸ *Associação Sindical dos Juizes Portugueses* (n 154) para 13.

¹⁵⁹ *ibid* 18.

¹⁶⁰ *ibid* 30.

¹⁶¹ *ibid* 32.

¹⁶² *Armin von Bogdandy and others* (n 157) 396–397; *Zinonos* (n 157) 623.

tribunals”.¹⁶³ This case represents the first major step taken by the Court of Justice towards making the rule of law legally enforceable within EU law.¹⁶⁴

In summer 2018, just a few months after the Court of Justice gave its opinion on the *Trade Union of Portuguese Judges* case, the Court further strengthened the position of the rule of law and judicial independence through the *L.M.* case. Here the Irish High Court asked whether it could refuse to extradite a Polish citizen to Poland under a European Arrest Warrant (EAW) due to the recent Polish judicial reforms which compromised their rule of law. Here, the Irish High Court asked the Court of Justice to interpret Article 1(3) of the EAW Framework Decision, which establishes the obligation to observe the individual’s fundamental rights when executing a EAW.¹⁶⁵ The High Court relied on the findings of the Venice Commission and the reasoned proposal of the European Commission adopted pursuant to Article 7, paragraph 1, TEU to conclude that the rule of law was compromised in Poland and that L.M.’s fundamental right to a fair trial may be jeopardised if the EAW was executed.¹⁶⁶ In light of this, the High Court did not ask the Court of Justice to give their opinion on the recent development of the Polish judicial framework and its compliance with the rule of law. Instead, it asked for clarification on what a national court should do in a situation such as it finds itself – should a court refrain from fulfilling a EAW or, similar to what has been decided in *Aranyosi and Căldăraru*,¹⁶⁷ should the court follow an established test to determine whether the individual concerned is likely to be subjected to an unfair trial.¹⁶⁸

The Court of Justice decided that the executing court may refrain, on the basis of Article 1(3) of Framework Decision 2002/584, to give effect to a EAW issued by a Member State which is the subject of a reasoned proposal as referred to in Article 7(1) TEU only in

¹⁶³ Laurent Pech and Sébastien Platon, ‘Rule of Law Backsliding in the EU: The Court of Justice to the Rescue? Some Thoughts on the ECJ Ruling in Associação Sindical Dos Juizes Portugueses’ (*EU Law Analysis*, 13 March 2018) <<http://eulawanalysis.blogspot.com/2018/03/rule-of-law-backsliding-in-eu-court-of.html>> accessed 6 May 2021.

¹⁶⁴ Armin von Bogdandy and others (n 157) 385–388.

¹⁶⁵ *L.M.* (n 155) para 22.

¹⁶⁶ *ibid* 21–22.

¹⁶⁷ Joined Cases C-404/15 and C-659/15 *PPU Pál Aranyosi and Robert Căldăraru* [2016] ECLI:EU:C:2016:198.

¹⁶⁸ *L.M.* (n 155) para 25.

exceptional circumstances.¹⁶⁹ To establish these circumstances the executing court must carry out a specific and precise assessment of the particular case and conclude that there are substantial grounds for believing that the person concerned will ‘run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial’ if surrendered.¹⁷⁰ The first part of this test would require the executing court to establish whether the existence of ‘systemic or generalised deficiencies’ in the independence of the judiciary in the issuing member state would create circumstances where there is a ‘real risk’ of breach of the persons fundamental right to an independent tribunal.¹⁷¹ When carrying out this test, the executing court must rely on ‘objective, reliable, specific and properly updated’ sources with the Commission reasoned proposal under Article 7(1) TEU being highlighted by the Court as particularly relevant in this case.¹⁷² Along with any information provided by the issuing Member State on the condition of their judicial independence, the Court referred to judgments and opinions of European and international institutions as useful which would add legitimacy to any findings adopted by the executing court.¹⁷³ If the executing court does identify that a risk to the person’s right to fair trial exists, it must then determine, ‘specifically and precisely’ whether there are substantial grounds for believing that that person will run such a risk if they are surrendered, taking into account their personal situation, the nature of the offence the factual context that forms the basis of the EAW and in the light of the information provided by the issuing Member State.¹⁷⁴

In the *L.M.* case the Court of Justice did not pass up the opportunity to strengthen the position of the rule of law and judicial independence within the EU. Instead of following the Advocate General and relying on the fundamental right of a fair trial, the Court of Justice linked the right to a fair trial with the rule of law to reply to the responding court.¹⁷⁵ The Court refers to their previous judgment of *Trade Union of Portuguese Judges*

¹⁶⁹ *ibid* 73.

¹⁷⁰ *ibid*.

¹⁷¹ *ibid* 74–75.

¹⁷² *ibid* 61.

¹⁷³ Armin von Bogdandy and others (n 157) 396.

¹⁷⁴ *L.M.* (n 155) para 79.

¹⁷⁵ Armin von Bogdandy and others (n 157) 395.

and the determination that Article 19 TEU embodies the value of the rule of law in Article 2 TEU. These two judgments read together, clearly show a tactful move on the part of the Court of Justice to widen the scope of protection of EU values and in particular, the rule of law in response to the evolving political climate in Poland and the EU in general. In *L.M.* the Court states that the “requirement of judicial independence forms part of the essence of the fundamental right to a fair trial” which is a right central to guaranteeing the protection of EU law to individuals and the general safeguarding of Article 2 TEU values, particularly the rule of law.¹⁷⁶ This alludes to the fact that judicial independence and the rule of law are non-negotiable values that Member States must abide by.¹⁷⁷ In other words, no matter how a judicial system of a Member State is organised, it is obliged to facilitate the rule of law and judicial independence.

The *A.K. and others v. Sąd Najwyższy* judgment introduced another tool to the arsenal of rule of law defence within the EU. This judgment was given in 2019 and originated from the referral of three cases by the Labour and Social Insurance Chamber of the Supreme Court of Poland.¹⁷⁸ The cases pertained to the ongoing judicial reforms in Poland which were widely deemed unconstitutional and illegitimate by the EU and observers.¹⁷⁹ At the centre of the judicial reforms was the new empowerment of the Minister of Justice to supervise courts and the new electoral system for members of the National Council of the Judiciary (NCJ) which played a role in nominating members of a new body, the Disciplinary Chamber of the Polish Supreme Court (DC).¹⁸⁰

The three judges who originally took the case before the Supreme Court had reached their newly lowered mandatory retirement age but still wished to carry on in their duties. However, the legislation at the time (which has since been deemed incompatible with EU

¹⁷⁶ *L.M.* (n 155) para 48.

¹⁷⁷ Armin von Bogdandy and others (n 157) 385–388.

¹⁷⁸ *A. K. and Others* (n 156).

¹⁷⁹ Laurent Pech, Patryk Wachowiec and Dariusz Mazur, ‘Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action’ (2021) 13 *Hague Journal on the Rule of Law* 1, s 2.2.

¹⁸⁰ Michał Ziółkowski and Michał Krajewski, ‘A. Court of Justice EU Judicial Independence Decentralized: A.K.’ (2020) 57(4) *Common Market Law Review* 1107, 1108
<<https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/57.5/COLA2020717>>
accessed 17 April 2021.

law by the ECJ)¹⁸¹ allowed judges who had reached the mandatory retirement age to apply to the President of Poland to request to stay on in their position.¹⁸² This application was then to be considered by the President with the advice of the NCJ. The first judge made this request to the President but it was refused while the remaining two judges did not engage in the process leading to all three judges being dismissed.¹⁸³ The judges claimed that the implementation of this new retirement age infringed upon judicial independence under Article 19(1) TEU and Article 47 of the EU Charter of Fundamental Rights, as well as laws against age-based discrimination prohibited by Article 9(1) of the Council Directive 2000/78.¹⁸⁴ The Polish Supreme Court noted that this case should be heard by the DC under the new law. However, given that the very legitimacy of the DC as a court was in question the Polish Supreme Court made a preliminary reference to the Court of Justice.¹⁸⁵

The Court of Justice devised a test for national courts to use to ascertain whether a court or tribunal is objectively independent. They adopted the concept of “appearance of independence” directly from the case law of the European Court of Human Rights (ECtHR).¹⁸⁶ This approach entails the court considering whether a judicial body is independent from the point of view of a reasonable observer of court proceedings and whether their arising concerns about the independence of a judicial body can be objectively justified.¹⁸⁷ The test focuses on whether a particular arrangement is likely to pose “reasonable doubts in the minds of individuals” as to the actual independence of a judicial body.¹⁸⁸ In particular, the judicial body should be independent from the executive and legislature in accordance with the separation of powers principle.¹⁸⁹

¹⁸¹ *Case C-192/18 Commission v Poland* ECLI:EU:C:2019:924.

¹⁸² *A. K. and Others* (n 156) para 17.

¹⁸³ *ibid* 37–38.

¹⁸⁴ *ibid*.

¹⁸⁵ *ibid* 40–41.

¹⁸⁶ *ibid* 127.

¹⁸⁷ Ziolkowski and Krajewski (n 180) 1115; *A. K. and Others* (n 156) para 129.

¹⁸⁸ *A. K. and Others* (n 156) para 134.

¹⁸⁹ *ibid* 124.

2.5.3. Media Freedom

Since the emergence of the press as a medium of public communication, it has been heralded as playing a vital human rights role by facilitation freedom of expression and the right to information.¹⁹⁰ Therefore, free and independent media has been described as the ‘life-blood’ of a democracy due to its role as a political watchdog and facilitator of public debate.¹⁹¹ The central role of free and independent media has been acknowledged by the ECtHR in this sense.¹⁹² The ECtHR has emphasised that free and independent media requires that matters of public interest should not be subject to censorship or control at the hands of the state.¹⁹³ The ECtHR’s reasoning is twofold: first it noted the importance of the role of the media to impart information to the public on matters of public interest and second, its role in keeping the state and elites to account by exposing them to continuous public scrutiny.¹⁹⁴ However, since the wave of authoritarian reform has started to sweep across the CEE region in the last decade, media freedom has become a target of governments seeking to control public discourse in an effort to entrench their power.

A key principle of democracy is that citizens have equal rights to participate in collective decision making either directly or indirectly, especially through voting in free elections. In this way citizens can choose who governs them, and hold politicians to account.¹⁹⁵ This right to deliberative democracy requires free media to function as citizens need to have access to accurate and unbiased information so they can make informed democratic

¹⁹⁰ Evangelia Psychogiopoulou, ‘Media Freedom and Independence in Contemporary Democratic Societies’ in Evangelia Psychogiopoulou (ed), *Media Policies Revisited: The Challenge for Media Freedom and Independence* (Palgrave Macmillan 2014) 22.

¹⁹¹ Natalie Fenton, ‘Post-Democracy, Press, Politics and Power’ (2016) 87(1) *The Political Quarterly* 81, 81 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/1467-923X.12207>> accessed 19 March 2021.

¹⁹² *The Sunday Times v the United Kingdom App No 6538/74 (ECHR, 26 April 1979)* [65]; *Lingens v Austria App No 9815/82 (ECHR, 8 July 1986)* [44].

¹⁹³ *Manole and Others v Moldova App No 13936/02 (ECHR, 17/12/2009)* [107–110].

¹⁹⁴ Evangelia Psychogiopoulou (n 190) 22; *Case C-617/10 Åklagaren v Hans Åkerberg Fransson ECLI:EU:C:2013:280*.

¹⁹⁵ High Level Group on Media Freedom and Pluralism, ‘A Free and Pluralistic Media to Sustain European Democracy’ (European Commission 2013) 10 <https://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf> accessed 3 June 2023.

decisions.¹⁹⁶ If media is under political influence this can lead to a concentration of power as public opinion is manipulated to sway an election.¹⁹⁷ Free and pluralistic media is also a key European Union value.¹⁹⁸ Polyák identifies that freedom of media is an essential component of a liberal constitutional democracy as it protects political competition and facilitates “solution-seeking discourse on the common issues of a pluralistic society.”¹⁹⁹ Constitutional liberalism is based on the ideal of a pluralistic society and “inevitably denies all forms of monopolistic opinion-control.”²⁰⁰

Media commissions play a key role in ensuring fair use of the media, as well as the assignment of rights to the broadcast spectrum. This ensures that public space remains free which is especially important around election time. Voters have to be able to cast their ballots having received accurate news about party agendas.²⁰¹ However, Ginsburg and Huq caution that media commissions can be “two-edged swords” as although they have great powers in ensuring media outlets remain free they can also be corrupted by politicians and manipulated so that news is beneficial to their own political cause.²⁰² This is the situation currently evolving in both Poland and Hungary which has been widely written about and will be discussed in chapter three.

2.5.4. Gender and Minority Rights

The ‘thick’ concept of democracy establishes the centrality of respect for human rights, including minority rights, to the integrity of a liberal constitutional democracy. The EU positions itself as a “normative power” which has had a global influence in terms of

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid.*

¹⁹⁸ European Commission, ‘Public Consultation on the Independence of the Audiovisual Regulatory Bodies’ (2013) 3 <<https://ec.europa.eu/digital-single-market/en/news/public-consultation-independence-audiovisual-regulatory-bodies-read-contributions>> accessed 3 June 2023.

¹⁹⁹ Gábor Polyák, ‘Media in Hungary: Three Pillars of an Illiberal Democracy’ in Eva Połowska and Charlie Beckett (eds), *Public Service Broadcasting and Media Systems in Troubled European Democracies* (Springer International Publishing 2019) 281.

²⁰⁰ *ibid.* 280.

²⁰¹ Stephen Cushion, ‘PSM Contribution to Democracy: News, Editorial Standards and Informed Citizenship’ in Eva Połowska and Charlie Beckett (eds), *Public Service Broadcasting and Media Systems in Troubled European Democracies* (Springer International Publishing 2019) 36–37.

²⁰² Ginsburg and Huq (n 3) 199.

universal human rights both within the Europe and elsewhere.²⁰³ The principles of respect for minorities and human rights stood alongside the principles of democracy and the rule of law in the Copenhagen accession criteria set out by the EU.²⁰⁴ This is because, at that point, respect for human rights was an established feature of existing Member States.²⁰⁵ Therefore, respect for minority rights is seen as essential for political equality and the ability of all citizens to participate in democracy on a level playing field.

Article 21(1) of the Charter of Fundamental Rights prohibits discrimination on the basis of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation. Furthermore, the Framework Convention for the Protection of National Minorities establishes safeguards for minority rights based on the logic that minority rights are intrinsically linked to genuine democracy.²⁰⁶ The rights protected under the Framework Convention include the right to free self-identification enshrined as per Article 3, the principles of equality and non-discrimination guaranteed by Article 4, the duty of states to encourage a spirit of tolerance and intercultural dialogue established in Article 6, and the freedom of assembly, association and expression contained in Article 7.²⁰⁷ Article 15 further requires states to create the conditions necessary to ensure effective participation of persons belonging to national minorities in cultural, social and economic life and that they can effectively participate in public affairs.²⁰⁸

²⁰³ Bianka Vida, 'New Waves of Anti-Sexual and Reproductive Health and Rights Strategies in the European Union: The Anti-Gender Discourse in Hungary' (2019) 27(2) *Sexual and Reproductive Health Matters* 13, 13.

²⁰⁴ Presidency Conclusions, Copenhagen European Council (June 21–22, 1993) 7 A iii.

²⁰⁵ Max Plog, 'Democratic Theory and Minority Rights: "Internal" and "External" Group Rights in a Global Democracy' (2003) 10 *International Journal on Minority and Group Rights* 55, 57
<<https://www.jstor.org/stable/24675054>> accessed 19 March 2021.

²⁰⁶ Council of Europe, 'Advisory Committee on the Framework Convention for the Protection of National Minorities: Twelfth Activity Report Covering the Period from 1 June 2018 to 31 May 2020' (Council of Europe 2020) 12.

²⁰⁷ *ibid.*

²⁰⁸ *ibid.*

The preamble to the Framework Convention states that a “genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity”.²⁰⁹ In order to achieve a society where minorities are afforded equal opportunities to preserve and develop their identities, it is insufficient to protect them from discrimination and injustice. States must provide an environment where minorities “take an active role in the development of their societies” as much as majorities do.²¹⁰ Max Plog argues that positive action of states to address inequalities amongst citizens is an inherent element of a democracy as political rights such as freedom of expression or assembly can only be realised if basic social rights are also vindicated.²¹¹

As will be noted in this thesis there has been a marked increase in oppression of minority rights on top of pre-existing minority rights deficiencies in the countries under study. These negative developments have a detrimental effect on a country’s liberal democracy as oppression and exclusion of minority voices from the LGBTQ+, Roma and ethnic communities leads to disenfranchisement of these minorities. A further issue associated with minority rights deficiencies is the ongoing refusal of the countries under study to acknowledge violence against women as an exceptional threat. Most notably, the rejection of the Convention on preventing and combating violence against women and domestic violence, also known as the Istanbul Convention, delegitimises the threat of domestic violence against women which is noted as having oppressive and quietening effects on women in society.²¹² This also has a damaging effect on liberal democracy as women face barriers to democratic participation.

The rejection of ‘gender ideology’ in the countries under study is a symptom of the wider illiberal backlash against the emergence of a progressive, modernist, and neoliberal

²⁰⁹ Framework Convention for the Protection of National Minorities 1995.

²¹⁰ Council of Europe, ‘Advisory Committee on the Framework Convention for the Protection of National Minorities: Twelfth Activity Report Covering the Period from 1 June 2018 to 31 May 2020’ (n 206) 12.

²¹¹ Plog (n 205) 60–62.

²¹² Andrea Krizsán and Conny Roggeband, *Politicizing Gender and Democracy in the Context of the Istanbul Convention* (Springer International Publishing 2021) 19–20.

consensus in the West.²¹³ Illiberal political forces utilise women's rights discourse reflexively to suit their own political needs, but they lack genuine respect for this cause.²¹⁴ At the same time, traditional roles for women, the rejection of reproductive rights and LGBTQ+ rights are used by illiberal politicians to garner support from the electorate by offering refuge in traditionalism in the face of liberal social changes. Pető calls this alternative the "illiberal offer":

*"It is important to note that besides opposing "gender ideology" and political correctness illiberalism also offers a liveable, viable alternative centred on the family, the nation, religious values, and freedom of speech. This package, what I termed the "illiberal offer," is widely attractive because it allows for a positive identification with the individual's own choices and promises a safe and secure community as a remedy for individualism and social atomization."*²¹⁵

2.6. Conclusion

As a concept, liberal constitutional democracy encompasses all the key elements that have come under attack in Hungary and Poland since 2010 and 2015, respectively. At the core of this concept lies a thick understanding of democracy where competitive elections are complimented by fundamental political rights such as freedom of assembly and association and also respect for minority rights which allow for citizens' access to voting on an equal basis. Furthermore, liberal constitutional democracy also requires strong fidelity to the rule of law in order for human rights and institutional safeguards to be guaranteed by law and upheld by independent courts. Through the declaratory nature of Article 2 TEU, it is clear that the EU also operates under the consensus of liberal constitutional democracy as all member states are required to achieve a high standard of the rule of law, democracy and respect for minority rights.

Of course, since the consolidation of liberal constitutional democracy as a concept in the mid-1990s, the belief that it is fail-safe and would bring about the end of history has

²¹³ Andrea Pető, 'Gender and Illiberalism' in András Sajó, Renáta Uitz and Stephen Holmes, *Routledge Handbook of Illiberalism* (1st edn, Routledge 2021) 318.

²¹⁴ *ibid* 317.

²¹⁵ *ibid* 319.

proven to be untrue. This chapter has highlighted how different the process of democratic backsliding is now compared to the latter half of the 20th century. Now, democracies tend to erode slowly at the hands of elected populist leaders who use their electoral mandate to hollow out liberal democracy using the law. This makes pinpointing the exact starting point of a democratic breakdown very difficult as populist leaders deliberately use stealthy legalistic tactics to empty democracy of meaningful choice and to tilt the electoral playing field in their favour just enough to entrench their power while still operating under the facade of a constitutional democracy.²¹⁶

In light of the identified problem of stealth authoritarianism, this chapter has aimed to break down the essential constituent parts of liberal constitutional democracy, namely the role of a functioning political party landscape and civil society in democratic stability, the importance of judicial independence for upholding the rule of law and the stabilising role of free media and respect for minority rights. This framework of understanding liberal constitutional democracy will be used throughout this thesis to analyse the attacks on each element of liberal constitutional democracy in Poland and Hungary and to compare this to the experience in Lithuania and Latvia.

A stable political party system is essential for maintaining democratic standards. Institutionalised political parties are rooted in society and are responsive to the needs of voters.²¹⁷ By contrast, a volatile political landscape characterised by the continuous emergence of inexperienced parties with leaders engaging in politics for personal gain results in poor governance patterns which leads to voters becoming disheartened not only with the inexperienced leadership but with democracy itself. This is especially true for young democracies such as those in CEE, where democracy held a promise of economic prosperity. When democracy proved too slow to deliver on the promise of prosperity, this left the stage open for anti-system populist parties an opportunity to utilise voter discontent to gain power and to implement anti-democratic policies.

²¹⁶ Ginsburg (n 3).

²¹⁷ Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (n 114) 343.

Similarly, an active civil society can make a democracy self-enforcing as it implements safeguards against anti-system and anti-democratic turns. A healthy civil society can hold elected leaders accountable through social means with the result of bolstering vertical political accountability.²¹⁸

This chapter has also outlined the central role of judicial independence for the functioning of liberal constitutional democracy. The rule of law can only function if national courts are independent and able to check that political decision making operates within the boundary of the constitution. Respect for the judicial independence has also been acknowledged by the CJEU as fundamental to upholding the rule of law principle on a national level and on a EU level. In the *Trade Union of Portuguese Judges* case, the Court establishes a general obligation for Member States to guarantee and respect the independence of their national courts and tribunals. While in *L.M.* the Court stated that the requirement of judicial independence is central to the guarantee of the right to a fair trial which is vital for safeguarding Article 2 TEU values, particularly the rule of law. The *A.K. and others v. Sąd Najwyższy* judgment addressed one element of the Polish judicial reforms, namely the disciplinary procedure for judges. The Court established an objective test for ascertaining the independence of a judicial body.

This chapter has identified the role of free media in holding elected officials accountable in between elections. Citizens also need to have access to accurate and unbiased information so they can make informed democratic decisions prior to elections. Therefore, political control of media outlets is particularly dangerous as pro-government propaganda combined with manipulation of electoral laws to favour incumbent leaders is a key tactic used by populist leaders to hijack a country's electoral democracy. Respect for minority rights is also framed as an essential feature of a liberal constitutional democracy. The concept of a pluralistic and accepting polity forms the foundations of the EU as the EU has played a leading role in influencing the respect for human rights within Europe and also globally. Genuine democratic engagement cannot feasibly exist if large

²¹⁸ Bernhard and others (n 111) 3.

sections of the population are disenfranchised , either directly or indirectly, due to their belonging to a minority group.

3. Democratic Backsliding in Context

3.1. Introduction

Chapter two established the key principles of a liberal constitutional democracy and identified that democratic backsliding encompasses the regression of the rule of law, liberal principles and constitutional checks and balances. Causes of democratic regression are debated amongst scholars with many different explanations being offered, but most are in agreement that the illiberal trend revolves around two dimensions: first, the “dismantling of the political institutions guaranteeing checks and balances and minority rights” and second, the “contestation of liberal social and cultural norms”.²¹⁹ Furthermore, today the deterioration of democracy happens incrementally,²²⁰ and tends to follow similar patterns as described in the previous chapter.²²¹ Therefore, scholars have established a number of common factors which have contributed to the likelihood of a country to undergo democratic regression. These are attempts to manipulate electoral rules, attacks on judicial independence, limitations on media and academic freedom and attacks on minority rights. These have been identified as tell-tale signs that a democracy is backsliding from the experience of Poland and Hungary.²²² Therefore, this chapter will outline the tactics used by the Polish and Hungarian governments to achieve their illiberal revolution. Later, this thesis will rely on these most established features of democratic regression to assess whether Lithuania and Latvia are also at risk.

²¹⁹ Lisa H Anders and Astrid Lorenz, ‘Examining Illiberal Trends and Anti-EU Politics in East Central Europe from a Domestic Perspective: State of Research and Outline of the Book’ in Astrid Lorenz and Lisa H Anders (eds), *Illiberal Trends and Anti-EU Politics in East Central Europe* (Springer International Publishing 2021) 3–4.

²²⁰ Huq and Ginsburg (n 37) 118.

²²¹ Laurent Pech and Kim Lane Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 3
<https://www.cambridge.org/core/product/identifier/S152888701700009X/type/journal_article> accessed 7 May 2021; Scheppele, ‘Autocratic Legalism’ (n 12).

²²² Christina Holtz-Bacha, ‘The Kiss of Death. Public Service Media under Right-Wing Populist Attack’ (2021) 36(2) *European Journal of Communication* 221, 225–226; James E Moliterno and Peter Čuroš, ‘Recent Attacks on Judicial Independence: The Vulgar, the Systemic, and the Insidious’ (2021) 22(7) *German Law Journal* 1159, 1172–1185; Huq and Ginsburg (n 37).

This chapter will begin by explaining one of the most effective strategies used by PiS and Fidesz to entrench their power, namely, manipulation of the electoral system to ensure they win subsequent elections. This poses as an assault on the very core of electoral democracy as elections are no longer free or fair. However, this tactic makes sense in the eyes of PiS and Fidesz who insist they are the only parties who can fulfil the will of ‘the people’. Section 3.3 will outline the most significant features of the extensive assault on judicial independence that has occurred in Poland and Hungary in the last decade. Here, there will be a focus on outlining how control of national judicial councils, packing of key apex courts, the setting up of parallel court administration systems and the establishment of institutions designed to discipline and intimidate judges have been used to limit judicial freedom. Section 3.4 will focus on how Fidesz and PiS have successfully manipulated the media landscape to allow for the dissemination of pro-government propaganda and stifled any legitimate criticism of the respective regimes. Related to this, freedom of expression has also been compromised through limiting the activities of NGOs and academic institutions that are not aligned with the government’s illiberal conservative ideologies. Section 3.5 will address how ethnopopulist tactics have been employed by the governments in Poland and Hungary to further polarise their politics on minority rights issues as well as politicise gender equality. It is argued that undermining minority rights is an important electoral tactic used by Fidesz and PiS to take advantage of voters’ fears and insecurities to benefit their electoral campaigns.

3.2. Assault on Electoral Laws

3.2.1. Hungary’s Assault on Electoral Laws

Often, the first action of populist governments once in power is to entrench their authority by biasing electoral laws to favour themselves in the next general election. Manipulation of electoral rules is an assault on democracy by its very nature as it seeks to eliminate the political competition.²²³

²²³ Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press 2015) 129.

The Fidesz-KDNP (Christian Democratic Party) coalition won the parliamentary elections in 2010 by 53%. However, because of a quirk in the electoral system this translated into 68% of the seats in parliament.²²⁴ Once in power Fidesz wasted no time in fixing the electoral system to ensure another victory in the 2014 elections. They did this by introducing vast reforms of electoral laws under new legislation.²²⁵ Opposition groups were disadvantaged in four main ways which meant that Fidesz was able to secure its second two-thirds majority. First, the Hungarian constituency districts were changed prior to the 2014 elections to benefit the ruling coalition, bringing accusations of gerrymandering.²²⁶ Although the reform of electoral districts was necessary to correspond with natural population redistribution, these changes also disadvantaged left-leaning districts by splitting them up and combining them with more conservative districts.²²⁷

Second, the new legislation also facilitated the creation of ‘fake parties’ which created confusion for voters as they were presented with numerous parties with similar names on ballots.²²⁸ The vast numbers of new emerging parties was facilitated by a reduction in requirements to make the national party list. Receiving nominations in 27 single member districts now only requires 13,500 signatures as opposed to the previous 36,750 nomination requirement.²²⁹ Furthermore, new campaign financing measures allowed for substantial financial benefits for parties. This gave rise to ‘fake parties’ that were seeking

²²⁴ Gabor Halmai, ‘The rise and fall of constitutionalism in Hungary’ in Paul Blokker (ed)

Constitutional Acceleration within the European Union and Beyond (1st Edition, 2017, Routledge) 255

²²⁵ Act CCIII of 2011 on the Elections of Members of Parliament of Hungary; Gabriella Ilonszki and Réka Várnagy, ‘Parliamentary Elections in Hungary, 2014’ (2016) 43 *Electoral Studies* 169, 171.

²²⁶ Viktor Szigetvári, Csaba Tordai and B Vető, ‘Beyond Democracy – The Model of the New Hungarian Parliamentary Electoral System (Part 2)’ (2011) 5 <[https://www.semanticscholar.org/paper/Beyond-democracy-%E2%80%93-The-model-of-the-new-Hungarian-\(-Szigetv%C3%A1ri-Tordai/5f1b80cd7782b7d79ae2310a4881e836cc1a2da7](https://www.semanticscholar.org/paper/Beyond-democracy-%E2%80%93-The-model-of-the-new-Hungarian-(-Szigetv%C3%A1ri-Tordai/5f1b80cd7782b7d79ae2310a4881e836cc1a2da7)> accessed 6 March 2023; Andrea Schmidt, ‘Challenges of the Illiberal Democracy in Hungary. Some Aspects to the 2018 Elections’ (2018) 6 *Polish Political Science Review* 70, 82.

²²⁷ Ilonszki and Várnagy (n 225) 169.

²²⁸ Schmidt (n 226) 82.

²²⁹ Ilonszki and Várnagy (n 225) 170.

to benefit financially from creating a party but had no intentions of winning the election.²³⁰

Third, although the new electoral system is still a mixed-member majoritarian one, some crucial changes were made that benefited the ruling coalition. The old three-tier mixed-member majoritarian system was condensed into a two tier system with the single member districts and national party list being combined, and the regional lists were removed all together.²³¹ This could have been seen as a beneficial simplification of the old system, however upon closer inspection the new changes made the system more majoritarian than before.²³²

Finally, the introduction of a dual voting system for foreign voters and domestic voters worked in the incumbent government's favour. Ethnic Hungarians who were granted Hungarian citizenship but did not reside in Hungary could vote in general elections more easily than native Hungarians who study or work abroad. Hungarians outside the state who resided in neighbouring countries with Hungarian historical borders could vote by post.²³³ However, native Hungarians abroad had to attend polling stations in embassies or consulates to cast their vote.²³⁴ This move proved to be a particularly beneficial one in the 2014 election for the Fidesz ruling coalition as 128,000 votes just beyond Hungary's borders were cast by ethnic Hungarians. Approximately half of them were from Romania and 95% of those who voted in this way voted for the Fidesz-KDNP party alliance.²³⁵ Allowing ethnic Hungarians to vote more easily than Hungarian residents living abroad is a violation of the principle of equal suffrage but this was not a priority for the Fidesz coalition as they knew this system would boost their voter base.²³⁶

²³⁰ *ibid.*

²³¹ *ibid.* 169.

²³² Gábor Halmai, 'A Coup Against Constitutional Democracy: The Case of Hungary' in Mark A Graber, Sanford Levinson and Mark V Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 7.

²³³ Schmidt (n 226) 82.

²³⁴ *ibid.*

²³⁵ Ilonszki and Várnagy (n 225) 169–170.

²³⁶ Puddington (n 83) 299.

Once the 2018 election rolled around, Fidesz, with its coalition party KDNP, had benefitted from the numerous electoral reforms they had implemented throughout eight years of being in power. The sheer amount of time Fidesz had spent in power meant they had ample opportunities to introduce further policies and laws that entrenched their power through biasing media laws, dismantling checks and balances and limiting civil society. By the time the 2018 elections came, Fidesz had such a firm hold on power that it was almost impossible for the opposition to secure a win.²³⁷ In April 2018, the Fidesz-KDNP party alliance secured their third supermajority in parliament.²³⁸

In the run-up to the April 2022 Hungarian general election, experts found it difficult to predict if Fidesz could secure a fourth consecutive win.²³⁹ Indeed, there were hopes that a strong and united opposition could finally win and begin to steer Hungary back towards liberal democracy. However, it was not to be, as a combination of an electoral playing field that remained tilted in Fidesz's favour and a series of skilful electoral tactics by Orbán's party meant that their re-election was inevitable. In fact, they secured their biggest victory to date as they finished 20 points ahead and won 83 percent of the single-member districts and 54 percent of the party-list vote.²⁴⁰ Aside from continuing to benefit from the biased electoral landscape Fidesz had been cultivating since 2010, they also appealed to voters with cash handouts to families and pensioners and manipulated the Russian invasion of Ukraine to scare voters into supporting them for another term. Their campaign focused on unsubstantiated claims that the opposition was colluding with the Ukrainian President and were at risk of dragging Hungary into war with Russia too.²⁴¹ As a remedy to this claim, which the opposition did not have a fair opportunity to rebut due to being effectively shut-out of the media landscape, Fidesz promised peace and security.

²³⁷ Ilonszki and Várnagy (n 225) 172.

²³⁸ Helene Bienvenu and Marc Santora, 'Hungary Election Was Free but Not Entirely Fair, Observers Say' *New York Times* (9 April 2018) <<https://www.nytimes.com/2018/04/09/world/europe/hungary-election-orban-fidesz.html>> accessed 21 December 2022.

²³⁹ Kim Lane Scheppele, 'How Viktor Orbán Wins' (2022) 33(3) *Journal of Democracy* 45, 45 <<https://muse.jhu.edu/article/860244>> accessed 5 November 2022.

²⁴⁰ *ibid* 46.

²⁴¹ *ibid* 46–50.

They promised that Hungary would remain on good terms with Russia in order to avoid war and to secure Hungary's access to cheap Russian natural resources.²⁴²

3.2.2. Poland's Assault on Electoral Laws

PiS in Poland, rather predictably, followed in the footsteps of its role-model Fidesz and sought to strengthen their prospects of being re-elected for a second term soon after their first election in 2015. The resulting law adopted in 2017, changed the composition of the National Electoral Commission (*Państwowa Komisja Wyborcza*, PKW) so they favoured the PiS government. This commission, which was usually composed of independent judges, was now comprised of only two judges and seven members appointed by the Sejm. It was given extensive authority over elections and fund allocation for political parties.²⁴³ In addition, the responsibility over electoral districts was now given to one hundred 'commissioners' who were appointed by PKW but from a list of candidates drafted by the Minister of Interior. This meant the commissioners answered to the minister rather than the PKW which made it easier to redraw electoral district boundaries in favour of PiS without opposition. The law also altered the admissibility of ballots displaying a crossed-out and replaced "x" next to the voters chosen candidate. This allows a third party to replace the vote on the ballot in favour of a particular political party.²⁴⁴ Moreover, the local commissioner has discretion over the admissibility of such ballots. Allocating positions of power in the PKW to political actors and eliminating the judicial role compromised the integrity of the electoral process.²⁴⁵

All of these reforms to the Polish electoral system seemed to have paid off for the PiS party as they enjoyed another victory in the 2019 parliamentary elections. Although this election saw a turnout of 62 percent, with 44 percent voting for PiS which translates into 51 percent majority in the Lower House, PiS lost their majority in the Upper House, the Senate.²⁴⁶ This was due to a fragmented opposition being able to coordinate their

²⁴² *ibid* 48.

²⁴³ Sadurski, *Poland's Constitutional Breakdown* (n 101) 140–143.

²⁴⁴ *ibid*.

²⁴⁵ *ibid*.

²⁴⁶ Radoslaw Markowski, 'Plurality Support for Democratic Decay: The 2019 Polish Parliamentary Election' (2020) 43(7) *West European Politics* 1513, 1.

campaign in pursuit of the Senate which paid off.²⁴⁷ However, PiS's victory is undeniably partially due to their insistence of obtaining a tight grip on institutions that have the potential to criticise PiS government actions.²⁴⁸ Therefore, the PiS government's grip on the Constitutional Tribunal combined with the control of the PKW and public media broadcasters, means that although the 2019 election was fair, it was by no means free.²⁴⁹

3.3. The Dismantling of Judicial Independence

3.3.1. Attacks on Judicial Independence in Hungary

After the Hungarian Fidesz party won the parliamentary elections in 2010, they wasted no time in implementing an overhaul of the Hungarian constitutional order even though they did not rely on the promise of constitutional change in their electoral campaign.²⁵⁰ The new constitution (Fundamental Order) that was implemented in 2011 no longer guaranteed the independence of the judiciary in its text.²⁵¹ This symbolised the demotion of courts from an independent check on political power, to an extension of the governing parties' office.²⁵² Halmai notes that the overriding purpose of this revolution was for Fidesz to "eliminate any kind of checks and balances" on their power.²⁵³ The main way they achieved this was by using their two-thirds super majority in parliament to push through a new constitution with numerous subsequent amendments.²⁵⁴ These amendments and the new constitutional text were designed to systematically diminish

²⁴⁷ *ibid.*

²⁴⁸ Aleksandra Sojka, 'Polish Election Recap: A Victory for Law and Justice, but the Party May Find Governing More Difficult than Before' (*EUROPP*, 2019) <<https://blogs.lse.ac.uk/europpblog/2019/10/16/polish-election-recap-a-victory-for-law-and-justice-but-the-party-may-find-governing-more-difficult-than-before/>> accessed 6 March 2023.

²⁴⁹ Markowski (n 246) 7; Aleksandra Sojka (n 248).

²⁵⁰ Landau (n 60) 208.

²⁵¹ European Commission For Democracy Through Law (Venice Commission), 'Opinion on the New Constitution Of Hungary' (2011) Opinion no. 621 / 2011 21.

²⁵² Kriszta Kovács and Kim Lane Scheppelle, 'The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—and the European Union' (2018) 51(3) *Communist and Post-Communist Studies* 189, 191.

²⁵³ Gábor Halmai (n 232) 245.

²⁵⁴ Bánkuti, Halmai and Scheppelle (n 99) 139.

the powers of the institutions that could stifle the powers of the executive, with the Hungarian Constitutional Court as their priority target.²⁵⁵

Shortly after the Fidesz party took power they amended a rule governing the manner in which constitutional justices could be appointed giving Fidesz a monopoly on appointment power. A year later in 2011, Fidesz raised the number of seats in the Constitutional Court from 11 to 15 which resulted in 11 out of 15 justices being chosen by Fidesz. Once the judges loyal to Fidesz were seated, the law prescribing a mandatory retirement age of Constitutional Court justices was removed to ensure the Fidesz appointees could serve their purpose for as long as possible.²⁵⁶ These politically loyal justices were found to have decided cases primarily in the governments favour.²⁵⁷

The constitutional revolution also had a profound effect on limiting the Constitutional Court's powers of judicial review. The Hungarian Constitutional Court was known for its wide scope of judicial review powers and was recognised as the guardian of fundamental rights and a guarantor of the separation of powers.²⁵⁸ The most peculiar power of the Court was its ability to directly hear any petition for abstract judicial review of law from any citizen or qualified body. This procedure of *actio popularis* was known for allowing not only individuals, but also NGOs to contest the constitutionality of laws in front of the Constitutional Court. In the past two decades the unusual procedure was known for its substantial contributions to fundamental rights jurisprudence.²⁵⁹ The Fidesz led government swiftly limited the *actio popularis* procedure in their new constitutional order. Now, ex-post norm control may only be initiated by the government, if a quarter

²⁵⁵ Stephen Gardbaum, 'The Counter-Playbook: Resisting the Populist Assault on Separation of Powers' (2020) 59(1) Columbia Journal of Transnational Law 14–15.

²⁵⁶ Uitz, 'Can You Tell When an Illiberal Democracy Is in the Making?' (n 16) 292–293.

²⁵⁷ The Hungarian Helsinki Committee, 'Analysis Of The Performance Of Hungary's "One-Party Elected" Constitutional Court Judges Between 2011 And 2014' (Eötvös Károly Institute, the Hungarian Civil Liberties Union and the Hungarian Helsinki Committee 2015) 1–4 <https://helsinki.hu/wp-content/uploads/EKINT-HCLU-HHC_Analysis_CC_judges_performances_2015.pdf> accessed 1 February 2023; Kovács and Scheppele (n 252) 191.

²⁵⁸ Kriszta Kovács and Gábor Attila Tóth, 'Hungary's Constitutional Transformation' (2011) 7(2) European Constitutional Law Review 183, 184.

²⁵⁹ Gábor Halmai, 'Dismantling Constitutional Review in Hungary' (2019) 1 Revista di diritti comparati 31, 33; Gardbaum (n 255) 15.

of the parliament votes in favour of this or upon the request of the Commissioner for Fundamental Rights.²⁶⁰ Considering the current composition of the parliament is dominated by the Fidesz party, it seems unlikely they would launch a judicial review of their own bills.²⁶¹

The Constitutional Court was also forbidden from judicial review of any matter that involve financial laws. This was introduced by the Fidesz led government in the Fundamental Law as a backlash against a judgment by the Court which condemned a Fidesz law that retroactively reduced severance pay of public servants by imposing a 98% tax.²⁶² Now, the Constitutional Court can only adjudicate on the basis of rights such as human dignity, personal data rights, freedom of religion and citizenship, which financial laws cannot implicate. Therefore, the fundamental requirement that the constitution is binding on everyone is no longer satisfied.²⁶³

In 2013 the Hungarian Parliament amended the 2011 Constitution for the fourth time since its enactment. The fourth amendment introducing the dissolution of all court decisions that predated the new Constitution of 2011. Halmai explains that at face value, this decision makes sense, “old constitution = old decisions; new constitution = new decisions”.²⁶⁴ However, as he points out, the constitutional rights contained both in the new Constitution and its predecessor were fundamentally the same, except for the fact that now all of the Constitutional Court’s precedence developed since the enactment of the 1989 Constitution were null and void.²⁶⁵ These voided judgments were essential for giving context and life to the written fundamental rights provisions and had clarified the intricacies of constitutional rights and harmonised their relationship with European human rights law.²⁶⁶ This drastic change allowed the ruling party to threaten the reinstatement of the death penalty and retroactive political justice, both of which had

²⁶⁰ Halmai, ‘Dismantling Constitutional Review in Hungary’ (n 259) 33.

²⁶¹ *ibid* 33–34.

²⁶² Kovács and Tóth (n 258) 192.

²⁶³ Halmai, ‘Dismantling Constitutional Review in Hungary’ (n 259) 33.

²⁶⁴ Gábor Halmai (n 232) 247.

²⁶⁵ *ibid*.

²⁶⁶ Gardbaum, (n130) 15

been already abolished by the Constitutional Court in the early 1990s.²⁶⁷ These draconian policies of the Fidesz government diminished the Constitutional Court's power to hold the executive to account. Since the final packing of the Hungarian Constitutional Court in 2013, it has acted as a reliable rubber stamp on Fidesz policies except for one notable case in which the Court refused to satisfy the Hungarian Minister of Justice's request to declare judgment of the CJEU, Case C-808/18 *Commission v Hungary (Accueil des demandeurs de protection internationale)*, incompatible with Hungarian law. Such a ruling would have effectively disregarded the supremacy of EU law in Hungary, much like what the Polish Constitutional Court did in 2021. In this instance the Hungarian Constitutional Court refused to throw additional fuel on the fire of the Hungarian rule of law crisis for reasons that could possibly relate to the need of the judges of the Constitutional Court who are loyal to Fidesz to guarantee their posts. At the time of this decision the Hungarian 2022 general election were nearing and as mentioned above, there was real uncertainty if Fidesz were going to secure a fourth term. The decision of the Constitutional Court to not overtly reject the supremacy of EU law might have been related to the fact the opposition at the time were already planning on ousting the Fidesz-elected judges once they were in power.

The Fidesz government did not stop at capturing and neutralising the Constitutional Court, they proceeded to strip the Kúria (Hungarian Supreme Court), the system of judicial administration and the ordinary courts of their independence.²⁶⁸ A new judicial act was introduced soon after Fidesz came to power which reduced the retirement age of judges from 70 to 62-65 depending on the date of birth of judges.²⁶⁹ This had the effect of almost immediately removing 10-15 per cent of all judges in Hungary.²⁷⁰ The Constitutional Court, which was not yet packed at this point, held that this law was unconstitutional as it interfered with the principle of judicial irremovability. However,

²⁶⁷ Gardbaum (n 255) 15.

²⁶⁸ Kovács and Scheppele (n 252) 192.

²⁶⁹ Act CLXII of 2011 on the Status and Remuneration of Judges of Hungary; European Commission for Democracy Through Law (Venice Commission), 'On Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary' (2012) Opinion no. 663/2012 27.

²⁷⁰ Kovács and Scheppele (n 252) 192.

Fidesz, unphased by this ruling turned to their two-thirds super majority in parliament and amended the Constitution to the same effect with Article 26.2 of the Fundamental Law.²⁷¹ The European Commission, condemned this blatant infringement of judicial independence and issued infringement actions to the CJEU.²⁷² However, instead of the CJEU issuing a ruling of violation of EU law based on judicial independence grounds they used the grounds of age discrimination. Hungary was ordered to pay compensation but the removed judges were not reinstated which did not reverse the damage to Hungarian judicial independence.²⁷³

As judges were being removed from the bench around Hungary, the Fidesz-led government decided to change the administrative system of the courts.²⁷⁴ Act CLXI/2011 on the Organization and Administration of Courts of Hungary removed the autonomous judicial council and replaced it with a “strictly centralized body of judicial oversight” called the National Judicial Office.²⁷⁵ The President of the National Judicial Office is chosen by the Parliament for a term of 9 years and has the duty to elect judges with the condition that the Hungarian President approves the decision.²⁷⁶ The President of the National Judicial Office also has the power to dismiss and transfer judges at will.²⁷⁷ The Venice Commission notes that this makes the President a “crucial decision-maker in practically every aspect of the organization of the judicial system”.²⁷⁸ The first President of the National Judicial Office was Tünde Handó, a Fidesz party member’s wife and Viktor Orbán’s family friend.²⁷⁹

²⁷¹ *ibid.*

²⁷² *Case C-286/12 Commission v Hungary ECLI:EU:C:2012:687.*

²⁷³ Kovács and Scheppele (n 252) 192.

²⁷⁴ *ibid.*

²⁷⁵ S.12(3) Act CLXI of 2011 on the Organization and Administration of Courts of Hungary; Zoltán Fleck, ‘Judges under Attack in Hungary’ (*Verfassungsblog*, Mai 2018) <<https://verfassungsblog.de/judges-under-attack-in-hungary/>> accessed 6 March 2023.

²⁷⁶ S.12(3) Act CLXI of 2011 on the Organization and Administration of Courts of Hungary; Fleck (n 275).

²⁷⁷ Kovács and Scheppele (n 252) 192–193.

²⁷⁸ European Commission for Democracy Through Law (Venice Commission) (n 269) 29.

²⁷⁹ Fleck (n 275); Petra Bard and others, ‘Is the EU Toothless? An Assessment of the EU Rule of Law Enforcement Toolkit’ [2022] MTA Law Working Papers 2022/8 9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4100068> accessed 12 May 2022.

In 2011, the Fidesz led government proposed the setup of a parallel system of administrative courts in the country. However, this idea caused significant disagreement within the party. Scheppele and Kovács propose that perhaps this reform would have been too obvious in its intention:

“unlike the other court-capturing laws which were forwarded with rationales that one might believe were connected to reasonable reform (for example, getting rid of judges trained during the communist regime, adding judges to a system that would now have more cases), this one seemed too obviously aimed at creating a separate court system for politically sensitive cases in which the government would always win by design.”²⁸⁰

Nevertheless, the Fidesz government attempted to push through two acts which would have the effect of creating this parallel system. One act was passed successfully, while the other was referred to the Constitutional Court to be checked for its compatibility with the Constitution.²⁸¹ In its decision, the Court declared the act unconstitutional as it found that for such an act to pass it must be approved by a two-thirds majority in the Parliament.²⁸² At this point in time Fidesz had lost their supermajority in two by-elections.²⁸³ Even though they could not create a complete parallel system of administrative courts they settled for administrative chambers within existing courts for the time being. These chambers dealt with “politically sensitive cases”.²⁸⁴

Once the Fidesz two-thirds majority was regained in Parliament in 2018, it introduced a constitutional amendment creating a parallel system of administrative courts without delay. This new court system was to include an Administrative Supreme Court with the same legal status to the Kúria.²⁸⁵ However, this new parallel system of administrative

²⁸⁰ Kovács and Scheppele (n 252) 193.

²⁸¹ Act CL of 2016 on the Code of General Administrative Procedure; Bill T/12234 of 2016 on Administrative Court Procedure; Kovács and Scheppele (n 252) 193.

²⁸² *Hungarian Constitutional Court, Decision 1/2017 (I 17)*.

²⁸³ Kovács and Scheppele (n 252) 193.

²⁸⁴ *ibid.*

²⁸⁵ *ibid.*

courts proved to be politically divisive as the policy struggled to gain support even from Fidesz supporters.²⁸⁶ In 2019 the Hungarian government abandoned these court reforms unexpectedly and repealed the law and constitutional amendment which would have paved the way for the changes.²⁸⁷ However, despite the failure of the reforms the government still managed to introduce some elements of the failed project into the existing administrative court regime. They adopted Act CXXVII of 2019 which altered the structure of administrative justice so that it was largely within government control but without the need for a parallel administrative court system.²⁸⁸ These reforms included handing over significant jurisdiction over administrative matters to the Hungarian Supreme Court which also created a pretext for its packing.²⁸⁹

3.3.2. Attacks on Judicial Independence in Poland

After the activation of the Rule of Law Framework, the European Commission issued four Rule of Law recommendations between 2016 and 2017 and in 2017 the Commission also activated the Article 7(1) TEU procedure due to the existence of a clear risk of a serious breach of the rule of law by Poland.²⁹⁰ The Commission's concerns and reasons for activating the formal procedure centred around the decisive actions of the PiS-led Polish government in their dismantling of judicial independence. The packing of the Constitutional Tribunal, the establishment of a controversial Disciplinary Chamber and the mass-dismissal and replacement of ordinary court judges topping the list of concerns.²⁹¹

The PiS party's assault on the independent judiciary started with their presidential election victory in May 2015 with the election of Andrzej Duda. In October of the same year, PiS also won a simple majority in the Polish parliament (Sejm).²⁹² However, the PiS party lacked the parliamentary super majority of their Hungarian counterparts that would

²⁸⁶ Bard and others (n 279) 11–12.

²⁸⁷ *ibid.*

²⁸⁸ Act CXXVII of 2019; Bard and others (n 279) 11–12.

²⁸⁹ Bard and others (n 279) 11–12.

²⁹⁰ Pech, Wachowiec and Mazur (n 179) 5.

²⁹¹ *ibid.*

²⁹² Gardbaum (n 255) 16.

allow them to weaken the judiciary by sweeping constitutional change. Therefore, the PiS party had to lead their attack on judicial independence through strategic changes to ordinary laws and some acts of questionable legality by the Party's loyal actors.²⁹³ The primary aim of PiS once they gained power was to undo institutional checks and balances.²⁹⁴

The first target of the PiS-led government was the Constitutional Tribunal (the Tribunal) which operated effective judicial review. The Tribunal was known for its decisions that clarified the meaning of the separation of powers, elucidated the relationship between the executive and legislative organs of state and reduced the scope of the Prime Minister's powers.²⁹⁵ In light of the Tribunal's power to check and adjudicate on the executive's actions, this made it an obvious target of PiS. Once the Tribunal was stripped of its powers to check the executive, PiS could implement their policies without objection from the Tribunal.²⁹⁶

The capture and packing of the Tribunal did not occur at once, rather it involved a collaborative effort by PiS officials which lasted for a number of years. It began with refusal of the PiS government to accept the appointment of five new judges to the Tribunal by the previous government.²⁹⁷ Just before the parliamentary elections on the 8th October 2015 the out-going parliament led by the Civic Platform party used a statutory amendment they adopted in June 2015 to elect five new judges to the Tribunal.²⁹⁸ This

²⁹³ *ibid.*

²⁹⁴ Wojciech Sadurski, 'Constitutional Crisis in Poland' in Graber Mark A, Levinson Sanford and Tushnet Mark (eds), *Constitutional Democracy in Crisis?*, vol 1 (Oxford University Press 2018) 260.

²⁹⁵ *Constitutional Tribunal of Poland, Judgment of 14 April 1999, Ref No K 8/99, OTK ZU no 3/1999, item 41; Constitutional Tribunal of Poland, Judgment of 28 April 1999, Ref No K 3/99, OTK ZU no 4/1999, item 73.*

²⁹⁶ Tomasz Tadeusz Koncewicz, 'Farewell to the Separation of Powers – On the Judicial Purge and the Capture in the Heart of Europe' (*Verfassungsblog*, 19 July 2017) <<https://verfassungsblog.de/farewell-to-the-separation-of-powers-on-the-judicial-purge-and-the-capture-in-the-heart-of-europe/>> accessed 6 March 2023; Maciej Kisilowski, 'Poland's "Overnight Court" Breaks All the Rules' *POLITICO* (8 December 2015) <<https://www.politico.eu/article/law-vs-justice-poland-constitution-judges/>> accessed 6 March 2023.

²⁹⁷ Gardbaum (n 255) 16.

²⁹⁸ Kisilowski (n 296).

was unusual as only three judicial vacancies were to be filled during their parliamentary term while the remaining two vacancies were due to occur in the PiS government term.²⁹⁹ The acts of Civic Platform that were clearly orchestrated to prevent PiS from electing their judges has been described as an “aggressively partisan” stance.³⁰⁰ However, the statute of June 2015 that allowed this to occur was defended in parliamentary debates at the bill stage as it was apparently intended to help avoid a standstill in the Tribunal over the risk of overlapping dates of the elections of Tribunal judges and the parliamentary elections.³⁰¹

However, President Duda refused to swear in the five justices elected by the Civic Platform government even though he had no legal authority to do so. Following this, the new PiS led Sejm elected five judges of their own which President Duda swore in an urgent ceremony in the middle of the night on 2nd and 3rd December 2015.³⁰² However, on 3rd December the Tribunal itself handed down judgment K34/15 that declared that only three judges elected by Civic Platform were to be included in the Tribunal and that the following two vacancies were to be filled by the PiS parliament.³⁰³ However, as the five PiS elected justices had been already sworn in just hours before meant that this judgment was too late, there was already a deadlock within the Tribunal. The then president of the Tribunal, Andrzej Rzepliński, attempted to preserve the Tribunal’s integrity by refusing to seat the three PiS “quasi-judges”.³⁰⁴ He was an active defender of the independence of the Tribunal but, after his leaving the post in December 2016 the Tribunal’s defences were severely weakened. The PiS led government created a new role of “Acting President,” an extra-constitutional position which was filled by Julia Przyłębska who was loyal to PiS.³⁰⁵ With her help, the irregularly elected PiS loyal judges were

²⁹⁹ Sadurski, *Poland’s Constitutional Breakdown* (n 101) 62.

³⁰⁰ Kisilowski (n 296).

³⁰¹ Mariusz Muszyński, ‘Legal Analysis of The Election Process of The Judges of The Polish Constitutional Tribunal in The Autumn of 2015’ [2017] *Iustum Aequum Salutare* 127, 132.

³⁰² Sadurski, *Poland’s Constitutional Breakdown* (n 101) 64.

³⁰³ *Constitutional Tribunal of Poland, Judgment of 3 December 2015, Ref No K 34/15, OTK ZU no 11A/2015, item 185.*

³⁰⁴ Sadurski, ‘Constitutional Crisis in Poland’ (n 294) 257–262; Gardbaum (n 255) 16–17.

³⁰⁵ Sadurski, *Poland’s Constitutional Breakdown* (n 101) 65–66.

included on panels and the Tribunals General Assembly.³⁰⁶ Acting President Przyłębska also forced the vice president of the Tribunal into retirement.³⁰⁷

Finally, in October 2017 the Tribunal handed down a decision that legitimised the positions of the unconstitutionally elected PiS justices.³⁰⁸ This was done by adopting a peculiar interpretation of the K 34/15 judgment which was handed down by the Tribunal before it was captured by PiS.³⁰⁹ In that ruling the Tribunal had declared only three judges elected by Civic Platform were constitutional and the following two judges elected by Civic Platform were not, as they fell outside their parliamentary term.³¹⁰ In its new October 2017 ruling the Tribunal (packed with PiS chosen judges) reviewed its stance and held that the unconstitutionally elected PiS judges were now constitutional.³¹¹ Three main points of reasoning were used: first, the judgment guaranteed that a judge was legitimately elected if he/she swore an oath in front of the Polish President and was elected by the Sejm.³¹² Second, decision K 34/15 was now interpreted as not indicating any rank of existing judges “...because the subject-matter of that judgment concerned only a hierarchical inconsistency of norms, without any operative consequences.”³¹³ Third, the Tribunal was of the opinion that the Sejm of the 8th term did not elect three judges to positions already filled by the Sejm of the 7th term because judges elected by the 7th term Sejm were invalidated by the Sejm of the 8th term.³¹⁴ These three reasons fly in the face of rule of law principles as they are retroactive and it is clear that they were formulated to justify the PiS governments’ blatant court packing.

³⁰⁶ Gardbaum (n 255) 17.

³⁰⁷ Ginsburg (n 3) 364.

³⁰⁸ *Constitutional Tribunal of Poland, Judgment of 24 October 2017, Ref No K 1/17, OTK ZU no A/2017, item 79.*

³⁰⁹ Sadurski, *Poland’s Constitutional Breakdown* (n 101) 63.

³¹⁰ *Constitutional Tribunal of Poland, Judgment of 3 December 2015, Ref. No. K 34/15, OTK ZU no. 11A/2015, item 185* (n 303).

³¹¹ *Constitutional Tribunal of Poland, Judgment of 24 October 2017, Ref. No. K 1/17, OTK ZU no. A/2017, item 79* (n 308).

³¹² Sadurski, *Poland’s Constitutional Breakdown* (n 101) 63.

³¹³ *ibid.*

³¹⁴ *ibid* 63–64.

Another perplexing justification for the legitimacy of the PiS quasi-judges was that the Tribunal declared the most important part of the swearing in of Tribunal Judges to be the oath taken in the presence of the Polish President. This condition is not emphasised anywhere in the Polish Constitution and was added by statute.³¹⁵ Furthermore, two of the quasi-judges adjudicated in this seminal decision including Muszynski who was President of this panel, breaching the fundamental principle of *nemo iudex in causa sua*.³¹⁶

Now that the Tribunal is infiltrated by unconstitutionally elected judges that were hand-picked by the PiS party, the Tribunal can no longer be considered an independent check on arbitrary power. Now, the PiS loyal Tribunal President is tailoring the Tribunal panels to fit the political importance of cases. Many cases are now obscured to the public as they are increasingly held *in camera*. All in all, the Tribunal is now a mere extension of the PiS dominated parliament with no meaningful voice of its own.³¹⁷ As a result, the European Commission no longer considers the constitutionality of Polish laws is being upheld since December 2016 as a compromised Tribunal cannot conduct effective judicial review. Along the same lines, Iustitia, the largest association of Polish judges, declared it no longer considers the Tribunal as legitimately composed in October 2020. Therefore, the situation regarding the independence of the Tribunal can be considered worse than ever before. This is especially true since the Tribunal effectively nullified the CJEU's AK judgment of 19 November 2019,³¹⁸ and in 2021 issued a judgment which declared Polish constitutional law to be superior to EU law. This effectively renouncing the supremacy of

³¹⁵ *ibid.*

³¹⁶ *ibid.*

³¹⁷ Tomasz Tadeusz Koncewicz, 'The Court is dead, long live the courts? On judicial review in Poland in 2017 and „judicial space” beyond' (*Verfassungsblog*, März 2018) <<https://verfassungsblog.de/the-court-is-dead-long-live-the-courts-on-judicial-review-in-poland-in-2017-and-judicial-space-beyond/>> accessed 6 March 2023.

³¹⁸ Laurent Pech, 'Polish Ruling Party's "Fake Judges" before the European Court of Justice: Some Comments on (Decided) Case C-824/18 AB and (Pending) Case C-132/20 Getin Noble Bank' (*EU Law Analysis*, 7 March 2021) <<http://eulawanalysis.blogspot.com/2021/03/polish-ruling-partys-fake-judges-before.html>> accessed 2 January 2023.

EU law and igniting debates amongst experts about a possible 'Polexit'.³¹⁹ However, these rash judgments simply indicate that the Tribunal now exists to serve as a function of the PiS government instead of being an independent and legitimate court.³²⁰

Once the Constitutional Tribunal in Poland was wrangled to submission in December 2016, the PiS led government wasted no time in taking over the ordinary courts, the Supreme Court and the National Council of the Judiciary (KRS). The proposed changes to these institutions were fuelled by PiS rhetoric which asserted that Poland's democratic transition after 1989 had never fully happened but instead a "shadowy post-Communist system" emerged which was propped up by the country's corrupt legal system.³²¹ However, the reforms that Poland imposed were far from constructive. Rather than making the judicial system more efficient and independent it made it more open to political manipulation. The new process of judicial appointment and appointment to the KRS itself was non-transparent and based on political allegiances rather than competence.³²² Sadurski also observes that instead of the efficiency of the court system being improved the measures adopted will in fact work to make the system less efficient.³²³

The initial proposal for reforms was rejected by President Duda in July 2017 as mass protests and disputes with the ruling elite erupted.³²⁴ However, Davies argues that instead of President Duda's veto being an open demonstration of political debate, it is more likely to be a tactical political retreat.³²⁵ In the meantime, PiS controlled media launched a public propaganda campaign against the judiciary emphasising historic

³¹⁹ Renata Uitz, 'The Polish Constitutional Tribunal Asserts the Primacy of National Constitution over EU Law — In Words with No Legal Force' (*Brexit Institute*, 8 October 2021) <<https://dcubrexitinstitute.eu/2021/10/poland-constitution-eu-law/>> accessed 2 January 2023.

³²⁰ *ibid.*

³²¹ Christian Davies, 'Hostile Takeover: How Law and Justice Captured Poland's Courts' <https://freedomhouse.org/sites/default/files/2020-02/poland%20brief%20final_0.pdf> accessed 2 January 2023.

³²² Helsinki Foundation for Human Rights, 'It Starts with the Personnel, Replacement of Common Court Presidents and Vice Presidents from August 2017 to February 2018' 27–28 <<http://www.hfhr.pl/wp-content/uploads/2018/04/It-starts-with-the-personnel.pdf>> accessed 2 January 2023.

³²³ Sadurski, *Poland's Constitutional Breakdown* (n 101) 121.

³²⁴ Helsinki Foundation for Human Rights (n 322) 6.

³²⁵ Davies (n 321) 5.

miscarriages of justice and past crimes committed by judges such as drink-driving and theft.³²⁶

The revised proposals were announced in September 2017 and were passed into law in December 2017.³²⁷ The reforms included major changes to the functioning, appointment and disciplinary process of the judiciary. PiS granted itself control over the KRS by unconstitutionally removing sitting judges from the Council and creating new rules for the election of new members.³²⁸ The new rules provide that fifteen judges should be elected to the KRS by the Sejm by a three-fifths majority unless there is a shortfall in this threshold then remaining judges are elected by a simple majority vote.³²⁹ This gives the ruling party significant influence over the composition of the KRS and hence the nomination of judges. Effectively, after these reforms, politicians elect twenty-three out of twenty-five members to the KRS.³³⁰

The reforms also reduced the independence of the Supreme Court by unconstitutionally reducing the retirement age of judges from 70 to 65, meaning that 37 percent of Supreme Court judges were in the retirement age group.³³¹ If a judge past the new retirement age wanted to continue on in their position, they were required to ask permission of the Polish President who had discretion over whether to grant this request.³³² These judges were the most experienced on the bench and making them request permission from the President to stay in their role is humiliating and demeaning as pointed out by Sadurski.³³³ Due to pressure from the European Commission over the new retirement regime, superficial changes were made by the Sejm in an attempt to mitigate the bad press. Now the President must seek advice from the KRS before making a decision on the extension

³²⁶ *ibid.*

³²⁷ Sadurski, 'Constitutional Crisis in Poland' (n 294) 39.

³²⁸ Sadurski, *Poland's Constitutional Breakdown* (n 101) 100–103.

³²⁹ *ibid.* 101.

³³⁰ *ibid.*

³³¹ *ibid.* 106.

³³² *ibid.*

³³³ *ibid.*

of a judges tenure. This of course has very little material effect over the legitimacy of the process as the KRS is largely controlled by the PiS government also.³³⁴

In addition to the forced retirement of Supreme Court judges, the new law increased the number of sitting judges in the Supreme Court from 93 to 120 which amounted to approximately 60 percent of the Supreme Courts judicial positions becoming vacant.³³⁵ All of these new judgeships were open for new appointments to be made by the President and a government-controlled KRS. In this way, the parliamentary majority gained unprecedented control over the Supreme Court's composition.³³⁶

The reforms added two new chambers, the Extraordinary Control and Public Affairs Chamber and Disciplinary Chamber to the Supreme Court which was entirely composed of newly appointed judges.³³⁷ The Extraordinary Control and Public Affairs Chamber was tasked with adjudicating on the legality of electoral results which is clearly problematic given that the ruling party has the biggest say in the composition of the chamber through its control of the KRS.³³⁸ The Disciplinary Chamber deals with disciplinary issues of the judiciary and lawyers which is described as "a device to focus public opinion on judicial accountability."³³⁹ Furthermore, lay judges are now allowed to participate on panels in these two new chambers with the only educational pre-requisite being a high school diploma.³⁴⁰ Freedom House calls the unprecedented inclusion of lay judges a display of "the ruling party's intention to supplement formal legal justice with its own understanding of "social justice" in certain cases."³⁴¹

The law on the ordinary courts was signed in by the President in July 2017 and expanded the grasp of the Minister for Justice and Prosecutor General over the courts.³⁴² The Minister already enjoyed the power to elect judges to courts, abolish or create new

³³⁴ *ibid.*

³³⁵ *ibid* 111.

³³⁶ *ibid.*

³³⁷ *ibid* 259.

³³⁸ *ibid* 112–113.

³³⁹ *ibid* 112.

³⁴⁰ *ibid* 113.

³⁴¹ Davies (n 321) 5.

³⁴² Sadurski, *Poland's Constitutional Breakdown* (n 101) 115–116.

courts, transfer judges between courts or order for disciplinary proceedings against them and create divisions of courts.³⁴³ Now the new law allows the Minister for Justice and Prosecutor General to dismiss presidents of courts without giving reason within 6 months of the promulgation of the law.³⁴⁴ During the transition period one fifth of senior management of courts, including 158 out of 730 presidents and vice-presidents of courts, lost their posts in an undignified manner and without possibility of judicial review.³⁴⁵ After the transition period of 6 months, only vague reasons such as “serious or persistent failure to comply with the official duties” or “other reasons which render remaining in office incompatible with the sound dispensation of justice” would need to be given for dismissal. Sadurski highlights that the phrasing of these explanations for dismissal are easily malleable by the minister so that rogue judges can be removed.³⁴⁶ To further entrench control over ordinary courts, the parliamentary majority amended the 2017 Act on the Organisation of Ordinary Courts to allow the President the power to appoint new court presidents at his discretion.³⁴⁷

The CJEU has issued a number of key judgments condemning Poland’s new judicial reforms, leading the way in tackling the EU’s growing rule of law crisis. Although there have been a multitude of judgments issued by the ECJ against Poland through infringement proceedings and preliminary rulings since 2016 in relation to rule of law backsliding,³⁴⁸ thorough analysis of all of these judgments is beyond the scope of this thesis. However, the infringement judgments of the Court which addressed the new retirement regime for Supreme Court judges, ordinary court judges and public prosecutors, along with the courts consideration of the new judicial disciplinary regime

³⁴³ *ibid.*

³⁴⁴ *ibid.*

³⁴⁵ Pech, Wachowiec and Mazur (n 179) 13; Sadurski, *Poland’s Constitutional Breakdown* (n 101) 116.

³⁴⁶ Sadurski, *Poland’s Constitutional Breakdown* (n 101) 115–116.

³⁴⁷ Pech, Wachowiec and Mazur (n 179) 13.

³⁴⁸ Laurent Pech, ‘Protecting Polish Judges from Political Control A Brief Analysis of the ECJ’s Infringement Ruling in Case C-791/19 (Disciplinary Regime for Judges) and Order in Case C-204/21 R (Muzzle Law)’ (*Verfassungsblog*, 20 July 2021) <<https://verfassungsblog.de/protecting-polish-judges-from-political-control/>> accessed 18 March 2023. Laurent Pech, ‘Protecting Polish Judges from Political Control A Brief Analysis of the ECJ’s Infringement Ruling in Case C-791/19 (Disciplinary Regime for Judges) and Order in Case C-204/21 R (Muzzle Law)’ (*Verfassungsblog*, 20 July 2021) <<https://verfassungsblog.de/protecting-polish-judges-from-political-control/>> accessed 18 March 2023.

are worth mentioning in some detail as they had a significant impact on the Polish rule of law crisis.

In July 2018, the Commission launched infringement proceedings against Poland for the new illegal and unconstitutional retirement regime for Supreme Court judges and the President of the Supreme Court as noted above.³⁴⁹ The Commission argued that the new lowered retirement age for judges was incompatible with Article 19(1) TEU, the principle of effective legal protection and also Article 47 of the EU Charter of Fundamental Rights which guarantees the right to a fair trial.³⁵⁰ This was a welcome step considering that a very similar issue with the retirement regime of Hungarian judges was dealt with under age discrimination laws by the ECJ in 2012, which completely missed the point of the judicial reforms in Hungary being initiated to attack judicial independence rather than undermine gender equality.³⁵¹ As the Polish government did not effectively respond to the Commission's concerns, the Commission referred Poland to the ECJ requesting implementation of interim measures to halt the forced retirement of Supreme Court judges at the hands of the new judicial reforms.³⁵² The Court agreed with the Commission and ordered the restoration of the Supreme Court to its position before the contested reforms entered into force, arguing the need to preserve both the Supreme Court's independence and the integrity of the EU legal order.³⁵³

In 2019, the ECJ declared Poland was in violation of the second paragraph of Article 19(1) TEU, the principle of effective legal protection, for the first time due to the Polish government's interference with the independence of ordinary courts and the Supreme Court.³⁵⁴ In cases C-192/18 and C-619/18 the Court found against Poland due to the arbitrary retirement regime introduced for Supreme Court judges, ordinary court judges

³⁴⁹ Pech, Wachowiec and Mazur (n 179) 28.

³⁵⁰ European Commission, 'European Commission Press Release: Rule of Law: Commission Launches Infringement Procedure to Protect the Independence of the Polish Supreme Court' <https://ec.europa.eu/commission/presscorner/detail/EN/IP_18_4341> accessed 2 July 2023.

³⁵¹ *Commission v Hungary* (n 272); Pech, Wachowiec and Mazur (n 179) 28–29.

³⁵² *Case C-619/18 R Commission v Poland (Independence of the Supreme Court) EU:C:2018:1021*.

³⁵³ *ibid*; Pech, Wachowiec and Mazur (n 179) 29.

³⁵⁴ Pech, Wachowiec and Mazur (n 179) 29.

and public prosecutors under the guise of “judicial reforms”.³⁵⁵ Case C-619/18 was decided first by the Court which confirmed the jurisdiction of the CJEU to adjudicate on reforms pertaining to national judiciaries’, which the Polish and Hungarian governments had insisted was not possible.³⁵⁶ It also innovatively stated that the irremovability of judges was of “cardinal importance”.³⁵⁷ Similarly, in Case C-192/18 the Court stated that the new retirement regime of 2017 for public prosecutors and ordinary court judges, combined with the discretionary powers of the President to extend the service of retired judges were incompatible with the requirements pertaining to judicial independence and the principle of irremovability of judges.³⁵⁸

In 2021, the CJEU handed down its decision in Case C-791/19 which found the disciplinary regime for Polish judges in contradiction with EU law and in Case C-204/21 R, the Vice President of the ECJ issued an interim order suspending the operation of the Supreme Court’s Disciplinary Chamber.³⁵⁹ In Case C-791/19, the Court held that the Disciplinary Chamber is incompatible with the principle of judicial independence under Article 19(1) TEU meaning that it is essentially a “kangaroo court”.³⁶⁰ The Court further stressed that the Disciplinary Chamber lacks legitimacy due to its composition largely being decided on by the new KRS which in itself lacks independence from the political branch.³⁶¹ This judgment also acknowledged for the first time in the context of the rule of law crisis in Poland the principle of non-regression as the Court noted that the Disciplinary Chamber “constitutes a reduction in the protection of the value of the rule of law”.³⁶² Case C-204/21 R also introduced a daily penalty for the Polish government for not complying

³⁵⁵ *Case C-192/18 Commission v Poland (Independence of the ordinary courts)* ECLI:EU:C:2019:924; *Case C-619/18, European Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531.

³⁵⁶ Pech, Wachowiec and Mazur (n 179) 30.

³⁵⁷ *Case C-619/18, European Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531 (n 355) para 79; Pech, Wachowiec and Mazur (n 179) 30.

³⁵⁸ *Case C-192/18 Commission v Poland (Independence of the ordinary courts)* ECLI:EU:C:2019:924 (n 355); Pech, Wachowiec and Mazur (n 179) 30.

³⁵⁹ *Case C-204/21 R European Commission v Poland* ECLI:EU:C:2021:878; *Case C-791/19, European Commission v Poland (Disciplinary regime for judges)* ECLI:EU:C:2021:596.

³⁶⁰ Laurent Pech (n 348).

³⁶¹ *ibid.*

³⁶² *Case C-791/19, European Commission v Poland (Disciplinary regime for judges)* ECLI:EU:C:2021:596 (n 359) para 112.

with the interim measure which required the dissolution of the Disciplinary Chamber.³⁶³ The sizable financial penalty in combination with the European Commission withholding Poland's share of the Covid-19 Recovery fund prompted the Polish government to abolish the Disciplinary Chamber in order to comply with the Court's interim order.³⁶⁴ However, the Polish government introduced merely cosmetic changes as they simply replaced the Disciplinary Chamber with a body that essentially served the same function and was equally under the control of the political branch but now called it "the Chamber of Professional Responsibility".³⁶⁵

3.4. Limitations of Media Freedom, Civil Society and Academic Freedom

3.4.1. Limiting Media Freedom, Civil Society and Academic Freedom in Hungary

Media capture in Hungary began during the 2008 financial crisis when business men with close ties to Viktor Orbán took advantage of international investors leaving Hungary and bought up struggling media outlets.³⁶⁶ This helped pave the way for Fidesz's electoral success in 2010. Since then, concentration of media ownership by Fidesz loyalists has consolidated, creating an infrastructure designed to act as a podium for Fidesz's self-promotion.

Two significant laws were passed in 2010 which allowed the governing party statutory control of mass media.³⁶⁷ These new laws reformed the Hungarian Media Authority, the state regulatory agency, and established a new institution, the Media Council. The new Media Council was completely comprised of Fidesz-friendly loyalists and the head of the

³⁶³ Renata Uitz, 'Commission v Poland (C-204/21 R): Pulverizing the Primacy of EU Law' (*Brexit Institute*, 1 November 2021) <<https://dcubrexitinstitute.eu/2021/11/commission-v-poland-eu-law/>> accessed 2 August 2023.

³⁶⁴ Bartosz Sieniawski, 'Polish Supreme Court's New Criminal Chamber Lifts First Judge's Immunity' (*Euractiv*, 1 September 2022) <https://www.euractiv.com/section/politics/short_news/polish-supreme-courts-new-criminal-chamber-lifts-first-judges-immunity/> accessed 2 August 2023.

³⁶⁵ Pawel Marcisz, 'A Chamber of Certain Liability: A Story of Latest Reforms in the Polish Supreme Court Setting the Stage' (*Verfassungsblog*, Oktober 2022) <<https://verfassungsblog.de/a-chamber-of-certain-liability/>> accessed 2 August 2023.

³⁶⁶ Elisabeth Schimpfössl and Ilya Yablokov, 'Post-Socialist Self-Censorship: Russia, Hungary and Latvia' (2020) 35 *European Journal of Communication* 29, 33–34.

³⁶⁷ Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content; Act CLXXXV of 2010 on Media Services and Mass Media.

Media Authority was a former Fidesz MP appointed for a nine year term.³⁶⁸ The Media Council together with the Media Authority now control Hungarian public service media outlets such as radio and television channels and the national news service leading to the vast majority of public media serving the Fidesz government's propaganda purposes.³⁶⁹ The Media Council can issue fines to any journalist whose content they interpret as being not "balanced, accurate, thorough, objective and responsible".³⁷⁰ By 2015, a third of journalists stated they engaged in self-censorship by hiding or distorting information in order to keep their jobs.³⁷¹ Orbán justified reforms to Hungary's national media by saying they were a "corrective" measure to reduce the influence of left and liberal bias in the country's media.³⁷²

After public media outlets were fully under political control, Fidesz turned to seeking control of the private media sphere too.³⁷³ Fidesz has allowed for the steady concentration of media ownership in the hands of their allies. The Central European Press and Media Foundation (Közép-Európai Sajtó és Média Alapítvány, KESMA), is a pro-Fidesz media conglomerate which has helped facilitate the creation of the pro-government media environment.³⁷⁴ In 2018, 476 media outlets were donated to KESMA by Fidesz's political allies.³⁷⁵ Even though these outlets had already been owned by oligarchs and other Fidesz loyalists before, this extensive monopolisation of media ownership allows Fidesz extensive control over the media landscape.³⁷⁶ Furthermore, KESMA was founded under a Decree of the Prime Minister and declared to be of "national strategic

³⁶⁸ Bánkuti, Halmai and Scheppele (n 99) 140.

³⁶⁹ Robert Sata and Ireneusz Pawel Karolewski, 'Caesarean Politics in Hungary and Poland' (2020) 36(2) East European Politics 206, 7.

³⁷⁰ Article 83(1c) and 83(1m) Act CLXXXV of 2010 on Media Services and Mass Media.

³⁷¹ Schimpfössl and Yablokov (n 366) 33–34.

³⁷² Marius Dragomir, 'The State of Hungarian Media: Endgame' (*London School of Economics*, 29 August 2017) <<https://blogs.lse.ac.uk/medialse/2017/08/29/the-state-of-hungarian-media-endgame/>> accessed 6 March 2023.

³⁷³ *ibid.*

³⁷⁴ International Press Institute, 'Mission Report: Media Freedom in Hungary Ahead of 2022 Election' (2022) 3–6 <https://ipi.media/wp-content/uploads/2022/03/HU_PressFreedomMission_Report_IPI_2022.pdf> accessed 13 December 2022.

³⁷⁵ Bard and others (n 279) 21.

³⁷⁶ *ibid.*

importance” meaning that the Competition Office cannot review the body for monopolising media.³⁷⁷ The legal legitimacy of KESMA was also affirmed by the Constitutional Court in 2020 despite the obvious issues regarding this courts independence.³⁷⁸

Overall, Fidesz has distorted the media landscape in their favour by operating a system of patronage where wealthy businessmen and oligarchs close to Orbán and Fidesz are rewarded for their loyalty. For example, in early 2021 legislation was enacted regulating the use of drones after footage from drones revealing the assets of Orbán’s wealthy ally, Lőrinc Mészáros, were published in the media.³⁷⁹ The new law has a chilling effect on journalists as an offence under this act carries up to one year imprisonment.³⁸⁰ Similarly, public money is used to fund media outlets that are aligned with Fidesz ideology.³⁸¹ Even within the Hungarian Parliament, the attack on media freedom is apparent with the Speaker of the Parliament imposing strict rules around journalists activity in Parliament in 2019.³⁸² Independent journalists have been denied access to some news conference, recordings and interviews have been banned and journalists are confined to a press room and a small press section.³⁸³

Since the Fidesz governments elections in 2010, a systematic attack on Hungarian civil society was developed. This attack primarily focused on NGOs and academic institutions that were in receipt of foreign funding.³⁸⁴ The series of attacks on NGOs began with the public discrediting of NGOs in Hungary that were in receipt of the EEA/Norway Grants NGO Fund. This public shaming was perpetrated by Fidesz officials including Prime Minister Orbán who claimed that these NGOs represented “foreign interests”, essentially

³⁷⁷ Government Decree 229/2018. (XII. 5.).

³⁷⁸ *Hungarian Constitutional Court, Decision 16/2020 (VII 8) AB.*

³⁷⁹ Bard and others (n 279) 21–22.

³⁸⁰ *ibid* 22.

³⁸¹ *ibid.*

³⁸² *ibid* 23.

³⁸³ *ibid.*

³⁸⁴ Petra Bárd, ‘The Rule of Law and Academic Freedom or the Lack of It in Hungary’ (2020) 19 *European Political Science* 87, 87–88.

painting these institutions as enemies of the state.³⁸⁵ The attack on these NGOs also included illegal state audits into the use of EEA/Norway Grants NGO funds, criminal charges along with police raids of the NGO's premises and the suspension of their tax numbers.³⁸⁶ Although all criminal procedures were terminated without criminal charge by 2016, the attack on NGO's in 2017 reached an apex with the "seed of hostility" against NGOs planted in the minds of citizens.³⁸⁷ In June 2017 the bill on the Transparency of Organisations Receiving Foreign Funds ("Lex NGO") was adopted by the Parliament with little parliamentary debate and no public consultation.³⁸⁸ This new law orders organisations in receipt of foreign funds of more than 7.2 million HUF (approximately 23,000 EUR) annually to register at court and to label themselves as an organisation funded by foreign money on their publications and their website. Sanctions for non-compliance to this law include fines and eventual abolition for persistent defiance.³⁸⁹ Bárd criticises the government's attack on NGOs as coming very close to "demonizing dissenters as terrorists" and notes that the government is claiming "that NGOs receiving foreign support are helping asylum seekers, and among them terrorists, to enter the country".³⁹⁰ This claim that NGOs receiving foreign funding are a threat to national security is apparent in the preamble of the Lex NGO Act and the additional explanatory document attached to the bill on civil society organisation.³⁹¹

³⁸⁵ Hungarian Helsinki Committee, 'Timelines of Governmental Attacks against NGOs' (HHC 2017) 1 <https://helsinki.hu/wp-content/uploads/Timeline_of_gov_attacks_against_HU_NGOs_short_17112017.pdf> accessed 6 March 2023.

³⁸⁶ *ibid.*

³⁸⁷ Petra Bárd, 'The Hungarian "Lex NGO" before the CJEU: Calling an Abuse of State Power by its Name' (*Verfassungsblog*, 27 January 2020) <<https://verfassungsblog.de/the-hungarian-lex-ngo-before-the-cjeu-calling-an-abuse-of-state-power-by-its-name/>> accessed 6 March 2023.

³⁸⁸ Act LXXVI of 2017 on the Transparency of Organisations Receiving Foreign Funds; Bárd, 'The Hungarian "Lex NGO" before the CJEU' (n 387).

³⁸⁹ Bárd, 'The Hungarian "Lex NGO" before the CJEU' (n 387); Hungarian Helsinki Committee (n 385) 1,28.

³⁹⁰ Bárd, 'The Hungarian "Lex NGO" before the CJEU' (n 387).

³⁹¹ Act LXXVI of 2017 on the Transparency of Organisations Receiving Foreign Funds; Bárd, 'The Hungarian "Lex NGO" before the CJEU' (n 387).

A formal letter from the European Commission condemning the Lex NGO law was followed by a reasoned opinion in October 2017.³⁹² This constituted the second step of infringement proceeding where the European Commission stated it:

“had decided to start legal proceedings against Hungary for failing to fulfil its obligations under the Treaty provisions on the free movement of capital, due to provisions in the NGO Law which indirectly discriminate and disproportionately restrict donations from abroad to civil society organisations. In addition to these concerns, the Commission is also of the opinion that Hungary violates the right to freedom of association and the right to protection of private life and personal data enshrined in the Charter of Fundamental Rights of the European Union, read in conjunction with the EU Treaty provisions.”³⁹³

Dissatisfied with Hungary’s denial of these allegations and their attempts to stall dialogue with the Commission on this issue, the Commission proceeded to take the case to the Court of Justice of the European Union (CJEU) where Advocate General Sánchez-Bordona issued his opinion.³⁹⁴ He was of the opinion that the Lex NGO law “unduly restricts the free movement of capital, in that it includes provisions which amount to unjustified interference with the fundamental rights of respect for private life, protection of personal data and freedom of association protected by the Charter.”³⁹⁵ On 18 June 2020 the CJEU held that the Hungarian government’s Lex NGO “introduced discriminatory and unjustified restrictions on foreign donations to civil society organisations”. The Court followed the reasoning of Advocate General Sánchez-Bordona in finding that the Hungarian authorities infringed upon Article 63 TFEU (free movement of capital) as well as Articles 7 (right to respect for private and family life), 8 (right to the protection of personal data) and 12 (right to freedom of association) of the EU Charter of Fundamental

³⁹² Hungarian Helsinki Committee (n 385) 35.

³⁹³ European Commission, ‘Press Release: Infringement: European Commission Steps up Infringement against Hungary on NGO Law’ (10 April 2017)

<https://ec.europa.eu/commission/presscorner/detail/FI/IP_17_3663> accessed 6 March 2023.

³⁹⁴ Bárd, ‘The Hungarian “Lex NGO” before the CJEU’ (n 387).

³⁹⁵ *Case C-78/18 Commission v Hungary ECLI:EU:C:2020:1, Opinion of AG Campos Sánchez-Bordona.*

Rights.³⁹⁶ However despite this judgment, Lex NGO was not repealed until 2021. The damage had also been already inflicted at this stage as NGOs have been weakened and stigmatised in the public's eyes.³⁹⁷

The attack on civil society did not end with the assault on NGOs. In April 2017 the Fidesz led government introduced reforms on the national higher education institutions. This was an ill-disguised attempt to push out the Central European University (CEU) out of Budapest.³⁹⁸ The CEU was also funded by foreign capital as were the targeted NGO's. The CEU represented everything the Fidesz government were suspicious of such as the rule of law, fundamental rights, pluralism, justice, transparency, liberalism and political accountability.³⁹⁹ As the CEU was set up to provide American-style education outside of the US it is clear why Fidesz would be opposed to it.⁴⁰⁰ Before the introduction of the crucial bill aimed at abolishing the CEU and other foreign-funded universities, a pro-government website published a scathing opinion on the universities based on an unpublished government audit that accused them of cheating.⁴⁰¹ The bill aimed at reforming/abolishing these universities came soon after, being pushed through the legislature in secretive and expedited procedure. Fidesz then accused the CEU of being "fake" and claimed that George Soros, the billionaire that funds the university, conspired against Hungary.⁴⁰²

The resulting law (Lex CEU) made significant demands of universities it was created to target.⁴⁰³ For the CEU to be allowed to operate they now were required to establish two

³⁹⁶ Petra Bárd, Joelle Grogan and Laurent Pech, 'Defending the Open Society against Its Enemies' (*Verfassungsblog*, 22 June 2020) <<https://verfassungsblog.de/defending-the-open-society-against-its-enemies/>> accessed 14 February 2023.

³⁹⁷ Amnesty International, 'Hungary: LexNGO Finally Repealed but a New Threat Is on the Horizon' (*Amnesty International*, 18 May 2021) <<https://www.amnesty.org/en/latest/press-release/2021/05/hungary-lexngo-finally-repealed-but-a-new-threat-is-on-the-horizon/>> accessed 14 February 2023.

³⁹⁸ Bárd, 'The Rule of Law and Academic Freedom or the Lack of It in Hungary' (n 384) 87–88.

³⁹⁹ *ibid* 87–89.

⁴⁰⁰ Zsolt Enyedi, 'Democratic Backsliding and Academic Freedom in Hungary' (2018) 16(4) *Perspectives on Politics* 1067, 1067.

⁴⁰¹ *ibid* 1067–1068.

⁴⁰² *ibid* 1068.

⁴⁰³ Act XXV of 2017 modifying Act CCIV of 2011 on National Higher Education.

treaties, one with the Hungarian government and the United States Federal government and separately a treaty between the Hungarian government and the State of New York under unreasonable deadlines.⁴⁰⁴ The attack on foreign-funded universities, most notably the CEU, attracted international condemnation and criticism. Twenty Nobel Laureates, the European Parliament, Parliamentary Assembly of the Council of Europe, Venice Commission and a spokesperson for Angela Merkel condemned this severe attack on academic freedom.⁴⁰⁵ In October 2020, the CJEU made it clear that Lex CEU was in contrary to the General Agreement on Trade in Services of the WTO, Article 49(1) TEU, the Services Directive 2006/123, and Article 14(3) on the freedom to found educational establishments and Article 16 on the freedom to conduct a business of the Charter of Fundamental Rights.⁴⁰⁶ However, this judgment only serves a symbolic value for the CEU and Hungarian academic freedom in general as the time it took for the case to be heard by the CJEU, the CEU had already moved many of its activities to Vienna meaning that Fidesz's Lex CEU had succeeded in its purpose.⁴⁰⁷

3.4.2. Limiting Media Freedom, Civil Society and Academic Freedom in Poland

Once in power, PiS wasted no time in purging Polish independent media and replacing it with their own “propaganda machine”.⁴⁰⁸ PiS promptly removed two hundred journalists from public media television and radio and in their place, far-right fringe journalists took office.⁴⁰⁹ In 2015, PiS introduced the ‘Small Media Act’ which politicised public service media in Poland.⁴¹⁰ A few days before the Small Media Act expired in 2016, the National Media Act was introduced which consolidated the government's hold on public media.⁴¹¹ This law created the National Media Council (*Rada Mediów Narodowych*) which now worked as a parallel supervisory system for media along with the existing National Council

⁴⁰⁴ Enyedi (n 400) 1068.

⁴⁰⁵ *ibid.*

⁴⁰⁶ Bard and others (n 279) 25.

⁴⁰⁷ Petra Bárd, ‘A Strong Judgment in a Moot Case: Lex CEU before the CJEU’ (*Reconnect*, 12 November 2020) <<https://reconnect-europe.eu/blog/a-strong-judgment-in-a-moot-case-lex-ceu-before-the-cjeu/>> accessed 14 February 2023.

⁴⁰⁸ Sadurski, *Poland's Constitutional Breakdown* (n 101) 138–139.

⁴⁰⁹ *ibid.*

⁴¹⁰ Act of Law on Broadcasting, 30 December 2015 as amended, Official Journal 2016, item 25.

⁴¹¹ Act of Law on the National Media Council, 22 June 2016, Official Journal 2016, item 929.

of Radio and TV Broadcasting (*Krajowa Rada Radiofonii i Telewizji*, KRRiTV).⁴¹² The new National Media Council consisted of five members who were elected by the President and three out of five were representatives of PiS.⁴¹³ The National Media Board has now also been staffed by PiS loyalists which raises alarm as this body has control over all television and radio activities.⁴¹⁴

Overall, PiS has undertaken a policy to “repolonise” and “deconcentrate” the Polish media market since coming to power.⁴¹⁵ In 2020, the Polish government used its powers over companies owned by the State Treasury to buy stakes in media businesses.⁴¹⁶ A government controlled oil company, PKN Orlen, purchased a 65% stake in a newsstand operator with 1,300 kiosks in Poland.⁴¹⁷ This allows PiS influence over what newspapers are sold and displayed in newsstands. Furthermore, a long awaited development around the so-called Lex-TVN bill came in 2022 when President Duda vetoed the bill which threatened to complete PiS’s capture of free media and ruin relations between Poland and the US.⁴¹⁸ Talks around introducing a law which would have limited media ownership by foreign companies to between 15% to 30% would have impacted companies such as Swiss-German Ringier Axel Springer Polska and the US media company Discovery.⁴¹⁹ The PiS government has already had a dispute with the US State Department regarding a fine the PiS controlled National Media Council issued the Discovery owned TV channel, TVN, in 2016 over their reporting of the protests after the PiS imposed judicial reforms.⁴²⁰ This fine was later withdrawn by the Council after criticism from the US. Such actions by the government were clearly designed to discourage criticism of PiS’s illiberal policies by the

⁴¹² Sadurski, *Poland’s Constitutional Breakdown* (n 101) 138–139.

⁴¹³ *ibid* 139.

⁴¹⁴ *ibid*.

⁴¹⁵ International Press Institute, ‘Democracy Declining: Erosion of Media Freedom in Poland, Media Freedom Rapid Response (MFRR) Press Freedom Mission To Poland’ (2020) 4 <https://ipi.media/wp-content/uploads/2021/02/20210211_Poland_PF_Mission_Report_ENG_final.pdf> accessed 20 December 2022.

⁴¹⁶ *ibid* 9.

⁴¹⁷ *ibid* 9–10.

⁴¹⁸ Anabelle Chapman, ‘Poland: Veto of “Lex-TVN” a Victory for Media Freedom’ (10 January 2022) <<https://ipi.media/poland-veto-of-lex-tvn-a-victory-for-media-freedom/>> accessed 20 December 2022.

⁴¹⁹ International Press Institute (n 415) 9.

⁴²⁰ Sata and Karolewski (n 369) 8.

media.⁴²¹ However, in 2022 President Duda vetoed Lex-TVN much to the dismay of the PiS government.⁴²² Clearly this law would have been a step too far even for Duda as criticism had mounted from the EU, US and civil society over the concentration of media ownership in the hands of PiS and their allies under the guise of improving media pluralism.⁴²³

The PiS government also went out of their way to limit civil society by centralising the distribution of funds to NGOs. PiS used legislation to establish two new entities that would now be completely in charge of the distribution of funds to NGOs. The Committee for Public Benefit and The National Institute of Freedom: Centre for the Development of Civil Society.⁴²⁴ The Committee of Public Benefit is composed mostly of government officials which is problematic considering the wide scope of responsibility the committee has in respect of financing civil society organisations.⁴²⁵ They also have the power to appoint and dismiss members of the Public Benefit Council and the director and deputy director of the National Institute of Freedom.⁴²⁶

The National Institute of Freedom's purpose is to help with the allocation of funds to civil society organisations and to support their development.⁴²⁷ The president of the Committee reporting to the country's Prime Minister, has significant discretionary powers to allocate grants to NGOs.⁴²⁸ Sadurski notes that the design of governance in the Institute is entirely responsive to the government.⁴²⁹ Even though NGOs are represented in the council, they are outnumbered by government officials (5 to 6) and this Council

⁴²¹ *ibid.*

⁴²² Chapman (n 418).

⁴²³ *ibid.*

⁴²⁴ Sadurski, *Poland's Constitutional Breakdown* (n 101) 144.

⁴²⁵ *ibid* 144–145.

⁴²⁶ Article 35(2) of Act of Law on Public Benefit Activity and Volunteerism, 23rd April 2003 as amended, Official Journal 2016, item 1817; Article 5-7 and Article 10-11 of the Act of Law on the National Institute of Freedom: Centre for the Development of Civil Society, 13 October 2017, Official Journal 2017, item 1909.

⁴²⁷ Article 1(2) of the Act of Law on the National Institute of Freedom: Centre for the Development of Civil Society, 13 October 2017.

⁴²⁸ Sadurski, *Poland's Constitutional Breakdown* (n 101) 144–146.

⁴²⁹ *ibid.*

only has an advisory role.⁴³⁰ The president of the Committee who is once again a member of the PiS government, bares the most significant powers.⁴³¹ This clear domination of the government in funding of NGOs is even more worrying considering that clear preference is given to NGOs with a conservative Christian ethos that mirrors that of PiS. While 'liberal' or 'left' leaning organisations are deprived of funding.⁴³² One such instance was the denial of funding to women's rights organisations such as the Women's Rights Centre who provided support for women suffering from domestic violence.⁴³³ This organisation had funding suspended because the government claimed it was discriminatory towards men who can also experience domestic violence.⁴³⁴ A particular section of NGOs that have been effected badly by this new centralised model is NGOs who support asylum seekers and refugees.⁴³⁵ The Polish government now has the power to reward NGOs who are aligned with their political position while limiting and punishing the NGOs that dare to speak out against the government or that do not align with their Christian conservative agendas.⁴³⁶

Academic freedom has also been under attack in Poland although the problem has not so far been as acute as that in Hungary. In October 2018, the Act on Higher Education entered into force in Poland and spurred on multiple reforms of the higher education system which were directly aimed at limiting freedom of expression of Polish academics and furthering the ideological conservative views of the ruling party.⁴³⁷ A notable example of the restrictions of freedom of expression come from the ruling party and their

⁴³⁰ Helsinki Foundation for Human Rights, 'The Situation of the Civil Society Organizations in Poland' (HFHR 2019) 4 <<http://civicspacewatch.eu/poland-report-on-the-situation-of-the-civil-society-organisations/>> accessed 3 June 2023.

⁴³¹ Sadurski, *Poland's Constitutional Breakdown* (n 101) 144.

⁴³² *ibid.*

⁴³³ Civic Solidarity, 'Polish Authorities Reduce the Space for the Activities of NGOs Including Human Rights Organizations in the Country | Civic Solidarity' (24 April 2018) <<http://www.civicsolidarity.org/article/1545/polish-authorities-reduce-space-activities-ngos-including-human-rights-organizations>> accessed 6 March 2023.

⁴³⁴ Helsinki Foundation for Human Rights (n 430) 3.

⁴³⁵ *ibid.*

⁴³⁶ Sadurski, *Poland's Constitutional Breakdown* (n 101) 144–145.

⁴³⁷ Marta Bucholc, 'Academic Freedom in Poland' in Kirsten Roberts Lyer, Ilyas Saliba and Janika Spannagel, *University Autonomy Decline* (1st edn, Routledge 2022) 124.

associates bringing cases against Professor Wojciech Sadurski.⁴³⁸ Multiple cases were initiated on civil and criminal grounds due to Professor Sadurski's criticism of the ruling party on Twitter in 2019. Although the cases were either dropped or decided in Professor Sadurski's favour, the ruling party's continuous pressure on a critic of their regime has chilling effects on all reasonable political descent.⁴³⁹

3.5. 'Gender Ideology' and Attacks on Minority Rights

Both the Polish and Hungarian governments have perpetrated extensive assaults on minority rights in the last decade. Despite respect for minority rights being a fundamental EU value, it has become vulnerable to widespread assault at the hands of Fidesz and PiS. Minorities such as the LGBTQ+ community, Roma minority, migrants and religious and ethnic minorities have been targeted in an effort to minimise their democratic voice while also being villainised as a group to further the governments' populist illiberal policies. The so-called 'war on gender' has also featured prominently in Poland and Hungary in recent years, similarly to much of the CEE region.⁴⁴⁰ These anti-gender movements have used "gender ideology" as a catchall term encompassing women's movements and sexual minority movements and framed these as a threat to traditional values.⁴⁴¹ In this way, the regimes in both Poland and Hungary display aspects of ethnopopulism which combines nationalism and cultural conservatism with populism.⁴⁴² Like populism, nationalism is an ideology based on identity politics, so these two concepts work well together as an electoral strategy.⁴⁴³ Jenne defines the concept of ethnopopulism as

⁴³⁸ Gráinne de Búrca and John Morijn, 'Repression of Freedom of Expression in Poland: Renewing Support for Wojciech Sadurski' (*Verfassungsblog*, 3 June 2020) <<https://verfassungsblog.de/repression-of-freedom-of-expression-in-poland-renewing-support-for-wojciech-sadurski/>> accessed 15 February 2023.

⁴³⁹ Mateusz Mikowski, 'He Described PiS as an "Organized Criminal Group"'. The Final Victory of Prof. Sadurski, the Supreme Court Did Not Accept the Cassation' *Dziennik Gazeta Prawna* (21 January 2022) <https://www-gazetaprawna-pl.translate.google.com/wiadomosci/kraj/artykuly/8339072,sadurski-zorganizowana-grupa-przestepcza-pis.html?_x_tr_sl=pl&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc> accessed 15 February 2023.

⁴⁴⁰ Vida (n 203) 13.

⁴⁴¹ *ibid* 13–14.

⁴⁴² Jenne (n 110).

⁴⁴³ Sherrill Stroschein, 'Populism, Nationalism, and Party Politics' (2019) 47(6) *Nationalities Papers* 923, 10.

combining the two core issues of both nationalism and populism, i.e. by villainising both outgroups and elites:

“The populist metanarrative holds that ‘the people’ who are politically affiliated with the leader and exploited by domestic and global ‘elites.’ The nationalist metanarrative holds that the subset is members of ‘the nation’ who are threatened by ‘enemy nations’ or ‘national others.’ Ethnopolitism blends these threats by propagating narratives whereby enemies from beyond (migrants, immigrants, ethnic minorities) couple or even conspire with enemies from above (the EU, UN, IMF, ‘global elites’ or foreign powers) to undermine or even denationalize the nation-people.”⁴⁴⁴

Ethnopolitists will make-up external threats that they will use to justify their illiberal actions once in office under the guise of saving ‘the people’.⁴⁴⁵ In Poland and Hungary this has mainly taken the form of ‘protection’ from Muslim refugees, immigrants and international organisations like the EU.⁴⁴⁶ The conspiracy pushed by ethnopolitists is that refugees and immigrants threaten national security, the economy or culture of the titular people and that international organisations such as the EU conspire with internal enemies such as opposition parties, NGOs, the media or anyone who advocates for liberal values.⁴⁴⁷ Ethnopolitism is said to be more flexible than ethnic nationalism as a political tactic as it can fabricate enemies out of many different groups in society.⁴⁴⁸ Similarly, ‘the people’ that need to be protected from a perceived threat can be defined “very flexibly in terms of a culture, ethnicity, religion or even civilisation.”⁴⁴⁹ It is important to note that rhetoric of ethnopolitist illiberal parties may resonate in the CEE region especially well. Decades of communism has stifled the regions’ exposure to multiculturalism and an array of different races, religions and ethnicities.⁴⁵⁰ The East is also seen as less supportive of

⁴⁴⁴ Jenne (n 110) 549.

⁴⁴⁵ Anna Vachudova (n 107) 3.

⁴⁴⁶ *ibid.*

⁴⁴⁷ *ibid.*

⁴⁴⁸ *ibid.*

⁴⁴⁹ *ibid.*

⁴⁵⁰ *ibid* 5.

liberal democracy as a form of governance due to their limited exposure.⁴⁵¹ However, this underlying predisposition is exploited by ethnopopulist parties like PiS and Fidesz, who exaggerate existing issues along with fabricating non-existent ones. Therefore, ethnopopulist and culturally conservative sentiments gain support through a vicious cycle: existing illiberal sentiments in the voter base are tapped into and exploited by populists for political gain which in turn stokes further fear amongst voters.⁴⁵²

PiS and Fidesz are notorious for using ethnopopulist rhetoric which promises to defend traditional family values against Muslims and multiculturalism in general.⁴⁵³ The weaponised form of cultural conservatism that has flourished in Poland and Hungary has also attacked the rights of women and sexual minorities in an effort to entrench strongly majoritarian narratives.⁴⁵⁴

3.5.1. Assault on Minority and Women's Rights in Hungary

Since coming to power in 2010, the Fidesz-KDNP coalition have attacked reproductive rights, the rights of sexual minorities as well as 'othering' various ethnic minorities, especially immigrants. Hungarian women are considered to be reproductive citizens with their most important role being wives and mothers.⁴⁵⁵ This conception is informed by traditional values but also by fear of demographic decline.⁴⁵⁶ The Fidesz government has introduced generous economic incentives to families and mothers who have larger families while also insisting that the demographic deficit needs to be solved internally rather than populating Hungary with Muslim immigrants.⁴⁵⁷ Since Fidesz has come to power, abortion rights have been heavily restricted with the new 2012 Constitution protecting the foetus from the time of conception.⁴⁵⁸ The medical abortion pill was also banned in 2012 and mandatory counselling before surgical abortions was introduced.⁴⁵⁹

⁴⁵¹ Grigore Pop-Eleches and Joshua A Tucker, *Communism's Shadow: Historical Legacies and Contemporary Political Attitudes* (Princeton University Press 2017) 17–18.

⁴⁵² Anna Vachudova (n 107) 4.

⁴⁵³ Jenne (n 110) 550; Anna Vachudova (n 107) 3.

⁴⁵⁴ Anna Vachudova (n 107) 3,11.

⁴⁵⁵ Vida (n 203) 15.

⁴⁵⁶ *ibid.*

⁴⁵⁷ *ibid* 14–15.

⁴⁵⁸ Article 11, The Fundamental Law of Hungary.

⁴⁵⁹ Vida (n 203) 14.

The Hungarian school curriculum was also amended to exclude gender studies as a further way to eliminate education on gender identity.⁴⁶⁰ While at university level, two Master's degrees on gender studies at Eotvos Lorand University and the CEU were banned and replaced with "Economics of Family Policy and Public Policies for Human Development" programme despite opposition from the universities.⁴⁶¹

Fidesz's political identity has also long revolved around their rejection of immigrants and this has proven to be a successful electoral tactic which helped Fidesz secure their successive electoral wins.⁴⁶² Orbán has positioned himself as a protector of 'Christian Europe' against the oncoming 'Muslim invasion' during the 2015 migration crisis.⁴⁶³ These xenophobic and racist sentiments have become a core identity of Fidesz and has had detrimental effects on the treatment of immigrants in Hungarian society.⁴⁶⁴ This has perhaps been most evident in Hungary's treatment of asylum seekers, with Hungary building fences to keep migrants out or creating illegal transit zones and engaging in controversial push-backs.⁴⁶⁵ These actions by the Hungarian government have been condemned by the CJEU and the ECtHR in recent years.⁴⁶⁶ Besides villainising migrants, Orbán has also attacked the rights of the Roma community in Hungary with the Prime Minister declaring Roma people as workshy and their children as violent and unfit for education in the aftermath of the European Commission launching infringement

⁴⁶⁰ *ibid* 14–15.

⁴⁶¹ Central European University, 'CEU Reiterates Opposition to Removal of Gender Studies Programs in Hungary' (16 October 2018) <<https://www.ceu.edu/article/2018-10-16/ceu-reiterates-opposition-removal-gender-studies-programs-hungary>> accessed 15 December 2022; Vida (n 203) 14–15; Christopher Adam, 'Gender Studies Programs to Be Banned in Hungary' (*Hungarian Free Press*, 10 August 2018) <<https://hungarianfreepress.com/2018/08/10/gender-studies-programs-to-be-banned-in-hungary/>> accessed 16 December 2022.

⁴⁶² András Bíró-Nagy, 'Orbán's Political Jackpot: Migration and the Hungarian Electorate' (2022) 48(2) *Journal of Ethnic and Migration Studies* 405, 410–412.

⁴⁶³ *ibid* 406.

⁴⁶⁴ *ibid* 418–421.

⁴⁶⁵ *ibid* 406; Bard and others (n 279) 32–35.

⁴⁶⁶ *Shahzad v Hungary App no 12625/17 (ECtHR, 8 July 2021)*; *Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság, ECLI:EU:C:2020:367*.

proceedings against Hungary for their systemic discrimination against Roma children in schools.⁴⁶⁷

3.5.2. Assault on Minority and Women's Rights in Poland

PiS in Poland has also exploited minorities for political gain. During the presidential and parliamentary elections in 2015, PiS candidates campaigned on the basis of rejecting EU migrant quotas.⁴⁶⁸ Migrants from Africa and Asia in particular were portrayed as violent criminals that threatened Polish culture and way of life. Kaczynski even claimed that these immigrants are likely to carry diseases that Polish people do not have immunity to.⁴⁶⁹ Overall, stoking fear about immigrants produced favourable political results for PiS as they secured a win in both the presidential and parliamentary elections, albeit narrowly.⁴⁷⁰ This was despite the fact that Muslim migrants made up less than one percent of the Polish population in 2016, but discrimination and fear of migrants was at an all-time high.⁴⁷¹ This shows that PiS were instrumental in fabricating the issue of migrants flooding Poland and threatening Polish identity as fear produces high electoral turnouts. Kinowska-Mazaraki also notes that the small proportion of migrants in Poland means that Polish voters have very little interaction with them so stirring up fear around an imaginary threat is easier than when people have first-hand experiences with members of different religions and cultures.⁴⁷²

For the 2019 general elections, PiS created a new narrative to fuel emotional voting but this time sexual minorities and gender ideology were villainised. Traditional Catholic views are intertwined with PiS policies and identity. PiS disproportionately favours organisations affiliated with the Polish Catholic Church or conservative value.⁴⁷³ This has

⁴⁶⁷ Bernard Rorke, 'Antigypsyism in Hungary: The Gyöngyöspata Case versus "the People's Sense of Justice"' in Andrew Ryder, Marius Taba and Nidhi Trehan (eds), *Romani Communities and Transformative Change: A New Social Europe* (1st edn, Policy Press 2020) 96–97.

⁴⁶⁸ Zofia Kinowska-Mazaraki, 'The Polish Paradox: From a Fight for Democracy to the Political Radicalization and Social Exclusion' (2021) 10(3) *Social Sciences* 112, 8–9 <<https://www.mdpi.com/2076-0760/10/3/112>> accessed 8 November 2022.

⁴⁶⁹ *ibid* 8.

⁴⁷⁰ *ibid* 4.

⁴⁷¹ *ibid* 9.

⁴⁷² *ibid* 10–11.

⁴⁷³ *ibid* 2.

created a toxic narrative where ‘Polishness’ has been equated to support of conservative Catholic ideology so anyone who does not agree with such values is deemed a traitor of Poland.⁴⁷⁴ Therefore, LGBT+ rights have been rejected with PiS claiming gender ideology has been imported to Poland from abroad and threatens Polish culture, values and the biological continuation of Poland.⁴⁷⁵ PiS successfully evoked strong emotional responses from the voter base around LGBT+ issues and this continued to dominate public discourse.⁴⁷⁶ Local authorities endorsed the notion of “LGBT-Free Zones” and the Polish national broadcaster aired a homophobic documentary entitled “Invasion” claiming that the LGBT movement is being enforced by subversive foreign powers on the Polish people.⁴⁷⁷ During his re-election campaign in 2020, Andrzej Duda claimed that LGBT rights are “more harmful than communism”.⁴⁷⁸ In late 2020, PiS moved to restrict abortion rights even though Poland had one of the strictest regimes around abortion in Europe. The PiS-led parliament referred to the Constitutional Tribunal to clarify whether abortion in the case of fatal foetal abnormality was compatible with the Polish Constitution.⁴⁷⁹ The packed Constitutional Tribunal ruled on the 22nd of October 2020 that abortion in such cases was contrary to the Constitution resulting in an almost absolute ban on abortion in Poland.⁴⁸⁰ Swathes of protesters turned out on the streets of Poland to condemn the decision despite the dangers of the Covid-19 pandemic at the time.⁴⁸¹ Along the same lines, PiS has moved to withdraw from the Istanbul Convention and refuses to fully commit to protecting women against violence for fear that ratifying this convention could lead to the acceptance of gender ideology.⁴⁸² However, despite this it is clear that

⁴⁷⁴ Law and Justice Party, PiS, ‘Dobry Czas Dla Polski: Program Prawa i Sprawiedliwości’ 14 <http://pis.org.pl/files/Program_PIS_2019.pdf> accessed 16 December 2022.

⁴⁷⁵ Kinowska-Mazaraki (n 468) 10.

⁴⁷⁶ *ibid.*

⁴⁷⁷ *ibid.*

⁴⁷⁸ BBC, ‘Polish Election: Andrzej Duda Says LGBT “ideology” Worse than Communism’ (*BBC*, 14 June 2020) <<https://www.bbc.com/news/world-europe-53039864>> accessed 17 December 2022.

⁴⁷⁹ *Polish Constitutional Tribunal Judgment of 22 October 2020, Ref K 1/20, OTK ZU A/2021, item 4.*

⁴⁸⁰ *ibid.*

⁴⁸¹ Kinowska-Mazaraki (n 468) 12–13.

⁴⁸² Krizsán and Roggeband (n 212) 227; Sandrine Amiel, ‘Istanbul Convention: Poland Moves a Step Closer to Quitting Domestic Violence Treaty’ (4 January 2021)

<<https://www.euronews.com/2021/04/01/istanbul-convention-poland-moves-a-step-closer-to-quitting-domestic-violence-treaty>> accessed 17 December 2022.

Poland, like Hungary, prioritises women's importance as reproductive citizens rather than autonomous citizens that are equal to their male counterparts and the restriction of abortion rights and refusal to acknowledge the issue of violence against women is a symptom of this.

3.6. Conclusion

So far, populist leaders in Poland and Hungary have proven to be particularly successful in entrenching their position in power through their attacks on the key features of liberal constitutional democracy. This chapter has noted how the combination of manipulating electoral laws, stripping courts of independence, hijacking the media landscape and undermining minority rights has led to democratic backsliding in both Poland and Hungary. Fidesz and PiS's tactic of tilting the electoral playing field in their own favour was the first step in guaranteeing their future electoral success. Through packing the PKW, Polish authorities were in a position to ensure their subsequent electoral success as the PKW has authority over the division of electoral districts and fund allocation for political parties. While Hungary introduced a dual voting system which allowed ethnic Hungarians from bordering countries to vote more easily than Hungarian residents living abroad which boosted Fidesz's voter base. Furthermore, Fidesz ensured that electoral districts were redrawn in their favour ahead of the 2014 election as well as their attempt to confuse voters by putting 'fake parties' on ballots.

This chapter has outlined the ruthless and swift attack on judicial independence that took place in Poland and Hungary recently. Fidesz in Hungary undermined the Constitutional Court by limiting its jurisdiction and replacing the Hungarian Constitution in 2011 which nullified the Constitutional Court's jurisprudence under the previous constitutional regime. Alongside this, Fidesz also seized control of the court administration system which allowed them greater control of judicial appointments and dismissals. Similarly, PiS in Poland sought control of the KRS to gain control over judicial appointments and dismissals alongside packing the Constitutional Tribunal and the Supreme Court. The contentious DC was also imposed to intimidate judges who were outspoken against PiS's new illiberal regime by threatening disciplinary action over unfavourable judgments.

Both PiS and Fidesz sought to limit freedom of expression by controlling the media landscape and limiting academic freedom and civil society activities. In Hungary, legislation was introduced to make working as a journalist more difficult as reporting on certain politically sensitive topics now carried a risk of a fine that could be imposed by the Fidesz-controlled Media Council. Besides this, many media outlets are now under the control of Fidesz and their wealthy allies. Fidesz has also attacked institutions that embody liberal values and receive foreign funding. The CEU and NGOs in receipt of the EEA/Norway Grants NGO Fund were targeted through Lex CEU and Lex NGO.⁴⁸³ PiS used legislation to create the National Media Council which now works as a parallel supervisory system for media along with the existing National Council of Radio and TV Broadcasting. In general, the governing majority has attempted to “repolonise” the Polish media landscape by intimidating foreign-owned media companies such as TVN and also using their power to buy their way to controlling the media landscape.⁴⁸⁴ Regarding attacks on civil society, PiS used legislation to establish two new entities, the Committee for Public Benefit and the National Institute of Freedom: Centre for the Development of Civil Society, that are in charge of distributing of funds to NGOs. Worryingly, these new entities are controlled by the governing party and their allies. These organisations have generously handed out funds to civil society organisations who are aligned with PiS’s conservative and illiberal policies but have withheld funds from civil society groups who are considered ‘left-leaning’.⁴⁸⁵

This chapter has highlighted that both Fidesz and PiS have perpetrated extensive assaults on minority rights in the last decade by employing ethnopopulist rhetoric. Minorities such as the LGBTQ+ community, Roma minority, immigrants and religious and ethnic minorities have been targeted with the aim of minimising their democratic voice while also being villainised as out-groups to further the governments’ populist illiberal policies. The so-called ‘war on gender’ and especially the rejection of the Istanbul Convention has also featured prominently in Fidesz and PiS policies. These policies frame ‘gender

⁴⁸³ Hungarian Helsinki Committee (n 385) 1.

⁴⁸⁴ International Press Institute (n 415) 4.

⁴⁸⁵ Sadurski, *Poland’s Constitutional Breakdown* (n 101) 144–145.

ideology as a catchall term including campaigns seeking to protect women from gender-based violence and sexual minority movements and claimed that these are threats to traditional values.

4. The Risks to Liberal Constitutional Democracy in Lithuania

4.1. Introduction

The Copenhagen criteria, setting out the conditions that needed to be satisfied in order for Lithuania to be granted EU membership, required that candidate countries “achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”.⁴⁸⁶ This chapter will assess if these criteria are being respected in Lithuania seventeen years after accession to the EU. This chapter will also outline the deficiencies within the Lithuanian party system, the threats to the independence of the judiciary and media and the lack of a legal framework to protect minority rights. These factors are important to understand within Lithuania in order to ascertain the status of liberal constitutional democracy as described in chapters two and three. This chapter will identify a number of systemic issues that threaten the country’s democratic stability. The major threats identified relate to a weak and volatile political party system, deeply rooted institutional corruption, breaches of judicial independence, systemic attacks on media freedom and disrespect for minority rights. While this chapter details the issues that are prevalent in Lithuania and limiting its liberal constitutional democratic status, chapter six will deal with the question of why these issues exist. Chapter six will argue that systematic weakness of liberal constitutional democracy means that rapid democratic-backsliding seen elsewhere in the CEE region is also at risk of occurring in Lithuania.

Section 4.1 of this chapter will begin by briefly describe some of the most significant democratic milestones Lithuania reached after declaring independence in 1990 along with details of its foreign policy. Section 4.3 will discuss the volatility of the political party system in Lithuania, which combined with widespread corruption and populist rhetoric, leaves the political landscape open for an anti-system nationalist party to entrench their power. Section 4.4 will highlight the fragility of judicial independence in Lithuania and the

⁴⁸⁶ Presidency Conclusions, Copenhagen European Council (June 21–22, 1993) 7 A iii.

dysfunctionality of institutional dialogue. Undue pressure from parliament and government combined with a weakened reputation due to corruption scandals has eroded the public's trust in their courts. Section 4.5 highlights the threats to media freedom in Lithuania and the failings of the Lithuanian authorities to honour their obligation under domestic, EU and international law to preserve freedom of speech. While section 4.6 will describe the situation in Lithuania regarding minority rights. This chapter will conclude that all of the mentioned features of Lithuanian democracy give rise to concern over the possibility that Lithuania is vulnerable to democratic backsliding and a systemic breach of the rule of law.

4.2. Lithuania's Return to Europe and Democratisation

After Lithuania regained independence from the Soviet Union on 11th March 1990 there was a concerted effort by the political elites to return the state to the European community. After having been occupied by either Soviet or Nazi military forces for much of the 20th century, national security, European integration and economic stability were the top priorities of a newly independent Lithuania.⁴⁸⁷ Therefore, after consideration of the geopolitical options available to Lithuania at the time, EU and North Atlantic Treaty Organization (NATO) membership were widely considered better options than remaining neutral or strengthening relations with the Commonwealth of Independent States.⁴⁸⁸ Gaining EU membership was seen as vital in order to complete Lithuania's transitions from socialism to a sovereign democratic state. Joining the prosperous West, protecting national security, maintaining good neighbourly relations and rebuilding the economy were the main pillars of Lithuania's motivation to accede to the EU.⁴⁸⁹ The EU, after all, was an obvious choice for a newly free Lithuania as it sought to distance itself from Russia. In fact, due to the overwhelming fear that Russian forces might try to regain control of a newly free Lithuania not long after its independence, NATO membership and close relations with the United States was prioritised over EU membership in the 1990s.⁴⁹⁰ This

⁴⁸⁷ Ramūnas Vilpišauskas, 'Lithuania and the European Union', *Oxford Research Encyclopedia of Politics* (Oxford University Press 2019) 1.

⁴⁸⁸ *ibid* 7.

⁴⁸⁹ *ibid* 1; Pettai (n 18) 48.

⁴⁹⁰ Vilpišauskas (n 487) 2–3.

fear of a 1940s-style occupation proved not to be unfounded as Russia's conflict with Georgia in 2008, the annexation of Crimea in Ukraine in 2014 and ultimately the unprovoked invasion of Ukraine in 2022 proves that Russian aggression is an ever-standing geopolitical risk for its neighbours.⁴⁹¹

In 1995 Lithuania signed an association agreements with the EU signalling their intention to join the Union.⁴⁹² However, Lithuania had a considerable path ahead of it before it achieved all Copenhagen criteria with the EU Commission expressing significant concerns over Lithuania's fitness for accession in 1997.⁴⁹³ Although the EU was satisfied at an early stage that Lithuania had achieved substantial levels of democracy, the rule of law and respect for human rights, improvement was still necessary to strengthen the judiciary and reduce levels of corruption.⁴⁹⁴ Public support for EU membership was overwhelming as proven by the results of the referendum on Lithuania's accession to the EU in 2003. Of the 63.37% of the population who participated in the vote, 91.07% voted in favour for Lithuania's membership in the EU.⁴⁹⁵ Lithuania had the largest support base for EU accession of all CEE states who joined in 2004 and still experiences above average support for the EU to this day.⁴⁹⁶

After regaining independence, Lithuania rapidly reformed itself into a consolidated democracy with most democracy indices including Freedom House, Polity, and Varieties of Democracy indicating that Lithuania was already a stable electoral democracy by 1994.⁴⁹⁷ Lithuania also adopted the norms of liberal governance with respect for civil rights, rule of law and judicial independence becoming top priorities.⁴⁹⁸ Lithuania opted for a semi-presidential system of government and its party system in the first few years

⁴⁹¹ *ibid* 3.

⁴⁹² Ann-Margret Westin, in Françoise Le Gall and others (eds), *The Baltic Countries: From Economic Stabilization to EU Accession* (International Monetary Fund 1998) 64–65.

⁴⁹³ European Commission, 'Agenda 2000 - Commission Opinion on Lithuania's Application for Membership of the European Union' (Opinion) DOC/97/15.

⁴⁹⁴ *ibid* C.1.

⁴⁹⁵ Vilpišauskas (n 487) 10.

⁴⁹⁶ *ibid*.

⁴⁹⁷ Pettai (n 18) 40–41.

⁴⁹⁸ *ibid*.

of independence was consolidated and stable.⁴⁹⁹ Political parties rallied around an ‘anti-communist vs. ex-communist’ cleavage and there was a broad consensus over the goals of EU and NATO accession.⁵⁰⁰ However, Lithuania’s political party system has become increasingly more volatile and fragmented as time has gone by.⁵⁰¹

4.2.1. Overview of Lithuania’s Constitution

The Lithuanian Constitution was adopted by referendum on 25th October 1992 and had an important emphasis on the continuity of the Lithuanian state in spite of the Soviet occupation that spanned fifty years.⁵⁰² Therefore, when the Supreme Council of the Republic of Lithuania adopted the Act on the Re-establishment of the State of Lithuania on 11 March 1990, they also adopted a law that reinstated the validity of their pre-war Constitution of 1938.⁵⁰³ Although, this was merely symbolic as the validity of the pre-war constitution was almost immediately revoked and replaced by the Provisional Basic Law, which was in place until the 1992 Constitution was adopted.⁵⁰⁴ This set the tone of the new Constitution as an act re-establishing Lithuania’s independence which was taken illegally by the Soviet Union.

Overall the 1992 Constitution can be described as a liberal democratic constitution containing fundamental rights and freedoms, endorsing the rule of law, democratic rule and the separation of powers. However, an interesting quirk of the 1992 Constitution is that the first article focuses on Lithuania as an “independent democratic republic”.⁵⁰⁵ The state’s independence comes before its democratic nature and contrary to many European constitutions, the 1992 Constitution’s first chapter is devoted to the state as

⁴⁹⁹ *ibid* 41.

⁵⁰⁰ *ibid*.

⁵⁰¹ Kjetil Duvold and Mindaugas Jurkynas, ‘Lithuania’ in Sten Berglund and others (eds), *The Handbook of Political Change in Eastern Europe, Third Edition* (3rd edn, Edward Elgar, Cheltenham, UK 2013) 126–129.

⁵⁰² Irmantas Jarukaitis and Gintaras Švedas, ‘The Constitutional Experience of Lithuania in the Context of European and Global Governance Challenges’ in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) 998.

⁵⁰³ *ibid*.

⁵⁰⁴ *ibid*.

⁵⁰⁵ *ibid* 1000.

the common good of the Lithuanian people and not fundamental rights.⁵⁰⁶ According to Jarukaitis and Švedas this sequence is not coincidental but eluded to the importance of the country's sovereignty and self-preservation and freedom above all.⁵⁰⁷ This is also not surprising given the precarious geopolitical location of Lithuania and the fact that this constitution was adopted at a time when the Soviet army had still not left the country.⁵⁰⁸ The Lithuanian Constitutional Court also established itself as a powerful democratising force from the very inception as it served as an important counter-majoritarian branch.⁵⁰⁹ The Lithuanian Constitutional Court was established as a strong court in accordance with the Austro-German model as did many new CEE democracies.⁵¹⁰ The Lithuanian Constitutional Court has proven to be an important guarantor of the rule of law, separation of powers and constitutionalism throughout its existence.

4.2.2. Lithuania's Foreign Policy and Geopolitical Position

After accession to the EU, Lithuania's foreign policy centred around their role as a regional leader and a bridge between the West and the East.⁵¹¹ It was important for Lithuania to be seen as a mediator between Western forces and Russia in particular, in order to cement themselves as an integral geopolitical peacekeeper.⁵¹² This image as a central figure in European political affairs is also indicative of Lithuania's wish to restore some of their reputation and grandeur from the times of the Lithuanian Grand Duchy and the Polish–Lithuanian Commonwealth.⁵¹³ Lithuania also acted as a 'good European' by showing deference towards the EU during the pre-accession period and proved to be an unproblematic Member State once part of the Union.⁵¹⁴ This approach to EU affairs is summed up by Lithuania being the first EU country to ratify the Constitutional Treaty of

⁵⁰⁶ *ibid.*

⁵⁰⁷ *ibid.*

⁵⁰⁸ *ibid.*

⁵⁰⁹ Vaidotas A Vaičaitis, 'The Republic of Lithuania' in Bogusław Banaszak and Leonard FM Besselink (eds), *Constitutional Law of the EU Member States* (Deventer: Kluwer 2014) 1061–1065.

⁵¹⁰ *ibid.* 1061.

⁵¹¹ Vilpišauskas (n 487) 3.

⁵¹² *ibid.*

⁵¹³ *ibid.*

⁵¹⁴ *ibid.* 11.

the EU in 2004 less than two weeks after it was signed by Member State leaders.⁵¹⁵ However, Lithuania's foreign policy was also defined by their critique of Russia, especially when Russia intimidated or invaded nearby sovereign states.⁵¹⁶ Indeed, Lithuania swiftly condemned the illegal invasion of Ukraine in early 2022 and supported Ukrainian war efforts.⁵¹⁷

However, by the time the global financial crisis hit Lithuania in 2009, democratic and economic progress stalled significantly. Just as Lithuanians were beginning to feel the benefits of EU membership economically with annual economic growth ranging 7-8 percent, Lithuania's GDP dipped by 15 percent in 2009 and poverty statistics shot up in response.⁵¹⁸ Furthermore, the conservative government's handling of the financial crisis badly damaged their reputation along with peoples trust in the EU.⁵¹⁹ To this day, Lithuania experiences significant distrust in politics and democratic institutions and displays a slowly growing apathy towards democracy itself as exemplified by one of the lowest electoral turnout in Lithuania's democratic history during the 2020 general election at just 47.8 percent.⁵²⁰

2018 was a significant year for Lithuania as the country celebrated the centenary of their first declaration of independence. The handwritten declaration of independence was uncovered in an archive in Germany just a few months before the country's 100th birthday

⁵¹⁵ *ibid.*

⁵¹⁶ *ibid* 16.

⁵¹⁷ Lithuanian Foreign Ministry, 'Statement on Russian Invasion of Ukraine, One Year On' (24 February 2023) <<https://www.urm.lt/default/en/news/lithuanian-foreign-ministrys-statement-on-russias-invasion-of-ukraine-one-year-on>> accessed 15 March 2023.

⁵¹⁸ Vilpišauskas (n 487) 19; United Nations Development Programme, 'Poverty and Social Impact Analysis of the Global Economic Crisis' (2010) 10 <http://content-ext.undp.org/aplaws_publications/2819389/1958-UNDP-PSIA-Report-LR.pdf> accessed 21 May 2021.

⁵¹⁹ Pettai (n 18) 54–56; Vilpišauskas (n 487) 20.

⁵²⁰ Mait Talts, 'Some Aspects of the Baltic Countries' Pre- and Post- Accession Convergence to the European Union' (2013) 3(1) *Baltic Journal of European Studies* 58, 75; Vilpišauskas (n 487) 3; 'International Institute for Democracy and Electoral Assistance (International IDEA), Voter Turnout Statistics for Lithuania' <<https://www.idea.int/data-tools/country-view/175/40>> accessed 25 November 2020.

after being lost for over seven decades.⁵²¹ There were many aspects of Lithuania's progress worth celebrating, especially since between 1991, high standards of democracy, geopolitical security through the EU and NATO had been accomplished and Lithuanians had never lived in their history as well as they did now.⁵²² Despite this the celebration in 2018 was tinged with an unambiguous discontent.⁵²³ The economic and social prosperity, modernisation and westernisation that liberal constitutional democracy promised did not quite deliver. Vast emigration led to Lithuania's population dropping from nearly 3.5 million in 2002 to less than 2.8 million in 2021,⁵²⁴ devastating rural communities the most and leaving Lithuania with an aging population.⁵²⁵ The introduction of the Euro currency in 2015 led to significant inflation and compounded an already serious poverty issue in the country.⁵²⁶ This combined with persistently low trust in democratic institutions, corruption and political party fragmentation made the rhetoric of an organised, modern and prosperous Lithuania difficult to sell to a polity. These factors lead to Lithuania being at risk of the democratic fatigue sweeping across the rest of the CEE region.⁵²⁷

Euroscepticism, although not as prevalent in some neighbouring countries like Poland and Latvia, is still prevalent in Lithuania and focuses on reforming the EU from within on cultural and ideological grounds instead of exiting the Union.⁵²⁸ Geopolitical security and Western-style prosperity are the main incentives for Lithuania's devotion to upholding the liberal democratic status quo. Therefore, in many ways, the democratic stability experienced by Lithuania to date is contingent on the EU's financial support and also the

⁵²¹ LRT, 'Losing and Finding Lithuania's Act of Independence' *LRT* (16 February 2020) <<https://www.lrt.lt/en/news-in-english/19/1142217/losing-and-finding-lithuania-s-act-of-independence>> accessed 20 May 2021.

⁵²² Pettai (n 18) 56.

⁵²³ *ibid* 56–57.

⁵²⁴ European Commission, 'Population: Demographic Situation, Languages and Religions' (*Eurydice - European Commission*, 9 October 2017) <https://eacea.ec.europa.eu/national-policies/eurydice/content/population-demographic-situation-languages-and-religions-44_en> accessed 21 May 2021.

⁵²⁵ Rūta Ubarevičienė and Maarten van Ham, 'Population Decline in Lithuania: Who Lives in Declining Regions and Who Leaves?' (2017) 4(1) *Regional Studies, Regional Science* 57, 57–60.

⁵²⁶ Vilpišauskas (n 487) 20–21.

⁵²⁷ Pettai (n 18) 57–58.

⁵²⁸ Vilpišauskas (n 487) 4.

promise of protection against a hostile Russia from the US, NATO and the EU.⁵²⁹ With recent political turmoil and turnover across the Atlantic in the US and Brexit threatening to reduce financial support to Lithuania, the country's respect for liberal constitutional democracy can decline if key incentives are taken away.⁵³⁰

4.3. Weak Political Party System and Political Corruption

The political party system in Lithuania lacks institutionalisation meaning that the system has been evaluated as weak.⁵³¹ Failure to regulate political party activity adequately in the 1990s, has produced a volatile political landscape, where new and small parties continuously emerge but very few survive for enough time to build a loyal following or set down roots in society.⁵³² This has produced fertile ground for populism to become a core feature of Lithuanian politics with many voters becoming comfortable in choosing new and untested parties which utilise populist rhetoric.⁵³³

Although there have always been features of populism in mainstream political rhetoric, a distinct shift can be identified during the 2016 general election.⁵³⁴ A relatively unknown party, Lithuania's Farmers and Greens Union (LFGU) received 51 out of 141 seats in the Seimas by running on the basis of a distinctly populist message of nationalism, traditionalism and conservatism.⁵³⁵ Despite describing themselves as a green party, LFGU are not part of the European Green Party (EGP) in the European Parliament because of

⁵²⁹ Ramūnas Vilpišauskas, 'Lithuania: Euroscepticism—Present on the Margins' in Michael Kaeding, Johannes Pollak and Paul Schmidt, *Euroscepticism and the Future of Europe* (Springer International Publishing 2021) 92.

⁵³⁰ Pettai (n 18) 57–58; Vilpišauskas (n 529) 92.

⁵³¹ Kjetil Duvold and Mindaugas Jurkynas (n 501) 125–151; 'Lithuania: Nations in Transit 2018 Country Report' (*Freedom House*) <<https://freedomhouse.org/country/lithuania/nations-transit/2018>> accessed 19 November 2020.

⁵³² Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (n 114).

⁵³³ *ibid* 342–343.

⁵³⁴ Linas Jegelevicius, 'How COVID-19 Could Save Lithuania's Populists from Electoral Oblivion' *Euronews* (10 September 2020) <<https://www.euronews.com/2020/10/09/in-lithuania-covid-19-is-a-key-election-issue-but-not-in-the-way-you-might-think>> accessed 22 May 2021.

⁵³⁵ *ibid*.

EGP's support for the LGBTQ+ community.⁵³⁶ This does not align with LFGU's ideological views and traditional family values. Despite struggling to reach the 5 percent threshold in previous years, now its message appealed to swathes of Lithuanians with conservative Christian values. They appealed to voters discontented with mainstream parties that had ruled by rotation for much of the previous decade.⁵³⁷ This party's election success was part of the larger wave of populism and anti-establishment that swept across the world with the election of Donald Trump in the U.S., Brexit and the success of anti-establishment movements in Poland and Hungary. This proved that Lithuania was also not immune to the illiberal democracy trends seen in neighbouring CEE countries.

Overall, there is contempt for politics and politicians within the public sphere with considerable percentages of the population expressing distrust in their political representatives.⁵³⁸ This disillusionment with politics and politicians is fuelled by repeated political corruption scandals which damage the public's perception of politics and in turn, the democratic process. Each time a political corruption scandal is unveiled it proves that political elites in Lithuania are willing to put the interests of oligarchs and businessmen over those of the Lithuanian people. The combination of these conditions are particularly dangerous for democratic stability as the unpredictable political landscape and poor perception of politicians leaves the stage open for a radical populist party to take control and entrench their power by gaining support from discontented voters.

4.3.1. Political Party Institutionalisation in Lithuania

Successful party institutionalisation in Lithuania has been difficult to achieve. Most political parties that participated in the founding election of 1992 have not survived as

⁵³⁶ Austėja Masiokaitė-Liubinienė, 'Lithuania's Farmers and Greens Union Refuses to Join European Green Party Due to LGBT Stance' *LRT* (9 September 2019) <<https://www.lrt.lt/en/news-in-english/19/1095718/lithuania-s-farmers-and-greens-union-refuses-to-join-european-green-party-due-to-lgbt-stance>> accessed 22 May 2021.

⁵³⁷ Linas Jegelevicius (n 534).

⁵³⁸ Vilmorus, *Do you trust or distrust Lithuania's institutions?* (Vilmorus, Lietuvos Rytas, 2017) <<http://www.vilmorus.lt/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=7&cntnt01returnid=32>> accessed 25/11/2020.

prominent parties to this day.⁵³⁹ Overall, the political picture throughout the 1990s in Lithuania was a promising one as the main parties that emerged from the push for independence represented a healthy spread of left-wing and right-wing parties. Parties back then had strong ideologies and were led by popular charismatic politicians which aided their popularity amongst voters.⁵⁴⁰ People were excited by the prospect of democracy and the ability to choose their leaders, but this excitement however did not last long. As the turn of the century approached electoral turnout waned and so did the stable left-right party landscape.⁵⁴¹ Overall, since the early 2000s political parties in Lithuania have become fragmented and unpredictable.⁵⁴²

Electoral volatility in Lithuania has been measured using a few different techniques which all point to political party stability decreasing drastically since the 1990s.⁵⁴³ Distrust in political institutions following the global financial crisis of 2009 led to mass unemployment and emigration which exacerbated citizen's distrust in political institutions.⁵⁴⁴ This created optimal conditions for a surge in support of the populist LFGU party in 2016. In particular, Lithuania features high instances of old parties departing politics while new parties enter - a typical feature of post-communist party system volatility.⁵⁴⁵ This type of political party instability is particularly worrying as political outcomes are difficult to anticipate over the medium term as there is a high chance that a new and unpredictable party might gain power in the next election.⁵⁴⁶ This kind of

⁵³⁹ Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (n 114) 343.

⁵⁴⁰ Kjetil Duvold and Mindaugas Jurkynas (n 501) 125–126.

⁵⁴¹ 'International Institute for Democracy and Electoral Assistance (International IDEA), Voter Turnout Statistics for Lithuania' (n 520).

⁵⁴² Kjetil Duvold and Mindaugas Jurkynas (n 501) 126–129.

⁵⁴³ Tõnis Saarts, 'Comparative Party System Analysis in Central and Eastern Europe: The Case of the Baltic States' (2011) 3(3) *Studies of Transition States and Societies* 83, 89; Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (n 114) 344–348.

⁵⁴⁴ Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (n 114) 350.

⁵⁴⁵ Eleanor Neff Powell and Joshua A Tucker, 'Revisiting Electoral Volatility in Post-Communist Countries: New Data, New Results and New Approaches' (2014) 44 *British Journal of Political Science* 123, 131 <<https://www.cambridge.org/core/journals/british-journal-of-political-science/article/abs/revisiting-electoral-volatility-in-postcommunist-countries-new-data-new-results-and-new-approaches/46E14577C9EB765C7BED1A9EA657005F>> accessed 18 March 2021.

⁵⁴⁶ *ibid* 124.

volatility is significantly more dangerous to democratic stability than other types of volatility such as voters regularly switching their votes between different existing parties which can be seen as a product of normal democratic competition.⁵⁴⁷

The fragmentation and weakening of Lithuania's political party system can be attributed to a number of interrelated reasons. First, Lithuania was slow to introduce barriers to new political parties entering the electoral field.⁵⁴⁸ Second, Lithuania was also slow to phase out private party financing and corporate donations.⁵⁴⁹ Third, distrust of politicians in Lithuania is comparably high amongst voters.⁵⁵⁰ Voter turnout rates are low and a 'punishing' voting pattern can be identified as people are continuously disappointed with the lack of economic progress made by each political party when in power.⁵⁵¹

Lithuania failed to take action to create barriers to new party formation such as raising the minimum membership number for political parties and implementing state financing measures. This has contributed to the high levels of volatility in the party system.⁵⁵² Lithuania started by having a minimum party membership threshold of 400 in 1990, eventually increasing this to 1,000 in 2004 and then doubling the requirement in 2015 to

⁵⁴⁷ *ibid.*

⁵⁴⁸ Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (n 114) 342–344.

⁵⁴⁹ *ibid* 347–349.

⁵⁵⁰ 'Market & Opinion Research Centre "VILMORUS" - Do You Trust or Distrust in These Lithuania's Institutions?'

<<http://www.vilmorus.lt/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=7&cntnt01returnid=32>> accessed 25 November 2020; Saulius Jakučionis, 'Lithuanian Public Increasingly Distrustful of Prosecutors and Political Parties – Survey - LRT' *LRT* (Vilnius, 25 November 2019)

<<https://www.lrt.lt/en/news-in-english/19/1119237/lithuanian-public-increasingly-distrustful-of-prosecutors-and-political-parties-survey>> accessed 25 November 2020.

⁵⁵¹ Ingrida Unikaitė-Jakuntavičienė, 'Lithuania's New Parliament: Tackling Emigration Will Be a Key Priority for the Country's New MPs' (*EUROPP*, 14 November 2016)

<<https://blogs.lse.ac.uk/europpblog/2016/11/14/lithuanias-new-parliament-tackling-emigration-will-be-a-key-priority-for-the-countrys-new-mps/>> accessed 18 March 2021; Liucija Balciunaite, 'Explaining Variance in Party System Stability in Lithuania and Latvia' (Masters Research Paper, Southern Illinois University Carbondale 2016) 36–37, 9–10.

⁵⁵² Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (n 114) 349.

2000 members.⁵⁵³ Lithuania introduced state financing in 1999 and banned corporate donations to political parties only in 2012.⁵⁵⁴ The pace of these reforms was too slow, especially when compared to Estonia's prompt measure to raise barriers preventing political parties splintering.⁵⁵⁵ Barriers to new parties entering politics are crucial for filtering out the opportunists and entrepreneurs who see being elected as an easy way to make quick money.⁵⁵⁶

4.3.2. Populism in Lithuania

Populism has been a core feature of Lithuanian politics since the turn of the century.⁵⁵⁷ As observed above, Lithuanian politics started off as being relatively stable in the elections of the 1990s because of the 'black and white' nature of Lithuanian politics at the time – the parties participating back then were united by the common goals of gaining independence, developing a market economy, democracy and integration into the West.⁵⁵⁸ However, as the founding parties became more radical and hostile towards Russia and Lithuania's communist past, parties began to fragment due to infighting.⁵⁵⁹ As a result voters looked for new parties and fresh faces as Lithuania entered a new century and EU accession became a priority. This is where the political party system saw the rise of new political parties and with this, the rise of populist rhetoric.

The economic reforms that resulted from the democratisation movement in the 1990s led to unfortunate economic consequences such a record levels of inflation and income plummeted for workers.⁵⁶⁰ However, it also created opportunities for well-placed

⁵⁵³ European Parliament, Committee on Constitutional Affairs, 'Criteria, Conditions, and Procedures for Establishing a Political Party in the Member States of the European Union - Think Tank' (2012) PE 462.512 30–32.

⁵⁵⁴ Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (n 114) 347.

⁵⁵⁵ *ibid* 348.

⁵⁵⁶ *ibid* 347.

⁵⁵⁷ Gintaras Aleknonis and Renata Matkevičienė, 'Populism in Lithuania: Defining the Research Tradition' (2016) 9(1) *Baltic Journal of Law & Politics* 26, 28–29.

⁵⁵⁸ Kjetil Duvold and Mindaugas Jurkynas (n 501) 127–128.

⁵⁵⁹ *ibid* 126–127.

⁵⁶⁰ Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (n 114) 349.

business men from the Soviet nomenklatura to profit from the privatisation process.⁵⁶¹ This led to polarisation of Lithuanian society between the ‘losers’ of the transition and the ‘winners’ which created optimal conditions for populist parties to emerge.⁵⁶²

Lithuania’s first major wave of populist rhetoric had begun in the early 2000s with notorious populist, Rolandas Paksas. He served as leader for a few parties, including the conservatives and the Liberal Union before abandoning them to establish his own party, the Liberal Democratic Party, later renamed Order and Justice (*Partija tvarka ir teisingumas*, PTT).⁵⁶³ This party was distinctly populist with morally conservative, nationalistic and anti-establishment sentiments.⁵⁶⁴ Paksas managed to beat incumbent president Valdas Adamkus in the 2003 presidential election. However, his presidency was short-lived as a scandal revealed Paksas’ secret dealings with a Russian businessman who was suspected of being linked to Russian organised crime groups.⁵⁶⁵

Soon after the Paksas scandal another controversial figure entered the political scene. Viktor Uspaskich a prominent Russian businessman-turned politician entered politics as leader of the Labour Party (*Darbo Partija*, DP). This new party was noteworthy as it was also distinctly populist and anti-establishment with an unclear ideology. This party’s tactics were successful as they managed to charm voters with the outcome of gaining the support of one out of three voters in the 2004 parliamentary election.⁵⁶⁶ Both Paksas and Uspaskich have been under criminal investigation by the Lithuanian authorities.⁵⁶⁷ Auers identifies that these populists have relied on two main populist points to rally support amongst voters. The first point indicates that Lithuanian politics are fatally flawed and

⁵⁶¹ *ibid.*

⁵⁶² *ibid.*

⁵⁶³ Kjetil Duvold and Mindaugas Jurkynas (n 501) 129.

⁵⁶⁴ *ibid.*

⁵⁶⁵ Mindaugas Jurkynas, ‘Populist Parties in Lithuania: Curious Case of Party Order and Justice and Its Leadership’ (2019) 7(1) *Polish political science review* 120, 130; Steven Lee Myers, ‘Lithuania: Impeachment Delayed For Court’s Ruling’ *New York Times* (Vilnius, 9 March 2004) <<https://www.nytimes.com/2004/03/09/world/world-briefing-europe-lithuania-impeachment-delayed-for-court-s-ruling.html>> accessed 18 March 2021.

⁵⁶⁶ Kjetil Duvold and Mindaugas Jurkynas (n 501) 129.

⁵⁶⁷ Auers, ‘Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania’ (n 114) 352.

failing due to the corruption and incompetence of political elites and second, that international elites are challenging Lithuania's sovereignty.⁵⁶⁸

In 2012 a new populist party emerged, The Path of Courage (Drąsos Kelias, DK), which ran an electoral campaign premised on a single issue - that a group of Lithuanian political and economic elites were responsible for hiding an extensive paedophilia ring.⁵⁶⁹ Although they captured significant voter attention considering it was their first election, as the outrage around the child abuse scandal dimmed, the Path of Courage party disintegrated also as they had no other ideological or policy grounds to prop them up.⁵⁷⁰ The party's leader, Neringa Venckienė, lost her parliamentary immunity after she refused to cooperate in accordance with a court order and with this, the party failed to be re-elected in the subsequent general election.⁵⁷¹

The populist parties mentioned so far illustrate that Lithuanian politics has long featured extreme populist parties that gain significant support periodically but largely remain on the political margins. However, it is perhaps more important to point out that more radical far-right parties have not yet gained significant control because Lithuania's main stream politics have always utilised moderate populist rhetoric.⁵⁷² The classic components of populism: nativism and authoritarianism, are a core feature of main stream political parties, which makes it more difficult for a radical populist party to emerge using the same rhetoric.⁵⁷³ Lithuania also features a comparably small percentage of a Russian minority or other ethnic minority groups than neighbouring Latvia. Lithuania accepted comparably few refugees during the ongoing 2015

⁵⁶⁸ *ibid* 352–353.

⁵⁶⁹ *ibid* 353.

⁵⁷⁰ Aleknonis and Matkevičienė (n 557) 39.

⁵⁷¹ Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (n 114) 353.

⁵⁷² Małgorzata Kulbaczewska-Figat, 'The Extreme Right in the Baltic States: Lithuania' (*Transform Europe*, 6 September 2020) <<https://www.transform-network.net/en/focus/overview/article/radical-far-and-populist-right/the-extreme-right-in-the-baltic-states-lithuania/>> accessed 18 March 2021.

⁵⁷³ Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (n 114) 351.

humanitarian crisis of migrants fleeing the Middle-East in search of asylum in Europe.⁵⁷⁴ Therefore, it is less likely that a portion of the population can be villainised by a populist movement and blamed for various domestic issues.⁵⁷⁵ Nevertheless, there has been a notable increase in ultra-conservative, nationalistic sentiments growing within Lithuania for over a decade now which has largely been ignored.⁵⁷⁶ Homophobic demonstrations have turned violent many times and slogans like “Lithuania for Lithuanians” have been prominent features in nationalists marches in recent years.⁵⁷⁷ There is a real concern that this growing discontent with mainstream politics combined with an ever growing anti-pluralism movement is creating fertile ground for populist power-grabs.

4.3.3. Political Corruption in Lithuania

Corruption in Lithuania is widespread and infiltrates all corners of society, but it is most destructive to democracy when it is prevalent amongst political elites. The issue of political corruption is deeply rooted in Lithuanian politics, with origins stretching back to pre-democratisation periods. The rapid privatisation that ensued after the declaration of independence divided society deeply – a small portion of the political elites from the Soviet era adapting to the new independent order spectacularly well by taking advantage

⁵⁷⁴ David Martin, ‘The EU Migrant Relocation and Resettlement Scheme - What You Need to Know’ *DW.COM* (9 June 2017) <<https://www.dw.com/en/the-eu-migrant-relocation-and-resettlement-scheme-what-you-need-to-know/a-40378909>> accessed 18 March 2021; European Social Policy Network, ‘The Challenges of an Action Plan to Improve the Integration of Aliens in Lithuania’ (2016) ESPN Flash Report 2016/59

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewiOlf1jo_vAhV8QxUIHWJ9BdgQFjABegQIARAD&url=https%3A%2F%2Fec.europa.eu%2Fsocial%2FblobServlet%3FdocId%3D16193%26langId%3Den&usg=AOvVaw3m2Rno_rVrJYXD9BxSij-Z> accessed 28 November 2020.

⁵⁷⁵ Małgorzata Kulbaczevska-Figat (n 572).

⁵⁷⁶ Efraim Zuroff, ‘The Threat of Baltic Ultra-Nationalism | Efraim Zuroff’ *the Guardian* (3 April 2010) <<http://www.theguardian.com/commentisfree/2010/apr/03/baltic-far-right-eu>> accessed 18 March 2021; Fabio Belafatti, ‘Lithuanian Far-Right Walking into Putin’s Trap – Opinion’ *LRT* (23 February 2020) <<https://www.lrt.lt/en/news-in-english/19/1142075/lithuanian-far-right-walking-into-putin-s-trap-opinion>> accessed 18 March 2021.

⁵⁷⁷ Lithuanian Gay League, ‘Lithuanian Gay League Monitoring Report’ (2013) <<http://www.lgl.lt/assets/Stebesenos-ataskaita-EN-internet.pdf>> accessed 28 November 2020; Nerijus Adomaitis, ‘Lithuania Holds First Gay March amid Protests’ *Reuters* (Vilnius, 5 August 2010) <<https://www.reuters.com/article/us-lithuania-gay-idUSTRE64723Y20100508>> accessed 18 March 2021; Efraim Zuroff (n 576).

of the privatisation process to gain personal wealth.⁵⁷⁸ However, many Lithuanians found themselves on the wrong side of privatisation as poorer members of society like farmers and unskilled workers, were marginalised and worse-off financially than before.⁵⁷⁹ This can be regarded as perhaps the core reason of societies suspicion of its political elites today. Nevertheless, such oligarchical influence of Lithuanian politics is arguably more prevalent than ever in Lithuania today. Many scholars and interest groups have been warning of the prevalence of unofficial corruption networks that have been influencing Lithuanian politics for many years.⁵⁸⁰ Political corruption scandals unveiling the close relationship between politicians and businessmen have become increasingly common, threatening trust in the democratic process.⁵⁸¹

It is well established that the impact of corruption on democratic development is palpable; corruption is not only detrimental to a countries economic stability but also to public morale, administration, politics and the overall democratic system.⁵⁸² However, dealing with pervasive corruption in Lithuania proved to be one of the most stubborn obstacles to EU accession. Indeed, the European Commission warned that the fight against corruption should be a top priority for candidate states if they wish to enter the EU.⁵⁸³ The Open Society Institute in their EU Accession Monitoring Program expressed the following concerns in their 2002 report:

“...assessing levels of corruption in candidate States has proven difficult for the Commission, not only because the corruption problems of Central and East European (CEE) States are often different to the corruption problems faced by EU member States, but also because the European Union itself lacks a clear anti-

⁵⁷⁸ Auers, ‘Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania’ (n 114) 349.

⁵⁷⁹ *ibid.*

⁵⁸⁰ Dainius Velykis, ‘Civil Society Against Corruption: Lithuania Report’ (Hertie School of Governance 2010) 2 <<https://www.againstcorruption.eu/wp-content/uploads/2012/02/Lithuania.pdf>>; Raimundas Urbonas, ‘Corruption in Lithuania’ (2009) 9(1) *Connections* 67; Risk & Compliance Portal, ‘Lithuania Corruption Report’ (*GAN Integrity*, 2020) <<https://www.ganintegrity.com/portal/country-profiles/lithuania/>> accessed 19 March 2021.

⁵⁸¹ Raimundas Urbonas (n 580) 68.

⁵⁸² *ibid* 67.

⁵⁸³ *ibid* 75.

*corruption framework. As a result, the European Commission has not established clear benchmarks for candidate States in the area of corruption or anti-corruption policy.*⁵⁸⁴

The EU's apparent urgency regarding the need to curb corruption within candidate states resulted in rapid action being taken by the Lithuanian government to make sure that the country's corruption problem was not its downfall in the EU accession process. As a result Lithuania now features sophisticated anti-corruption programmes and laws including criminalisation of all forms of corruption in the public and private sector and has established a dedicated anti-corruption agency (Special Investigation Service).⁵⁸⁵ It is important to note at this stage that important leaps have been made as a consequence of the anti-corruption measures implemented in Lithuania but this progress is inadequate in dealing with the deeply rooted problem of corruption within Lithuanian society and politics.⁵⁸⁶

It is evident now that the anti-corruption measures in Lithuania were implemented in law but not in spirit as there is a distinct lack of political will to meaningfully combat political corruption. The political will that drove the anti-corruption institutions into existence during the accession process has evidently run out. Now that Lithuania is part of the EU there is few incentives to drive politicians to honour the commitments Lithuania made to fight corruption at all levels. In many ways EU accession was seen as a finishing line, as soon as member state status was achieved, the race to become a Western-style democracy could be staled as member state status, once achieved, was virtually impossible to lose. This type of sentiment was reinforced by the double standards set by the EU commission regarding corruption. While candidate states were heavily criticised and monitored to make sure anti-corruption measures were implemented, existing member states with similar issues were not subjected to the same pressures from the

⁵⁸⁴ The EU Accession Monitoring Program, 'Monitoring the EU Accession Process: Corruption and Anti-Corruption Policy' (Open Society Institute 2002) 16

<https://www.opensocietyfoundations.org/uploads/42333bd7-4b3e-46e9-9a9a-0f9a4ae3c577/1euaccesscorruptionfullreport_20020601_0.pdf> accessed 30 November 2020.

⁵⁸⁵ Dainius Velykis (n 580) 4.

⁵⁸⁶ Raimundas Urbonas (n 580) 68.

EU.⁵⁸⁷ This perpetuated the mentality of ‘box-ticking’ when it came to the Copenhagen criteria.

These shortcomings have resulted in corruption becoming an ever-evolving issue in Lithuania. Transparency International has reported either worsening or relatively unchanging scores for Lithuania over the past five years.⁵⁸⁸ This statistic is also mirrored by societies evident mistrust and discontent with the level of corruptions nationally. The 2019 Eurobarometer survey revealed that 92 percent of Lithuanian citizens believe that corruption in their country is widespread, while the EU average is far less at 71 percent.⁵⁸⁹ Perhaps more worryingly, 26 percent of people surveyed believed that levels of corruption had gotten worse over the last three years and 48 percent believed that levels of corruption remained stagnant.⁵⁹⁰

The poor public perception of the extent of corruption in Lithuania and the lack of overall progress of anti-corruption measures in Lithuania can be attributed to both public and government tolerance of corruption in the state combined with a lack of judicial incentive to combat the problem (this point will be further analysed in the next section of this chapter).⁵⁹¹ The 2019 Eurobarometer survey highlighted that public tolerance for corruption was comparably high if analysed against other member states.⁵⁹²

One of the most notorious examples of the scale of Lithuania’s political corruption problem can be illustrated by the LEO LT (*Lietuvos elektros organizacija*) scandal. LEO LT was established as a national energy holding company in 2008 and transferred almost 40 percent of their stocks to the Maxima group. Maxima owns a large number of shopping outlets that operate successfully across all Baltic countries and belongs to the VP (*Vilniaus*

⁵⁸⁷ *ibid* 75.

⁵⁸⁸ Transparency International, ‘Corruption Perceptions Index 2019 for Lithuania’ (*Transparency.org*, 2019) <<https://www.transparency.org/en/cpi/2019>> accessed 19 March 2021.

⁵⁸⁹ European Commission, ‘Special Eurobarometer 502 Corruption Report, Factsheet on Lithuania’ (European Commission 2019) 1.

⁵⁹⁰ *ibid*.

⁵⁹¹ Raimundas Urbonas (n 580) 68.

⁵⁹² European Commission, ‘Special Eurobarometer 502 Corruption Report, Factsheet on Lithuania’ (n 589) 17.

prekyba) group. The subsidiary of this group, *NDX Energija*, became the largest shareholder of Lithuania's electricity distribution network in 2003 as a result of the privatisation process.⁵⁹³ In 2007, the Seimas adopted a law which laid the groundwork for establishing the LEO LT project, with the objective of building a new nuclear power plant.⁵⁹⁴ This enterprise was fervently criticised by experts for contradicting both EU values and the Lithuanian Constitution for its monopolistic nature.⁵⁹⁵ Furthermore, there was no open competition for selecting the private company which would become the partner of LEO LT project as the position was given to the Maxima group without any consideration of other potential collaborators or debate.⁵⁹⁶ Although LEO LT was dissolved in 2009, it highlights the culture of 'behind closed doors' political decision making. More importantly, it shows that governments are willing to put the business interests of large companies above those of the Lithuanian people.

Lithuania was also shaken by another political corruption scandals in 2016. In spring of that year, the then party leader of the Liberal Movement (*Lietuvos Respublikos Liberalų Sąjūdis*, LRLS), Eligijus Masiulis, was caught up in a bribery scandal. Mr. Masiulis was caught outside the Seimas building with a suspected bribe of €106,000 in cash stuffed into an alcoholic beverage box in his car.⁵⁹⁷ This bribe was allegedly given to him by the vice-president of MG Baltic, a large business group, in exchange for favourable political decisions.⁵⁹⁸ During the investigation of this case, it became clear that many other prominent politicians, including some from the Labour Party, were also involved in this

⁵⁹³ Raimundas Urbonas (n 580) 83.

⁵⁹⁴ *ibid.*

⁵⁹⁵ Vytautas Beniušis, 'KaunoDiena.Lt | Tavo Miesto Naujienos' *Kauno Diena* (Kaunas, 24 September 2008) <<http://kauno.diena.lt/naujienos/lietuva/salies-pulsas/lietuva-skesta-korupcijos-liune-449035>>; Justinas Vainilavicius, 'Leo LT Found Unconstitutional' *The Baltic Times* (Vilnius, 3 April 2009) <<https://www.baltictimes.com/news/articles/22450/>> accessed 19 March 2021.

⁵⁹⁶ Raimundas Urbonas (n 580) 83.

⁵⁹⁷ Sarunas Cerniauskas, 'Lithuania: Two Political Parties Charged in Major Corruption Case' (Organised Crime and Corruption Reporting Project 2017) <<https://www.occrp.org/en/daily/7043-lithuania-two-political-parties-charged-in-major-corruption-case>> accessed 30 November 2020.

⁵⁹⁸ *ibid.*

corruption network.⁵⁹⁹ Although this political corruption case is still ongoing in court, it poses as further evidence of a systemic corruption problem in Lithuania.

Successive Lithuanian governments have also struggled to gain the initiative to address the issue of corruption for many years.⁶⁰⁰ The LFGU, who were in power from 2016 to 2020, have been accused of ineffectiveness in dealing with corruption. They have also come under fire for politicising and taking advantage of anti-corruption measures to hinder opposition members. Such claims came as LFGU leaders attempted to ban anyone who has been convicted of corruption from running in national elections for ten years.⁶⁰¹ This has been criticised for being a thinly veiled attempt by the then ruling LFGU government to stifle the campaign of the Social Democratic Party (*Socialdemokratų Partija*; LSDP) whose leader has been convicted of abuse of public procurement rules.⁶⁰²

Populism, weak political party stability combined with a growing apathy of citizens toward political elites is a dangerous combination. Voters who have become used to political discourse riddled with populist rhetoric are likely to choose a new and untested party with a strong charismatic leader who promises to reform the country's 'broken' democratic institutions. We have seen this play out in both Poland and Hungary with devastating outcomes and it can equally occur in Lithuania.

⁵⁹⁹ BNS, 'MG Baltic Owner Calls Lithuania's Biggest Corruption Trial "Political Reprisal"' *LRT* (Vilnius, 14 November 2019) <<https://www.lrt.lt/en/news-in-english/19/1115804/mg-baltic-owner-calls-lithuania-s-biggest-corruption-trial-political-reprisal>> accessed 19 March 2021.

⁶⁰⁰ Sergejus Muravjovas, 'Politinės partijos kovoje su korupcija nesiūlo beveik nieko naujo' (*Transparency international Lithuania*, 13 February 2012) <<https://www.transparency.lt/politines-partijos-kovoje-su-korupcija-nesiulo-beveik-nieko-naujo/>> accessed 19 March 2021.

⁶⁰¹ Ronaldas Galin, 'Įvertino „Palucko pataisą“: to tiesiog neturėtų būti' (*Alfa*, 14 September 2018) <<https://www.alfa.lt/straipsnis/50325385/ivertino-palucko-pataisa-to-tiesiog-neturetu-buti>> accessed 19 March 2021.

⁶⁰² LRT and BNS, 'G. Paluckas: Teistiems Asmenims Kandidatuoti Draudžianti Pataisa Nukreipta Prieš Mane' (30 June 2018) <<https://www.lrt.lt/naujienos/lietuvoje/2/217820/g-paluckas-teistiems-asmenims-kandidatuoti-draudzianti-pataisa-nukreipta-pries-mane>> accessed 24 April 2023.

4.4. Judicial Independence, Legitimacy and Trust in the Separation of Powers

There are a number of systemic weaknesses within the Lithuanian judiciary that pose a significant threat to the functioning of the separation of powers and the independence and legitimacy of the judiciary within the state. In particular, the Lithuanian Constitutional Court and the Supreme Court, are most at risk of being politicised and overwhelmed due to their role as a check on political power. Since the inception of the 1992 Lithuanian Constitution and with it, the fundamental ideas of the separation of powers, rule of law and independence of the judiciary these principles have struggled to be embodied by Lithuanian democratic intuitions.⁶⁰³ It is important to note that Lithuania's reforms towards achieving judicial independence were not easily achieved with many issues being recognised with judicial autonomy before accession. These issues included undue interference from the executive, inadequate working environment, insufficient salary and widespread corruption in the judiciary just a few years before accession to the EU in 2004.⁶⁰⁴ However, by the time the accession date approached it was undoubtable that important progress had been made in achieving judicial independence in Lithuania.⁶⁰⁵ Unfortunately, this progress has failed to maintain momentum. Even though high standards of judicial independence were achieved, this progress has taken a definite turn for the worst in the past decade or so. Although there were always issues with enforcement of judgments of the Constitutional Court by the executive and an underlying distrust and apprehension about the legitimacy of the judiciary in Lithuania, the situation has recently gotten more serious. This change coincides with the election of LFGU in 2016 as under this government's supervision the Constitutional Court and the Supreme Court have fallen victim to unprecedented politicisation and harassment.

⁶⁰³ Haroldas Šinkūnas, 'Valstybės Valdžių Santykiai: Harmoningas Bendradarbiavimas?' (*Teisė Pro*, 24 October 2020) <<http://www.teise.pro/index.php/2020/10/24/h-sinkunas-valstybes-valdziu-santykiai-harmoningas-bendradarbiavimas/>> accessed 19 March 2021.

⁶⁰⁴ EU Accession Monitoring Program, *Monitoring the EU Accession Process: Judicial Independence: Country Reports, Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania Slovakia, Slovenia* (Central European University Press 2001) 267–307.

⁶⁰⁵ Dimitry Kochenov, 'Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law' (2004) 3 *European Integration online Papers* 20–21 <<http://eiop.or.at/eiop/texte/2004-010a.htm>> accessed 24 May 2021.

4.4.1. Institutional Dialogue: Respect for Judicial Independence in Lithuania

It has been well established in constitutional theory and endorsed by the Lithuania Constitutional Court that the relationship between the judicial branch and the political branches should be based on mutual respect and cooperation.⁶⁰⁶ However, the attitude of the executive and legislature towards the Constitutional Court in particular can only be described as being hostile. There have been instances where politicians have publicly questioned the legitimacy of this Constitutional Court's existence as well as exerting political pressure on the Constitutional Court when unfavourable judgments are issued. Baseless criticisms of the judiciary and their decisions have become a common feature of political discourse. This was particularly prevalent in the most recent election in Autumn 2020 where politicians voiced their harsh critique of courts, calling for reform, but yet had no workable suggestions as to how this is to be done.⁶⁰⁷ To compound the damage to the legitimacy of the judiciary that is being caused by the political branches of state, the judiciary itself has considerable shortcomings. In the last few years the judiciary has suffered a blow to its reputation due to widespread corruption within the courts coming to light along with increased pressure from Russia. With hostility towards the judiciary gaining momentum there is a real fear that a constitutional crisis could be underway similar to the one that has consumed Poland and Hungary during the past decade.⁶⁰⁸

Hostility towards the judiciary has been growing for many years now in Lithuania with baseless criticism of the judiciary and their decisions becoming a common feature of political discourse.⁶⁰⁹ In 2006 a landmark case was brought by a member of the Seimas (Lithuanian Parliament), Egidijus Klumbys, acting as the representative of a group of members of the Seimas which set the tone for the distrust of the political branches of

⁶⁰⁶ Aharon Barak, *The Judge In A Democracy* (Princeton University Press 2006) 227; Constitutional Court of the Republic of Lithuania, Decision of 10 January 1998 "On the Compatibility of the resolution of the Seimas of the Republic of Lithuania of 10 December 1996 'On the program of Government of the Republic of Lithuania' with the Constitution of the Republic of Lithuania" *State news*, 14/01/1998, No 5-99 [1].

⁶⁰⁷ Haroldas Šinkūnas (n 603).

⁶⁰⁸ *ibid.*

⁶⁰⁹ *ibid.*

state in the judiciary.⁶¹⁰ In this case a group of Seimas members asked the Constitutional Court whether its own existence was constitutional and legitimate. The case came into being following the fall out of the President Paksas impeachment just a few years before. Mr. Klumbys fervently disagree with the Constitutional Courts decision to impeach the president and take away Juris Borisov's Lithuanian citizenship which was granted to him by President Paksas in improper circumstances.⁶¹¹ Mr. Klumbys' outrage at the Court's decision led him to argue that, *inter alia*, the Constitutional Court lacked legitimacy as a state institution as its powers were allocated in a separate section of the Lithuanian Constitution to other national courts such as the Supreme Court or Court of Appeal.⁶¹² Due to this Mr. Klumbys suggested that the Constitutional Court was not a legitimate court and did not poses authority.⁶¹³ These claims were dismissed by the Court but it nevertheless set a precedent of mistrust and disrespect towards the Constitutional Court from members of the legislature and executive.

4.4.2. The 2020 Deadlock over Constitutional Court Rotation

This type of aggressive questioning of the legitimacy of the Constitutional Court and the wider judiciary was not an isolated event and has also been observed as getting worse and not better with time.⁶¹⁴ In particular, the LFGU coalition government, which was replaced in late 2020, has been criticised for its aggressive stance against the Constitutional Court with attempts to pressure the Court into politically favourable decisions and baselessly questioning the legitimacy of the Court's President, Dainius Žalimas.⁶¹⁵

⁶¹⁰ Constitutional Court of the Republic of Lithuania, Decision of 6 June 2006 "Regarding the title of Article 1 of the Law on the Constitutional Court of the Republic of Lithuania 'Constitutional Court - Judicial Institution' and the compliance of Paragraph 3 of this Article with the Constitution of the Republic of Lithuania" *Registry of Legal Acts*, 10/06/2006, No 65-2400.

⁶¹¹ 15 min, 'Unikali Byla: KT Nesutiko Su Politikų Siūlymais „susinaikinti' (15 min Bylos, pakeitūsios Lietuvą) <<https://www.15min.lt/media-pasakojimai/bylos-pakeitūsios-lietuva-kt-386>> accessed 8 December 2020.

⁶¹² *Constitutional Court of the Republic of Lithuania Decision No. 65-2400* (n 610) para II.

⁶¹³ *ibid* 17.

⁶¹⁴ Haroldas Šinkūnas (n 603).

⁶¹⁵ Roberta Tracevičiūtė, 'Naujas valdančiųjų demaršas? Kodėl užsimota prieš Konstitucijos sergėtojus' *15min* (Vilnius, 18 June 2020) <<https://www.15min.lt/naujiena/aktualu/lietuva/naujas-valdanciuju-demarsas-kodel-uzsimota-pries-konstitucijos-sergetojus-56-1334228>> accessed 19 March 2021.

The terms of two ordinary Constitutional Court judges and the Constitutional Court President ended on March 19th 2020 but for the first time in Lithuanian constitutional history their replacement has been disrupted by a political deadlock which forced the judges whose terms had expired to continue their duties indefinitely. This has stifled the Constitutional Court's work and has greatly damaged the institutions reputation as an independent court in the eyes of the public.⁶¹⁶ The Lithuanian Constitution must have nine judges sitting on the Constitutional Court at all times. Judges serve for a single term of 9 years and every three years the judicial panel is replaced by one third by a vote of the Seimas.⁶¹⁷ The candidates for these positions are proposed by the President of Lithuania, the Speaker of the Seimas and the President of the Supreme Court, each suggesting one candidate.⁶¹⁸

In early April 2020, the then ruling LFGU Seimas rejecting all three nominated candidates for the vacant positions on the Constitutional Court bench. Their excuses were varied, they blamed the pandemic and said that the nominees were not up to the standard required to fill such positions.⁶¹⁹ However, these were just excuses to conceal why nominations have been rejected. As observed by notable Lithuanian constitutional experts such as former Constitutional Court judges and the current Judge of the European Court of Human Rights, the deliberate stalling and manipulation of Constitutional Court appointments points in the direction of attempted politicisation of the Constitutional Court.⁶²⁰ It has been suggested that the LFGU-led parliament are refusing to replace Constitutional Court Judges simply because they can. In a display of their political dominance they refused to support the nominated judges because they were not aligned

⁶¹⁶ Vytautas Sinkevičius, 'Kaip Galima Paralyžiuoti Konstitucinio Teismo Darbą?' *15 min* (Vilnius, 23 April 2020) <<https://www.15min.lt/naujiena/aktualu/komentarai/vytautas-sinkevicius-kaip-galima-paralyziuoti-konstitucinio-teismo-darba-500-1307694>> accessed 27 April 2021; Teisė Pro, 'Konstitucinio Teismo Atnaujinimas: Teisininkai Įžvelgia Grėsmes Teisinei Valstybei' (*Teisė Pro*, 13 January 2021) <<http://www.teise.pro/index.php/2021/01/13/konstitucinio-teismo-atnaujinimas-teisininkai-izvelgia-gresmes-teisinei-valstybei/>> accessed 19 March 2021.

⁶¹⁷ Constitution of the Republic of Lithuania, Article 103.

⁶¹⁸ *ibid.*

⁶¹⁹ Vytautas Sinkevičius (n 616).

⁶²⁰ Teisė Pro (n 616).

with the party's political agenda.⁶²¹ By rejecting the President's suggested candidate the ruling majority retaliated against the President in response to him refusing to support many of their previous political agendas. At the same time, the non-approval of the nominees selected by the President of the Supreme Court and the Speaker of the Seimas was to teach them a lesson, that while exercising their mandate to independently nominate a candidate for the Constitutional Court they must still seek the approval of the ruling majority.⁶²²

In addition to the LFGU-led government stalling the timely rotation of the Constitutional Court they were also accused of attacking its independence and launching a baseless smear campaign on the Court's President, Dainius Žalimas, in an attempt to influence the Court's future decision and to discredit the Court's previous judgment. This unfolded in response to a decision handed down by the Constitutional Court in June 2020 which declared that the Seimas' temporary commission of inquiry which had been led by LFGU member and minister for law and order, Agnė Širinskienė, was unconstitutional.⁶²³ The Court held that this temporary commission was granted too wide a scope of investigation by allowing it to look into the possible impacts of illegal influences on decision makers and the political process over the last eight years. The Constitutional Court noted that to allow such a wide scope for this commission would be contrary to Articles 67 and Articles 76 of the Lithuanian Constitution, the constitutional principles of responsible government and the rule of law.⁶²⁴

⁶²¹ Milena Andrukaitytė, 'Seimas Atmetė Visus Tris Kandidatus į Konstitucinį Teismą' *Diena.lt* (21 April 2020) <<https://www.diena.lt/naujienos/lietuva/salies-pulsas/seimas-balsuos-del-triju-konstitucinio-teismo-teiseju-lat-vadoves-skyrimo-963482>> accessed 27 April 2021.

⁶²² Vytautas Sinkevičius (n 616).

⁶²³ *Constitutional Court of the Republic of Lithuania, Decision of 12 June 2020 "Regarding the decision of the Seimas of the Republic of 25th September 2018, Resolution no XIII-1495 "On the Establishment of the Temporary Commission of Inquiry of the Seimas of the Republic of Lithuania on the Possible Illegal Influence and (or) Influence on Lithuanian Politicians, Civil Servants and Political Processes in Lithuania" and Resolution no XIII-2937 of 14th May 2020 "On the Compliance with the Constitution of the Republic of Lithuania of the Conclusion of the Parliamentary Investigation Conducted by the Temporary Commission of Inquiry of the Seimas of the Republic of Lithuania into Possible Illegal Influence and (or) Influence on Lithuanian Politicians, Civil Servants and Political Processes in Lithuania" Registry of Legal Acts, 12/06/2020, No 12928.*

⁶²⁴ *ibid* 33.2.

The denial by the Constitutional Court of this wide scope of power to investigate political decision-making was met with outrage and retaliation by the LFGU-led government. Ms. Širinskienė issued a public statement shortly after the Court's decision was handed down accusing the President of the Constitutional Court of collusion with members of the opposition.⁶²⁵ She claimed to have a document which indicated that an informal meeting occurred between the Constitutional Court's president and members of the opposition where upcoming referrals to the Constitutional Court were discussed.⁶²⁶ These claims proved to be baseless as Ms. Širinskienė and LFGU have failed to provide any proof of these meetings.

The LFGU-led coalition continued to attack the position of the President of the Constitutional Court.⁶²⁷ Just days after the Constitutional Court held that the temporary commission was unconstitutional, LFGU circulated a report questioning whether the President of the Constitutional Court could legally still be President of the Court as his term had ended a few months prior. This report is damaging for many reasons but mostly because the issue of three judges on the Constitutional Court bench (including the President of the Court) still performing their duties even though their terms ended on the 19th March 2020 was a problem of the government's own making, as mentioned previously. LFGU contended that they received advice from lawyers which indicated that the position of the President of the Constitutional Court is held unconstitutionally by Dainius Žalimas. However, when asked who precisely advised the government in this way they did not have any names to hand.⁶²⁸ In fact, Judge Žalimas' continued work as President of the Constitutional Court is in line with the Constitution and the Law on the Functioning of the Constitutional Court which allows judges to continue in their positions

⁶²⁵ Roberta Tracevičiūtė, 'Sutapimas ar ne? Po nepalankaus KT sprendimo – A.Širinskienės dūriai D.Žalimui ir konservatoriams' *15min* (Vilnius, 15 June 2020)

<<https://www.15min.lt/naujiena/aktualu/lietuva/sutapimas-ar-ne-po-nepalankaus-kt-sprendimo-a-sirinskienes-duriai-d-zalimui-ir-konservatoriams-56-1332958>> accessed 19 March 2021.

⁶²⁶ *ibid.*

⁶²⁷ Tracevičiūtė (n 615).

⁶²⁸ *ibid.*

until they are replaced.⁶²⁹ This ensures the Constitutional Court's work is disturbed as little as possible.

It is evident that the LFGU-led government were attacking the Constitutional Court and its president in an attempt to exert pressure on the Court and retaliate against the unfavourable decision regarding the temporary commission that the Court issued. Vytautas Sinkevičius, former Constitutional Court judge and one of the Lithuanian Constitution's drafters, contends that this happened in part due to a number of politically sensitive referrals to the Constitutional Court that were coming up on the Court's list.⁶³⁰ It seems like in this case the government was attempting to harass and threaten the integrity of the Constitutional Court to warn them against issuing any more unfavourable decisions in the future.⁶³¹ This stands as a gross violation of judicial independence and the rule of law.

In late October 2020 a new Seimas emerged following a general election. Now a coalition of three parties, the Homeland Union-Lithuanian Christian Democrats (TS-LKD), Liberal Movement (LRLS) and the Freedom Party (LP) have formed a government. With a new ruling majority came renewed hope that the Constitutional Court deadlock would be resolved promptly. However, the new Seimas continued to deepen the constitutional crisis by delaying and rejecting further nominations. Although two ordinary Constitutional Court judges were replaced on January 14th, 2021 after much political back and forth, the Court's President, Dainius Žalimas' replacement proved to be a particularly sticky political issue. He was finally replaced on May 18th 2021, after more than a year of working in 'over-time'.

The replacement of the President of the Constitutional Court was especially difficult because the current Speaker of the Seimas, Viktorija Čmilytė-Nielsen (LRLS), has the sole

⁶²⁹ *ibid.*

⁶³⁰ *ibid.*

⁶³¹ Roberta Tracevičiūtė, 'Naujas valdančiųjų demaršas? Kodėl užsimota prieš Konstitucijos sergėtojus' 15 min (Vilnius, 18/06/20) < <https://www.15min.lt/naujiena/aktualu/lietuva/naujas-valdanciuju-demarsas-kodel-uzsimota-pries-konstitucijos-sergetojus-56-1334228>> accessed 08/12/20.

mandate to nominate a replacement for the current President of the Constitutional Court as he was also nominated by former Speaker of the Seimas, Irena Degutienė. However, Ms. Čmilytė-Nielsen's first candidate to replace the President of the Constitutional Court was refused by the Seimas Committee on Law and Order in January 2021.⁶³² During the same session, this committee endorsed the nominations of the ordinary Constitutional Justices which were subsequently seated on the bench following a successful Seimas vote. Following the multiple unsubstantiated delays in replacing Constitutional Court justices that came before, the refusal to replace the Court's President in January 2021 has proven that the new parliamentary majority is once again politically manipulating the composition of the Constitutional Court. These fears are also not unfounded as Judge Žalimas can be considered an important ally of the Speaker's party, LRLS, not only because he is ideologically aligned with the Speaker's political views but also because he is a fervent critic of the LFGU Party, who are now leaders of the opposition.⁶³³ In light of this, it is not unreasonable to suggest that Ms. Čmilytė-Nielsen was in no hurry to replace Judge Žalimas and was certainly not going to suggest a candidate that would not fit her party's political goals. Therefore, it was no surprise that when she nominated respected academic, lawyer and advocate for LGBTQ+ rights, Vytautas Mizaras, in early February 2021, intense debates and controversy within government and the wider Seimas erupted.⁶³⁴ During the routine questioning session of the new candidate by the Seimas many conservative parliamentarians heavily criticised the candidate's progressive and liberal world views and took issue with some of his past political engagements.⁶³⁵ However, despite the political divide, Vytautas Mizaras, managed to gain the support of

⁶³² BNS, 'Seimo TTK Nepritarė Kabišaičio Kandidatūrai į KT' *Delfi* (13 January 2021) <<https://www.delfi.lt/news/daily/lithuania/seimo-ttk-nepritare-kabisaicio-kandidaturai-i-kt.d?id=86217553>> accessed 28 April 2021.

⁶³³ Egidijus Šileikis, 'Naujos Prielaidos Manipuliacijoms Nekeisti Konstitucinio Teismo Teisėjo Ir Pirmininko' (*Teisė Pro*, 13 January 2021) <<http://www.teise.pro/index.php/2021/01/13/egidijus-sileikis-naujos-prielaidos-manipuliacijoms-nekeisti-konstitucinio-teismo-teisejo-ir-pirmininko/>> accessed 28 April 2021.

⁶³⁴ Vilmantas Venckūnas, 'Kandidatūra į Konstitucinio Teismo Teisėjus – Dar Viena Parako Statinė Koalicijos Santykiuose?' *tv3.lt* (2 April 2021) <<https://www.tv3.lt/naujiena/lietuva/kandidatura-i-konstitucinio-teismo-teisejus-dar-viena-parako-statine-koalicijos-santykiuose-n1080287>> accessed 28 April 2021.

⁶³⁵ Dalia Plikūnė, and others, 'Seimas Nusprendė: Mizaras Taps Konstitucinio Teismo Teisėju' *Delfi* (Vilnius, 18 May 2021) <<https://www.delfi.lt/news/daily/lithuania/seimas-nusprende-mizaras-taps-konstitucinio-teismo-teiseju.d?id=87217745>> accessed 19 May 2021.

76 Seimas members out of 134 and is due to commence his position as Constitutional Court judge in June 2021.

As a result of this deadlock in electing judges to vacant Constitutional Court seats a serious shortcoming have been identified in the process of Constitutional Court appointment. The process is not transparent enough, at high risk of being politicised.⁶³⁶ Article 103 of the Constitution only succinctly sets out the conditions under which Constitutional Court justices should be elected. It states that upon the renewal of the Constitutional Court by one third, three candidates for the judicial seats of the Constitutional Court shall be appointed by the Seimas from among the candidates nominated by the President of the Republic, the Speaker of the Seimas and the President of the Supreme Court.⁶³⁷ The Constitution also establishes that the judges of the Constitutional Court must have an impeccable reputation and must be highly education in law and have at least ten years of legal or academic pedagogical work experience in law.⁶³⁸ Article 5 of the Law on the Constitutional Court additionally provides that the names of candidates for positions in the Constitutional Court are announced in the press before consideration in the Seimas and that the Seimas Committee on Law and Order considers the candidacies of the Constitutional Court judges and chairman in a closed session before submitting its opinion to the Seimas.⁶³⁹

These rules lack specific guidelines regarding the criteria by which each candidate should be considered by the Seimas. Furthermore, the President of the Republic, the Speaker of the Seimas and the President of the Supreme Court only nominate one candidate each and there is no requirement for each nomination to be validated by reasons why these particular nominees have been chosen. Given the importance of the Constitutional Court as a protector of the rule of law and the requirement for this court in particular to be independent from political will, it is highly problematic that two out of three of the

⁶³⁶ Liudvika Meškauskaitė, Rasa Ragulskytė-Markovienė, 'Konstitucinio Teismo teisėjų skyrimo džiunglės' *DELFI* (Vilnius, 27 April 2020) <<https://www.delfi.lt/a/84145757>> accessed 19 March 2021.

⁶³⁷ Constitution of the Republic of Lithuania, Article 103.

⁶³⁸ *ibid.*

⁶³⁹ Part 1, Article 5 of Law on the Constitutional Court of Lithuania, State News, 1993, No. 6-120 (Law on the Constitutional Court of Lithuania).

nominees are elected by politicians that do not have to explain why they choose one candidate for the position over another. It has been suggested that this process should be reformed to make it significantly more transparent.⁶⁴⁰ Furthermore, there is currently no official process by which an appropriate candidate can nominate themselves for a position in the Constitutional Court.⁶⁴¹

Although the Constitutional Court vacancies have now been filled, much damage has been left in the wake of this political tug of war. The political manipulation of the Constitutional Court's composition has serious consequences for the rule of law and judicial independence in Lithuania. The political deadlock over the rotation of the Constitutional Court has revealed to the public that politicians can easily influence the work of the Constitutional Court which undermines the principle of judicial independence and sets a dangerous precedent for future politicisation of court appointments.⁶⁴² Ultimately, the disregard for the Constitution by the Seimas damages the reputation of not only the judiciary but also the Seimas and democracy itself. The uncertainty around the timeline of rotation of Constitutional Court judges threatens to cause serious disruption to the efficiency of the Court and has created an important practical dilemma. Now that some judges have been seated abnormally late, it is evident that the Lithuanian Constitution has been violated. The judges whose nine year terms have concluded had been in office for over nine months longer than permitted by Article 103 of the Constitution.⁶⁴³ This means that new judges may have to cut their tenure short in order to return the Constitutional Court to its correct timeline of being renewed by one third every nine years. The fact that some judges have served significantly longer terms than permitted while some terms are shortened violates Article 103 of the Lithuanian Constitution which states that tenure of Constitutional Court justices is for 9 years, no more no less.⁶⁴⁴

⁶⁴⁰ Liudvika Meškauskaitė, Rasa Ragulskytė-Markovienė (n 636).

⁶⁴¹ *ibid.*

⁶⁴² *Teisė Pro* (n 616).

⁶⁴³ Constitution of the Republic of Lithuania, Article 103.

⁶⁴⁴ Vaidotas Vaičaitis, 'Konstitucijai 28-Eri' (*Teisė Pro*, 22 October 2020)

<<http://www.teise.pro/index.php/2020/10/22/v-vaicaitis-konstitucijai-28-eri/>> accessed 19 March 2021; Vaidotas Vaičaitis, 'Kas Apgins Konstituciją Arba Kaip Paskirti Konstitucinio Teismo Teisėjus?' (1 July 2021)

It is worth noting that the Lithuanian judicial appointment system could be considered partly to blame for the events that unfolded since March 2020 as it could be argued that the executive has excessive powers over the appointment of Constitutional Court Judges. As mentioned previously, candidates for the position of Constitutional Court judge are proposed by the President of Lithuania, the Speaker of the Seimas and the President of the Supreme Court and subsequently appointed by the Seimas. This system seems to contravene the Venice Commission's recommendations on judicial appointments where it states that in semi-presidential systems such as the one adopted by Lithuania, the majority of the judicial appointment power should rest with an independent judicial council.⁶⁴⁵ Furthermore, the Venice Commissions notes that extra care is needed to prevent abuse of judicial appointments by the executive in young democracies as they lack constitutional traditions that prevent exploitation.⁶⁴⁶ Nevertheless, Lithuanian constitutional law scholars have pointed out that nothing of this scale has happened to disrupt judicial appointments before,⁶⁴⁷ so it is reasonable to conclude that the existing flaws in judicial appointment rules were used to achieve disingenuous political motives in this instance.

4.4.3. The Demotion of a Supreme Court Judge

Another weakness in the independence of the Lithuanian judiciary was highlighted in 2020, only this time it concerned the Supreme Court of Lithuania. In spring 2020 the Lithuanian President, Gitanas Nausėda, sought to promote Supreme Court judge and President of the Supreme Court's civil case division, Sigita Rudėnaitė, to the position of President of the Supreme Court in a single presidential decree.⁶⁴⁸ According to the

<<http://www.teise.pro/index.php/2021/01/07/v-a-vaicaitis-kas-apgins-konstitucija-arba-kaip-paskirti-konstitucinio-teismo-teisejus/>> accessed 28 April 2021.

⁶⁴⁵ Venice Commission, 'Judicial Appointments: Report Adopted by the Venice Commission at Its 70th Plenary Session' (2006) Opinion No. 403 / 2006 4.

⁶⁴⁶ *ibid* 3.

⁶⁴⁷ Egidijus Šileikis (n 633); Vaidotas Vaičaitis, 'Konstitucijai 28-Eri' (n 644).

⁶⁴⁸ Decree of President of the Republic of Lithuania, 16 December 2019, no. 1K-164 "Regarding the submission to the Seimas of the Republic of Lithuania to dismiss Judge Sigita Rudėnaitė of the Supreme Court of Lithuania from the position of the President of the Civil Cases Division of this Court and appoint her President of the Supreme Court of Lithuania" Registry of Legal Acts, 216/12/019, No. 20242.

Constitution, the president of Lithuania can suggest candidates for election to positions within the Supreme Court for the Seimas to vote on.⁶⁴⁹ However, in this particular situation an unprecedented issue arose when the Seimas agreed to dismiss Judge Rudėnaitė from her position as head of the civil division of the Supreme Court but they refused to appoint her as President of the Supreme Court in the subsequent secret vote.⁶⁵⁰ This resulted in Judge Rudėnaitė losing her existing position as head of the civil division and being denied the role of President of the Court, rendering her an ordinary justice of the Supreme Court with lower pay and lower status. This situation was contested by a group of Seimas members who sought clarification on the constitutionality of the dismissal of Judge Rudėnaitė in the Constitutional Court.⁶⁵¹ The Constitutional Court issued a ruling in September 2020 declaring that the situation that resulted from the presidential decree and the subsequent vote in the Seimas was contrary to the Constitution and the Law on Courts.⁶⁵² The Constitutional Court held that the actions of President Nausėda and the Seimas breached, *inter alia*, the constitutional principles of independence of the judiciary and courts, separation of powers, the rule of law and responsible government.⁶⁵³

Article 90 of the Law on Courts establishes that a judge may be removed from his/her position for the purposes of reappointment to another position only if they have already secured that new position.⁶⁵⁴ The President, by trying to both remove Judge Rudėnaitė from her old position and appoint her to her new position in one decree, breached the

⁶⁴⁹ Constitution of the Republic of Lithuania, Article 84.11.

⁶⁵⁰ Jūratė Skėrytė, 'Konstitucinis Teismas: sprendimas dėl Rudėnaitės atleidimo – neteisėtas, ji grąžinama į pareigas' *LRT* (Vilnius, 9 February 2020) <<https://www.lrt.lt/naujienos/lietuvoje/2/1224477/konstitucinis-teismas-sprendimas-del-rudenaites-atleidimo-neteisetas-ji-grazinama-i-pareigas>> accessed 19 March 2021.

⁶⁵¹ Constitutional Court of the Republic of Lithuania, Decision of 2 September 2020 "On decree no 1K-164 of the President of the Republic of Lithuania of 16 December 2019 'For the provision of the Seimas to dismiss Supreme Court judges Sigita Rudėnaite from the Supreme Court's civil case division and appoint her as President of the Supreme Court' Article 1 and resolution no XIII-2848 of the Seimas of 21st April 2020 regarding 'the dismissal of Supreme Court judges Sigita Rudėnaite from the Supreme Court's civil case division' compliance with the constitution and the Law on Court" *Registry of Legal Acts*, 03/09/2020, No 18611.

⁶⁵² *ibid.*

⁶⁵³ *ibid* 47–48.

⁶⁵⁴ Article 90, The Law on Courts, State News, 1994, No. 46-851.

Law on Courts by allowing a judge to be removed from her position before her new position was guaranteed. The Constitutional Court in its decision also highlighted that what had occurred flew in the face of the rule of law, separation of powers principle and violated judicial independence. The Constitutional Court nullified the decision of the Seimas and reinstated Judge Rudėnaitė in her original position as head of the civil division of the Supreme Court.

Although, the unconstitutional situation that occurred with the appointment of Judge Rudėnaitė was resolved eventually by the Constitutional Court, it nevertheless highlighted how fragile judicial independence is in Lithuania.⁶⁵⁵ The Constitutional Court in this instance was criticised for delaying a declaration of unconstitutionality by over four months.⁶⁵⁶ If the expedient nature by which the Constitutional Tribunal of Poland was packed with partisan justices in 2015 is considered, then there is no reason to think that this situation could not arise in Lithuania also. In the Lithuanian example that unfolded in early 2020, if we generously assume that Judge Rudėnaitė was dismissed and then not promoted as planned by the Seimas through a miscommunication or missight, this still reveals a significant weakness in the integrity of judicial independence. In this situation if the Seimas was set on demoting or punishing a judge for an unfavourable decision then they can clearly do so with ease. Overall this mishap in judicial appointment sends a message to all judges in Lithuania that their position can be easily jeopardised.

The Constitutional Court's rulings on the constitutionality of actions of Seimas members has also been ignored and dismissed. This is evidenced by the situation that occurred in 2010 when Seimas members Linas Karalius and Aleksandr Sacharuk were held to have gravely violated the Constitution and broken their parliamentary oath by the

⁶⁵⁵ Egidijus Šileikis, 'Teisėjos Kvazi Paaukštino Suspendavimas: Ankstesnės Padėties Atsikūrimo „klaidos“ Aspektai' (*Teise Pro*, 20 May 2020) <<http://www.teise.pro/index.php/2020/05/20/e-sileikis-teisejos-kvazi-paaukstinimo-suspendavimas-ankstesnes-padeties-atsikurimo-klaidos-aspektai/>> accessed 19 March 2021.

⁶⁵⁶ Lina Navickytė, 'Kodėl Visi Tyli, Arba Kaip Konstitucinis Teismas Pervaziavo Konstituciją' *Defli* (Vilnius, 6 January 2020) <<s://www.delfi.lt/news/ringas/lit/lina-navickyte-kodel-visi-tyli-arba-kaip-konstitucinis-teismas-pervaziavo-konstitucija.d?id=84419683>> accessed 11 December 2020.

Constitutional Court.⁶⁵⁷ Mr. Karalius was held to have breached his duty as a member of Seimas by undertaking personal travel plans to Asia during a time when he should have been participating in Seimas proceedings in January 2010. While he was on his trip he allowed Mr. Sacharuk to use his Seimas identification card to vote on his behalf on legislation on eight occasions.⁶⁵⁸ The Constitutional Court held that both parliamentarians had grossly violated the Lithuanian Constitution and broken their oath.⁶⁵⁹ However, despite this condemnation of both parliamentarians the Seimas subsequently voted only for Mr. Karalius position as a Seimas member to be terminated but they chose to spare Mr. Sacharukas position.⁶⁶⁰ This decision raises some serious issues regarding the Constitutional Court's perceived authority as a protector of constitutionality in the state government as the decision of fellow parliamentarians to protect Mr. Sacharuk's position resulted in him having continued to work as a legislator having broken his oath.⁶⁶¹ This situation once again proved that political alliances were more valuable to the Seimas than respecting Constitutional Court decisions.

A similar situation where the Seimas failed to respect the Constitutional Court decision transpired in 2017 when parliamentarian, Mindaugas Bastys, was held by the Constitutional Court to have violated his oath and grossly breached the Constitution by concealing his ties with former KGB employee, Piotr Vojeika, when he applied for a permit to work with classified information.⁶⁶² However, notwithstanding the seriousness of the

⁶⁵⁷ Constitutional Court of the Republic of Lithuania, Decision of 27 October 2020 'On the compliance of actions of Linas Karalius, a member of the Seimas of the Republic of Lithuania, against whom an impeachment case has been instituted, and Aleksandr Sacharuk, a member of the Seimas of the Republic of Lithuania, against whom an impeachment case has been instituted, with the Constitution of the Republic of Lithuania, *State News*, 30/10/2010, No 128-6545.

⁶⁵⁸ Eglė Samoškaitė, Vytenė Stašaitytė, 'L.Karalius Neteko Seimo Nario Mandato, A.Sacharukas Išsaugojo' (Vilnius, 2 November 2010) <<https://www.delfi.lt/news/daily/lithuania/lkaralius-neteko-seimo-nario-mandato-asacharukas-issaugojo.d?id=38448691>> accessed 11 December 2020.

⁶⁵⁹ *Constitutional Court of the Republic of Lithuania Decision No. 128-6545* (n 657) 54–55.

⁶⁶⁰ Eglė Samoškaitė, Vytenė Stašaitytė, 'L.Karalius Neteko Seimo Nario Mandato, A.Sacharukas Išsaugojo - DELFI' <<https://www.delfi.lt/news/daily/lithuania/lkaralius-neteko-seimo-nario-mandato-asacharukas-issaugojo.d?id=38448691>> accessed 19 March 2021.

⁶⁶¹ Gediminas Cibulskis, 'Po iš dalies įvykusios apkaltos valdantieji ir opozicija svaidosi kaltinimais' *15 min* (Vilnius, 11/11/10) <<https://www.15min.lt/naujiena/aktualu/lietuva/po-is-dalies-ivykusios-apkaltos-valdantieji-ir-opozicija-svaidosi-kaltinimais-56-123979>> accessed 12/12/20.

⁶⁶² Constitutional Court of the Republic of Lithuania, Decision of 22 December 2017 "On the compliance of the actions of Mindaugas Bastys, a member of the Seimas of the Republic of Lithuania, against whom

Court's declaration the Seimas failed to gather the necessary votes to remove Mr. Bastys from his position which sparked public outrage and protests to be organised.⁶⁶³ Evidently, the Seimas does not respect the Constitutional Court's declaration that a member of the legislature has broken his oath. Even though public outrage at Mr. Bastys behaviour led to him resigning from the Seimas voluntarily, he nevertheless continued to baselessly criticise the Constitutional Court's decision. In a media interview he accused the Constitutional Court of being politicised and declared that in his opinion the Constitutional Court's declaration that he had broken his oath was irrelevant as he does not answer to the Constitutional Court but only the people who elected him.⁶⁶⁴ This kind of sentiment, which openly disrespects the separation of power principle and the authority of the Constitutional Court, is symptomatic of the lack of respect for checks and balances in politics.

4.4.4. Judicial Corruption in Lithuania

The Lithuanian judiciary has also had to contend with its own internal corruption issues. The Special Investigation Service of Lithuania noted that courts were amongst the most corrupt institutions in the country in their 2019 annual report.⁶⁶⁵ This survey has revealed the evident mistrust of the public in their judicial system with 50 percent of the public and 55 percent of business representatives saying the courts are significantly affected by political interests.⁶⁶⁶ The judiciary's transparency was also perceived as getting worse rather than better by the public, civil servants and business representatives.⁶⁶⁷ These

an impeachment case has been instituted, with the Constitution of the Republic of Lithuania" *Registry of Legal Acts*, 02/01/2018, No 60.

⁶⁶³ Milda Seputyte, 'Lithuanians Protest Against Lawmakers After Failed Impeachment' *Bloomberg* (Vilnius, 15 March 2018) <<https://www.bloomberg.com/news/articles/2018-03-15/lithuanians-protest-against-lawmakers-after-failed-impeachment>> accessed 12 December 2020.

⁶⁶⁴ Nemira Pumprickaitė, 'Mindaugas Bastys: man reikia mandato, kad galėčiau tarnauti su nauja priesaika' *15min* (Vilnius, 23 September 2018) <<https://www.15min.lt/naujiena/aktualu/lietuva/mindaugas-bastys-man-reikia-mandato-kad-galeciau-tarnauti-su-nauja-priesaika-56-1034096>> accessed 19 March 2021.

⁶⁶⁵ Special Investigation Service of the Republic of Lithuania, 'Annual Report of the Special Investigation Service of the Republic of Lithuania' (2019) 17 <<https://www.stt.lt/en/doclib/oflInfo1bhmfv3h73f1wenwnc22ssqzkw>> accessed 15 December 2020.

⁶⁶⁶ *ibid* 18.

⁶⁶⁷ *ibid* 17.

sentiments were also mirrored in a study carried out by the European Commission where 26 percent of Lithuanians said their country's judicial independence was fairly bad and 7 percent said it was very bad.⁶⁶⁸

In early 2019 news broke of the biggest judicial corruption scandal in the state's history. The Special Investigation Service and the Prosecutor General's Office had started an investigation into alleged bribery, trading in influence, and abuse of power within the Lithuanian judiciary.⁶⁶⁹ The investigation so far has resulted in over 50 accusations of large-scale bribery, trading in influence and abuse of power.⁶⁷⁰ Amongst those accused were lawyers, and judicial assistants along with judges including judges of the Supreme Court and Court of Appeal who stand accused of taking bribes between €1,000 to €100,000.⁶⁷¹ The investigation revealed suspected criminal acts, which were "long-term, systematic and organised, and involved a large number of both perpetrators, and persons assisting them in one way or another".⁶⁷² This corruption network was systemic and involved mediators, or chains of mediators, who facilitated dialogue between the judiciary and persons seeking favourable decisions.⁶⁷³

Since these accusations, many judges have been dismissed by the Seimas or President however they have not been subjected to formal court proceedings for their illegal

⁶⁶⁸ European Commission, 'Flash Eurobarometer 483 on Perceived Independence of the National Justice Systems in the EU among the General Public' (European Commission 2020) 7 <<https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/survey/getsurveydetail/instruments/flash/surveyky/2258>> accessed 19 February 2021.

⁶⁶⁹ Ruta Mrazauskaite, 'Lithuania's Judicial Scandal Shows Why Public Communication Matters in Corruption Investigations' (*The Global Anticorruption Blog*, 15 March 2019) <<https://globalanticorruptionblog.com/2019/03/15/lithuanias-judicial-scandal-shows-why-public-communication-matters-corruption-investigations/>> accessed 19 March 2021.

⁶⁷⁰ Gytis Pankūnas, 'Vėgėlė: šiuo metu visa teisinė sistema yra „giliame nokdaune' *LRT* (Vilnius, 28 August 2020) <<https://www.lrt.lt/naujienos/lietuvoje/2/1221091/vegele-siuo-metu-visa-teisine-sistema-yra-giliame-nokdaune>> accessed 19 March 2021.

⁶⁷¹ Reuters Staff, 'Lithuania Arrests Eight Top Judges in Anti-Corruption Crackdown' *Reuters* (Vilnius, 20 February 2019) <<https://www.reuters.com/article/us-lithuania-corruption-idUSKCN1Q922O>> accessed 19 March 2021.

⁶⁷² Special Investigation Service of the Republic of Lithuania (n 665) 21–22.

⁶⁷³ *ibid.*

actions.⁶⁷⁴ However, the investigation overall has been criticised for losing momentum.⁶⁷⁵ This has led some observers to criticise the crack-down on judicial corruption as a publicity stunt or a politicised move rather than a genuine operation.⁶⁷⁶ The ongoing investigation into judiciary corruption threatens the integrity and reputation of the judiciary in Lithuania. The lack of professionalism and transparency is a real risk to the rule of law and the separation of powers. Transparency International's Corruption Perception Index highlights a poor performance in improving the perception of corruption in Lithuania between 2012 and 2019.⁶⁷⁷ The World Economic Forum also noted the worrying lack of independence from political, business and other pressures of the courts.⁶⁷⁸ These sentiments were also mirrored in the 2017 survey conducted by the European Network of Councils for the Judiciary where 19% of Lithuanian judges expressed that they have been affected by a threat of, or actual, disciplinary or other action as a result of deciding cases in a certain way.⁶⁷⁹ This figure was the highest of all the countries surveyed, so it is no surprise that public confidence in their justice systems is low.

⁶⁷⁴ Eglė Dagilytė, 'Country Report: The Rule of Law in Lithuania' (Re: constitution, Democracy Reporting International 2020) 2 <https://democracy-reporting.org/dri_publications/country-report-the-rule-of-law-in-lithuania/> accessed 19 March 2021.

⁶⁷⁵ Eglė Dagilytė, 'Lithuania: Rule of Law Overview, (Re: constitution, Democracy Reporting International, 22/10/20) 2, <https://democracy-reporting.org/dri_publications/country-report-the-rule-of-law-in-lithuania/> accessed 08/12/20.

⁶⁷⁶ Gytis Pankūnas (n 670); Milda Kuizinaite, 'Teisėjų Mantiją Aptaškę Prokurorai Ir STT Pareigūnai Sulindo Po Šluota' *Lietuvos Rytas* (Vilnius, 6 July 2020) <<https://www.lrytas.lt/lietuvosdiena/aktualijos/2020/06/07/news/teiseju-mantija-aptaske-prokurorai-ir-stt-pareigunai-sulindo-po-sluota-15172673/>>> accessed 19 March 2021.

⁶⁷⁷ Transparency International (n 588).

⁶⁷⁸ Eglė Dagilytė (n 674) 2; Klaus Schwab, World Economic Forum, 'The Global Competitiveness Insight Report 2019' (2019) 351 <http://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf> accessed 15 December 2020.

⁶⁷⁹ European Network of Councils for the Judiciary, 'European Network of Councils for the Judiciary Report on Independence: Accountability and Quality of the Judiciary' (2017) 137 <https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_ia_ga_adopted_ga_13_6.pdf> accessed 15 December 2020.

4.4.5. Interference of Russia in Lithuanian Judicial Independence

On the 27th March 2019, Vilnius Regional Court issued a ruling condemning the actions of Soviet officials that led to the death of 14 people and the injury of nearly 800 while they were peacefully protecting the Vilnius TV tower in 1991.⁶⁸⁰ The court's ruling in the so called '13th of January case' found that 67 Russian, Belarusian and Ukrainian citizens, including former high-ranking former USSR officials, were found guilty of war crimes and crimes against humanity for their part in the Soviet aggression on the 13th January 1991 in Vilnius.⁶⁸¹ Prison sentences of up to 14 years had been handed out by the Court *in absentia*, as Belarus and Russia refused to cooperate with Lithuanian authorities and extradite the accused people.⁶⁸² Russia however, retaliated at the Lithuanian judges, prosecutors and investigators involved in the investigation of this case. Russia has issued proceedings against the Lithuanian judges involved, accusing them of unlawful prosecution of Russian citizens.⁶⁸³ Russia issued international arrest warrants and is seeking information from states about individual judges to support their own legal case against them.⁶⁸⁴ Russia's actions have been met with stark criticism from both the Lithuanian authorities and the EU for their violation of another country's judicial independence and rule of law and abuse of the Interpol system to further their political tactics.⁶⁸⁵ Russia meddling with Lithuania's judicial independence and exerting pressure on judges for their legitimate decisions is a violation of the rule of law and poses a significant threat to the integrity of the Lithuanian legal system.

⁶⁸⁰ European Parliament resolution 2019/2938(RSP) on recent actions by the Russian Federation against Lithuanian judges, prosecutors and investigators involved in investigating the tragic events of 13 January 1991 in Vilnius [2019].

⁶⁸¹ *ibid.*

⁶⁸² *ibid.*

⁶⁸³ BNS/TBT Staff, 'MEPs to Discuss Lithuania's Call for Help to Protect Its Judges from Russian Prosecution' (Vilnius, 11 December 2019)

<https://www.baltictimes.com/meps_to_discuss_lithuania_s_call_for_help_to_protect_its_judges_from_russian_prosecution/> accessed 19 March 2021.

⁶⁸⁴ Ben Keith, 'We Are Allowing Russia to Abuse Interpol for Political Gain' (*Lexology*, 12 December 2019) <<https://www.lexology.com/library/detail.aspx?g=7e365ed0-4329-48d0-a4d0-55e14e51fb36>> accessed 19 March 2021.

⁶⁸⁵ Ministry of Foreign Affairs of the Republic of Lithuania, 'Statement on Russian Investigative Committee's Actions against Lithuanian Judges and Prosecutors' (23 July 2018)

<<https://www.urm.lt/default/en/news/statement-on-russian-investigative-committees-actions-against-lithuanian-judges-and-prosecutors>> accessed 15 December 2020.

The collaborative partnership between the judicial branch and the political branches has been significantly damaged in the past decade which threatens the system of checks and balances. If judgments of the Constitutional Court which check political powers are disrespected by the political branches of state, then the separation of powers, the rule of law, democracy and civil rights are subordinated. The populist rhetoric Lithuanian politicians adopt when speaking of courts is reminiscent of the type of rhetoric utilised by Viktor Orbán and Jarosław Kaczyński who managed to introduce vast reforms of their national judiciaries through casting doubt on their legitimacy in the eyes of the public.⁶⁸⁶ The eerie similarity between the reasoning of the leaders of Poland and Hungary and politicians in Lithuania raises concern over the possibility of vast politicisation of courts there also. It is now clear that the Seimas stalling the appointments of three new Constitutional Court judges amounts to politicisation.⁶⁸⁷ The widespread corruption within the judiciary and the contempt that is simmering within politics and the citizenry around courts, is fuel for such reforms.⁶⁸⁸ Furthermore, since the introduction of individual constitutional complaint in Lithuania in 2019 there has been a growing number of explanations issued by the Constitutional Court regarding their rejection of cases.⁶⁸⁹ The Constitutional Court simply does not have the capacity to accept all of the cases flooding in from individuals. This might spur on a reform similar to the one witnessed in President Erdoğan's Turkey, where the introduction of individual constitutional complaint was used as an excuse to expand the Constitutional Court's judiciary which led to the partisan packing of the court.⁶⁹⁰ The underlying deficiencies surrounding within the Lithuanian judicial system have been overlooked by the EU. In late September 2020 the European

⁶⁸⁶ Anna Grzymala-Busse, 'A Tale of Two Illiberalisms: Why Is Poland Failing Where Hungary Succeeded?' (*IPI Global Observatory*, 2 August 2017) <<https://theglobalobservatory.org/2017/08/poland-hungary-authoritarianism-fidesz-pis/>> accessed 19 March 2021.

⁶⁸⁷ Teisė Pro (n 616).

⁶⁸⁸ Haroldas Šinkūnas (n 603).

⁶⁸⁹ *ibid.*

⁶⁹⁰ Bertil Emrah Oder, 'Populism and the Turkish Constitutional Court: The Game Broker, the Populist and the Popular' (*Verfassungsblog*, 5 February 2017) <<https://verfassungsblog.de/populism-and-the-turkish-constitutional-court-the-game-broker-the-populist-and-the-popular/>> accessed 19 March 2021.

Commission published its first report on the rule of law in Lithuania.⁶⁹¹ This report was criticised by experts, including the President of the Constitutional Court, for ignoring mounting political interference with judicial independence.⁶⁹² Indeed, the relative silence and inaction on these issues from the European Commission is only exacerbating the pressure the Lithuanian judiciary is under. The Commission's inadequate Rule of Law reports will be discussed in depth in chapter seven of this thesis.

4.5. Limitations and Attacks on Media Freedom

Lithuanian media underwent rapid liberalisation in the follow up to accession to the EU in 2004.⁶⁹³ However, after the economic crisis of 2008, media freedom and independence has been significantly restricted both financially and in regulatory policies.⁶⁹⁴ Lithuania's public broadcaster, the Lithuanian National Radio and Television (LRT) body, is the most poorly funded broadcaster in the EU, with the management of the national broadcaster having to regularly request further funding from the minister of finance.⁶⁹⁵ In particular, the recent developments around media freedom in Lithuania have been problematic as the LFGU-led coalition government from 2016 to 2020 issued a sustained assault on media freedom. In just four years this coalition's numerous attempts to politicise the national broadcaster and exert pressure on media freedom has resulted in public condemnation from civil society organisations, opposition members, and the Lithuanian President.⁶⁹⁶

⁶⁹¹ European Commission, 'Country Chapter on the Rule of Law Situation in Lithuania' (European Commission 2020) SWD(2020) 314.

⁶⁹² Jurga Bakaite, 'EU's Praise of Lithuanian Justice System Ignored Political Pressure, Lawyers Say' *LRT* (23 October 2020) <<https://www.lrt.lt/en/news-in-english/19/1259914/eu-s-praise-of-lithuanian-justice-system-ignored-political-pressure-lawyers-say>> accessed 19 March 2021.

⁶⁹³ Deimantas Jastramskis, 'Reduction of Liberalism in Lithuanian Media Policy' (2016) 9 *Central European Journal of Communication* 164, 165–166 <<https://journals.ptks.pl/cejc/article/view/92>> accessed 19 March 2021.

⁶⁹⁴ *ibid* 167–175.

⁶⁹⁵ Deimantas Jastramskis, 'Politinė Įtaka Lietuvos Nacionalinio Radijo Ir Televizijos Vadybai Ir Finansavimui: Kaita Ir Pasekmės' (2018) 90(2) *Politologija* 5, 22–23 <<https://www.zurnalai.vu.lt/politologija/article/view/11818>>.

⁶⁹⁶ Human Rights Monitoring Institute, 'Human Rights in Lithuania 2018 – 2019' (2020) 23–25 <<https://hrmi.lt/en/zmogaus-teises-lietuvoje-2018-2019/>> accessed 2 February 2021; European Federation of Journalists, 'Lithuania: EFJ Urges Parliament to Guarantee LRT Independence' (*European*

Since independence, successive governments have struggled to form a coherent approach around media policy but government actions in recent years have clearly demonstrated attempts to exert political control on free media.⁶⁹⁷ Deimantas Jastramskis notes that an underlying problem with the approach of governments to media policy is their desire to make it more responsible rather than more independent.⁶⁹⁸ This has caused harmful and arbitrary laws such as temporary impositions of blanket bans on Russian media outlets and the restriction of reporting on suicides.⁶⁹⁹ These prohibitions are examples of government trying to control media in order to make it more responsible however this comes at the expense of media freedom.⁷⁰⁰

Members of the LFGU-led government coalition in particular demonstrated a lack of respect for media freedom as they not only attempted to push through an unprecedented number of proposals aimed at limiting press freedom, but also vocally diminished the importance of media freedom and threatened specific media outlets.⁷⁰¹ These targeted reforms harmed press freedom, both by limiting the financial autonomy of media outlets and by outright attacking the principle of free speech. This section details some of the attempts by the LFGU-led government to politicise and limit the media while

Federation of Journalists, 3 January 2019) <<https://europeanjournalists.org/blog/2019/01/03/lithuania-efj-urges-parliament-to-guarantee-lrt-independence/>> accessed 19 March 2021.

⁶⁹⁷ Rosita Garškaitė, 'Naujos Monografijos Autorius D. Jastramskis: Žiniasklaidos Politikoje Trūksta Aiškių Vertybinių Nuostatų' (*Bernardinai.lt*, 25 October 2019) <<https://www.bernardinai.lt/2019-10-25-naujos-monografijos-autorius-d-jastramskis-ziniasklaidos-politikoje-truksta-aiskiu-vertybiniu-nuostatu/>> accessed 19 March 2021.

⁶⁹⁸ *ibid.*

⁶⁹⁹ Reporters Without Borders, 'Baltic Countries: Misusing EU Sanctions to Ban Russian TV Channels Is Not a Legitimate Tool for Promoting Reliable Information' (*Reporters Without Borders*, 10 July 2020) <<https://rsf.org/en/news/baltic-countries-misusing-eu-sanctions-ban-russian-tv-channels-not-legitimate-tool-promoting>> accessed 16 October 2021; Law on Public Information No. I-1418 Law Amending Article 22, Registry of Legal Acts, 19/09/2018, No. 14698.

⁷⁰⁰ Jastramskis, 'Politinė Įtaka Lietuvos Nacionalinio Radijo Ir Televizijos Vadybai Ir Finansavimui' (n 695) 8–9.

⁷⁰¹ Šarūnas Černiauskas, 'Vyriausybė sunaikino įrašą su S. Skvernelio pasisakymais apie žodžio laisvę' *LRT* (8 October 2018) <<https://www.lrt.lt/naujienos/lietuvoje/2/229644/vyriausybe-sunaikino-irasa-su-s-skvernelio-pasisakymais-apie-zodzio-laisve>> accessed 19 March 2021; *LRT*, 'Lithuania's Ruling Party Leader Threatens LRT after Report on Minister' *LRT* (15 May 2020) <<https://www.lrt.lt/en/news-in-english/19/1178737/lithuania-s-ruling-party-leader-threatens-lrt-after-report-on-minister>> accessed 19 March 2021.

in power. The government in some circumstances lacked a sufficient majority in parliament to push through controversial amendments, or they were forced to abandon some of their proposal due to protest from the president, civil society or opposition. However, the vast scale of the proposed amendments and determination of the LFGU-led government to force these amendments highlights how aggressive the attack on media freedom has been.

In 2017 the Seimas approved new laws aimed at restricting the sale and advertisement of alcohol on health grounds.⁷⁰² However, the ban on advertising alcohol proved to be a major blow for the media as they lost significant amounts of yearly revenue.⁷⁰³ Media outlets were still recovering from the shock of the economic crisis of 2008 and the subsequent hike in VAT tariffs for periodical publications in 2009 from a reduced 5 percent to the standard rate of 19 percent in 2009 (21 percent from 2010) until 2013 when the reduced VAT rate of 9 percent was reintroduced for newspapers, magazines and other periodical publications.⁷⁰⁴ The hike in VAT charges for periodical media has been criticised as a mistake on the by the Lithuanian governments part – this move weakened the financial standing of free media in Lithuania but produced very little budgetary income for the state.⁷⁰⁵ This in conjunction with the fact that the Press, Radio and Television Support Fund has not been increased since 2015, despite inflation, means that media is still under significant financial pressure.

The government has not only put national media under financial stress but they also threatened the independence of media by attempting to implement an unprecedented number of reforms. In 2016 the Lithuanian parliament moved to limit press freedom by amending defamation laws to make anyone who criticises public figures, including

⁷⁰² The Republic of Lithuania Alcohol Control Act No. I-857 Amendment of Articles 2, 16, 161, 17, 18, 22, 28, 29 and 34, *Registry of Legal Acts*, 09/06/2019, No. 9774.

⁷⁰³ Mindaugas Samkus, 'Alkoholio Reklamos Draudimas: Gamintojai Ir Žiniasklaida Ieško Išeičių' *Delfi* (26 October 2017) <<https://www.delfi.lt/m360/naujausi-straipsniai/alkoholio-reklamos-draudimas-gamintojai-ir-ziniasklaida-iesko-iseiciu.d?id=76171911>> accessed 19 March 2021; Rosita Garškaitė (n 697).

⁷⁰⁴ Deimantas Jastramskis, 'Žiniasklaidos Paramos Politika Lietuvoje' (2013) 63 *Informacijos mokslai* 129, 132 <<https://www.zurnalai.vu.lt/informacijos-mokslai/article/view/1587>>.

⁷⁰⁵ Rosita Garškaitė (n 697).

politicians, accountable to the courts under civil law.⁷⁰⁶ After much outcry from media freedom watchdogs and the general public, President Grybauskaitė vetoed this law, forcing the parliament to reconsider its decision.⁷⁰⁷ What was particularly shocking in this case was the disorganisation of the parliamentarians during the vote of this draft law. 101 parliamentarians voted to pass the amendment into law, none voted against and one member abstained – but soon after the vote, some parliamentarians admitted they did not fully understand the consequences of the proposed law they passed.⁷⁰⁸

4.5.1. Attempt at Passing Censorship Law

The next significant attempt to censor free media came in 2019 with a controversial bill⁷⁰⁹ aimed at combating disinformation under the EU's audio-visual media services directive.⁷¹⁰ Although the need to fight against disinformation was cited as the main reason for the introduction of this draft law, it was clear that this was just an excuse to allow the government to censor the public and media's criticism of government. This draft law proposed to supplement Article 19 of the Law on Public Information by providing a restrictive understanding of unpublishable information. The proposed amendment stated:

“It is prohibited to publish information in public information media in which:

⁷⁰⁶ The Republic of Lithuania Draft Law Amending Article 2.24 of the Civil Code, State News, 2016, No. XIIP-3606(3).

⁷⁰⁷ 'Letter of Human Rights Monitoring Institute to the Office of the Republic of Lithuania' (15 December 2016) <<http://hrmi.lt/wp-content/uploads/2016/12/2016-12-15-IS-XI-36-Del-Civilinio-kodekso-pataisy.pdf>> accessed 2 February 2021; President of the Republic of Lithuania Decree No. 1K-835 of 19 December 2016 'On the Law on the Amendment of Article 2.24 of the Civil Code of the Republic of Lithuania adopted by the Seimas of the Republic of Lithuania No. XIII - 66 return to the Seimas of the Republic of Lithuania for reconsideration' Registry of Legal Acts, 20/12/2016, Nr. 29138.

⁷⁰⁸ Delfi, 'Seimo Nariai Vėl Nežino, Už Ką Balsavo? Kaip Viskas Vyko' <<https://www.delfi.lt/news/daily/lithuania/seimo-nariai-vel-nezino-uz-ka-balsavo-kaip-viskas-vyko.d?id=73130312>> accessed 19 March 2021.

⁷⁰⁹ Draft law amending Articles 19, 31, 34 (1), 48 of Public Information Law No. I-1418, State News, 2019, No. XIIP-3118.

⁷¹⁰ Council Directive 2018/1808 of 14 November 2018 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services (Audio-visual Media Services Directive) in view of changing market realities [2018] OJ L 303/69.

calls for coercion to violate the sovereignty of the Republic of Lithuania – change its constitutional order, encroach on its independence or violate the integrity of the territory, disseminate disinformation, war propaganda, incite war, try to distort the historical memory of the Republic of Lithuania, promote mistrust and dissatisfaction with the Lithuanian state and its institutions, democratic order, national defence; cultural differences, to weaken national identity and citizenship, to weaken the determination of citizens to defend their state, or otherwise seek to exert an influence on the country's democracy, electoral processes and party system directed against the interests of the national security of the Republic of Lithuania.”⁷¹¹

Under this broad formulation of sensitive or unpublishable information an overly wide discretion is afforded to state institutions in deciding what an expression of “mistrust” or “dissatisfaction” with the Lithuanian state and its institutions is.⁷¹² It is also contrary to Article 10 (2) of the European Convention on Human Rights which prohibits overly broad restrictions on freedom of expression.⁷¹³ It could also make way for censorship of historical facts that shed a negative light on Lithuanian history, much like what has been implemented in Poland by the PiS government.⁷¹⁴ After strong criticisms of the proposal from journalists, the president and Prime Minister the bill was withdrawn. If this law had been passed, even objective criticism of the state’s politics or government institutions could be deemed unpublishable information.⁷¹⁵ Clearly this law was designed to act as a ‘muzzle’ on media to control their unwanted criticism of politicians.

⁷¹¹ Draft law amending Articles 19, 31, 34 (1), 48 of Public Information Law No. I-1418.

⁷¹² Mindaugas Lankauskas, ‘Korupcijos Valdymas Ir Kontrolė Panaudojant Žiniasklaidos Sektorių: Korupcijos Prevencija Stiprinant Spaudos Laisvę’ (2019) 97(1) Teisės Problemos 71, 91 <https://teise.org/wp-content/uploads/2019/07/Lankauskas_2019_1.pdf> accessed 2 February 2021.

⁷¹³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Article 10(6).

⁷¹⁴ Wojciech Sadurski, ‘How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding’ (2018) Sydney Law School, Legal Studies Research Paper No.18/01 51–52.

⁷¹⁵ Mindaugas Lankauskas (n 712) 91.

4.5.2. Attempt to Seize Control of Lithuania's National Broadcaster

In early 2018 the LFGU-led parliament set up a special investigatory commission (the special commission) tasked with looking into the financial and managerial functioning of the LRT. On the back of this special commission's findings, in October 2018, the LFGU-led parliament sought to change the management structure of the LRT to make it more transparent as an institution.⁷¹⁶ However, when these proposed changes were analysed it became clear that this was yet another attempt by the LFGU-led government to politicise and undermine free media, this time by seeking control of the national broadcaster. The temporary special commission proposed to establish a new politicised supervisory authority for the LRT, reduce the LRT Council's powers and functions, shorten Council members' term of office from 6 years to 5 year and change their appointment procedure.⁷¹⁷ The special commission's conclusions also proposed amending the procedure for appointing members of the LRT Council in line with the terms of office of the appointing authorities . The President of Lithuania would appoint four members of the council not all at once, but every 15 months. This would allow the President to appoint all members of the Council during his/her term in office.⁷¹⁸ It was proposed to gradually move to a model where the Seimas would also appoint its delegated council members not all at once, but throughout their parliamentary term.⁷¹⁹

Liudvikas Gadeikis, chairman of the LRT Council, issued a statement to the Seimas warning that the proposed amendments were a clear attempt to politicise the LRT.⁷²⁰

⁷¹⁶ Draft Resolution of the Seimas "On the Conclusions of the Parliamentary Investigation Conducted by the Temporary Commission of Inquiry of the Seimas of the Republic of Lithuania on the Management, Financial and Economic Activities of the Lithuanian National Radio and Television" State News, 2018, No. XIIIIP-2656 (Draft Resolution of the Seimas No. XIIIIP-2656).

⁷¹⁷ Mapping Media Freedom, 'Violation of Media Freedom - Lithuania: Ruling Party's Proposals Raise Fears over Independence of Public Broadcaster' (2019) <<https://mappingmediafreedom.usahidi.io/posts/22734>> accessed 19 March 2021.

⁷¹⁸ Draft Resolution of the Seimas No. XIIIIP-2656; Jūratė Skėrytė, 'R.Karbauskis: Kultūros Komitetas Svarstys LRT Tarybos Depolitizavimą' 15 min (Vilnius, 16 October 2018) <<https://www.15min.lt/naujiena/aktualu/lietuva/r-karbauskis-kulturos-komitetas-svarstys-lrt-tarybos-depolitizavima-56-1045142>> accessed 2 February 2021.

⁷¹⁹ Jūratė Skėrytė, 'R.Karbauskis: Kultūros Komitetas Svarstys LRT Tarybos Depolitizavimą' (n 718).

⁷²⁰ LRT, 'The LRT Council on the Threat for the Independence of the Lithuanian National Radio and Television' LRT (10 October 2018) <<https://www.lrt.lt/en/news-in-english/19/202830/the-lrt-council-on->

Similarly, the European Broadcasting Union (EBU) also expressed their concerns over the amendments to the functioning of the LRT stating that the proposed amendments "appear to lack safeguards against political influence" and that "it is of crucial importance that the body entrusted with the supervision of LRT is truly independent from political powers and assumes the role of guaranteeing the editorial independence of public service media as provided by European standards".⁷²¹

The Seimas rejected the special investigative commission's findings on the 6th November 2018 - 56 parliamentarians voted in favour, 56 were against and three abstained.⁷²² Because the Seimas failed to uphold these findings under the parliamentary Committee on Legal Affairs, the proposals were forwarded onto an alternative parliamentary committee, the Committee on Culture, which at the time was chaired by LFGU leader Ramūnas Karbauskis.⁷²³ On 20th December 2018 the Seimas once again rejected the special investigative commission's findings. However, instead of going back to the drawing board and redrafting the bill or abandoning it all together, Mr. Karbauskis insisted on pushing forward with the existing bill. In early January 2019 the parliamentary majority voted to pass the amendment with 50 parliamentarians voting for them, 36 – against and 2 abstained which is adequate to pass the first legislative hurdle.⁷²⁴

However, in October 2018, more than two months prior to the draft passing the first legislative stage the very basis of the bill was brought into question. A group of Seimas members from the opposition asked the Constitutional Court to clarify if the setting up of the special investigative commission by the Seimas was constitutional in the first place.

the-threat-for-the-independence-of-the-lithuanian-national-radio-and-television> accessed 20 March 2021.

⁷²¹ European Broadcasting Union, 'EBU Concerned about Proposed Legal Changes in LRT Governance' (EBU, 17 October 2018) <<https://www.ebu.ch/news/2018/10/ebu-concerned-about-proposed-legal-changes-in-lrt-governance>> accessed 20 March 2021.

⁷²² BNS, 'Seimas Rejects LRT Probe Conclusions, Sends Them to Different Committee' *Delfi* (Vilnius, 11 June 2018) <<https://m.delfi.lt/en/article.php?id=79509957>> accessed 20 March 2021.

⁷²³ Mapping Media Freedom (n 717).

⁷²⁴ Linas Jegelevičius, 'Lithuania's Ruling Majority Swings at Media Freedom, Experts Warn' *Baltic News Network* (Vilnius, 17 January 2019) <<https://bnn-news.com/lithuania-s-ruling-majority-swings-at-media-freedom-196279>> accessed 20 March 2021.

The Constitutional Court accepted the case in October 2018 meaning that the LFGU-led parliament's attempts to rush the legislation through, prior to the ruling of the Constitutional Court, in bad faith.⁷²⁵ LRT representatives and opposition members urged the government to halt all votes and debates on the restructuring of LRT until a judgment was given on the matter by the Constitutional Court but these urges were ignored.⁷²⁶

Monika Garbačiauskaitė-Budrienė, the LRT director general at the time issued a statement condemning the actions of the Seimas saying that the attempts of the LFGU-led government to rush the adoption of their draft law before a ruling by the Constitutional Court, was evidence of them attempting to exert political power over the national broadcaster.⁷²⁷ Member of the opposition Eugenijus Gentvilas also spoke out against the actions of the parliamentary majority and likened them to tactics used in Hungary and Poland: "What we see is the remnants of Sovietism and the reflection of the new trends budding in Eastern Europe. We have the examples (of constraints of media freedom) in Hungary, Poland and, lately, in Romania. Now Lithuania starts playing the loudest chord in the choir".⁷²⁸

In May 2019 the Constitutional Court decided that the formation of the special investigatory commission, on the initiative of the LFGU-led government, for the purpose of investigating the management and finances of the LRT was in conflict with the Lithuanian Constitution.⁷²⁹ According to the Constitutional Court the setting up of this

⁷²⁵ 'Constitutional Court of the Republic of Lithuania, Notice of Acceptance to Issue Judgment on "The Petition to Investigate Whether the Resolution of the Seimas to Form a Temporary Commission to Investigate the Financial and Economic Activities of the Lithuanian National Radio and Television Is Not in Conformity with the Constitution" (06/02/2018)' <<https://www.lrkt.lt/lt/apie-teisma/naujienos/prasymo-priemimas/1335/priimtas-nagrineti-prasymas-istirti-ar-konstitucijai-nepriestarauja-seimo-nutarimas-sudaryti-laikinaja-komisija-lietuvos-nacionalinio-radijo-ir-televizijos-finansinei-ir-ukinei-veiklai-tirti:9>> accessed 8 February 2021.

⁷²⁶ Mapping Media Freedom (n 717).

⁷²⁷ Linas Jegelevičius (n 209).

⁷²⁸ Linas Jegelevičius (n 724).

⁷²⁹ *Constitutional Court of the Republic of Lithuania, Decision of 16 May 2019 "On resolution of 12 January 2018 No XIII-1022 of the Seimas of the Republic of Lithuania 'on the formation of the temporary investigation commission of the Seimas of the Republic of Lithuania tasked with the investigation of the management, financial and economic activities of the National Radio and Television of Lithuania"* Registry of Legal Acts, 17/05/2019, No 7876.

special commission violated Article 25 of the Constitution which establishes the right to freedom of expression.⁷³⁰ The Court noted in its judgment the centrality of the freedom of expression and the press as the foundation of other constitutional rights:

“Interpreting the content of freedom of information enshrined in the Constitution as a natural human freedom, the Constitutional Court has held: this freedom is one of the foundations of an open, just, harmonious civil society, can exercise their constitutional rights and freedoms only with the freedom to seek, receive and impart information without hindrance; the Constitution guarantees and protects the public interest in being informed, inter alia, the freedom of the media...”⁷³¹

The Constitutional Court also established that the Seimas was not in a position to establish the special investigative commission as this resulted in undue political influence to be placed on the LRT. Only designated independent bodies, that are established under legislation, can play a supervisory role of the LRT.⁷³²

In May 2020 amendments to the law on LRT were passed but these amendments were heavily changed by the various parliamentary committees and outside experts who opposed the special investigative commission’s findings.⁷³³ Essentially, the resulting law was a toothless version of the original draft as the elements that would have heavily politicised the LRT were removed. Therefore, this new legislation was basically useless with no significant positive reforms introduced.⁷³⁴

⁷³⁰ Constitution of the Republic of Lithuania, Article 25.

⁷³¹ *Constitutional Court of the Republic of Lithuania Decision No. 7876* (n 729) para 23.1.1.

⁷³² *ibid* 23.8.3.2.

⁷³³ Law on National Radio and Television of the Republic of Lithuania No. I-1571 Amendment Act, Registry of Legal Acts, 22/05/2020, No. 10874.

⁷³⁴ Verslo Žinios, ‘Naujas LRT Įstatymas: Valdysena Nepakeista, Įsteigta Etikos Kontrolieriaus Pareigybė’ *Verslo Žinios* (Vilnius, 5 July 2020) <<https://www.vz.lt/rinkodara/medijos/2020/05/07/naujas-lrt-istatymas-valdysena-nepakeista-isteigta-etikos-kontrolieriaus-pareigybe>> accessed 20 March 2021.

4.6. Structural Disrespect for Minority Rights

Protection of minority rights in Lithuania lags far behind the standard that is expected of a liberal democracy. EU accession conditionality has largely failed to establish comprehensive protection of minority rights in Lithuania.⁷³⁵ Politics in Lithuania has been dominated by majority elites and both policy makers and the general public remain sceptical about the loyalty of minorities, especially Russophone minorities.⁷³⁶ Therefore, minority integration has been weak with minorities struggling to gain equal access to their democratic and socio-economic rights.⁷³⁷ Lithuanian identity still remains tied up with an ethno-national, ethno-linguistic and Catholic ideology.⁷³⁸ Issues around the rights of sexual minorities are particularly controversial right now. The ratification of the Istanbul Convention dominated not only public discourse but also parliamentary debates in early 2021.⁷³⁹ This is because the Istanbul Convention adopts a liberal stance on the concept of gender as a social and not a biological construct while also reemphasising the duty of states to condemn discrimination on the grounds of sexual orientation and gender identity.⁷⁴⁰ This liberal stance on gender and minority rights contained in the Istanbul Convention is forcing the issues of same-sex partnership and gender reassignment to be heatedly debated. Although the Freedom Party, one of three parties composing the current government coalition, campaigned for the introduction of same-sex partnership legislation, it has so far been met with fervent opposition from conservative Seimas

⁷³⁵ Timofey Agarin, 'Nation-States into Nationalising States: The Impact of Transformation on Minority Participation in the Baltic States' (2017) 3(4) *Intersections. East European Journal of Society and Politics* 41, 48–49.

⁷³⁶ Zsuzsa Csergő, Ognen Vangelov and Balázs Vizi, 'Minority Inclusion in Central and Eastern Europe : Changes and Continuities in the European Framework' (2017) 3(4) *Intersections. East European Journal of Society and Politics* 5, 11.

⁷³⁷ *ibid.*

⁷³⁸ Agarin (n 735) 48; Hugo Greenhalgh, 'Lithuania to Legalise Gay Civil Partnerships next Year' *Reuters* (Vilnius, 21 December 2020) <<https://news.trust.org/item/20201221111026-ecc3d/>> accessed 20 March 2021.

⁷³⁹ Kristina Jackūnaitė, 'Stambulo konvencija Seime vis dar priimama nevienareikšmiškai: nemato prasmės jos ratifikuoti dėl Lietuvos įstatymų' *Irt.lt* (Vilnius, 12 February 2021) <<https://www.irt.lt/naujienos/lietuvoje/2/1343767/stambulo-konvencija-seime-vis-dar-priimama-nevienareiksmiskai-nemato-prasmes-jos-ratifikuoti-del-lietuvos-istatymu>> accessed 20 March 2021.

⁷⁴⁰ Council of Europe Convention on preventing and combating violence against women and domestic violence (opened for signature 11 May 2011, entered into force 1 October 2014) CETS No. 210 art 4.

members.⁷⁴¹ In fact, the first openly gay parliamentarian, Tomas Vytautas Raskevičius, became the subject of a petition to have him removed from his position as head of the Seimas Committee on Culture because of his efforts to vindicate the rights of sexual-minorities. This petition was even backed by a current members of the Seimas.⁷⁴² Ethnic minority groups in Lithuania also struggle with issues of acceptance and legal recognition. The most recent report by the European Commission against Racism and Intolerance (ECRI) condemned the lack of action taken by the Lithuanian authorities on ethnic minority issues.⁷⁴³ Therefore, intolerance of minorities in Lithuania remains a significant flaw of Lithuanian liberal constitutional democracy.

4.6.1. Rights of Sexual Minorities in Lithuania

The legal and policy frameworks designed to recognise and protect the Lithuanian LGBTQ+ community is far behind what is expected of a liberal constitutional democracy. According to ILGA Europe's (the European Region of the International Lesbian, Gay, Bisexual, Trans & Intersex Association) evaluation of Lithuania's respect for human rights and equality of LGBTQ+ people earned 23.35 points out of 100 in 2020 where 0 equals gross violations of human rights, and discrimination and 100 equals respect of human rights, full equality.⁷⁴⁴ In general, most democratic institutions have failed to recognise the importance of LGBTQ+ rights with the Seimas in particular stalling or plainly refusing to implement laws that would bring Lithuania in line with EU standards for protection of sexual minority rights. The lack of initiative on the part of the legislature to establish a legal framework for same-sex civil partnerships, adoption rights for same-sex couples and gender reassignment laws comes as no surprise as there is minimal momentum from the wider population to implement such laws. In 2014 the European Union Fundamental Rights Agency issued the results of its study entitled 'European Union survey of

⁷⁴¹ Viktorija Rimaitė, 'Naujas partnerystės įstatymas tuoj bus Seime: numatytas ir tos pačios lyties asmenų santykių įteisinimas' *Delfi* (2 October 2021) <<https://www.delfi.lt/a/86449783>> accessed 20 March 2021.

⁷⁴² Jadvyga Bieliavskā, 'Gražulis: Kultūros Komitetą Keisčiau Tik į Žmogaus Teisių Komitetą' *LRT* (Vilnius, 28 January 2021) <<https://www.lrt.lt/naujienos/lietuvoje/2/1331329/grazulis-kulturos-komiteta-keisciau-tik-i-zmogaus-teisiu-komiteta>> accessed 20 March 2021.

⁷⁴³ European Commission against Racism and Intolerance, 'ECRI Conclusions On The Implementation Of The Recommendations In Respect Of Lithuania Subject To Interim Follow-Up' (Council of Europe 2019) 6.

⁷⁴⁴ ILGA-Europe, 'Rainbow Europe Country Ranking 2020' (*Rainbow Europe*) <<https://rainbow-europe.org/country-ranking>> accessed 20 March 2021.

discrimination and victimisation of lesbian, gay, bisexual and transgender persons'.⁷⁴⁵ This study revealed that 61% of Lithuanian LGBTQ+ respondents had felt discriminated against or harassed on the grounds of their sexual orientation within the previous year which was the highest percentage in the EU, where the overall average was 47%.⁷⁴⁶ Furthermore, the average number of acts of violence perpetrated against LGBTQ+ people in Lithuania was 525 per 1,000 respondents - also, more than any other EU state.⁷⁴⁷

The 2015 European Commission's Eurobarometer survey on discrimination in the EU also found that half of all Lithuanian respondents stated that gay, lesbian and bisexual people should not necessarily have the same rights as heterosexual people where the EU average was 23 percent.⁷⁴⁸ 71 percent of Lithuanian participants would not support same-sex marriages being legalised in Europe - the EU average was 33 percent.⁷⁴⁹ While 59 percent would feel uncomfortable with an LGB person securing the highest elected political position – the EU average was 21 percent.⁷⁵⁰ Furthermore, 47 percent of Lithuanians would disapprove of information about diversity in terms of sexual orientation being part of the curriculum – 20 percent higher than the EU average.⁷⁵¹

The exception to the rule of domestic democratic institutions failing the LGBTQ+ community in Lithuania is the Constitutional Court, which in 2019 affirmed the constitutionality of same-sex relationships and the right to a private family life of all families not just ones based on marriage between a man and a woman.⁷⁵² Furthermore,

⁷⁴⁵ European Union Agency for Fundamental Rights, 'EU LGBT Survey European Union Lesbian, Gay, Bisexual and Transgender Survey' (FRA 2013) <https://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance_en.pdf> accessed 20 February 2021.

⁷⁴⁶ *ibid* 26.

⁷⁴⁷ *ibid* 59.

⁷⁴⁸ European Commission, 'Special Eurobarometer 437 on Discrimination in the EU in 2015' (European Commission 2015) <<https://op.europa.eu/en/publication-detail/-/publication/d629b6d1-6d05-11e5-9317-01aa75ed71a1>> accessed 19 February 2021.

⁷⁴⁹ *ibid* 248.

⁷⁵⁰ *ibid* 30.

⁷⁵¹ *ibid* 254.

⁷⁵² Decision of the Constitutional Court of the Republic of Lithuania On the compliance of Item 5 of Paragraph 1 of Article 43 of the Law of the Republic of Lithuania "On the Legal Status of Aliens" with the Constitution of the Republic of Lithuania, *Registry of Legal Acts*, 11/01/2019, No 439.

the recent decision of the European Court of Human Rights (ECtHR) in *Beizaras & Levickas v. Lithuania* further pointed out the shortcomings of the Lithuanian authorities for its lack of initiative taken on LGBTQ+ rights.⁷⁵³ These recent decisions are examples of the mounting pressure on the Lithuanian authorities to bring their laws around LGBTQ+ rights in line with EU and European Convention on Human Rights (ECHR) standards. However, these decisions have so far fallen on deaf ears as the Seimas has still not established a system for same-sex couples to have their relationship legally recognised, there has not been any development of gender reassignment laws and in some cases the law still permits discrimination against the LGBTQ+ community.

Article 4, section 2 (16) of the Law on the Protection of Minors against the Detrimental Effect of Public Information (Law on the Protection of Minors) prohibits “public defiance of family values”, which includes public information which “expresses contempt for family values, (or) encourages the concept of entry into a marriage and creation of a family other than that stipulated in the Constitution of the Republic of Lithuania and the Civil Code of the Republic of Lithuania”.⁷⁵⁴ Under Article 12 of the Lithuanian Constitution, a marriage is described as a union between a man and a woman.⁷⁵⁵ Also the Constitutional Court only recognised the legitimacy of a family consisting of a same-sex relationship in 2019, but this decision has not been acknowledged by the Seimas as they have still not passed legislation establishing civil partnerships for same-sex couples despite multiple proposed bills. Therefore, the Law on the Protection of Minors has had the effect of censoring information in the media that promotes LGBTQ+relationships.

In September 2014, Lithuanian TV stations refused to broadcast the information campaign ‘Change It’, which portrayed a same-sex family, due to fears it was contrary to Article 4 of the Law on the Protection of Minors. This was confirmed by the Inspector of

⁷⁵³ *Beizaras & Levickas v Lithuania* (App No 41288/15 ECHR, 14 January 2020).

⁷⁵⁴ The Republic of Lithuania’s Law on the Protection of Minors against the Detrimental Effect of Public Information, State News, 18/09/2002, No. 91-3890.

⁷⁵⁵ Constitution of the Republic of Lithuania, Article 12.

Journalists Ethics as the campaign portrayed a same-sex family in a positive light which would be contrary to the law.⁷⁵⁶

In another case, a children's book by author Neringa Dangvydė was removed from bookshops on the basis of the Law on the Protection of Minors after a group of conservative members of the Seimas and the Lithuanian Parent's Association complained to the Ministry of Culture and the Lithuanian University of Educational Sciences (LEU).⁷⁵⁷ The complainants noted their alarm at the fact that a children's book that paints same-sex relationships in a positive light is funded by the Ministry of Culture.⁷⁵⁸ This book featured members of ethnic and sexual minority groups with the aim of teaching children about tolerance towards diverse members of society.⁷⁵⁹ After the removal of this book from circulation, the LEU explained that the book was "harmful, primitive and biased homosexual propaganda".⁷⁶⁰ The Office of the Inspector of Journalist Ethics also issued a statement about the book which described the portrayal of same-sex couples as damaging to minors. The Inspectorate's experts decided that these portrayals were "harmful, invasive, direct and manipulative".⁷⁶¹ They also found that stories of same-sex couples were in violation of the Law on the Protection of Minors because they incite "the concept of entry into a marriage and creation of a family other than stipulated in the Constitution of the Republic of Lithuania and the Civil Code of the Republic of Lithuania".⁷⁶² The author of the book fought a long legal battle in national courts to allow her book to be published without restrictions until her death from illness in 2020.⁷⁶³

⁷⁵⁶ European Commission against Racism and Intolerance, 'ECRI Report on Lithuania (Fifth Monitoring Cycle)' (Council of Europe 2016) para 92.

⁷⁵⁷ Seimas of the Republic of Lithuania, 'Statement of Group of Seimas Members: "Is the Promotion of Children's Books That Promote Same-Sex Marriages a Priority of the Ministry of Culture?' (20 March 2014) <https://www.lrs.lt/sip/portal.show?p_r=15375&p_k=1&p_t=144522> accessed 22 March 2021.

⁷⁵⁸ *ibid.*

⁷⁵⁹ European Commission against Racism and Intolerance (n 756) para 92.

⁷⁶⁰ Human Rights Monitoring Institute, 'Soviet-Era Censorship Is Back: Children's Fairy Tale Book Banned Because of "Harmful, Primitive and Biased Homosexual Propaganda"' (*Liberties.eu*, 20 May 2014) <<https://www.liberties.eu/en/stories/censorship-in-lithuania-lgbt/705>> accessed 22 March 2021.

⁷⁶¹ European Commission against Racism and Intolerance (n 756) para 91.

⁷⁶² *ibid.*

⁷⁶³ Austėja Mikuckytė-Mateikienė, 'Kolegos Prisimena Neringą Dangvydę: Susidūrusi Su Kritika Ir Liga Ji Neužsidarė Nuo Gyvenimo' *LRT* (Vilnius, 21 March 2020)

However, having exhausted all national legal remedies, and failing to obtain a judgment allowing for the unrestricted sale of her book,⁷⁶⁴ the author applied to the ECtHR in 2019. In early 2023, the ECtHR issued its judgment in favour of the children's author in *Macatė v. Lithuania*.⁷⁶⁵ The Grand Chamber of the court unanimously decided that the decision to place a warning label on the front cover of the children's book due to its portrayal of a same-sex couple was contrary to Article 10 of the European Convention on Human Rights, the freedom of expression.

Although the jurisprudence of the ECtHR has not yet led to an obligation being placed on member states to legalise marriage for same-sex couples, there is a positive obligation on member states to provide legal recognition of such relationships by alternative institutions (such as civil partnerships) as per the ECtHR's decision in *Oliari and Others v. Italy*.⁷⁶⁶ Here the Court suggested that Article 12 of the ECHR,⁷⁶⁷ the rights of men and women to wed in accordance with national laws, does not impose an obligation on states to provide access to marriage for same-sex couples.⁷⁶⁸ However, an absence of an alternative legal framework to recognise same-sex unions would be a violation of Article 8 of the ECHR,⁷⁶⁹ the right to respect for family life.⁷⁷⁰

Currently the Constitution of the Republic of Lithuania establishes that marriage is between a man and a woman.⁷⁷¹ Article 3.7 of the Civil Code of the Republic of Lithuania

<<https://www.lrt.lt/naujienos/kultura/12/1153817/kolegos-prisimena-neringa-dangvyde-susidurusi-sukritika-ir-liga-ji-neuzsidare-nuo-gyvenimo>> accessed 22 March 2021.

⁷⁶⁴ Decisions of Vilnius District Court Civil Case divisions, 19th February 2019, "NM v Vytautas Magnus University (successor of the public institution Lithuanian University of Educational Sciences)" (case No e2A-221-803/2019).

⁷⁶⁵ *Macatė v Lithuania* (App No 61435/19 ECHR, 1 January 2023).

⁷⁶⁶ *Oliari and Others v Italy* App Nos 18766/11 and 36030/11 (ECHR, 21 October 2015).

⁷⁶⁷ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art. 12.

⁷⁶⁸ Giuseppe Zago, 'A Victory for Italian Same-Sex Couples, a Victory for European Homosexuals? A Commentary on *Oliari v Italy*' (*Articolo 29*, 21 August 2015) <<http://www.articolo29.it/2015/victory-for-italian-same-sex-couples-victory-for-european-homosexuals-commentary-on-oliari-v-italy/>> accessed 22 March 2021.

⁷⁶⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art. 8.

⁷⁷⁰ *Oliari* (n 766) para 185.

⁷⁷¹ Constitution of the Republic of Lithuania, Article 12.

also defines marriage as a voluntary agreement between a man and a woman to establish a family legal relationship in accordance with the procedure established by law.⁷⁷² Furthermore, Article 3.12 of the Civil Code establishes an explicit ban on same-sex marriage.⁷⁷³ Given that the ECtHR allows States to decide for themselves on such unions, it can be argued that national legislation is not in conflict with the standards set by the ECtHR.⁷⁷⁴ On the other hand, transgender people who have undergone gender reassignment have the right to marry persons of the opposite sex, but the existing law governing medical and legal gender reassignment procedures raises problems already at the gender reassignment stage.⁷⁷⁵ A transsexual person, unable to change his/her gender and legally establish his/her gender identity, does not have the possibility to enter into marriage, because same-sex marriage, as mentioned above, is not established in the Lithuanian legal regulation.⁷⁷⁶ Given that the ECtHR calls for the legal protection of transgender people, Lithuanian legislation does not meet the standards set by the Court and at the same time indirectly restricts the right of transgender people to marry.⁷⁷⁷

As noted above, there is still no suitable legal framework to recognise the relationship of same-sex couples in Lithuania. Although section XV of the Civil Code provides for a system of cohabitation of non-married couples, Guliakaitė argues that this system is not only unsuitable for opposite-sex couples as it only regulates financial aspects of a union, it also outright excludes same-sex couples from its remit in article 3.229.⁷⁷⁸ This makes the law contrary to the ECtHR decision of *Vallianatos and Others v. Greece* where it was established that the legislature cannot exclude same-sex couples when introducing a legal alternative to marriage.⁷⁷⁹ It can be concluded that Lithuania's legal regulation does not meet the standards set by the ECtHR. LGBTQ+ couples do not have adequate legal

⁷⁷² Civil Code of the Republic of Lithuania, State News, 06/09/2000, No. 74-2262.

⁷⁷³ *ibid.*

⁷⁷⁴ Monika Guliakaitė, 'LGBT Asmenų Teisių Apsauga: EŽTT Praktika' (LLM Dissertation, Vilnius University 2019) 48–49.

⁷⁷⁵ *ibid.*

⁷⁷⁶ *ibid.*

⁷⁷⁷ *ibid.*

⁷⁷⁸ *ibid.* 33.

⁷⁷⁹ *Vallianatos and Others v Greece App Nos 29381/09 and 32684/09 (ECHR, 7 November 2013)* para 91–92.

protection, as there is no alternative to marriage to protect the property and non-property rights of LGBTQ+ families.⁷⁸⁰

In 2019 the Constitutional Court considered a case where a Belarussian man who married a Lithuanian citizen in Denmark had his residency application refused by the Lithuanian Migration Department.⁷⁸¹ His application was refused due to the fact that same-sex marriage is not possible under Lithuanian law so residency as a family member of his husband was, therefore, also not possible. The Lithuanian Constitutional Court in this 2019 decision disagreed with the reasoning given by the Lithuanian Migration Department and established that Article 29 of the Constitution prohibits discrimination on the grounds of sexual orientation and/or gender identity.⁷⁸² This was particularly important as Lithuania also does not have a legal framework for gender reassignment procedures.⁷⁸³ The Court also interpreted Article 38 of the Constitution, which deals with the concept of family. The Constitutional Court declared that the concept of family in Article 38 of the Lithuanian Constitution is gender-neutral even though the concept of marriage is reserved for opposite-sex unions.⁷⁸⁴ Therefore, the judgment established that both international treaties and the Lithuanian Constitution protects not only families established by marriage but also other family arrangements including same-sex families.⁷⁸⁵

The Constitutional Court emphasised that only a state guided by respect for the dignity of every human being can be considered a truly democratic state and that the Constitution is an anti-majoritarian act which protects individuals.⁷⁸⁶ Thus, in a democratic state governed by the rule of law, the prevailing attitudes or stereotypes of the majority of members of society during a given period of time cannot discriminate

⁷⁸⁰ Monika Guliakaitė (n 774) 49.

⁷⁸¹ *Decision of the Constitutional Court of the Republic of Lithuania No. 439* (n 752).

⁷⁸² *ibid*, [31.2].

⁷⁸³ Human Rights Monitoring Institute, 'Concept of Family Is Gender-Neutral, Rules Lithuanian Constitutional Court' (*Liberties.eu*, 30 January 2019) <<https://www.liberties.eu/en/stories/concept-family-gender-neutral-lithuanian-constitutional-court/16622>> accessed 22 March 2021.

⁷⁸⁴ *Decision of the Constitutional Court of the Republic of Lithuania No. 439* (n 752) para 32.5.

⁷⁸⁵ *ibid*, [32.3].

⁷⁸⁶ *ibid*, [31.3].

against persons solely on the basis of constitutionally important objectives, such as public order, solely on the basis of their gender identity and/or sexual orientation.⁷⁸⁷

The judgment of the ECtHR in *Beizaras & Levickas v. Lithuania* was pivotal as it highlighted not only the deeply rooted homophobic beliefs within Lithuanian society but also the systemic discriminatory within Lithuanians judicial system. The ECtHR issued a scathing judgment in January 2020 which criticised the Lithuanian authorities for their dealing with this case and also highlighted the issue of deeply rooted prejudice against the LGBTQ+ community within society. The ECtHR noted that because the national courts explicitly mentioned the applicants' sexual orientation, it is clear that one of the grounds for refusing to open a pre-trial investigation was the courts' disapproval of the applicants' demonstrating their sexual orientation.⁷⁸⁸ Furthermore, the ECtHR found that the argument of irreconcilability between the majority of Lithuanian society having traditional family values and the applicant's same-sex relationship was inadequate.⁷⁸⁹ This is because the ECtHR acknowledged that the Lithuanian Constitutional Court in both its 2011 and 2019 judgment established that the concept of family under the Lithuanian Constitution was gender neutral.⁷⁹⁰ The ECtHR also made reference to the fact that ECHR is a "living instrument" and the State should consider "developments in society and changes in the perception of social, civil status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life."⁷⁹¹

Importantly, the ECtHR declared that not only was there a failing on the part of the Lithuanian authorities to uphold the applicant's rights under Article 8 and Article 14 of the Convention but that there was prevailing prejudice against the homosexual community in Lithuanian society that permeated the public authorities leading to a breach of Article 13, the right to an effective remedy before national authorities:

⁷⁸⁷ *ibid.*

⁷⁸⁸ *Beizaras* (n 753) paras 120–121.

⁷⁸⁹ *ibid* 122.

⁷⁹⁰ *ibid* 123.

⁷⁹¹ *ibid* 122.

“Having regard to all the material at hand, the Court thus finds it established, firstly, that the hateful comments including undisguised calls for violence by private individuals directed against the applicants and the homosexual community in general were instigated by a bigoted attitude towards that community and, secondly, that the very same discriminatory state of mind was at the core of the failure on the part of the relevant public authorities to discharge their positive obligation to investigate in an effective manner whether those comments regarding the applicants’ sexual orientation constituted incitement to hatred and violence, which confirmed that by downgrading the danger of such comments the authorities at least tolerated such comments. In the light of those findings the Court also considers it established that the applicants suffered discrimination on the grounds of their sexual orientation. It further considers that the Government did not provide any justification showing that the impugned distinction was compatible with the standards of the Convention.”⁷⁹²

The ECtHR also drew emphasis to the fact that the 2016 report by the European Commission against Racism and Intolerance revealed that growing intolerance towards sexual minorities in Lithuania which remained unchecked⁷⁹³ and made note of the ECRI’s conclusions that the Lithuanian authorities have not made significant progress to address intolerance toward sexual minorities.⁷⁹⁴

4.6.2. Racial Discrimination in Lithuania: The Roma Community and Immigration Crises

Lithuania also has a considerable population of ethnic minority groups with 5.8 percent of the population identifying as ethnic Russians, 6.6 percent identifying as Polish which are the largest non-Lithuanian segments of the population.⁷⁹⁵ There are also

⁷⁹² *ibid* 129.

⁷⁹³ *ibid* 56.

⁷⁹⁴ *ibid* 62.

⁷⁹⁵ Lithuanian Statistics Department, ‘Results of the 2011 Population and Housing Census of the Republic of Lithuania, Ethnicity, Mother Tongue and Religion’ (2011)

approximately between 2,000 and 2,500 members of the Roma community living in Lithuania.⁷⁹⁶ Despite these numbers and the fact that these ethnic groups have deep historical roots in Lithuania, intolerance and discrimination within society and the national infrastructure is widespread. Racially motivated violence and hate speech is common within society but many NGOs warn that instances of physical assault or hate speech are underreported due to minorities not trusting the police.⁷⁹⁷ This fear of the police is reasonable considering that there have been multiple allegations of members of the police force behaving in a discriminatory or violent manner towards members of minority groups although there are very few official reports submitted.⁷⁹⁸

There has also been very little progress achieved by the Lithuanian government in recent years to address severe deficiencies in the legal framework to support minority members of the population. In particular the ECRI notes that strategies designed to develop legal, social and economic protection for minorities such as the 2015-2020 Action Plan for the Integration of Roma into Lithuanian Society included vague measures and were “far from sufficient” compared to what was needed to make a material improvement.⁷⁹⁹ The working group on hate crime monitoring, analysis and evaluation established by the Lithuanian Ministry of Interior in November 2016 also notably lacked efficacy as they only met twice in 2016 and 2017, no meetings occurred in 2018, meaning that any positive impact from this working group is unclear.⁸⁰⁰ Furthermore, these action plans and working groups seem to lack coherent planning and inter-agency cooperation making any progress achieved localised and temporary.⁸⁰¹

<<https://osp.stat.gov.lt/en/web/guest/informaciniai-pranesimai?articleId=223122>> accessed 22 March 2021.

⁷⁹⁶ European Commission against Racism and Intolerance (n 756) para 61.

⁷⁹⁷ *ibid* 21,58; Human Rights Monitoring Institute, ‘Protection of Hate Crime Victims’ Rights: The Case of Lithuania’ (HRMI 2013) 7 <https://fra.europa.eu/sites/default/files/frc-2013-protection_of_hate_crime_en.pdf> accessed 17 February 2021.

⁷⁹⁸ Birute Sabatauskaite, ‘Racist Violence in Lithuania’ (European Network Against Racism 2011) 17 <<http://cms.horus.be/files/99935/MediaArchive/Racist%20Violence%20Lithuania%20-%20online.pdf>> accessed 17 February 2021; European Commission against Racism and Intolerance (n 756) para 51.

⁷⁹⁹ European Commission against Racism and Intolerance (n 743) 5.

⁸⁰⁰ *ibid* 6.

⁸⁰¹ *ibid*.

Common points of contention within the Seimas and society in general are the use of bilingual street signs in areas with a considerable population of minority groups.⁸⁰² This issue is particularly pertinent in Vilnius where there is a large Polish minority population. In 2018 the Seimas also refused to legalise the use of letters from the Latin alphabet which are not part of the Lithuanian alphabet in state documents such as passports.⁸⁰³ This proves that Lithuania's policy towards ethnic minorities remains restrictive due to the emergence of a largely ethno-linguistic and nationalistic identity of what a 'true Lithuanian' is.⁸⁰⁴ This can largely be explained by Lithuania's majority orientated identity after regaining independence.⁸⁰⁵

Education for children from minority backgrounds has also become a problem area. In 2011 a unified language examination for leaving certificate students was established which replaced special provisions for non-Lithuanian speaking students.⁸⁰⁶ Now, all students are required to sit a uniform Lithuanian exam even if they attend a minority school. The transition period for this change was originally envisaged as a seven-to-eight-year process to make sure that pupils from minority backgrounds were taught sufficient Lithuanian.⁸⁰⁷ However, this transition period was shortened to two years meaning that students attending national-minority schools who took exams in 2013 did so having had approximately 700 hours fewer Lithuanian-language lessons than students from Lithuanian schools.⁸⁰⁸ Allowances for minority students were originally made to make the Lithuanian language examination more approachable however these concessions were

⁸⁰² Evelina Baliko, 'Tautinių Mažumų Teisės: Ne Kam, o Kaip to Reikia' (*Mano Teises*, 24 May 2017) <<https://manoteises.lt/straipsnis/tautiniu-mazumu-teises-ne-kam-o-kaip-reikia/>> accessed 22 March 2021.

⁸⁰³ Margiris Meilutis, 'Seimas Po Pateikimo Atmetė Įstatymo Projektą Dėl Originalios Pavardžių Rašybos' *Delfi* (12 October 2020) <<https://www.delfi.lt/news/daily/lithuania/seimas-po-pateikimo-atmete-istatymo-projekta-del-originalios-pavardziu-rasybos.d?id=85970159>> accessed 22 March 2021.

⁸⁰⁴ Agarín (n 735) 48.

⁸⁰⁵ *ibid.*

⁸⁰⁶ European Commission against Racism and Intolerance (n 756) para 81.

⁸⁰⁷ *ibid.*

⁸⁰⁸ Marek Barwiński and Katarzyna Leśniewska, 'The Contemporary Situation of Polish Minority in Lithuania and Lithuanian Minority in Poland from the Institutional Perspective' (2014) 87(1) *Geographia Polonica* 27, 32.

deemed to be in violation of the equal treatment principle by the Supreme Administrative Court of Lithuania in 2013.⁸⁰⁹

Social disadvantages that certain minority groups face in Lithuania have been decreased over the last few years overall. However, racism and discrimination on the basis of ethnicity and nationality is still widespread in society. A 2019 representative survey highlighted that 36 percent of respondents would be opposed to having a Muslim person living in their neighbourhood. Members of the Roma community face the most prejudice from the general public as evidenced by the fact that 63 percent of respondents say they would be opposed to Roma people living in their neighbourhood.⁸¹⁰

The conception of what it means to be a Lithuanian in the public sphere is still inextricably tied up with “ethnocentric and racialised perception of nationality” and this has been demonstrated countless times by society in Lithuania.⁸¹¹ Ultra-nationalistic demonstrations are still common on Lithuanian Independence days on 16th February and 11th March.⁸¹² These demonstrators chant “Lithuania for Lithuanians” a term used to exclude all racial, sexual and ethnic minorities from identifying as a ‘true’ Lithuanian.⁸¹³ In 2015, the Lithuanian Nationalist Youth Union held such a demonstration in Kaunas,

⁸⁰⁹ Decision of the Supreme Administrative Court of Lithuania Civil Case Division of 18 June 2013 “Regarding the Minister of Education and Science 1 July 2011 order no V-1197” (Case No I-261-15/2013).

⁸¹⁰ Institute for Ethnic Studies of the Lithuanian Social Research Centre, ‘Public Attitudes Survey Results’ (2019) <http://www.ces.lt/wp-content/uploads/2010/02/Visuomen%C4%97s-nuostatos-apklauso-rezultatai_20191.pdf> accessed 17 February 2021.

⁸¹¹ Human Rights Monitoring Institute, *Human Rights in Lithuania 2018 – 2019* (2020) 68-69 <<https://hrmi.lt/en/zmogaus-teises-lietuvoje-2018-2019/>> accessed 02/02/2021.

⁸¹² European Commission against Racism and Intolerance (n 756) para 19; Eglė Krištopaitytė, ‘Tradicinėse tautininkų eitynėse skambėjo šūkis „Lietuva – lietuviams“’ *15min* (3 November 2020) <<https://www.15min.lt/naujiena/aktualu/lietuva/tradicinese-tautininku-eitynese-skambejo-sukis-lietuva-lietuviams-56-1114248>> accessed 22 March 2021; Ieva Urbonaitė-Vainienė, ‘Netikėtumai Tautininkų Eitynėse – Vėliava Su Dovydo Žvaigžde Ir Kelią Pastojes Lenkas’ *Delfi* (3 November 2016) <<https://www.delfi.lt/news/daily/lithuania/netiketumai-tautininku-eitynese-veliava-su-dovydo-zvaigzde-ir-kelia-pastojes-lenkas.d?id=70669226>> accessed 2 February 2021.

⁸¹³ Jūratė Skėrytė, ‘Vilniuje – Tautininkų Eitynės: Skandavo „Lietuva Lietuviams“ Ir Ragino Apriboti KT Galias’ *Delfi* (Vilnius, 3 November 2020) <<https://www.delfi.lt/news/daily/lithuania/vilniuje-tautininku-eitynes-skandavo-lietuva-lietuviams-ir-ragino-apriboti-kt-galias.d?id=83747831>> accessed 22 March 2021.

where some of the participants could be seen bearing swastika symbols.⁸¹⁴ The demonstration was held near the historical site of the Kaunas massacre of 1941 which claimed the lives of 10,000 Jews.⁸¹⁵ In 2011, swastika flags were reportedly raised by neo-Nazi sympathisers on 20 April to mark the birthday of Adolf Hitler.⁸¹⁶ In 2014, a demonstration took place in protest against a proposed law which would allow the use of foreign languages in official Lithuanian identity documents.⁸¹⁷ The protest was planned by the 'Vilnija' society, the Lithuanian Union of Freedom Fighters and the Lithuanian 'Sajūdis'.⁸¹⁸

Although some progress has been achieved by Lithuanian authorities to improve the equality of minority groups in society, these changes are inadequate. While Lithuania ratified the Framework Convention for the Protection of National Minorities in 2000, some of its provisions are still awaiting incorporation into national law.⁸¹⁹ Lithuania has also failed to sign and ratify Protocol No. 12 to the European Convention on Human Rights citing "the relatively small number of ratifications and the absence of a well-established body of case law of the European Court of Human Rights with regard to this instrument" as reasons for this.⁸²⁰ Furthermore, the last law on national minorities in Lithuania expired in 2010 and has not been renewed since.⁸²¹ Given the prevalence of negative stereotypes, hindered access to housing, education and state support that is faced by minority groups in Lithuania the efforts of Lithuanian authorities so far are inadequate.

The endorsement of the Lithuanian Constitutional Court of same sex relationships in 2019 and their declaration that the Lithuanian Constitution is a counter-majoritarian document

⁸¹⁴ European Commission against Racism and Intolerance (n 756) para 19.

⁸¹⁵ *ibid.*

⁸¹⁶ *ibid.*

⁸¹⁷ Šarūnas Sodonis and Eglė Urbonaitė, 'A Significant Vote for Human Rights - A Report of the Monitoring of the Public Space during the Political Campaign of Election to the European Parliament' (Lithuanian Gay League and the Lithuanian Human Rights Centre 2014) <<https://www.lgl.lt/assets/Significant-vote.pdf>> accessed 2 February 2021.

⁸¹⁸ *ibid.*

⁸¹⁹ Human Rights Monitoring Institute, 'Human Rights in Lithuania 2018 – 2019' (n 696) 68.

⁸²⁰ European Commission against Racism and Intolerance (n 756) para 1.

⁸²¹ Human Rights Monitoring Institute, 'Human Rights in Lithuania 2018 – 2019' (n 696) 68.

was a significant step in establishing equal rights for minority groups in the country.⁸²² The Constitutional Court challenged the prevailing stance of majority elites who have been pushing for an exclusionary Lithuanian identity. However, even though this decision holds immense aspirational power, for now, it remains just that. Since the decision was issued the legislative branch has failed to honour the views of the Constitutional Court which declared that the legislature should offer equal protection to all people.⁸²³ It seems that the observations of the ECtHR in *Beizaras & Levickas v. Lithuania*, that discriminatory attitudes against the LGBTQ+ community seep from within society into state authorities still holds true.⁸²⁴ Overall there seems to be a lack of will power within successive governments in Lithuania to honour their obligations to protect minorities under EU law and the Copenhagen criteria. Policy has always favoured majority outlooks rather than raising minority issues to the forefront to ensure that democracy can become accessible to everyone.

Following a significant political fallout between Belarus on the one hand and Lithuania and the EU on the other, Belarus's president, Alexander Lukashenko, has eased its border controls allowing thousands of illegal migrants to pass through into neighbouring Lithuania every day.⁸²⁵ This crisis developed after Belarussian president, Alexander Lukashenko, funnelled refugees mainly from Iraq and Africa into Poland, Lithuania and Latvia.⁸²⁶ This was in an act of retaliation against stringent EU sanctions following the grounding of a passenger plane destined for Vilnius in Minsk to arrest opposition journalist Roman Protasevich and his partner in May 2021.⁸²⁷ Relations are also strained

⁸²² *Decision of the Constitutional Court of the Republic of Lithuania No. 439 (n 752) para 31.3.*

⁸²³ *ibid* 29.

⁸²⁴ *Beizaras* (n 753) para 129.

⁸²⁵ Indrė Balčaitė, 'Lithuania: Pushbacks, Arbitrary Detention and Restrictions to Asylum' (*Platform for International Cooperation on Undocumented Migrants*, 28 September 2021) <<https://picum.org/lithuania-borders-migrants-2021/>> accessed 23 June 2022.

⁸²⁶ Jennifer Rankin, Andrew Roth and Jon Henley, 'Latvia and Lithuania Act to Counter Migrants Crossing Belarus Border' *The Guardian* (10 August 2021) <<https://www.theguardian.com/world/2021/aug/10/latvia-and-lithuania-act-to-counter-migrants-crossing-belarus-border>> accessed 3 May 2022.

⁸²⁷ Anton Troianovski and Ivan Nechepurenko, 'Belarus Forces Down Plane to Seize Dissident; Europe Sees "State Hijacking"' *New York Times* (23 May 2021) <<https://www.nytimes.com/2021/05/23/world/europe/ryanair-belarus.html>> accessed 3 June 2022.

between Lithuania and Belarus following Lithuania's outspoken political stance in support of Sviatlana Tsikhanouskaya, who claimed to have won the presidential elections in Summer 2020.⁸²⁸ Following major civil unrest and clashes between civilian and Belarusian forces, once Mr Lukashenko refused to concede his presidency to Ms Tsikhanouskaya, Lithuania offered her refuge from the Belarusian government forces. Therefore, the Lithuanian government has not hesitated to condemn the actions of President Lukashenko as a strategic act of hybrid warfare designed to destabilise Lithuania.⁸²⁹ However, in the process their portrayal of migrants as 'weapons' has served to dehumanise them.⁸³⁰

The unprecedented surge in migrants entering Lithuania has prompted a strict response from Lithuanian officials. The Lithuanian government's response to the crisis involved illegal pushbacks of migrants attempting to cross the border into the country as well as the mass detention of migrants in prison-like conditions.⁸³¹ The new laws adopted by Lithuania designed to prevent migrants who entered Lithuania on an irregular basis from applying for asylum were held to be contrary to EU law by the CJEU in June 2022.⁸³² In addition, there have been harrowing reports of inhuman treatment of migrants by Lithuanian and Frontex border guards including beatings with batons and the use of tasers and stun guns.⁸³³ This treatment of migrants mainly from North Africa and the Middle east is placed in stark contrast with the treatment of Ukraine refugees fleeing the war in Ukraine in early 2022, who were welcomed by Lithuanian authorities in a show of solidarity of their fight against Russia.⁸³⁴

⁸²⁸ DW, 'Lithuania Rejects Tsikhanouskaya Extradition Request – DW – 03/05/2021' (*dw.com*, 5 March 2021) <<https://www.dw.com/en/lithuania-to-belarus-rather-watch-hell-freeze-over-than-deliver-tsikhanouskaya/a-56787250>> accessed 20 March 2023.

⁸²⁹ Amnesty International, 'Lithuania: Forced out or Locked up: Refugees and Migrants Abused and Abandoned' (2022) 10 <<https://www.amnesty.org/en/documents/eur53/5735/2022/en/>> accessed 20 March 2023.

⁸³⁰ *ibid.*

⁸³¹ *ibid* 28–33.

⁸³² *Case C-72/22 PPU MA v Valstybės sienos apsaugos tarnyba ECLI:EU:C:2022:505.*

⁸³³ Amnesty International (n 829) 18.

⁸³⁴ *ibid* 13.

4.7. Conclusion

This chapter has highlighted the most concerning threats to Lithuanian democracy today. There are significant issues with the stability of Lithuania's political party system which is volatile and unpredictable. Populist rhetoric is prominent and party volatility has been a defining feature of Lithuanian politics since the early 2000s.⁸³⁵ A punishing voting pattern combined with the public's familiarity with populist rhetoric means that many young and inexperienced protest parties receive considerable support during elections. An unstable political landscape, such as this, leaves the electoral playing field vulnerable to populist power grabs. A definite shift in Lithuanian politics can be identified with the electoral win of the LFGU party in 2016. This party had a distinct nationalist conservative identity with anti-establishment motivations.⁸³⁶ The actions of this party while in government were concerning due to their organised attempts to limit media freedom and politicise the national broadcaster while also violating judicial independence on multiple occasions. This party has set a dangerous precedent regarding the political deadlock around the rotation of the Constitutional Court from 2020-2021. At the same time, there are deeply rooted issues with corruption within politics and the judiciary, which weakens citizens' trust in democratic institutions.⁸³⁷ Moreover, minority rights remain on the margins of political priority, with respect for the rights of ethnic and sexual minority groups mostly forgotten. In particular, the rights of the LGBTQ+ community have become a politically sensitive issue, with most Seimas members opposing almost all progress regarding this minority's rights. This, of course, reflects the polity's stance on these issues, with the majority of Lithuanians ascribing to conservative Catholic values.⁸³⁸

These aspects of the current state of liberal constitutional democracy in Lithuania reveal important issues that threaten the country's democratic stability. The systemic attacks on media freedom and judicial independence seen between 2017 and 2020 are particularly worrying. These autocratic tendencies reveal that politicians are testing the

⁸³⁵ Kjetil Duvold and Mindaugas Jurkynas (n 501) 126–129.

⁸³⁶ Linas Jegelevicius (n 534).

⁸³⁷ Pettai (n 18) 57–58.

⁸³⁸ LRT, 'Lithuanian Catholics Overwhelmingly Opposed to Gay Marriage' *LRT* (Vilnius, 3 November 2020) <<https://www.lrt.lt/en/news-in-english/19/1267847/lithuanian-catholics-overwhelmingly-opposed-to-gay-marriage-pew>> accessed 27 May 2021.

water to see how many breaches of democratic norms will go unnoticed by the EU, the international community and the Lithuanian people. The Lithuanian government has so far openly supported the Polish government for its controversial judicial reforms. The then Prime Minister of Lithuania, Saulius Skvernelis, suggested that Lithuania should also seek to “de-sovietise” their judiciary just like their neighbour, stating that Lithuania is not supporting EU sanctions on Poland.⁸³⁹ All of these factors combined show that fears that Lithuania might already be on a similar path to Poland and Hungary are certainly not unfounded.

⁸³⁹ Alexandra Brzozowski and Benas Gerdžiūnas, ‘Lithuania’s PM Backs Warsaw in Rule of Law Dispute with Brussels’ *Euractiv* (Vilnius/Warsaw, 18 September 2020) <https://www.euractiv.com/section/politics/short_news/vilnius-warsaw-lithuanias-pm-backs-warsaw-in-rule-of-law-dispute-with-brussels/> accessed 25 May 2021.

5. The Risks to Liberal Constitutional Democracy in Latvia

5.1. Introduction

This chapter will evaluate the state of liberal constitutional democracy in Latvia, nearly two decades after acceding to the EU and fulfilling the Copenhagen criteria of stable democratic institutions, the rule of law, human rights and respect for minorities.⁸⁴⁰ To this end, this chapter examines the Latvian political party system, judicial independence, media freedom and minority rights. These are the key aspects used to ascertain the status of liberal constitutional democracy as described in chapters two and three. This chapter argues that the Latvian political party system shows volatility, that judicial independence is under attack and that there are a number of deficiencies in media freedom. Moreover, the chapter highlights the deeply rooted issue of inequality between ethnic Latvians and the country's sizable Slavic minority. This chapter therefore details issues that are undermining Latvia's full liberal constitutional democratic status.

This chapter will proceed as follows: section 5.2 will outline Latvia's transition from socialism to democracy in the 1990s as well as highlighting some important themes such as Latvia's status as a hollow/ethnic democracy due to its adversarial approach in dealing with Latvia's significant Russophone minority. Section 5.3 will detail Latvia's volatile political party system and the emergence of the recent wave of populism. Section 5.4 explores issues around judicial independence including personal attacks on the Chairman of the Judicial Council by the Minister of Justice, the recent dialogue amongst parliamentarians about the abolition of the Constitutional Court and the resulting delays in the replacement of a Constitutional Court judge. Section 5.5 outlines some structural issues which negatively affects media independence. Section 5.6 will describe the dire situation regarding minority rights in Latvia. Institutional failures to eliminate discrimination against the LGBTQ+ and Roma community will be addresses as well as discussion of Latvia's battle to preserve their ethnic Latvian identity while reconciling with

⁸⁴⁰ Presidency Conclusions, Copenhagen European Council (June 21–22, 1993) 7 A iii.

their large Russian-speaking minority. This chapter will conclude that all of the mentioned features of Latvian democracy give rise to concern over the possibility that Latvia might also be vulnerable to democratic backsliding and a systemic breach of the rule of law, similar to its neighbours.

5.2. Latvia's Return to Europe and Democratisation

Latvia regained its independence on 21st August 1991 after spending the majority of the 20th century being occupied by foreign powers.⁸⁴¹ In 1940, Latvia was forcibly incorporated into the Soviet Union.⁸⁴² Soviet rule was interrupted by a brief Nazi occupation in 1941 until Soviet forces regained control of Latvia in 1944.⁸⁴³ The Latvian 1922 Constitution (hereinafter Satversme) was reinstated once independence was regained which symbolised the continuity of the Latvian State.⁸⁴⁴ The Satversme is a “laconic and predominantly procedural constitution” with some key amendments which were introduced post-independence to tailor it to a modern Latvian state.⁸⁴⁵ In 1996 a provision establishing the Constitutional Court was added followed by Chapter eight establishing fundamental rights in 1998 and an amendment which facilitated EU membership in 2003.⁸⁴⁶ The purpose of the Satversme has been described as twofold: first, it has an evident symbolic role as it was reinstated following decades of foreign occupation.⁸⁴⁷ This is symbolic of the Latvian state's resilience and longevity. Second, the Satversme document has a key role in establishing and upholding the institutional and procedural framework.⁸⁴⁸ The essential roles of the Satversme are “protection of the fundamental principles and values of democracy and the rule of law; the functioning of

⁸⁴¹ Daina Stukuls Eglitis, *Imagining the Nation: History, Modernity, and Revolution in Latvia* (Pennsylvania State University Press 2002) 5–11.

⁸⁴² *ibid* 6.

⁸⁴³ *ibid* 147.

⁸⁴⁴ Kristīne Krūma and Sandijs Statkus, ‘The Constitution of Latvia – A Bridge Between Traditions and Modernity’ in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) 952.

⁸⁴⁵ *ibid* 951.

⁸⁴⁶ *ibid* 952.

⁸⁴⁷ *ibid*.

⁸⁴⁸ *ibid* 952–953.

the parliamentary democracy; guarantees for national sovereignty; protection of fundamental rights and freedoms; and the functioning of the division of powers.”⁸⁴⁹

As a result of its traumatic socialist past, Latvia’s democratising elites were determined to achieve national security, European integration and economic stability as soon as possible.⁸⁵⁰ However, Latvia was considered one of the most sceptical candidate countries when it came to accession, as repeated polls in the early 2000s revealed that many Latvians were more inclined to maintain complete sovereignty or were largely undecided about accession.⁸⁵¹ A major reason for the relatively poor support of EU accession was due to the large Russophone population in Latvia who tended to be less supportive of the EU.⁸⁵² It was evident that democratising elites faced a major battle domestically to achieve their aspirations of reintegrating into the European Community. The EU also imposed strict conditionality for Latvia’s accession to the EU which included demands to liberalise Latvia’s policies around ethnic minorities, the LGBTQ+ community as well as a clamp-down on widespread corruption.⁸⁵³ Thus, the road to EU membership was arduous and forced Latvia to make many changes domestically before Latvia successfully joined NATO and the EU in 2004.

5.2.1. Reconciling Independence and Latvia’s Russophone Minority

Latvia had a particularly difficult task of shaking its communist past in order to join its liberal democratic future. In particular, the issue of a large Slavic minority, mostly comprised of Russian speakers, was then (and still remains) a highly sensitive topic domestically and one that supersedes any other political issue.⁸⁵⁴ Latvian society’s comparably low support for EU accession was largely blamed on the countries sizable

⁸⁴⁹ *ibid.*

⁸⁵⁰ Edgars Eihmanis, ‘Latvia and the European Union’, *Oxford Research Encyclopedia of Politics* (Oxford University Press 2019) 1–3.

⁸⁵¹ Dace Akule, ‘Minor Increase in Pro-EU Sentiment in Latvia’ *EUobserver* (Riga, 14 January 2003) <<https://euobserver.com/enlargement/9006>> accessed 13 December 2021; Derek Scally, ‘Only One-Third of Latvians Have Positive View of EU’ *The Irish Times* (25 September 2002) <<https://www.irishtimes.com/news/only-one-third-of-latvians-have-positive-view-of-eu-1.1096502>> accessed 4 January 2022.

⁸⁵² Pettai (n 18) 48–49.

⁸⁵³ Eihmanis (n 850).

⁸⁵⁴ *ibid* 3–4.

Russophone minority, as for them, joining the EU meant turning their back to their Russian connection.⁸⁵⁵ The large Russophone minority in Latvia is a hangover from the Soviet era when the central government deliberately facilitated migration of Russian-speaking workers to Latvia in order to diminish the ethnic Latvian demographic and exert Russian control over the small satellite state.⁸⁵⁶ Therefore, just before the Soviet Union fell apart in 1989, Latvia's ethnic Russian population was at 34 percent compared to only 9 percent in 1935.⁸⁵⁷

Latvia had already gained a poor reputation internationally regarding its treatment of their Russian-speaking minority.⁸⁵⁸ Latvia imposed harsh naturalisation and citizenship policies from the outset of their independence by only granting automatic Latvian citizenship to citizens of the inter-war Latvian Republic and their direct descendants.⁸⁵⁹ Furthermore, the government established strict rules around naturalisation including cut-off points for naturalisation.⁸⁶⁰ As a result, around 30 percent of Latvian residents had the status of being 'stateless' i.e. they were citizens of the former USSR but had no current citizenship. This had devastating effects for this group's access to their political rights. In the early 1990s, Latvia further imposed restrictive laws around ethnic minority access to economic rights as well as strict rules around the use of the Latvian language in public settings and in education.⁸⁶¹

Discrimination against Latvia's ethnic minorities was a highly contentious issue for the EU which prompted the imposition of both soft and hard conditionality which ranged from recommendations to direct threats of non-membership if Latvia failed to liberalise its

⁸⁵⁵ Pettai (n 18) 48–49.

⁸⁵⁶ Eihmanis (n 850) 4.

⁸⁵⁷ Timothy Heleniak, 'Latvia Looks West, But Legacy of Soviets Remains' (*Migration Policy Institute*, 1 February 2006) <<https://www.migrationpolicy.org/article/latvia-looks-west-legacy-soviets-remains>> accessed 13 December 2021.

⁸⁵⁸ Eihmanis (n 850) 3.

⁸⁵⁹ Frank Schimmelfennig, Stefan Engert and Heiko Knobel, 'Costs, Commitment and Compliance: The Impact of EU Democratic Conditionality on Latvia, Slovakia and Turkey' (2003) 41(3) *JCMS: Journal of Common Market Studies* 495, 510.

⁸⁶⁰ *ibid.*

⁸⁶¹ *ibid.*

minority policies.⁸⁶² The Commission's Opinion on Latvia in 1997 made clear that Latvia would not be allowed into the EU if they did not act to change minority policies.⁸⁶³ In 1997 Latvia was even strategically left out of the 'Luxembourg Round' which was intended to shock Latvian officials into action.⁸⁶⁴ It seemed to work, as soon, the Saeima eased their laws around naturalisation slightly.⁸⁶⁵ However, in 1999 the Saeima refused to listen to the demands of the international community to liberalise the State Language Law.⁸⁶⁶ This law provided for the mandatory use of Latvian in the private sector which was argued by nationalist parliamentarians as necessary to elevate the status of Latvian as a state language.⁸⁶⁷ However, many from the ethnic minority accused the government of forcing assimilation.⁸⁶⁸ This led President Vīķe-Freiberga to step in to veto the law as it had become increasingly clear that it would have been a step too far and a sure way to lose EU candidacy for Latvia.⁸⁶⁹ These tumultuous events highlighted that Latvia needed to face "two apparently irreconcilable aspirations": either to keep Latvia 'Latvian' or returning to Europe.⁸⁷⁰ Despite the existential conundrum Latvia faced, democratising elites pushed on and conceded to the EU's requests to liberalise laws around ethnic minority rights just enough to allow them to be invited to begin negotiations for EU accession in 2000.⁸⁷¹ However, a large part of Latvian society remained uneasy about the implications of the EU demands which raised serious questions around the ability of a newly free Latvia to maintain "self-determination, sovereignty and national identity."⁸⁷²

Latvian residents had mixed opinions of EU conditionality – for many ethnic-Latvians the EU had overstepped its competencies and interfered with Latvian sovereignty but many

⁸⁶² Eihmanis (n 850) 3.

⁸⁶³ *ibid* 3–4.

⁸⁶⁴ *ibid* 4.

⁸⁶⁵ *ibid*.

⁸⁶⁶ Katya Cengel, 'Latvia: President Sends Language Law Back To Parliament' (*Radio Free Europe/Radio Liberty*, 9 July 1999) <<https://www.rferl.org/a/1091760.html>> accessed 13 December 2021.

⁸⁶⁷ George Tsebelis and Tatiana P Rizova, 'Presidential Conditional Agenda Setting in the Former Communist Countries' (2007) 40(10) *Comparative Political Studies* 1155, 1172–1173.

⁸⁶⁸ *ibid* 1173.

⁸⁶⁹ Eihmanis (n 850) 5.

⁸⁷⁰ *ibid*.

⁸⁷¹ *ibid*.

⁸⁷² *ibid*.

from the Russophone minority felt let down by the EU for not doing enough to secure their equality.⁸⁷³ This was laid to bare during the EU accession vote in Latvia in 2003 when the majority of Russian-speakers were against EU accession.⁸⁷⁴ This would explain why trust in the EU in Latvia remains the lowest of all Baltic states.⁸⁷⁵

Latvia's diligence in complying with the EU's conditionality on minority rights proved to be a passing phase, as once they gained EU member status, the steam to continue to support minorities in Latvia ran out.⁸⁷⁶ The Integration Ministry which was set up in 2002 to develop minority rights was considered a failure as a result of being dragged down by political infighting on minority issues.⁸⁷⁷ Successive Latvian governments have continued to drag their feet and have ignored international calls to further protect ethnic minority rights. Indeed, the situation for non-Latvian minorities has even gotten progressively worse. For example, since 2018, restrictive language quotas for both public and private educational institutions have been put in place.⁸⁷⁸ These new laws oblige certain percentages of lessons to be conducted exclusively through Latvian in all educational institutions, even private Russian schools. This is explored in depth in section 5.6 of this chapter. Also, to this day around 217,000 people (approx. 10.4% of Latvia's population) remain non-citizens and continue to be deprived of their political rights.⁸⁷⁹ However, a significant step forward in eradicating Latvia's non-citizen issue has been taken recently where as of January 2020, Latvian citizenship is granted automatically to all children born in Latvia regardless of their parent's citizenship status.⁸⁸⁰

⁸⁷³ *ibid* 7–8.

⁸⁷⁴ *ibid* 8.

⁸⁷⁵ European Commission, 'Standard Eurobarometer 87 Public opinion in the European Union' (European Commission 2017) 45.

⁸⁷⁶ Eihmanis (n 850) 8.

⁸⁷⁷ Nils Muiznieks and David J Galbreath, 'Latvia: Managing Post-Imperial Minorities' in Bernd Rechel (ed), *Minority rights in Central and Eastern Europe* (Routledge 2009) 146–147.

⁸⁷⁸ Law of 22 March 2018 Amending the Law on Education, 02/04/2018, Latvian Journal. No. 65.

⁸⁷⁹ European Commission for Democracy through Law (Venice Commission), Latvia: Opinion on the Recent Amendments to the Legislation on Education in Minority Languages, Opinion No. 975/2020, 18 June 2020 4.

⁸⁸⁰ Council of Europe, 'Latvia Takes Important Step toward Eliminating Child Statelessness' (*Council of Europe*, 18 October 2019) <<https://www.coe.int/en/web/commissioner/-/latvia-takes-important-step-toward-eliminating-child-statelessness>> accessed 13 December 2021.

5.2.2. Political Corruption in Latvia

Behind the prominent ethnic political cleavage, the anti-corruption cleavage had become the second most important political issue at the turn of the century.⁸⁸¹ The World Bank found that Latvia had excessively high levels of state capture in 2000.⁸⁸² The laws pertaining to outlawing corruption enacted in the 1990s proved to be patchy and unfit for purpose.⁸⁸³ Therefore, creating an efficient and comprehensive anti-corruption policy in Latvia was another precondition of EU accession.⁸⁸⁴ Latvian authorities successfully set up the Corruption Prevention and Combating Bureau (Latvian: Korupcijas novēršanas un apkarošanas birojs, KNAB) in 2002 and began to legislate for robust anti-corruption measures which were essential for strengthening public administration and establishing the rule of law.⁸⁸⁵ As a result of the EU drawing attention to Latvia's corruption issue, anti-corruption rhetoric became a "flagship political strategy" for many political parties.⁸⁸⁶ Latvian society began to worry that corruption was rampant in high-level politics in the 2000s.⁸⁸⁷ It culminated in 2004 when the pro-EU and anti-corruption New Era party entered opposition while alleged oligarchs were in government.⁸⁸⁸ This dynamic produced a highly polarised political landscape which led to those accused of links to oligarchs coming under the investigation of KNAB.⁸⁸⁹ Anger in the polity swirled around the evident corruption within Latvian politics during the 'Umbrella Revolution' where mass protest broke out regarding rampant corruption in Latvia.⁸⁹⁰ This eventually led to the resignation of Prime Minister Aigars Kalvītis in 2007 and a referendum being passed

⁸⁸¹ Eihmanis (n 850) 6–7.

⁸⁸² World Bank, *Anticorruption in Transition: A Contribution to the Policy Debate* (World Bank 2000) 70–71.

⁸⁸³ Eihmanis (n 850) 6.

⁸⁸⁴ *ibid* 6–7.

⁸⁸⁵ *ibid* 5–7.

⁸⁸⁶ *ibid* 8–9.

⁸⁸⁷ *ibid* 6–7.

⁸⁸⁸ *ibid* 8–9.

⁸⁸⁹ *ibid* 9.

⁸⁹⁰ Andrew Wilson, 'Latvia's Unnoticed Revolution: Analysing the Elections' (*Open Democracy*, 21 September 2011) <<https://www.opendemocracy.net/en/odr/latvias-unnoticed-revolution-analysing-elections/>>; Eihmanis (n 850) 9.

on citizens' rights to dismiss the parliament in the summer of 2008.⁸⁹¹ The new constitutional powers were utilised in 2011 when a referendum to dissolve the 10th Saeima passed by 94.5 percent.⁸⁹² This signalled an unequivocal discontent amongst the public with their government which was accused of oligarchy and corruption.⁸⁹³ Despite Latvia's relentless battle with corruption, it still remains a contentious issue with high level politicians being embroiled in corruption scandals regularly, as discussed in section 5.3.

After accession in 2004, the EU's leverage in imposing conditionality waned as now that Latvia was a Member State, only soft law measures could be used. Therefore, Latvia's previous enthusiasm for promoting minority rights and fighting corruption was swapped for rigorous policies designed to increase Latvia's finances and economy.⁸⁹⁴ These measures produced powerful growth in the Latvian economy in the years following accession. This meant that the financial crisis in Latvia was preceded by an extraordinary period of growth on the back of their accession to the EU in 2004.⁸⁹⁵ The Latvian economy at its peak grew by 36 percent.⁸⁹⁶ However, this growth proved to be unsustainable and started to destabilised in 2007.⁸⁹⁷ Once the global financial crisis reached Latvia in 2008, it had catastrophic consequences as the already fragile Latvian economy could not weather the impact of the credit crunch. By the end of 2008, Latvia was banned from international money markets as it plunged into a deep recession.⁸⁹⁸ Latvia was forced to seek financial assistance internationally and an agreement was reached between the IMF

⁸⁹¹ Eihmanis (n 850) 9.

⁸⁹² 'Republic of Latvia 2011 Referendum' (*International Foundation for Electoral Systems*) <<https://www.electionguide.org/elections/id/179/>> accessed 13 December 2021.

⁸⁹³ Daniel Matthews-Ferrero, Ilvija Bruge and Robert Steenland, 'EU Country Briefing: Latvia' *Euractiv* (9 May 2019) <<https://www.euractiv.com/section/eu-elections-2019/news/eu-country-briefing-latvia/>> accessed 13 December 2021.

⁸⁹⁴ Eihmanis (n 850) 8.

⁸⁹⁵ Olivier J Blanchard, Mark Griffiths and Bertrand Gruss, 'Boom, Bust, Recovery: Forensics of the Latvia Crisis' (2013) 44(2) *Brookings Papers on Economic Activity* 325, 329–330.

⁸⁹⁶ Aldis Austers, 'How Great Is Latvia's Success Story?: The Economic, Social and Political Consequences of the Recent Financial Crisis in Latvia' (2014) 49(4) *Intereconomics* 228, 229.

⁸⁹⁷ *ibid* 229–330.

⁸⁹⁸ *ibid* 229.

and the EU to allow financial assistance on a medium-term basis.⁸⁹⁹ Balance of Payments assistance was granted to Latvia for three years starting in January 2009.⁹⁰⁰ Unemployment reached 20.5 per cent in early 2010, and GDP dropped 25 per cent from its peak.⁹⁰¹ However, Latvia's economy stabilised and grew in late 2009 after the government implemented a robust fiscal policy utilising tax increases, redundancies, salary, and spending cuts.⁹⁰² Public sector salary cuts accounted for almost half of all spending cuts between 2009 and 2011, with average wages decreasing by 30 per cent.⁹⁰³

In recent years, a general feeling of discontent with democratic institutions and the EU has become evident. The fragmentation of the country's political party system is both a symptom and a cause of the growing prominence of populist parties in Latvia which is explored in section 5.3. Ethnic division and corruption of democratic institutions breeds apathy towards the general premise of democracy. Latvia has displayed persistently low civic and political engagement with voter turnout rates some of the lowest amongst EU member states. Latvia's voter turnout rates are reflective of peoples waning political engagement having dropped from 65% to 55% in the last ten years.⁹⁰⁴ Euroscepticism is also becoming a major issue in Latvia with the election of the National Alliance (*Nacionālā Apvienība*, NA) party in the last general election. These recent trends are hardly surprising given that EU accession has failed to deliver its promises of economic prosperity and stability. Instead, Latvia lost a huge proportion of people to emigration (nearly one fifth) which left behind an aging population.⁹⁰⁵ The sharp drop in Latvia's population since

⁸⁹⁹ European Commission, Directorate-General for Economic and Financial Affairs, *EU Balance-of-Payments Assistance for Latvia Foundations of Success* (Europ Comm, Directorate-General for Economic and Financial Affairs 2012) 3.

⁹⁰⁰ *ibid.*

⁹⁰¹ Robert J Samuelson, 'What We Can Learn from Latvia's Recovery' *Washington Post* (17 July 2011) <https://www.washingtonpost.com/opinions/what-we-can-learn-from-latvias-recovery/2011/07/17/gIQAelvcKI_story.html> accessed 13 December 2021.

⁹⁰² Austers (n 896) 229.

⁹⁰³ Inna Dovladbekova, 'Austerity Policy in Latvia and Its Consequences' (Friedrich-Ebert-Stiftung, Central and Eastern Europe 2012) 1 <<https://library.fes.de/pdf-files/id-moe/09353.pdf>>.

⁹⁰⁴ International Institute for Democracy and Electoral Assistance, 'Voter Turnout in Latvia' (*International IDEA*) <<https://www.idea.int/data-tools/country-view/198/40>> accessed 13 December 2021.

⁹⁰⁵ Gordon F Sanders, 'Latvia, a Disappearing Nation' *POLITICO* (5 January 2018) <<https://www.politico.eu/article/latvia-a-disappearing-nation-migration-population-decline/>> accessed 20 December 2021.

accession combined with globalisation has produced fears that Latvian culture and language might be lost. Lack-lustre economic performance since accession combined with demographic issues has left a large number of Latvians questioning the value of EU membership. Similarly, these same issues have encouraged voters to support populist leaders recently.

5.3. Political Party System Weakness, Corruption and Populism

In 2011, Latvia experienced its first snap election only a year after the formation of the 7th Saeima in 2010. The election was triggered by a referendum supported by the then President, Valdis Zatlers, who argued that the “privatization of democracy in Latvia” was underway.⁹⁰⁶ Since this political crisis, a marked increase in the rate of populist rhetoric became apparent.⁹⁰⁷ In the 2011 election the radical right populist party NA almost doubled its share of seats in the Saeima and they continue to successfully enter government coalition up to now.⁹⁰⁸ It is evident that the right-wing populist wave is stronger than ever before in Latvian politics and this has significant ramifications for the health of Latvia as a liberal constitutional democracy. The political party system in Latvia is volatile with many new and untested parties being successful in elections.⁹⁰⁹ The Harmony party (*Sociāldemokrātiskā partija, “Saskaņa”*), which gathers the bulk of ethnic Russian votes, consistently gains the majority of seats in the Saeima in each election.⁹¹⁰ However, other parties have formed a de facto ‘cordon sanitaire’ around the party by refusing to let them join government due to their association with the country’s ethnic Russian minority.⁹¹¹ This treatment echoes the wider historic treatment of the sizable Slavic minority in Latvia since the reestablishment of independence; it is one of avoidance

⁹⁰⁶ Daunis Auers and Andres Kasekamp, ‘Comparing Radical-Right Populism in Estonia and Latvia’ in Ruth Wodak, Majid KhosraviNik and Brigitte Mral (eds), *Right-Wing Populism in Europe: Politics and Discourse* (1st edn, Bloomsbury Publishing Plc 2013) 235.

⁹⁰⁷ Auers and Kasekamp (n 906).

⁹⁰⁸ *ibid* 235.

⁹⁰⁹ Auers, ‘Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania’ (n 114) 345–349.

⁹¹⁰ Una Bergmane, ‘Latvia’s “Harmony” in Jeopardy’ (*Foreign Policy Research Institute*, 30 April 2019) <<https://www.fpri.org/article/2019/04/latvias-harmony-in-jeopardy/>> accessed 25 August 2021.

⁹¹¹ Timofey Agarin and Ryo Nakai, ‘Political Dejection in a Divided Society: A Challenge for Latvia’s Democracy?’ [2021] *Journal of Baltic Studies* 1, 16.

and forced assimilation. Therefore, the ethnic issue is the largest political hurdle in Latvia and one the country is struggling to grapple with as many from this minority have, and still are, denied their right to meaningfully participate in democracy. Wide-spread political corruption combined with the loss of trust of voters due to the technocratic nature of Latvian politics has left voters disillusioned with democracy, which is evident from waning electoral turnout rates. The lowest turnout yet for a general election was in 2018 at just 54.6 percent.⁹¹² These persistent issues are proof that, just like Lithuania, Latvia is also enduring its own illiberal turn.

5.3.1. Political Party System Volatility in Latvia

The Latvian political party system suffers from high levels of volatility brought about by poor regulation of political parties in the first decade of independence.⁹¹³ Lax requirements for party membership and little regulation of private donations to political parties has led to slow political party institutionalisation in Latvia.⁹¹⁴ In turn, this has let poorly organised and inexperienced political parties to regularly run in elections, resulted in populist rhetoric becoming a cornerstone of Latvian political discourse.⁹¹⁵

Institutionalised political parties emerge from cleavages in society or by attracting a large number of members to their political cause.⁹¹⁶ Institutionalised political parties are widely accepted as well-organised and efficient in handling competing issues in society and forming effective policy. Governments formed by institutionalised parties are more stable, predictable, and overall, better able to reinforce democratic structures.⁹¹⁷ Party institutionalisation has proven to be difficult in Latvia as many parties that participated in the founding 1993 elections no longer exist today.⁹¹⁸ Due to the volatile nature of the

⁹¹² Inese Helmane, 'Voter Turnout Is Falling. The Study Seeks to Find out the Reasons for This' (22 October 2018) <<https://lvportals.lv/norises/299591-veletaju-aktivitate-kritas-petijuma-censas-noskaidrot-kadi-tam-ir-ienesli-2018>> accessed 2 September 2021.

⁹¹³ Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (n 114) 345–349.

⁹¹⁴ *ibid* 347.

⁹¹⁵ *ibid*.

⁹¹⁶ *ibid* 343.

⁹¹⁷ *ibid*.

⁹¹⁸ *ibid*.

Latvian political landscape parties have struggled to establish themselves in society and gain longevity.

Although vote switching between existing political parties is high in all three Baltic states (including Estonia which has a well institutionalised political party system) it does not necessarily indicate a weak political party system but is to be expected in democratic party competition.⁹¹⁹ However, party volatility caused by old parties leaving the system and new parties entering is pronounced in Latvia.⁹²⁰ The ‘more established parties’ measure indicated that Latvian voters are more likely to switch their votes to new parties rather than remain loyal to a party with previous electoral success.⁹²¹ Saarts concludes that overall Latvia has the least stable party system of the Baltic states as there is an almost constant influx of new parties during elections that perform remarkably well at the expense of more established parties.⁹²²

The cause of Latvia’s political party volatility can be explained by the lack of barriers to new party entry and weak state financing of established parties since independence.⁹²³ For example, Estonia effectively regulated their political landscape through introducing higher minimum party membership and supporting existing parties with funding from the outset.⁹²⁴ This created favourable conditions for political parties to grow roots within society and establish a loyal voter base.⁹²⁵ Latvia adopted a threshold of 200 members for political party registration in 1994 and only recently raised this to 500.⁹²⁶ In comparison, Estonia initially adopted a 1000 member threshold while having a smaller population than Latvia.⁹²⁷ This led to the growth of bigger parties in Estonia while Latvia

⁹¹⁹ *ibid* 344–345.

⁹²⁰ *ibid* 345.

⁹²¹ Saarts (n 543) 89.

⁹²² *ibid* 90.

⁹²³ Auers, ‘Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania’ (n 114) 347.

⁹²⁴ *ibid*.

⁹²⁵ Saarts (n 543) 89.

⁹²⁶ Auers, ‘Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania’ (n 114) 347.

⁹²⁷ *ibid*.

still remains with the lowest membership parties of the Baltics.⁹²⁸ After the 2002 parliamentary election, the New Era (*Jaunais Laiks*) party formed and led the government despite running for election with just 400 members.⁹²⁹ In 2010, Latvia introduced state funding for eligible parties from 2012, the last post-communist state to do so in the EU.⁹³⁰ However, private donations remained legal.⁹³¹ Furthermore, Latvia has the most fragmented party system of the Baltic states as it is classified as an ‘extreme multiparty system’.⁹³² This creates even more opportunities for vote switching as more parties result in more possibilities for voters to choose from.⁹³³ This is compounded by the fact that Latvian voters have exceptionally low trust in political parties, so a punishing voting pattern persists.⁹³⁴

The lax membership thresholds and slow development of funding policy for established political parties has hindered party institutionalisation in Latvia. This means political campaigns often rely on corporate and private donations, professional advertising, and charismatic leaders to win over voters instead of solid policies and professionalism.⁹³⁵ The crowded political landscape with many new political parties fighting for voters’ attention has led to populist rhetoric becoming a typical part of Latvian politics.⁹³⁶

5.3.2. The Rise of Political Corruption and Oligarchs in Latvia

Corruption has been a titular issue in Latvian politics since the country’s independence. The transition from authoritarian socialism to democracy and market economy inevitably created gaps and grey areas which politicians, public servants, judges and entrepreneurs

⁹²⁸ *ibid.*

⁹²⁹ *ibid.*

⁹³⁰ *ibid* 348.

⁹³¹ *ibid.*

⁹³² Saarts (n 543) 91–92.

⁹³³ Powell and Tucker (n 545) 134–135.

⁹³⁴ Liucija Balciunaite (n 551) 20–21; Saarts (n 543) 92–93.

⁹³⁵ Auers, ‘Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania’ (n 114) 343–347.

⁹³⁶ *ibid* 349.

readily exploited.⁹³⁷ The 1998 World Bank report warned of the new rising class of oligarchs and their impact on political stability:

“Economic power in Latvia has become concentrated in a small number of conglomerates. Business and political interests have become intertwined in a complex and non-transparent way, and businesses are increasingly active in political parties. Excessive concentration of economic power, due in part to weak enforcement of competition legislation, drains efficiency from the economy and presents the risk that Latvia could become prone to high-level corruption.”⁹³⁸

Therefore, the vast privatisation project that ensued in the early days of independence created opportunities for many well-placed elites to cash-in on Latvia’s re-established independence. These oligarchs set up political parties to add political legitimacy to their financial power. The most prominent of the oligarchs-turned-politician is Aivars Lembergs, who gained his wealth through the control of Latvia’s main oil transit port, Ventspils, as he was mayor of Ventspils from 1988 to 2008.⁹³⁹ He is said to be Latvia’s richest person and created his party For Latvia and Ventspils (*Latvijai un Ventspilij*, LuV).⁹⁴⁰ He has also stood as candidate for prime minister for the Green/Farmers Union party which has given him significant political influence in the country.⁹⁴¹ He has only recently faced justice for long-standing accusations against him for large-scale bribery and abuse of office when Riga Regional Court sentenced him to five years imprisonment and ordered him to pay a €20,000 fine in 2021.⁹⁴²

⁹³⁷ Daunis Auers, *Comparative Politics and Government of the Baltic States: Estonia, Latvia and Lithuania in the 21st Century* (2015) 136.

⁹³⁸ James Anderson, ‘Corruption in Latvia: Survey Evidence’ (The World Bank for the Corruption Prevention Council of Latvia 1998) 33257 21
<<https://documents1.worldbank.org/curated/en/596391468278122873/pdf/332570LV0Corruption0Survey01public1.pdf>> accessed 30 August 2021.

⁹³⁹ Auers, *Comparative Politics and Government of the Baltic States* (n 937) 139.

⁹⁴⁰ *ibid.*

⁹⁴¹ *ibid.*

⁹⁴² Euronews, ‘One of Latvia’s Richest Men Is Jailed for Bribery and Money Laundering’ *Euronews* (23 February 2021) <<https://www.euronews.com/2021/02/23/aivars-lembergs-one-of-latvia-s-richest-men-is-jailed-for-bribery-and-money-laundering>> accessed 30 August 2021.

Andris Šķēle, who gained his wealth through acquiring Latvia's biggest food processing business through an opaque privatisation process, has served as Prime Minister from 1995 to 1997 and founded his own political vehicle the Peoples Party (*Tautas Partija*, TP) in 1998.⁹⁴³ While Ainārs Šlesers gained his fortune through real estate and retail investments and has created four political parties: the New Party (*Jaunā Partija*, JP), Latvia's First Party (*Latvijas Pirmā Partija*, LPP), For a Good Latvia (*Par Labu Latviju*, PLL) and United for Latvia (*Vienoti Latvijai*, VL).⁹⁴⁴ Šķēle and Šlesers have also been embroiled in significant corruption and bribery scandals. All three oligarchs have allegedly gained control over Latvian media outlets as well as a shared interest in the *Diena* newspaper group.⁹⁴⁵

The Transparency International Corruption Perceptions Index (CPI) measures the perception of corruption based on surveys completed by business people, the general public and country analysts.⁹⁴⁶ Latvia's CPI ranking since 2001 has shown that the average perception of the extent of corruption in Latvia is the highest of the Baltic States.⁹⁴⁷ The 2020 Delna report (Latvian chapter of *Transparency International*) has also pointed out that in the last seven years there has been a stagnation in Latvia's progress in the index.⁹⁴⁸ This is worrying as it indicates that Latvia's progress in fighting the perception of corruption is lagging behind its EU counterparts.⁹⁴⁹ Moreover, Latvia was evaluated to have the highest risk in the EU (alongside Romania and Greece) for political corruption by the PRS Group's International Country Risk Guide.⁹⁵⁰

⁹⁴³ Auers, *Comparative Politics and Government of the Baltic States* (n 937) 139.

⁹⁴⁴ *ibid.*

⁹⁴⁵ Alla Petrova, 'Šlesers, Šķēle and Lembergis May Have Bought Diena via Rigas Tirdzniecības Osta' (*The Baltic Course*, 10 December 2011) <<http://www.baltic-course.com/eng/transport://www.baltic-course.com/eng/transport/?doc=47109>> accessed 30 August 2021.

⁹⁴⁶ Auers, *Comparative Politics and Government of the Baltic States* (n 937) 137.

⁹⁴⁷ *ibid.* 137–138.

⁹⁴⁸ Delna, 'Analysis: Corruption Perceptions Index 2020' (2020) 4 <https://delna.lv/wp-content/uploads/2021/01/CPI-2020-LV_Analysis_ENG.pdf> accessed 30 August 2021.

⁹⁴⁹ *ibid.*

⁹⁵⁰ Delna (n 948).

Measures to tackle Latvia's political corruption were set into gear following a slew of negative reports from prominent international organisations.⁹⁵¹ In 2000 the World Bank published a detailed report on 'Anticorruption in transition: A contribution to the policy debate' where it pointed out that systemic state capture – where the powerful elite “influence the formation of laws, regulations, decrees, and other government policies to their advantage as a result of the illicit and non-transparent provision of private benefits to public officials”, was exceptionally high in Latvia.⁹⁵² This report suggested that this high level of state capture arose from the close relationship between political parties and economic interests relating to the transit routes of natural resource.⁹⁵³ The people who control the transport of natural resources maintain their power through obtaining control of state institutions.⁹⁵⁴

Latvia also received worrying evaluations from the European Commission, where it was highlighted that more needed to be done to mitigate the high instance of corruption.⁹⁵⁵ While NATO expressed their concern for the Baltics' ability to keep NATO secrets given the extent of corruption there.⁹⁵⁶ These reports prompted a strict anti-corruption campaign to be launched by Latvian officials which saw the establishment of KNAB, the Latvian anti-corruption agency, in 2002.⁹⁵⁷ KNAB has extensive powers to fight corruption at administrative and political levels and has become a prominent watchdog over the political system. KNAB not only has law-enforcement powers but also has the right of legislative initiative and legislative review but also has control and oversight over the funding of political parties.⁹⁵⁸

The vast issue of corruption in Latvian politics has had a detrimental effect on the health of Latvia's democracy. Latvian voters are some of the least trusting and most unsatisfied

⁹⁵¹ Auers, *Comparative Politics and Government of the Baltic States* (n 937) 141.

⁹⁵² James Anderson and others, *A Contribution to the Policy Debate* (World Bank 2000) xv.

⁹⁵³ *ibid* xxvii.

⁹⁵⁴ Auers, *Comparative Politics and Government of the Baltic States* (n 937) 141.

⁹⁵⁵ 'European Commission, "2002 Regular Report on Latvia's Progress Towards Accession" COM (2002) 700 Final, 9 October 2002' 117–118.

⁹⁵⁶ Auers, *Comparative Politics and Government of the Baltic States* (n 937) 141.

⁹⁵⁷ *ibid* 142.

⁹⁵⁸ *ibid*.

with their national governments, parliament and political parties in the EU.⁹⁵⁹ The Winter 2020-2021 Eurobarometer survey found that 77 percent of Latvians tend not to trust their national government where the EU average is 60 percent.⁹⁶⁰ 79 percent also tend not to trust their parliament where the EU average distrust is 60 percent and an overwhelming 93 percent do not trust political parties where the EU average is 75 percent.⁹⁶¹ These trends are also not new and have been deemed an indication of a deeply rooted discontent with state administration and political party activity and culture.⁹⁶² Although rising discontent with features of democratic governance have been on the rise in many established democracies around the world in recent years, Latvia's public trust indicators are "critically low" and are symptomatic of a fundamental issue with democratic governance.⁹⁶³ Evidently, the long-standing alliance between corrupt political elites, oligarchs and political parties have left voters disillusioned with the democratic process.

Further evidence of disillusionment with politics and democracy are the plummeting electoral turnout rates. During the last general election in 2018 only 54.6 percent of eligible voters actually voted.⁹⁶⁴ More than 4 percent less than for the previous general election in 2014. Overall, since the first democratic election after the reestablishment of Latvian independence in 1993, electoral turnout rates have been rapidly decreasing from 88.4 percent in 1993 to the lowest turnout yet in 2018 of 54.6 percent.⁹⁶⁵ The reasons for Latvia's poor electoral performance and trust in democratic institutions has been attributed to many factors that have converged to weaken Latvian democracy.⁹⁶⁶ Researchers cite persistently inadequate socio-economic conditions for Latvian citizens that leave voters disillusioned with the political system and the weight of their voting

⁹⁵⁹ Lilita Seimuskane and Maija Voroslava, 'Citizens' Trust In Public Authorities of Latvia and Participation Paradigm' (2014) 9 *European Scientific Journal*, ESJ 285.

⁹⁶⁰ European Commission, 'Eurobarometer 94 Public Opinion in the European Union Winter 2020-2021' (2021) 46.

⁹⁶¹ *ibid* 47-49.

⁹⁶² Seimuskane and Voroslava (n 959) 280.

⁹⁶³ *ibid*.

⁹⁶⁴ Helmane (n 912).

⁹⁶⁵ *ibid*.

⁹⁶⁶ *ibid*.

power.⁹⁶⁷ The poor electoral turnouts and vast distrust in democratic institutions could also be linked to the political conflict between ethnic Latvians and ethnic Russian citizens. Although it is difficult to be certain of what groups in society tend to be the least trusting of democratic institutions and reluctant to turn up during elections, it is reasonable to assume that Latvia's deep ethnic divide in politics is an influence on political disillusionment. As indicated previously, the Harmony party has been largely ostracised from the prospect of joining government coalitions due to their representation of the ethnic Russian minority. This is despite the fact Harmony consistently receives a large fraction of votes during general elections. This de facto imposition of a 'cordon sanitaire' around the party has resulted in large sections of the Russophone population 'giving-up' on participating in elections as their chosen party is unlikely to be part of government despite receiving popular voter support.⁹⁶⁸ Furthermore, when Harmony attempted to diversify their voter base during the 2018 general election and attract more Latvian voters they ended up losing votes overall as their ethnic Russian voters felt betrayed by their party's attempt to attract ethnic Latvian voters.⁹⁶⁹

Of course, all voters, not just ethnic Russians, have evidently been disillusioned by multiple corruption scandals involving prominent politicians and leaders over the years. These scandals ultimately teach voters that politicians are more interested in personal and financial gain than representing voters faithfully. The lack of social and economic progress on issues that are important to voters and vast levels of emigration have left voters doubting whether their vote makes a difference.⁹⁷⁰

5.3.3. Euroscepticism in Latvia

Euroscepticism has long been a feature in Latvian politics with levels of doubt about the EU sweeping across Latvia in waves. In the beginning of accession talks, some concerns

⁹⁶⁷ Seimuskane and Vorslava (n 959) 281; Jeffrey Sommers, 'No People, Big Problem': Democracy And Its Discontents In Latvia's National Elections' (*Social Europe*, 17 October 2018) <<https://socialeurope.eu/no-people-big-problem-democracy-and-its-discontents-in-latvias-national-elections>> accessed 2 September 2021.

⁹⁶⁸ Agarin and Nakai (n 911) 16.

⁹⁶⁹ Bergmane (n 910).

⁹⁷⁰ Seimuskane and Vorslava (n 959) 281.

were voiced by politicians and citizens about the loss of sovereignty EU membership posed with public attitudes on EU accession being described as shaky with lower levels of support than in other candidate states.⁹⁷¹ People were understandably weary about losing some of their sovereignty to the EU so soon after claiming it back after decades of occupation by the USSR.⁹⁷² Debates about EU membership were separated by the ethnic cleavage with many ethnic Latvians resenting the pressure from the EU to liberalise their ethnic minority policies which raised concerns about self-determination, sovereignty, and national identity.⁹⁷³ At the same time, the Russian minority population in Latvia formed a negative opinion about the EU.⁹⁷⁴ Although they initially supported the push from the EU to create equality between ethnic minority groups in Latvia, later they felt left behind after EU conditionality around ethnic rights failed to go far enough.⁹⁷⁵ The low support for EU accession in Latvian society prompted the democratising elites to launch a large campaign to promote EU membership.⁹⁷⁶ However, some observers have noted that the initiative might have had the opposite effect as the campaign framed the EU debate as a choice between the prosperous West and the backwards East.⁹⁷⁷ Therefore, there is no surprise that once it came to the EU accession referendum in 2003 while 57 percent of ethnic Latvians supported accession, only 20 percent of ethnic Russians supported EU accession.⁹⁷⁸ Despite a generally successful result of 67.5 percent of Latvians supporting EU membership, a Eurosceptic identity crisis loomed underneath.⁹⁷⁹ Nevertheless, support for the EU once accession was achieved seemed to come in waves. During the

⁹⁷¹ Geoffrey Pridham, 'Legitimizing European Union Accession?: Political Elites and Public Opinion in Latvia, 2003—2004' (2007) 13(5) *Party Politics* 563, 571 <<http://journals.sagepub.com/doi/10.1177/1354068807080086>> accessed 6 September 2021; Eihmanis (n 850) 7–8.

⁹⁷² Pridham (n 971) 571.

⁹⁷³ Eihmanis (n 850) 7–8.

⁹⁷⁴ *ibid.* 8.

⁹⁷⁵ Inese Šūpule, 'Vēlreiz Par Referendumu: Etniskā Šķelšanās Balsojumā Par Latvijas Iestāšanos ES. Pētījumu Rezultāti' (24 February 2004) <<http://providus.lv/article/velreiz-par-referendumu-etniska-skelsanas-balsojuma-par-latvijas-iestasanos-es-petijumu-rezultati>> accessed 6 September 2021; Eihmanis (n 850) 8.

⁹⁷⁶ Eihmanis (n 850) 8.

⁹⁷⁷ *ibid.*; Pridham (n 971) 575; Daunis Auers, 'How Democratic Was the 2003 Latvian Referendum?' (14 October 2003) <<http://providus.lv/en/article/how-democratic-was-the-2003-latvian-referendum>> accessed 6 September 2021.

⁹⁷⁸ Eihmanis (n 850) 8.

⁹⁷⁹ *ibid.*

crisis caused by Russia's annexation of Crimea in Ukraine in 2014, support for the EU increased amongst Latvians as many were anxious that Latvia could suffer a similar fate.⁹⁸⁰ However, in 2015 at the beginning of the migration crisis the EU's popularity fell again as the majority of Latvians were not comfortable with welcoming migrants into Latvia, let alone fulfilling EU-imposed migrant quotas.⁹⁸¹

5.3.4. The Rise of Populism in Latvia

Populism has been a central part of Latvian politics since independence due to both distinct social factors and structural issues. Latvian society has had to endure high levels of division and inequality after transitioning to democracy and a market economy after the collapse of the Soviet Union.⁹⁸² This was compounded by structural issues such as a poorly regulated political party system which failed to support political party institutionalisation early in the democratisation process.⁹⁸³ Latvia has experienced three waves of populism since independence.⁹⁸⁴ The first wave began in 1995 when a collection of nationalist populist parties secured one-third of seats in the Saeima.⁹⁸⁵ They directly appealed to voters who were considered 'losers' of the transition process such as pensioners, farmers and public sector workers and offered to round-up and imprison corrupt officials and business men.⁹⁸⁶ However, these populists proved to have weak party organisation and faltered due to infighting quickly.⁹⁸⁷

The second wave at the turn of century was similar. Again, high-level corruption was at the centre of the populist appeal which saw a victory for populists in the 2002 general election.⁹⁸⁸ What is worrying is that the third and most recent wave of populism has been

⁹⁸⁰ Gints Apals, 'Euroscepticism in Latvian Politics: Twenty-Five Years of Change' in Kārlis Bukovskis and Aldis Austers (eds), *Euroscepticism in the Baltic States: uncovering issues, people and stereotypes* (Latvian Institute of International Affairs, Friedrich Ebert Stiftung 2017) 24–25.

⁹⁸¹ *ibid.* 25.

⁹⁸² Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (n 114) 349–350.

⁹⁸³ *ibid.*

⁹⁸⁴ Auers and Kasekamp (n 906) 239.

⁹⁸⁵ *ibid.*

⁹⁸⁶ *ibid.*

⁹⁸⁷ *ibid.*

⁹⁸⁸ *ibid.*

different. The third wave began with the electoral success of the NA party in 2010 which will be described in detail below.⁹⁸⁹ Importantly this third wave is still persisting today with the 2018 general election being declared a victory for populist forces.⁹⁹⁰ The first two waves of populism could be described as ‘orthodox’ populist movements whose success signalled a genuine need for reform amongst Latvian society.⁹⁹¹ These waves were therefore not radical or extreme so what is noteworthy about the emergence of NA is the fact it is the first successful radical-right wing party.⁹⁹² Its success has been attributed to its grassroots origins and loyal following.⁹⁹³ It stands in stark contrast to most mainstream ‘élite’ political parties with thin ideologies as NA boasts entrenched principles of anti-elitism, nativism, authoritarianism and Euroscepticism and utilises the lure of a charismatic leader.⁹⁹⁴ The unprecedented success of NA and the third populist wave can be attributed to two factors. First, populist rhetoric has become normalised within the political landscape. The situation has been described as populism becoming a “pathologically normal part of Latvian politics”.⁹⁹⁵ Indeed, almost 70% of all parties utilised populist rhetoric in their election campaigns by 2011 and populist messaging has been shown to be contagious between coalition members.⁹⁹⁶ Second, NA organised nature and unique entrenchment within society has made it successful in mobilising discontented people to support its cause.⁹⁹⁷

⁹⁸⁹ *ibid.*

⁹⁹⁰ Andrew Higgins, ‘Populist Wave Hits Latvia, Lifting Pro-Russia Party in Election’ *New York Times* (7 October 2018) <<https://www.nytimes.com/2018/10/07/world/europe/latvia-election-russia.html>> accessed 20 December 2021.

⁹⁹¹ Auers and Kasekamp (n 906) 239.

⁹⁹² *ibid.*

⁹⁹³ *ibid* 235–236.

⁹⁹⁴ Auers, ‘Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania’ (n 114) 351; Auers and Kasekamp (n 906) 240.

⁹⁹⁵ Auers and Kasekamp (n 906) 236.

⁹⁹⁶ Ilze Balcerē, ‘Populism in the Manifestos of Latvian Political Parties: Increasingly Used but Ineffective?’ (2014) 45 *Journal of Baltic Studies* 477, 484–487; Caroline Heidenberg, ‘Dwindling Democracy: A Study of Democratic Backsliding in the European Union’s Eastern Bloc’ (Master’s thesis, Uppsala University 2017) 43.

⁹⁹⁷ Auers and Kasekamp (n 906) 235–236.

Thus, despite the prevalence of populism as a core feature of Latvian politics, there has been an undeniable increase in the fortunes of populist parties in the last decade or so.⁹⁹⁸ The rise in popularity of populist parties can be largely attributed to a loss of trust in traditional political parties and a highly fragmented and volatile political party landscape.⁹⁹⁹ The impact of the 2008 financial crisis caused financial ruin in the young democracy and prompted mass emigration and unemployment which caused a surge in distrust in political parties.¹⁰⁰⁰ Distrust is also fuelled by the vast issue of political corruption and state capture that Latvia experiences. For example, one of the biggest political corruption scandals emerged in 2017 after various recorded conversations between prominent politicians and oligarchs were published.¹⁰⁰¹ The recordings related to a KNAB investigation into political corruption involving former Minister of Transportation Ainārs Šlesers, the Mayor of Ventspils, Aivars Lembergs, and former Prime Minister Andris Šķēle between 2009-2011.¹⁰⁰² The recordings revealed various plots to increase personal wealth and gain control of democratic institutions including a plot between Šlesers and Lembergs to sabotage the Unity (*Vienotība*) party so that the *Farmers and Greens (Zaļo un Zemnieku savienība, ZZS)*, *For a Good Latvia (Par Labu Latviju!, AŠ)* (Šlesers' and Šķēles' party) and *Harmony* could form government.¹⁰⁰³ The recordings also revealed plans to gain control over strategic companies, influence the media and how to illegitimately replace the general prosecutor.¹⁰⁰⁴ Scandals such as this have proven to be detrimental to citizens trust in politics and democracy. The increased

⁹⁹⁸ Ernst Stetter and others (eds), *The State of Populism in the European Union 2016* (Foundation for European Progressive Studies 2016) 27; Paul Taggart and Andrea LP Pirro, 'European Populism before the Pandemic: Ideology, Euroscepticism, Electoral Performance, and Government Participation of 63 Parties in 30 Countries' [2021] *Italian Political Science Review/Rivista Italiana di Scienza Politica* 1, 20.

⁹⁹⁹ Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (n 114) 350.

¹⁰⁰⁰ *ibid.*

¹⁰⁰¹ Una Bergmane, 'The Three Little Oligarchs: Latvia's Corruption Scandal - Foreign Policy Research Institute' (22 November 2017) <<https://www.fpri.org/article/2017/11/three-little-oligarchs-latvias-corruption-scandal/>> accessed 8 September 2021.

¹⁰⁰² Freedom House, 'Freedom in the World 2018 - Latvia' (*Refworld*, 5 October 2018) <<https://www.refworld.org/docid/5bcdce2f13.html>> accessed 8 September 2021.

¹⁰⁰³ Bergmane (n 1001).

¹⁰⁰⁴ Freedom House, 'Freedom in the World 2018 - Latvia' (n 1002).

success of populist parties in Latvia also coincide with a wider trend in other CEE countries which are experiencing a surge in popularity of right-wing populist parties.

The NA party has been identified as the dominant radical right populist party in Latvia.¹⁰⁰⁵ NA was formed by a merger of two parties - For Fatherland and Freedom-Latvian National Independence Movement (*Tēvzemei un Brīvībai-Latvijas Nacionālā Neatkarības Kustība*, TB-LNNK), a nationalist party which emerged in the late Soviet period and All for Latvia! (*Visu Latvijai!*, VL) which started off as a grass-roots nationalist youth movement.¹⁰⁰⁶ NA has the key features of many far-right populist parties such as anti-elitism, nativism, authoritarianism and Euroscepticism.¹⁰⁰⁷ The two parties merged to form NA in 2010 where they were elected to parliament in the same year and also in 2011, 2014 and 2018. They served in opposition in 2010 and have been part of a coalition government since the 2011 election. Younger party members from VL's wing of NA have made waves in Latvian politics by ridiculing older parliamentarians from mainstream parties.¹⁰⁰⁸ VL deputies would also film their rivals browsing the internet during plenary sessions and would record confidential conversations to prove their transparency.¹⁰⁰⁹ NA has also been vocal about their disapproval of EU migrant quotas which they see as elite-driven.¹⁰¹⁰ Janis Lesalnieks, a senior official at the Justice Ministry and member of NA, criticised migrant quotas by invoking an alleged Swedish precedent: "Is this what we want in Latvia? 127,000 immigrants arrived in Sweden in 2014 but meanwhile 115,000 children were born".¹⁰¹¹ NA have also been campaigning to change the Satversme to define the concept of family as a union of a male and a female person.¹⁰¹² NA along with the Lithuanian

¹⁰⁰⁵ Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (n 114) 350.

¹⁰⁰⁶ *ibid* 350–351.

¹⁰⁰⁷ *ibid* 351.

¹⁰⁰⁸ *ibid*.

¹⁰⁰⁹ *ibid*.

¹⁰¹⁰ *ibid*.

¹⁰¹¹ Latvian Public Broadcasting, BNS, 'Refugee Numbers Known in a Month Says PM' *LSM.LV* (25 June 2015) <<https://eng.lsm.lv/article/society/society/refugee-numbers-known-in-a-month-says-pm.a135277/>> accessed 8 September 2021.

¹⁰¹² Latvian Public Broadcasting, 'National Alliance Wants Constitution of Latvia to Strictly Define "Family"' *LSM.LV* (1 July 2021) <<https://eng.lsm.lv/article/politics/saeima/national-alliance-wants-constitution-of-latvia-to-strictly-define-family.a388009/>> accessed 8 September 2021.

Nationalists Union (*Lietuvių tautininkų sąjunga*, LTS) and Estonia's Conservative People's Party (*Eesti Konservatiivne Rahvaerakond*, EKRE) signed the Bauska Declaration in 2013, EKRE.¹⁰¹³ This document sets up cooperation between the three parties to promote their ideological pillars of nationalism and anti-immigration policy.¹⁰¹⁴

Many other populist parties have had electoral success during the years including Zatlers Reform party (*Zaļtēra Reformu Partija*, ZRP) which came third in the 2011 election despite only forming a month previously and campaigning on the basis that Latvia had been 'stolen' by three oligarchs who were close to claiming control over Latvian politics.¹⁰¹⁵ Oligarch and unofficial leader of the Green/Farmers Union, Aivars Lembergs, is also well-known for controversial populist rhetoric denouncing the Western imposed liberal agenda, criticising Hungarian-American investor, George Soros, and even likening NATO's presence in Latvia after the 2014 annexation of Crimea to the 1940s occupation of Latvia by Soviet forces.¹⁰¹⁶

Who Owns the State? (*Kam Pieder Valsts*, KPV LV), led by popular TV personality and Radio host, Artuss Kaimiņš, enjoyed an outstanding victory for its populist party in the 2018 elections coming in second place.¹⁰¹⁷ This is despite the fact that this party was only founded in 2016 but its message of anti-establishment, soft-Euroscepticism and conservatism resonated with the voter base.¹⁰¹⁸ Artuss Kaimiņš's also played a vital role in forming the identity of the party as an anti-elitist reform party by utilising social media to record and broadcast parliamentary sessions and encounters with other politicians from an angle not captured by mainstream media outlets.¹⁰¹⁹ Despite the sharp rise in support for KPV LV, since being party of the government coalition the party has been

¹⁰¹³ Stefano Braghiroli and Vassilis Petsinis, 'Between Party-Systems and Identity-Politics: The Populist and Radical Right in Estonia and Latvia' (2019) 20 *European Politics and Society* 431, 4.

¹⁰¹⁴ National Alliance, 'Bauska Declaration' (*Nacionālā apvienība VL-TB/LNNK*) <<https://www.nacionalaapvieniba.lv/valodas/bauska-declaration/>> accessed 8 September 2021.n

¹⁰¹⁵ Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (n 114) 352.

¹⁰¹⁶ *ibid.*

¹⁰¹⁷ Taggart and Pirro (n 998) 20.

¹⁰¹⁸ *ibid.*

¹⁰¹⁹ Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (n 114) 352.

plagued by disagreements, fragmentation and in-fighting.¹⁰²⁰ An internal issue that came to the forefront after their poor performance in the European Parliament elections where they only managed to gain 0.9 percent of votes.¹⁰²¹

The most recent parliamentary election of October 2022 has resulted in another victory for the incumbent New Unity (Jaunā Vienotība, JV) party, with Prime Minister Krišjānis Kariņš receiving the go-ahead from President Levits to form a government coalition.¹⁰²² After the general election, it took two and a half months for a coalition government to be officially agreed upon.¹⁰²³ The new coalition once again includes the far-right NA party, JV and United List (Apvienotais Saraksts, AS). The 2022 parliamentary election also produced major losses for the dominant Russophone-representing party, Harmony, which led to the rise of a new and more radical party being supported by sections of the Russian speaking minority in Latvia, Stability (Stabilitāte, S).¹⁰²⁴ Stability has taken a radical stance against Latvia's support for Ukraine during its invasion, as well as criticising Latvia's mandatory Covid-19 vaccination campaign.¹⁰²⁵ It is evident that populist politics still remain central in Latvia, as per previous elections.

The sharp rise in the fortunes of populist parties in Latvia is evidence of growing discontent within the polity. Latvia's unstable political party landscape combined with high instances of political corruption and political dejection of Latvia's Russian speaking minority means that Latvia is a poor-quality constitutional democracy at the very most.

¹⁰²⁰ Taggart and Pirro (n 998) 20.

¹⁰²¹ *ibid.*

¹⁰²² Jānis Kincis, 'Levits Officially Invites Kariņa to Form the Government' *LSM.LV* (22 November 2022) <https://www-lsm-lv.translate.google.com/raksts/zinas/latvija/levits-oficiali-aicina-karinu-veidot-valdibu.a483584/?utm_source=lsm&utm_medium=theme&utm_campaign=theme&_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc> accessed 22 November 2022.

¹⁰²³ LSM, Latvian Public Broadcasting), 'Latvia's Coalition Parties Sign next Government Agreement' (14 December 2022) <<https://eng.lsm.lv/article/politics/politics/latvias-coalition-parties-sign-next-government-agreement.a486944/>> accessed 17 March 2023.

¹⁰²⁴ Daunis Auers, 'Continuity in Change?: Latvia's Local Governments after Regional Reform and Local Government Elections' (Friedrich-Ebert-Stiftung 2021) <<https://static.lsm.lv/documents/1am.pdf>> accessed 4 August 2023.

¹⁰²⁵ *ibid.*

These high levels of discontent combined with voters being comfortable with regularly voting for populist parties makes a potential populist power-grab a very real possibility.

5.4. Attacks on Judicial Independence and Efforts to Limit the Role of Courts

Latvia's court system and judiciary has come under pressure from the executive in recent years. The excessive supervisory capacity of the Court Administration over judicial budgets and the excessive influence of the Minister of Justice in the day-to-day functioning of courts is a cause for concern. Latvian judges have themselves admitted they believe their work is under excessive political pressure at the hands of the Minister of Justice.¹⁰²⁶ Indeed, the Minister of Justice has recently attempted to exert his influence over the Chairman of the Judicial Council by attempting to turn members of the Judicial Council against their chairman.¹⁰²⁷ These sentiments are also echoed in the broader dysfunctional relationship between the judiciary and the executive and legislative branches of state. The threats waged by the Saeima at the Constitutional Court over their judgments in the recent parental leave case¹⁰²⁸ and the Varakļāni and Rēzekne regions case¹⁰²⁹ are clear attacks on judicial independence. These events have a devastating effect on the public's trust in their judicial system which creates ample opportunity for populist forces to conjure up public support for drastic reforms of the Latvian judiciary. The rhetoric used by populist parliamentarians in Latvia, who suggest abolishing the Constitutional Court, are eerily similar to the reasoning utilised by populists in Poland and Hungary.

¹⁰²⁶ Linda Spundiņa, 'Latvian Judges Feel Political Pressure from Justice Ministry, Study Shows' *LSM.LV* (5 November 2021) <<https://eng.lsm.lv/article/politics/diplomacy/latvian-judges-feel-political-pressure-from-justice-ministry-study-shows.a403936/>> accessed 25 September 2021.

¹⁰²⁷ Uldis Dreiblat and Ritums Rozenbergs, 'Former Minister of Justice Guntars Grīnvalds: Bordāns Is Trying to Influence Court Decisions' *Neatkarīgā Rīta Avīze* (12 March 2021) <https://neatkariga-nra-lv.translate.googleusercontent.com/translate/341724-bijusais-tieslietu-ministrs-guntars-grinvalds-bordans-megina-ietekmet-tiesu-lemumus?_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en-GB&_x_tr_pto=nui,elem> accessed 2 December 2022.

¹⁰²⁸ *Judgment of the Constitutional Court of the Republic of Latvia 12 November 2020 in case no 2019-33-01 2020 Latvia Journal* <[https://www.satv.tiesa.gov.lv/en/cases/?search\[number\]=2019-33-01](https://www.satv.tiesa.gov.lv/en/cases/?search[number]=2019-33-01)>.

¹⁰²⁹ *Judgment of the Constitutional Court of the Republic of Latvia, 28 May 2021 in case no 2020-43-0106, 2021, Latvia Journal* <[https://www.satv.tiesa.gov.lv/en/cases/?search\[number\]=2019-33-01](https://www.satv.tiesa.gov.lv/en/cases/?search[number]=2019-33-01)>.

5.4.1. Latvia's Judicial and Court Administration Structure

The Latvian court system is divided into three tiers. The courts of first instance are nine district courts which hear civil and criminal cases, and one district administrative court.¹⁰³⁰ As of 31 March 2021 there is a new specialised district court, the Court of Economic Cases which was implemented to manage the large amount of financial crimes in Latvia.¹⁰³¹ New judges of this court are specially trained in matters of money laundering, commercial law, competition law, financial law and insurance matters.¹⁰³² At the second tier there are five regional courts which hear civil and commercial cases and one regional administrative court.¹⁰³³ The Supreme Court, at third instance hears criminal, civil and administrative cases.¹⁰³⁴ The Constitutional Court carries out constitutional review and is an independent judicial body not part of the court hierarchy.¹⁰³⁵ The Judicial Council is a collegial authority which participates in the development of the policies and strategies for the judicial system, and also the improvement of the organisation of the work of the judicial system.¹⁰³⁶ The Judicial Council is responsible for nominating candidate judges, appointing and dismissing court presidents, determining the judicial map and approving the content of judicial training.¹⁰³⁷ Candidates for the office of a judge are selected through an open competition organised by the Judicial Council. They are ranked and placed on a list, from which the Minister for Justice proposes the candidate with the highest number of points to the *Saeima* for appointment.¹⁰³⁸ After three years and an evaluation by a judicial body, judges are appointed for an indefinite term by the *Saeima* on a proposal from the Minister for Justice.¹⁰³⁹ Article 83 of the Constitution of the Republic of Latvia states that “Judges

¹⁰³⁰ European Commission, ‘Commission staff working document – 2021 Rule of Law Report Country Chapter on the rule of law situation in Latvia’ SWD (2021) 719 final 2.

¹⁰³¹ *ibid* 5.

¹⁰³² *ibid*.

¹⁰³³ *ibid* 2.

¹⁰³⁴ *ibid*.

¹⁰³⁵ Marko Aavik and others, ‘Evaluation of the Latvian Judicial System’ (European Commission for the Efficiency of Justice 2018) CEPEJ-COOP(2018)1 33.

¹⁰³⁶ Law on Judicial Power (Article 89(1) of 1993). 01/01/1993 Reporter of the Supreme Council and Government of the Republic of Latvia <<https://likumi.lv/ta/en/en/id/62847-on-judicial-power>>.

¹⁰³⁷ 2021 Rule of Law Report on Latvia 2.

¹⁰³⁸ *ibid*.

¹⁰³⁹ *ibid*.

shall be independent and subject only to the law”.¹⁰⁴⁰ Therefore, the judiciary should be independent from the influence of the executive and legislative branches.

The Court Administration is an institution established in the Law on Judicial Power and is tasked with handling all administrative duties related to the district courts, regional courts and the land registries office.¹⁰⁴¹ The Supreme Court is in charge of its own administrative duties.¹⁰⁴² The Court Administration was established in 2004 with the aim of centralising administrative duties of Latvian courts.¹⁰⁴³ Originally this institution was intended to be run under the authority of the Judicial Council, but this was not accepted by policy makers.¹⁰⁴⁴ Therefore, a 2018 report of Latvian judicial independence issued by the European Commission for the Efficiency of Justice noted that although the Court Administration was created as an independent body, its true independence is difficult to ascertain for various reasons.¹⁰⁴⁵ Notably, the Court Administration is directly subordinate to the Minister of Justice and is controlled by a director who is appointed by the Minister of Justice for a term of 5 years and can be reappointed without limitation.¹⁰⁴⁶ Furthermore, the Court Administration has vast scope in court budgetary matters. The Court Administration prepares the budget for both district and regional courts and the land registry office. This draft is sent to the Minister of Justice who asks the Judicial Council for an opinion before the Minister of Finance presents the courts’ budget to the Saeima for implementation.¹⁰⁴⁷ Importantly, if the Judicial Council disagrees with the draft budget the Minister of Justice can ignore this and proceed with presenting the budget to the Minister of Finance.¹⁰⁴⁸

¹⁰⁴⁰ Constitution of the Republic of Latvia, Article 83.

¹⁰⁴¹ Aavik and others (n 1035) 11.

¹⁰⁴² *ibid.*

¹⁰⁴³ *ibid.*

¹⁰⁴⁴ *ibid* 11–12.

¹⁰⁴⁵ *ibid* 11.

¹⁰⁴⁶ Law on State Civil Service Law (Article 11 of 2000). 22/09/2000 Latvian Journal. No. 331/333; Aavik and others (n 1035) 12.

¹⁰⁴⁷ Law on Judicial Power (Article 50.2(3) of 1993). 01/01/1993 Reporter of the Supreme Council and Government of the Republic of Latvia <<https://likumi.lv/ta/en/en/id/62847-on-judicial-power>>.

¹⁰⁴⁸ Law on Judicial Power (Article 50.2(5) of 1993). 01/01/1993 Reporter of the Supreme Council and Government of the Republic of Latvia <<https://likumi.lv/ta/en/en/id/62847-on-judicial-power>>.

The Court Administration has been recently stripped of certain crucial duties that risk diminishing judicial independence in Latvia. Most notable a 2018 law transferred the duty of deciding the procedure for the selection of candidate judges from the Court Administration to the Judicial Council.¹⁰⁴⁹ The Commission for the selection of judicial candidates under the new authority of the Judicial Council commenced its work in October 2020.¹⁰⁵⁰ This was an important change as the 2018 report of Latvian judicial independence published by the European Commission for the Efficiency of Justice noted that Court Administration, being influenced by the Minister of Justice, creates significant issue for judicial independence as it grants the executive excessive power over the composition of courts.¹⁰⁵¹

It is not unusual for court administration to be professionalised and centralised in a single body.¹⁰⁵² It might also be efficient to have administrative tasks centralised as the presidents of individual courts can concentrate their time on judicial duties.¹⁰⁵³ However, there are concerns within the current Latvian system that are impossible to ignore. As the Court Administration has vast control over the day-to-day running of courts, it is always a concern that judicial behaviours might be directly or indirectly impacted by the knowledge that the Minister for Justice is ultimately overseeing essential functions of courts such as budget allocation.¹⁰⁵⁴ The Judicial Council would be a more appropriate authority to run the Court Administration as this is the only body that is mainly comprising of legal professionals and lawyers with their goal being to implement best practice of their profession.¹⁰⁵⁵ While the control of the Court Administration by the Minister for Justice, constantly runs the risk of the government attempting to exert influence over the judiciary for political gain or entrenchment of power.

The 2018 report of Latvian judicial independence issued by the European Commission for the Efficiency of Justice also draws attention to the concerns surrounding the

¹⁰⁴⁹ 2021 Rule of Law Report on Latvia 2.

¹⁰⁵⁰ *ibid.*

¹⁰⁵¹ Aavik and others (n 1035) 13–14.

¹⁰⁵² *ibid.* 14.

¹⁰⁵³ *ibid.*

¹⁰⁵⁴ *ibid.*

¹⁰⁵⁵ *ibid.*

appointment of the director of the Court Administration.¹⁰⁵⁶ If the government wishes to entrench their power and influence the judiciary, the appointment of a favourable director of the Court Administration would be particularly beneficial to their agenda. Furthermore, the fact that the director is appointed for a term of five years and the term can be renewed indefinitely indicates that a director conducive to the government's or the Minister of Justice's agenda is likely to be re-elected and continue to exert significant control over the judiciary's essential services.¹⁰⁵⁷ Therefore, the director's actions can be heavily influenced by their knowledge that their reappointment relies on the Minister of Justice approving their work and policies so far.

There are also solid grounds for concerns for Latvia's judicial independence. A 2021 survey of judicial independence carried out by the University of Latvia on the Judicial Council's behalf unveiled that 70.7 per cent of surveyed judges feel they are under political pressure from the Minister of Justice.¹⁰⁵⁸ Furthermore, 25.4 per cent of the judges believe that judicial independence is negatively impacted by the government, while 23.3 per cent of judges said judicial independence is also negatively affected by the Saeima.¹⁰⁵⁹ Judges expressed concern over the pressure exerted by the Minister of Justice, political parties and also the quality of other work of law enforcement bodies which affects judicial work as well.¹⁰⁶⁰ Chairman of the Judicial Council, Aigars Strupiņš, called for reforming the judicial system to improve judicial independence and reduce systemic dependence of courts on the executive.¹⁰⁶¹ In particular, he said that political pressure from the Minister of Justice is felt in budgetary and training matters which corroborates the concerns of the 2018 report of Latvian judicial independence issued by the European Commission for the Efficiency of Justice.¹⁰⁶² The Chairman said that the judicial system needs to be distanced from the executive, for example, courts' budgetary

¹⁰⁵⁶ *ibid.*

¹⁰⁵⁷ *ibid.*

¹⁰⁵⁸ Linda Spundiņa (n 1026).

¹⁰⁵⁹ *ibid.*

¹⁰⁶⁰ LETA, 'Study: Majority of Judges in Latvia Unhappy with Ministry of Justice Interference' *Baltic News Network* (5 October 2021) <<https://bnn-news.com/study-majority-of-judges-in-latvia-unhappy-with-ministry-of-justice-interference-224672>> accessed 25 September 2021.

¹⁰⁶¹ *ibid.*

¹⁰⁶² *ibid.*

issues should be handled directly with the Minister of Finance instead of needing to go through the Minister of Justice first.¹⁰⁶³ The Chairman also attributes the judiciary's negative opinion of the Minister of Justice to his numerous baseless and public criticisms of judicial decisions.¹⁰⁶⁴

5.4.2. Latvia's Judicial Council under Pressure from the Minister of Justice

In early 2021, a public dispute broke out between the Minister of Justice, Jānis Bordāns, and the Chief Justice of the Supreme Court of Latvia and Chair of the Judicial Council, Aigars Strupišs.¹⁰⁶⁵ Minister Bordāns issued a resolution on the Ministry of Justice website accusing Chairman Strupišs of violating judicial ethics by criticising the judgment of the Riga Regional Court on the high profile case of Aivars Lembergs.¹⁰⁶⁶ The resolution has since been removed from the Ministry's website after Minister Bordāns attacks were deemed to be baseless by the Judicial Ethics Committee.¹⁰⁶⁷ Minister Bordāns attempted to turn the Judicial Council against their Chairman in a vote as he claimed that Chairman Strupišs was damaging the reputation of the judiciary and preventing foreign investments by commenting on a court's decision to the media.¹⁰⁶⁸ However, the Judicial Ethics Committee disagreed with the Minister's evaluations and found that Chairman Strupišs was acting within his competence when he spoke to the media about his belief that the Lembergs trial was too lengthy and that many lessons should be drawn from this trial for the Latvian justice system.¹⁰⁶⁹ Former Minister of Justice, Guntars Grīnvalds, condemned

¹⁰⁶³ Linda Spundiņa (n 1026).

¹⁰⁶⁴ LETA, 'Study: Majority of Judges in Latvia Unhappy with Ministry of Justice Interference' (n 1060).

¹⁰⁶⁵ Uldis Dreiblat and Ritums Rozenbergs, 'SC Chief Justice: Bordāns Spreads Fake News and Acts as a Lawyer for Individual Judges' *Neatkarīgā Rīta Avīze* (16 March 2021) <<https://neatkariga.com/opinions/342042-sc-chief-justice-bordans-spreads-fake-news-and-acts-as-a-lawyer-for-individual-judges>> accessed 10 March 2021.

¹⁰⁶⁶ Dreiblat and Rozenbergs (n 1027).

¹⁰⁶⁷ Supreme Court of the Republic of Latvia, 'The Judicial Council Does Not Support the Draft Resolution of the Minister of Justice' (26 April 2021) <<https://at.gov.lv/en/jaunumi/par-tieslietu-padomi/the-judicial-council-does-not-support-the-draft-resolution-of-the-minister-of-justice-10590?year=2021&month=04>> accessed 10 March 2021.

¹⁰⁶⁸ Dreiblat and Rozenbergs (n 1065).

¹⁰⁶⁹ LSM.LV, 'Strupišs: The Length of the Lembergs Case Is an Example for Judges of How Not to Do It' (*LSM.LV*, 26 February 2021) <https://www-lsm-lv.translate.goog/raksts/zinas/latvija/strupiss-lemberga-lietas-ilgums--piemers-tiesnesiem-ka-nevajag-darit.a394493/?_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=nui,sc>.

the attacks of Minister Bordāns on the Chairman of the Judicial Council as the worst possible attack on judicial independence.¹⁰⁷⁰ It is now clear that the Minister of Justice was attempting to censor the politically inconvenient opinions of Chairman Strupiņš which threatened the Minister's reputation and competence. It has also been reported that the Minister's public criticism of Chairman Strupiņš indicated that Minister Bordāns had attempted to gain control of the newly created judicial training institution which is currently controlled by the Judicial Council.¹⁰⁷¹

Latvian society remains untrusting of their judiciary's independence with 39 per cent of respondents stating they believe judicial independence is fairly bad or very bad in Latvia where the EU average is 33 per cent.¹⁰⁷² The public tends to distrust courts of lower instance more than courts of higher instance - 50 per cent of respondents trust the Supreme Court while 51 per cent trust the Constitutional Court.¹⁰⁷³ Approximately a fifth of Latvian citizens believe they have sufficient legal ability to protect their rights against companies or the government.¹⁰⁷⁴

The lack of general trust in the Latvian judiciary can be attributed to the mismanagement of large-scale corruption trials.¹⁰⁷⁵ Latvia has gained an international reputation for being an epicentre for money laundering for wealthy Russian business men and oligarchs.¹⁰⁷⁶ A

¹⁰⁷⁰ Dreiblats and Rozenbergs (n 1027).

¹⁰⁷¹ Dreiblats and Rozenbergs (n 1065).

¹⁰⁷² European Commission, 'Flash Eurobarometer 483 on Perceived Independence of the National Justice Systems in the EU among the General Public' (n 668) 7.

¹⁰⁷³ 'Latvia: Nations in Transit 2021 Country Report' (Freedom House)

<https://freedomhouse.org/country/latvia/nations-transit/2021#footnote1_rf3ox5s> accessed 25 September 2021.

¹⁰⁷⁴ SKDS Research Centre, 'Latvian Population Opinions on the Constitutional Court' (SKDS Research Centre 2020) 14–15 <https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/08/Pētījums_Satversmes-tiesa_SKDS_27082020.pdf> accessed 25 September 2021; 'Latvia: Nations in Transit 2021 Country Report' (n 1073).

¹⁰⁷⁵ 'Latvia: Nations in Transit 2021 Country Report' (n 1073).

¹⁰⁷⁶ Gederts Gelzis and John O'Donnell, 'Latvia's Reputation at Stake after Corruption Allegations' *Reuters* (21 February 2018) <<https://www.reuters.com/article/us-latvia-banking-explainer-idUSKCN1G52LF>> accessed 27 September 2021; LSM.LV and Re:Baltica, 'Leaked Documents Show Oligarchs Made Extensive Use of Latvian Banks' *LSM.LV* (21 September 2021) <<https://eng.lsm.lv/article/economy/banks/leaked-documents-show-oligarchs-made-extensive-use-of-latvian-banks.a375044/>> accessed 27 September 2021.

fraudulent scheme involving the digitalisation of Latvia's television system, now known as 'Digitalgate', involving many high-profile figures including former Prime Minister, Andris Šķēle, lawyers and former government ministers has been ongoing since 2007.¹⁰⁷⁷ In October 2020 the Supreme Court overturned some convictions by Riga Regional Court and sent the case for retrial which has further prolonged proceedings.¹⁰⁷⁸ The case of oligarch, long-time mayor of Ventspils and prominent Farmers and Greens politician, Aivars Lembergs, concluded in early 2021 for bribery, money laundering and a number of other illicit activities after a 14 year legal battle.¹⁰⁷⁹ However, the disgraced politician is unphased by the five-year prison sentence ordered for his crimes as he has lodged multiple appeals to the conviction threatening to continue his case for another decade.¹⁰⁸⁰

5.4.3. The Legislature's Backlash Against the Same-Sex Partnership Judgment

This section has so far detailed some structural issues with judicial independence in Latvia, but there have also been instances of targeted attacks on the independence of specific courts. Much like the politicisation of the Constitutional Court in Lithuania, which is discussed in the previous chapter, the Latvian Constitutional Court has also faced attacks from members of the executive and legislature in recent years. On 12 November 2020 the Latvian Constitutional Court delivered a landmark judgment which affirmed the rights of same-sex parents and demanded legal protection for same-sex couples.¹⁰⁸¹ The

¹⁰⁷⁷ LETA, 'Latvia's Ex-Prime Minister and Ex-Transport Minister Officially Accused of Illegalities with Large Sums of Money' *Baltic News Network* (22 March 2021) <<https://bnn-news.com/latvia-s-ex-prime-minister-and-ex-transport-minister-officially-accused-of-illegalities-with-large-sums-of-money-223207>> accessed 27 September 2021; 'Latvia: Nations in Transit 2021 Country Report' (n 1073).

¹⁰⁷⁸ The Baltic Course, 'Supreme Court Overrules Convictions in Digital TV Case in Latvia' (*The Baltic Course*, 30 October 2020) <<http://www.baltic-course.com/eng/legislation/?doc=160425&output=d>> accessed 27 September 2021.

¹⁰⁷⁹ LSM.LV, 'The Lembergs Case: A Ruling 14 Years in the Making' *LSM.LV* (22 February 2021) <<https://eng.lsm.lv/article/society/crime/the-lemborgs-case-a-ruling-14-years-in-the-making.a393709/>> accessed 27 September 2021.

¹⁰⁸⁰ LETA, 'Lembergs Compares His Sentencing to Navalny's Case' *The Baltic Times* (22 February 2021) <https://www.baltictimes.com/lemborgs_compares_his_sentencing_to_navalny_s_case/> accessed 27 September 2021.

¹⁰⁸¹ *Judgment of the Constitutional Court of the Republic of Latvia 12 November 2020 in case no. 2019-33-01. 2020. Latvia Journal* <[https://www.satv.tiesa.gov.lv/en/cases/?search\[number\]=2019-33-01](https://www.satv.tiesa.gov.lv/en/cases/?search[number]=2019-33-01)> (n 1028).

Court ruled that Section 155, Paragraph one of the Labour Law (the Labour law) which allows for 10 days paternity leave to a father (man) after the birth of his child was incompatible with Article 110 of the Latvian Constitution which provides that the state is required to protect the family.¹⁰⁸² The applicant, a woman in a same-sex relationship with the child's mother, claimed that the Labour law's specification that only fathers are entitled to ten days leave was discriminatory towards her same-sex relationship and incompatible with the states requirement to protect her family as required by Article 110 of the Constitution.¹⁰⁸³

The Constitutional Court ruled that the state has a positive obligation to protect all families not just those established by traditional means such as marriage, a biological relationship or a legally recognized child-parent relationship. A family is a social institution based on social reality and identifiable close personal ties based on understanding and respect.¹⁰⁸⁴ Therefore, the court acknowledges that in social reality close personal ties can also emerge as a result of actual cohabitation.¹⁰⁸⁵ The first sentence of Article 110 of the Constitution sets out the State's positive obligation to protect and support every family, including also a de facto family which the Constitutional Court had previously established in their judgment of 5 December 2019.¹⁰⁸⁶ The Court also reasoned that Latvia is an independent, democratic and legal state which strongly values human dignity.¹⁰⁸⁷ The principle of human dignity does not allow the State to waive the fundamental rights of a particular person, or group of persons.¹⁰⁸⁸ Stereotypes existing in society cannot serve as justification to diminish the fundamental rights of a specific person or group of persons in a democratic state governed by the rule of law.¹⁰⁸⁹

¹⁰⁸² *ibid* 36.

¹⁰⁸³ *ibid* 2.

¹⁰⁸⁴ *ibid* 12.1.

¹⁰⁸⁵ *ibid*.

¹⁰⁸⁶ *Judgment of the Constitutional Court of the Republic of Latvia 5 December 2019 in case no 2019-01-01 2019 Latvia Journal* <[https://www.satv.tiesa.gov.lv/en/cases/?search\[number\]=2019-01-01](https://www.satv.tiesa.gov.lv/en/cases/?search[number]=2019-01-01)> [12.2.2].

¹⁰⁸⁷ *Judgment of the Constitutional Court of the Republic of Latvia 12 November 2020 in case no. 2019-33-01. 2020. Latvia Journal* <[https://www.satv.tiesa.gov.lv/en/cases/?search\[number\]=2019-33-01](https://www.satv.tiesa.gov.lv/en/cases/?search[number]=2019-33-01)> (n 1028) para 12.2.

¹⁰⁸⁸ *ibid*.

¹⁰⁸⁹ *ibid*.

While the LGBTQ+ community and their supporters celebrated this judgment and the Constitutional Court's initiative in protecting the rights of same-sex couples, the judgment was seen by many in society and parliament as an attack on traditional family and catholic values.¹⁰⁹⁰ The judgment sent shockwaves through Latvian politics with many members of government and parliament not only criticising the judgment on its merits but also the Constitutional Court's authority and independence.¹⁰⁹¹

Many members of the Saeima from a diverse group of parties and backgrounds voiced problematic opinions about the Constitutional Court and even called for its abolition.¹⁰⁹² Juris Rancāns from the New Conservative party (*Jaunā konservatīvā partija*, JKP), proclaiming that "unfortunately, there is currently a myth in the public sphere about the Constitutional Court as an institution endowed with divine legitimacy, which stands above the political will of the people or the political will of the legislator, but in reality this is not the case".¹⁰⁹³ While Alexander Kirstein (NA) called the Constitutional Court a "decorative and expensive" institution which does not need to exist and its competence could be transferred to the Supreme Court.¹⁰⁹⁴ In sum, the general consensus was that the Constitutional Court had become overly politicised and had overstepped its competence. Some members of parliament declared that the Court has no legitimate standing as it was not included in the original 1922 Satversme.¹⁰⁹⁵ This indicates that the Latvian Constitutional Court was established in the Satversme in 1996, 5 years after the

¹⁰⁹⁰ Kalvis Engīzers and Madara Meļņika, 'Defining the Modern Family: The Latvian Constitutional Court, the Definition of "Family", and Parliamentary Bitterness' (*Verfassungsblog*, 2 February 2021) <<https://verfassungsblog.de/defining-the-modern-family/>>; LSM.LV, 'Supporters of "traditional" Families Gather by Latvian Constitutional Court' *LSM.LV* (9 December 2020) <<https://eng.lsm.lv/article/society/society/supporters-of-traditional-families-gather-by-latvian-constitutional-court.a384696/>> accessed 29 September 2021.

¹⁰⁹¹ Jānis Lasmanis, 'Deputies Question the Competence of the Constitutional Court. A New Judge Shall Not Be Elected' *Neatkarīgā Rīta Avīze* (22 December 2020) <https://neatkariga-nra-lv.translate.google/politika/334033-deputati-apsauba-satversmes-tiesas-kompetenci-jaunu-tiesnesi-neievele?_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en-GB&_x_tr_pto=nui,elem> accessed 29 September 2021.

¹⁰⁹² *ibid*; Sanita Upleja, 'The Saeima Confirms Anita Rodiņš as a Judge of the Constitutional Court' *Defli* (3 November 2021) <https://www-delfi-lv.translate.google/news/national/politics/saeima-apstiprina-anitu-rodinu-satversmes-tiesas-tiesnesa-amata.d?id=53012637&_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en-GB&_x_tr_pto=nui,elem> accessed 29 September 2021.

¹⁰⁹³ Lasmanis (n 1091).

¹⁰⁹⁴ *ibid*.

¹⁰⁹⁵ *ibid*.

reestablishment of Latvian independence.¹⁰⁹⁶ Therefore, the parliamentarians reasoned that the Court lacks legitimacy and is dispensable as many neighbouring countries like Estonia, Sweden and Finland do not have a Constitutional Court.¹⁰⁹⁷ Of course, this ignores the fact that the Supreme Court in these countries is also permitted to perform judicial review.

All of this culminated into a party of the governing coalition, NA, to submit a proposal to amend Article 110 of the Latvian Constitution on 7 November 2021.¹⁰⁹⁸ The new text would state that a family can only be formed by marriage, blood kinship and adoption and must be based on a union between a man and a woman.¹⁰⁹⁹ Although Prime Minister Krisjanis Karins' New Unity (Jaunā Vienotība, JV) stated that this is not the appropriate time to amend the Satversme (eluding to the emergency caused by the Covid-19 pandemic), on 14 January 2021, 47 members of parliament voted in favour of the amendment being put to Saeima Committees for further deliberation.¹¹⁰⁰ However, this proposed amendment was abandoned in due course. Later, a referendum was proposed by conservative members of parliament to introduce a new definition of family which would strengthen the position of traditional family values. However, again, the initiative did not gather enough votes from the public for the question to be put to the people in a referendum.¹¹⁰¹ In early 2022, the Minister of Justice initiated a draft civil partnership bill which would allow for the legal recognition of same-sex couples so that the requirements set out by the Constitutional Court in the same-sex partnership judgment would be

¹⁰⁹⁶ Krūma and Statkus (n 844) 951–952.

¹⁰⁹⁷ Lasmanis (n 1091).

¹⁰⁹⁸ Draft Amendment to the Constitution of the Republic of Latvia, Saeima of the Republic of Latvia, 07/01/2021, no. 3396.

¹⁰⁹⁹ *ibid.*

¹¹⁰⁰ LETA, 'Kariņš: This Is Not the Time for Discussions on Amendments to the Satversme' *Apollo.lv* (11 January 2021) <https://www-apollo-lv.translate.google.com/7153128/karins-sis-nav-istais-laiks-diskusijam-par-grozijumiem-satversme?_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en-GB&_x_tr_pto=nui,elem> accessed 29 September 2021; Jānis Kincis and LSM.LV, 'Saeima Debates Definition of "family" in the Constitution' *LSM.LV* (14 January 2021) <<https://eng.lsm.lv/article/politics/saeima/saeima-debates-definition-of-family-in-the-constitution.a388754/>> accessed 29 September 2021.

¹¹⁰¹ LSM.LV, 'Another Initiative Launched to Define "family" in Constitution of Latvia' *LSM.LV* (3 August 2022) <<https://eng.lsm.lv/article/society/society/another-initiative-launched-to-define-family-in-constitution-of-latvia.a467810/>> accessed 22 November 2022.

satisfied. However, despite the bill passing through to the third reading in the Saeima, it failed due to conservative members of parliament such as NA, Farmers and Greens (Zaļo un Zemnieku savienība, ZZS), and Harmony boycotting the vote.¹¹⁰² Thus, the Saeima has now passed the deadline set by the Constitutional Court by which it should have given legal recognition to same-sex couples. This presents a major concern for the standing of the Constitutional Court as it diminishes the perceived authority of the judiciary's decisions in the public eye. Furthermore, a constitutional court unable to carry out constitutional review is stripped of its purpose and is incompatible with the requirement of judicial independence demanded by liberal constitutional democracy.

5.4.4. Dispute over the Merger of the Vārakļāni and Rēzekne Self-Governing Regions

Another face-off between the legislature and the Constitutional Court came just a few months later in May 2021 after the Constitutional Court delivered its judgment on the merger of the Vārakļāni and Rēzekne regions, threatening to start a constitutional crisis.¹¹⁰³ The merger of the two regions came about as a result of the adoption of a new law on “Administrative Territories and Settlements” in June 2020 by the Saeima.¹¹⁰⁴ This law initiated the reform of Latvia’s local government regions to tackle ongoing national concerns over declining demographics in rural Latvia and the related issue of these smaller rural regions being unable to cope financially with necessary public administration.¹¹⁰⁵ The reforms would redraw regional boundaries and merge some smaller regions with bigger ones to improve the overall delivery of public administration and, in turn, saving the Latvian economy millions of euro through making the system more efficient.¹¹⁰⁶ However, this reform proved to be one of the most contentious political issues in recent years. Many wealthier regions were opposed to the reforms as

¹¹⁰² ‘Latvian Saeima Dodges Civil Union Law Adoption Again’ (*LSM.LV*, 2 June 2022) <<https://eng.lsm.lv/article/society/society/latvian-saeima-dodges-civil-union-law-adoption-again.a459661/>> accessed 29 November 2022.

¹¹⁰³ *Judgment of the Constitutional Court of the Republic of Latvia, 28 May 2021 in case no. 2020-43-0106, 2021, Latvia Journal* <[https://www.satv.tiesa.gov.lv/en/cases/?search\[number\]=2019-33-01](https://www.satv.tiesa.gov.lv/en/cases/?search[number]=2019-33-01)> (n 1029).

¹¹⁰⁴ Law on Administrative Territories and Settlements (2020). 10/06/2020 *Latvian Journal*. No.119C.1.

¹¹⁰⁵ Auers, ‘Continuity in Change?’ (n 1024) 4.

¹¹⁰⁶ *ibid.*

their merger with poorer regions sparked concerns over the dilution of the quality of public services.¹¹⁰⁷ Another major concern was the planned creation of fewer but larger administrative units which would absorb the administrative tasks previously performed by public sector workers in smaller regions.¹¹⁰⁸ This would create job losses and mean that larger towns would attract more resources, devastating already faltering rural communities.¹¹⁰⁹ Of course, individual politicians were also concerned about losing political influence over certain regions during the reshuffle which further aggravated the discourse around the reform.¹¹¹⁰ Auers notes that a “window of opportunity” emerged when the current governing coalition formed in January 2019, led by prime minister Krišjānis Kariņš (JV).¹¹¹¹ The coalition consists of five parties, all with differing ideologies but crucially the ZZS, which held the prime minister position before the 2018 general election, were left in opposition.¹¹¹² This regional reform would have been very difficult if the ZZS were in power as they have been fierce advocates for small rural towns and villages.¹¹¹³ Nevertheless, even in opposition Viktors Valainis, a ZZS politician and member of the Saeima submitted hundreds of amendments to the proposed law during parliamentary debates.¹¹¹⁴ Scrutiny also came from the Latvian Association of Local and Regional Authorities as they lodged a complaint with the Congress of Local and Regional Authorities of the Council of Europe which resulted in a critical report being issued by the Congress.¹¹¹⁵ The report published in late 2020 reasoned that the new reforms were evidence of “deterioration in the overall situation of local democracy” and lacked proper consultation with local authorities and greatly reduced the financial autonomy of local authorities in Latvia.¹¹¹⁶ A follow up report by the Congress published after the adoption of the reforms by Saeima lamented that the reform process was a “missed opportunity

¹¹⁰⁷ *ibid.*

¹¹⁰⁸ *ibid* 4–5.

¹¹⁰⁹ *ibid.*

¹¹¹⁰ *ibid* 4.

¹¹¹¹ *ibid* 3–4.

¹¹¹² *ibid.*

¹¹¹³ *ibid.*

¹¹¹⁴ *ibid* 4.

¹¹¹⁵ ‘Recommendation 447 (2020) Fact-Finding Report on Territorial Reform in Latvia, Congress of Local and Regional Authorities of the Council of Europe’ 2.

¹¹¹⁶ *ibid.*

for Latvia to adopt a territorial reform in full compliance with the European Charter of Local Self-Government which it has ratified”.¹¹¹⁷

On 28 May Latvia’s Constitutional Court ruled against the merger of Varakļāni with Rēzekne less than ten days before planned municipal elections.¹¹¹⁸ The Court reasoned that the Saeima, which had merged the two regions on the third and final reading of the law, had ignored some crucial objectives of the reform.¹¹¹⁹ Mergers should be based on efficiency rather than cultural history and further stated that the opinion of the counties’ residents should be considered, this was relevant because 84% of Varakļāni residents preferred to be merged with Madona according to a poll.¹¹²⁰ Furthermore, Rēzekne County did not have the status or capacity to merge with Varakļāni county.¹¹²¹ The last minute cancelation of the merger prompted the Central Election Committee to cancel the planned municipal elections in both Rēzekne and Madona county as the Constitutional Court had suggested Madona to be a better choice compared to Rēzekne.¹¹²²

The Constitutional Courts judgment sparked opposition from some Saeima factions including the governing NA and JKP.¹¹²³ The Saeima threatened to ignore the judgment and push on with a vote to merge Varakļāni with Rēzekne through another parliamentary vote, once again throwing the Constitutional Courts reputation and authority into question.¹¹²⁴ As Latvia sat on the verge of spiralling into a constitutional crisis, president Levits was forced to mediate the situation and urged the Saeima to respect the decision

¹¹¹⁷ Congress of Local and Regional Authorities, *Communication by the Secretary General of the Congress at the 1397th Meeting of the Ministers’ Deputies* (CG(2021)40-14, Council of Europe, 2021) 24.

¹¹¹⁸ *Judgment of the Constitutional Court of the Republic of Latvia, 28 May 2021 in case no. 2020-43-0106, 2021, Latvia Journal* <[https://www.satv.tiesa.gov.lv/en/cases/?search\[number\]=2019-33-01](https://www.satv.tiesa.gov.lv/en/cases/?search[number]=2019-33-01)> (n 1029).

¹¹¹⁹ *ibid* 3.1.

¹¹²⁰ *ibid*; Auers, ‘Continuity in Change?’ (n 1024) 5.

¹¹²¹ *Judgment of the Constitutional Court of the Republic of Latvia, 28 May 2021 in case no. 2020-43-0106, 2021, Latvia Journal* <[https://www.satv.tiesa.gov.lv/en/cases/?search\[number\]=2019-33-01](https://www.satv.tiesa.gov.lv/en/cases/?search[number]=2019-33-01)> (n 1029) para 3.1.

¹¹²² *ibid*; Auers, ‘Continuity in Change?’ (n 1024) 5.

¹¹²³ Auers, ‘Continuity in Change?’ (n 1024) 5.

¹¹²⁴ Sally Benfelde, ‘The Constitutional Crisis Has Been Postponed. What Is Happening to the Saeima?’ (*Latviesi.com*, 2 June 2021) <https://www-latviesi-com.translate.google.com/translate/jaunumi/konstitucionala-krize-atlikta-kas-noteik-ar-saeimu?_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=nui,sc,elem> accessed 30 September 2021.

of the Court and called upon representatives of the parties in coalition to meet and resolve the issue.¹¹²⁵ A temporary solution was decided which saw the Saeima vote to keep Varakļāni as a separate county.¹¹²⁶ However, as this county has a small population 3,000 and does not have the capacity to support itself, the decision will need to be revisited at a later stage.¹¹²⁷

President Levits was forced to remind the Saeima that “Latvia is a country which adheres to the rule of law and that means that Saeima must respect the decisions of the Constitutional Court. If Saeima ignores the Court’s rulings, it creates the risk of a constitutional crisis”.¹¹²⁸ Indeed, the legislature disrespecting the authority and decision of the Constitutional Court is a blatant attack on the rule of law.¹¹²⁹ Although a pause has been placed on the dispute over the merger of regions which avoided an outright coup against the Constitutional Court, this was the second major attack on the Constitutional Courts authority and legitimacy waged by the legislature and executive within months. These attacks have severe consequences on the Constitutional Courts reputation which is particularly pertinent given that Latvia’s citizens are already weary and untrusting of their justice system.

5.4.5. Politicisation of the Constitutional Court Appointments Procedure

Late 2020 and early 2021 saw another crisis unravel between the Constitutional Court and the Saeima. The President of the Constitutional Court, Ineta Ziemele, left her position on 2 October 2020 as she was appointed as a judge of the Court of Justice of the European

¹¹²⁵ Office of the President, ‘President of Latvia Expects Varakļāni Region Status Issue to Be Resolved According to Satversme’ (*President of the Republic of Latvia*, 6 January 2021) <<https://www.president.lv/en/article/president-latvia-expects-varaklani-region-status-issue-be-resolved-according-satversme>> accessed 30 September 2021.

¹¹²⁶ ‘Transcript of the Saeima 01/06/2021. No 190/LP13. 14/06/2021. Latvian Journal No. 113’.

¹¹²⁷ Auers, ‘Continuity in Change?’ (n 1024) 5.

¹¹²⁸ Office of the President (n 1125).

¹¹²⁹ Guntars Laganovskis, ‘Ignoring the Judgment of the Constitutional Court Would Actually Change the Meaning of the State’ (*LV Portal*, 2 June 2021) <https://lvportals-lv.translate.google.com/norises/328922-satversmes-tiesas-spriduma-ignoresana-faktiski-mainitu-valsts-jegu-2021?_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=nui,sc,elem> accessed 30 September 2021.

Union.¹¹³⁰ This created a vacancy in the Constitutional Court that the Saeima struggled to fill due to their fears that the Constitutional Court had become too politically active. According to article 4 and 12 of Constitutional Court Law, the Constitutional Court judges are confirmed by the Saeima.¹¹³¹ Three Constitutional Court judges are confirmed following a proposal by not less than ten members of the Saeima, two following a proposal by the Cabinet of Ministers and two more following a proposal by the Supreme Court plenary session.¹¹³² The Supreme Court plenary session shall select candidates for the position of a Constitutional Court judge from among the judges of the Republic of Latvia.¹¹³³ However, the appointment of a new judge proved to be particularly difficult for the Saeima as the political backlash against the Constitutional Court's judgment on same-sex couples in early November was still a contentious topic.¹¹³⁴ Five candidates were nominated by different Saeima factions before the end of 2020 but none of the five nominees managed to acquire the necessary 51 votes in a parliamentary sitting on 21 December 2020.¹¹³⁵ The main reason for the indecision revolved around the ongoing narrative of the Saeima that questioned the very necessity of the Constitutional Court as an institution.¹¹³⁶ Especially after the same-sex couples' decision which many viewed as evidence that the Constitutional Court had overstepped its competence.¹¹³⁷ Aldis Gobzems, an independent member of the Saeima urged his fellow parliamentarians not to support Rodiņa because she approved of the Constitutional Court's judgment on same-sex couples.¹¹³⁸ He believed this was a violation of traditional family values found in the

¹¹³⁰ Constitutional Court of the Republic of Latvia, 'President of the Constitutional Court Ineta Ziemele Will Commence Performing the Duties of the Judge of CJEU on 6 October' <<https://www.satv.tiesa.gov.lv/en/press-release/president-of-the-constitutional-court-ineta-ziemele-will-commence-performing-the-duties-of-the-judge-of-cjeu-on-6-october/>> accessed 10 January 2021.

¹¹³¹ Law of the Constitutional Court (1996, Section 4(1). 14/06/1996 Latvian Journal. no. 103.

¹¹³² *ibid.*

¹¹³³ *ibid.*

¹¹³⁴ Upleja (n 1092).

¹¹³⁵ Kārlis Arājs, 'The Saeima Will Not Elect a New Judge of the Constitutional Court - Another Election Will Have to Be Held' *Delfi* (21 December 2020) <https://www-delfi-lv.translate.google.com/news/national/politics/saeima-jaunu-satversmes-tiesas-tiesnesi-neizvel-bus-jariko-vel-vienas-velesanas.d?id=52777081&_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en-GB&_x_tr_pto=nui,elem> accessed 10 January 2021.

¹¹³⁶ Upleja (n 1092).

¹¹³⁷ Arājs (n 1135).

¹¹³⁸ Upleja (n 1092).

Latvian Constitution.¹¹³⁹ Aleksandrs Kiršteins NA) called on the Saeima to postpone appointment of any judge to the Constitutional Court as he believed the Court violated its powers and created chaos by appropriating the role of legislature.¹¹⁴⁰

Finally, on 11 March 2021, more than five months after the Constitutional Court vacancy arose, Anita Rodiņa gathered 56 votes in the Saeima and was appointed to the Constitutional Court.¹¹⁴¹ Rodiņa was nominated for this position at the beginning of February by coalition members Development/For! (Attīstībai/Par!, AP!), JV and endorsed by the Judicial Council for the position.¹¹⁴² However, despite this, there was no consensus about her candidacy amongst coalition members the day before the vote.¹¹⁴³ Rodiņa was appointed only with the additional support of opposition members such as Harmony and ZZS.¹¹⁴⁴ The debate about Rodiņa's appointment lasted more than an hour, with the conversation dominated by the work of the Constitutional Court so far, the interference of the Court in politics, as well as the necessity of the Court overall.¹¹⁴⁵ Inese Voika (AP!) called out certain members of the Saeima for stalling the appointment of a new judge due to ideological differences, which she argued was inappropriate.¹¹⁴⁶

There was also another important incident recently surrounding a judicial appointment to the Constitutional Court. On 9 December 2021, Irēna Kucina received

¹¹³⁹ *ibid.*

¹¹⁴⁰ *ibid.*

¹¹⁴¹ LETA, 'Latvian Parliament Approves New Judge for the Constitutional Court' *Baltic News Network* (11 March 2021) <<https://bnn-news.com/latvian-parliament-approves-new-judge-for-the-constitutional-court-222896>> accessed 10 January 2021.

¹¹⁴² Upleja (n 1092); Laura Selina Flower, 'ST as an Independent Arbitrator in the Legal System - The Judicial Council Supports Rodiņš as a Judge' *Delfi* (26 February 2021) <https://www-delfi-lv.translate.google.com/news/national/politics/st-ka-neatkarigs-arbitrs-tiesiskaja-sistema-tieslietu-padome-atbalsta-rodinu-tiesnesa-amata.d?id=52973979&_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en-GB&_x_tr_pto=nui,elem> accessed 10 January 2021.

¹¹⁴³ Upleja (n 1092).

¹¹⁴⁴ LETA, 'Again, There Is No Consensus in the Coalition on the New ST Judge; Rodin's Election Will Need the Support of the Opposition' *Delfi* (3 October 2021) <https://www-delfi-lv.translate.google.com/news/national/politics/koaliciona-atkal-nav-vienpratibas-par-jauno-st-tiesnesi-rodinas-iveelesanai-vajadzies-opozicijas-atbalstu.d?id=53009891&_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en-GB&_x_tr_pto=nui,elem> accessed 10 January 2021.

¹¹⁴⁵ Upleja (n 1092).

¹¹⁴⁶ *ibid.*

adequate votes from the Saeima to become a Constitutional Court judge.¹¹⁴⁷ However, her candidacy was plagued by controversy in the months prior to her selection for the post. Judge Kucina's previous role was to act as President Levits' legal advisor and there were several concerning reports before her nomination that President Levits had held phone calls with parliamentarians from AP! where he threatened to criticise the party if they failed to vote for Kucina, his preferred candidate, for the judicial post.¹¹⁴⁸ If these allegations were true, then this would constitute court packing which is a violation of judicial independence and the rule of law.

A further constitutional crisis materialised in Latvia in early 2021 when Sanita Osipova's candidacy to the Supreme Court failed to be approved in the Saeima with 40 MPs voting in her favour, 29 MPs against, and 16 MPs abstaining.¹¹⁴⁹ This was considered a shocking result as Sanita Osipova had previously served as President of the Constitutional Court and was considered a highly qualified and suitable candidate for the position of judge of the Supreme Court. What was troubling about the rejection of her candidacy by certain members of the Saeima was their reasoning. Many parliamentarians from the conservative wing of the Saeima, including ZZS and NA, cited the former Constitutional Court President's support of same-sex couples' rights and the corresponding jurisprudence of the Constitutional Court.¹¹⁵⁰ Emphasis was placed on the landmark decision of the Court of November 2020 as a reason to reject Osipova's candidacy. It was feared she would lead the Supreme Court in deciding cases pertaining to recognition of same-sex partnerships that were coming up on the Supreme Court's list in a similar fashion.¹¹⁵¹ The Saeima's controversial decision led the Supreme Court to issue a decision after a sitting of its plenary session where the court condemned the

¹¹⁴⁷ LETA, 'Latvian Parliament Approves New Judge for the Constitutional Court' (n 1141).

¹¹⁴⁸ Māris Klūga, 'Lavian President Denies Exerting Inappropriate Pressure on Politicians' *LSM.LV* (24 September 2021) <<https://eng.lsm.lv/article/politics/president/lavian-president-denies-exerting-inappropriate-pressure-on-politicians.a422742/>>.

¹¹⁴⁹ 'The Saeima Rejects the Candidates for the Post of Supreme Court Judge' (*Jurista Vārds*, 22 February 2022) <https://juristavards-lv.translate.google.com/doc/280708-saeima-noraida-augstakas-tiesas-tiesnesa-amata-kandidati/?_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc> accessed 24 November 2022.

¹¹⁵⁰ *ibid.*

¹¹⁵¹ *ibid.*

inappropriate politicisation of the appointment of a Supreme Court judge.¹¹⁵² In this decision, the Supreme Court drew particular attention to the Saeima's violation of Article 83 of the Latvian Constitution which guarantees the independence of judges from political influence:

“From this norm follows an absolute prohibition to punish a judge or otherwise create adverse consequences for him due to his judgments, unless one of the circumstances specified in the Law on Disciplinary Responsibility of Judges, which may be the basis for the judge's liability, is proven. The decision of the Saeima, based on displeasure with the outcome of a specific case, to deny a Constitutional Court judge the possibility of a further career violates the said Constitutional norm.”¹¹⁵³

This controversy has put the judiciary in a very dangerous position, as now it has become clear that the careers of judges can be hindered due to their political stance on important issues. The placing of ideology considerations above a candidate judge's qualifications is likely to have direct and indirect effects on how judges adjudicate on sensitive political cases.¹¹⁵⁴ This disagreement between the legislature and the judiciary in such a public manner has major ramifications for the public's perception of the authority of the judiciary as well as the obvious violation of the well-established principle of judicial independence in Latvia.

The past few years have seen an increasingly tense and adversarial relationship develop between the judiciary and the other powers of state. These challenges can be summarised as a strategic attack by some members of the Saeima and the government designed to place pressure on the judiciary for political gain. The attacks on the Constitutional Court due to the Saeima's disagreement with Constitutional Courts

¹¹⁵² Decision No 2 of 18 February 2022 of the plenary session of the Supreme Court 'On the relationship between the legislature and the judiciary and the independence of the judge'

<https://www.at.gov.lv/files/uploads/files/2_Par_Augstako_tiesu/Plenums/plenuma%20lemums2%2018022022_EN.docx>.

¹¹⁵³ *ibid.*

¹¹⁵⁴ 'The Saeima Rejects the Candidates for the Post of Supreme Court Judge' (n 1149).

reasoning in recent judgments is based on their political and ideological disagreements but it is unacceptable for parliamentarians to attack the legitimacy and standing of an independent court for these reasons. Structural obstacles also still remain in Latvia's judicial system such as the excessive control of the day-to-day functioning of the courts by the Minister of Justice. This negatively impacts judicial independence in Latvia.

5.5. Limitations on Media Freedom

The status of Latvia's media independence is varied as a dichotomy exists between the law on media independence and the actual lived experience of journalists and media editors. Although the Latvian parliament has taken important steps to improve media independence in recent years, many issues with journalistic freedom persist without change.¹¹⁵⁵ Media ownership is loosely regulated meaning that a few individuals and companies own the majority of Latvian news channels and transparency of ownership is difficult to ascertain despite legal provisions existing for this purpose.¹¹⁵⁶ Furthermore, journalists still face pressure from politicians despite many formal laws forbidding political interference with journalists' freedom.¹¹⁵⁷ This has resulted in editors of media channels admitting they self-censor their broadcasts to satisfy both the commercial interests of media owners and the interests of their political allies.¹¹⁵⁸

The Latvian legal framework protects the freedom of speech and media both in the Satversme and legislation. Article 100 of the Latvian Constitution states that "everyone has the right to freedom of expression, which includes the right to freely receive, keep and distribute information and to express his or her views. Censorship is prohibited."¹¹⁵⁹ The Electronic Mass Media Law (EMML) establishes the status, competencies, rights and duties of the media authority, the National Electronic Mass Media Council (NEMMC).¹¹⁶⁰

¹¹⁵⁵ Anda Rozukalne, 'Monitoring Media Pluralism in the Digital Era: Application of the Media Pluralism Monitor 2021 in the European Union, Albania, Montenegro, North Macedonia, Serbia & Turkey: Country Report : Latvia' (European University Institute 2021).

¹¹⁵⁶ *ibid* 12–13.

¹¹⁵⁷ *ibid* 13–15.

¹¹⁵⁸ Anda Rožukalne, 'Self-Censorship in Latvian Journalism: A Research Note' (2020) 35(1) *European Journal of Communication* 60, 61.

¹¹⁵⁹ Article 100, Constitution of the Republic of Latvia.

¹¹⁶⁰ Electronic Mass Media Law (2010) 28/07/2010 *Latvian Journal*, No. 118.

The Law on the Press and Other Mass Media and the Freedom of Information Law establishes the right for the press to access information held by both state and public organisations.¹¹⁶¹

In December 2020, the Parliament adopted an Act amending the EMML, transposing the revised Audio-Visual Media Services Directive, which enhances the independence of the NEMMC.¹¹⁶² Importantly, the amended EMML now includes a new provision stipulating that the NEMCC “*shall not seek or take instructions from any other authority*”.¹¹⁶³ However, after the promulgation of the new Law on Public Electronic Mass Media and their Management (LPEMMM) in December 2020, the NEMCC lost its supervisory capacity of public service media.¹¹⁶⁴ Two new independent bodies were established by LPEMMM for this purpose - the Public Electronic Mass Media Council (PEMMC) and the Public Electronic Mass Media Ombudsperson.¹¹⁶⁵ These two new authorities aim to safeguard the independence and quality of public electronic media.¹¹⁶⁶

Provisions on transparency of media ownership were enacted with the amendments to the EMML.¹¹⁶⁷ New audio-visual service providers are required to provide information on their beneficial owners to the NEMMC and existing service providers to submit information on any changes of the beneficial owner.¹¹⁶⁸ Despite this, the Centre for Media Pluralism and Media Freedom 2020 report evaluated Latvia’s media market plurality as high risk since 2019.¹¹⁶⁹ This is because information on media ownership continues to be difficult to obtain for the general public without payment and the level

¹¹⁶¹ Law on the Press and Other Mass Media (1990) 14/02/1991 Reporter of the Supreme Council and Government of the Republic of Latvia; Freedom of Information Law (1998) 06/11/1998 Latvian Journal, No. 334/335; 2021 Rule of Law Report on Latvia 11.

¹¹⁶² 2021 Rule of Law Report on Latvia 11.

¹¹⁶³ Law of 5 November 2020 ‘Amendments to the Law on Electronic Media’ (2020) 17/11/2020 Latvian Journal, No. 223.

¹¹⁶⁴ 2021 Rule of Law Report on Latvia 11.

¹¹⁶⁵ Law on Public Electronic Media and their Management (2020) 01/12/2020 Latvian Journal, No. 232.

¹¹⁶⁶ 2021 Rule of Law Report on Latvia 11.

¹¹⁶⁷ Law of 5 November 2020 ‘Amendments to the Law on Electronic Media’ (2020) 17/11/2020 Latvian Journal, No. 223.

¹¹⁶⁸ 2021 Rule of Law Report on Latvia 11.

¹¹⁶⁹ Anda Rozukalne (n 1155) 11–12.

of media market concentration in Latvia is considered high in all media branches.¹¹⁷⁰ There are no regulations for the number of licences, audience share, circulation for media outlets and there are no rules regulating horizontal, vertical or cross-media concentration in Latvia.¹¹⁷¹ Both the EU Commission's 2020 Rule of Law Report on Latvia and the Centre for Media Pluralism and Media Freedom 2020 report noted that information on media ownership needs to be available to the public due to the considerable amount of issues with news media ownership in Latvia being highly concentrated.¹¹⁷²

No framework exists in Latvian to ensure appointments and dismissals of editors-in-chief of media outlets are not influenced by commercial interests.¹¹⁷³ Editors and journalists representing various media outlets recognise that media owners commercial interests are a major source of self-censorship and a limitation of editorial independence.¹¹⁷⁴ 49 percent of journalists admit that they felt they had to consider the interests of their media outlet's owner and their political allies in their work.¹¹⁷⁵

There is a gap between the law on media independence and the actual lived experience of journalists and media editors. The principle of editorial autonomy is protected in the Press and other Mass Media Law however, there are no strategies to enforce editorial independence in reality.¹¹⁷⁶ Therefore, commercial media editors are increasingly serving the interests of advertisers and media owners in order to support their media outlet.¹¹⁷⁷ This is an issue because prominent news media owners continue to be closely linked with politicians in Latvia.¹¹⁷⁸

¹¹⁷⁰ *ibid* 12.

¹¹⁷¹ *ibid*.

¹¹⁷² European Commission, 'Commission staff working document – 2020 Rule of Law Report Country Chapter on the rule of law situation in Latvia' SWD (2020) 313 final 10; Anda Rozukalne (n 1155) 12.

¹¹⁷³ Anda Rozukalne (n 1155) 13.

¹¹⁷⁴ Rožukalne (n 1158) 61–62.

¹¹⁷⁵ *ibid* 61.

¹¹⁷⁶ Anda Rozukalne (n 1155) 14–15.

¹¹⁷⁷ *ibid* 15.

¹¹⁷⁸ *ibid* 14–15.

The Centre for Media Pluralism and Media Freedom 2021 report has again reported a deteriorating situation regarding media independence from political influence.¹¹⁷⁹ There have been persistent attempts to gain political control over media outlets for several years.¹¹⁸⁰ Leading news publications such as *Diena* and *Neatkarīgā Rīta Avīze* being either controlled by, or linked to politicians, while the leading TV channel *Perviy Baltijskiy Kanal* (PBK), is also subjected to political influence.¹¹⁸¹

Worryingly, journalists are increasingly subjected to harassment online, especially at the hands of politicians or political communications companies who aim to discredit journalists and attack their privacy.¹¹⁸² A recent example of these attacks came in 2019 where journalists of the Baltic Centre for Investigative Journalism “*Re:Baltica*” were harassed and threatened.¹¹⁸³ As a reaction to the *Re:Baltica* harassment case the Latvian Association of Journalists, the Latvian Union of Journalists and the State Police have agreed a memorandum of cooperation to ensure effective measures to protect journalists.¹¹⁸⁴ Despite this, the police closed the criminal case resulting from the *Re:Baltica* incident.¹¹⁸⁵

Leading up to the 2018 general election, journalists noted a sustained attack on their work at the hands of two political parties – the pro-Russian Harmony party and anti-establishment populist party KPV LV. In June 2018 the then Riga mayor and co-leader of Harmony, Nils Ušakovs, was the subject of an article by *Re:Baltica* detailing how he spent €8 million of public funds to improve his public image before the general election.¹¹⁸⁶

¹¹⁷⁹ *ibid* 14.

¹¹⁸⁰ *ibid*.

¹¹⁸¹ *ibid*.

¹¹⁸² *ibid* 10.

¹¹⁸³ Arta Giga, ‘The Memorandum of Cooperation Signed by the LMA and the VP Will Help to Prevent the Threat to Journalists.’ (*The Latvian Association of Journalists*, 21 April 2020) <https://www-latvijaszurnalisti-lv.translate.google.com/valdes-lemumi/2020/04/21/lza-un-vp-parakstaitais-sadarbibas-memorands-palidzes-noverst-zurnalistu-apdraudejumu/?_x_tr_sch=http&_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en-GB&_x_tr_pto=nui> accessed 16 October 2021.

¹¹⁸⁴ *ibid*.

¹¹⁸⁵ Anda Rozukalne (n 1155) 10.

¹¹⁸⁶ Mapping Media Freedom, ‘Violation of Media Freedom - Latvia’ <<https://www.mappingmediafreedom.org/country-profiles/latvia/>> accessed 16 October 2021.

Ušakovs sued the two journalist responsible for the piece for criminal defamation claiming that he did not misappropriate public funds in this way.¹¹⁸⁷ The complaint was dismissed by the police but Ušakovs appealed the decision in November 2018.¹¹⁸⁸ Despite the appeal the Latvian Prosecutor's office dismissed the accusations stating that the journalist acted in the public interest and did not attack the mayor personally.¹¹⁸⁹

In August 2018, Aldis Gobzems, the candidate for prime minister of KPV LV filed complaints for criminal defamation and crimes against the state against *Re:Baltica* journalists who published an article linking Godzems to oligarch, Ainars Šlesers.¹¹⁹⁰ The article suggested that KPV LV was planning on pushing the Harmony party into government for the first time as Šlesers business would benefit from a pro-Russian government in Latvia.¹¹⁹¹ Godzems claimed that the journalist responsible for these accusation were attempting to influence the upcoming 2018 general election by publishing 'fake news'.¹¹⁹² Critics have accused Godzems of attempting to place pressure on *Re:Baltica* in order to deter it from criticising KPV LV before the election.¹¹⁹³ However, after the election Godzems issued an apology to the journalist on social media for his attack but refrained from withdrawing the formal complaint he made against the journalists concerned to the police. However, the Police refused to move forward with the complaint in November 2018 and Godzems did not appeal.¹¹⁹⁴

Latvia's media authorities have also had a long standing battle with Russian media outlets and journalists. The authorities continue to walk a fine line between upholding media freedom of pro-Russian outlets while trying to maintain the dominance of the ethnic Latvian majority. This tension is a direct reflection of tensions between the sizable

¹¹⁸⁷ *ibid.*

¹¹⁸⁸ *ibid.*

¹¹⁸⁹ *Re:Baltica*, 'Ušakovs and Gobzems Fail to Bring Criminal Defamation Proceedings against *Re:Baltica*' *Re:Baltica* (2 March 2019) <<https://en.rebaltica.lv/2019/02/usakovs-and-gobzems-fail-to-bring-criminal-defamation-proceedings-against-rebaltica/>> accessed 16 October 2021.

¹¹⁹⁰ Mapping Media Freedom (n 1186).

¹¹⁹¹ *ibid.*

¹¹⁹² *ibid.*

¹¹⁹³ *ibid*; *Re:Baltica* (n 1189).

¹¹⁹⁴ Mapping Media Freedom (n 1186); *Re:Baltica* (n 1189).

Russian-speaking minority and the ethnic Latvian majority that is seen in broader society and political discourse.¹¹⁹⁵ Media authorities together with law enforcement bodies have exerted pressure on Russian media and journalists on many occasions which has sparked backlash from NGO's such as Reporters Without Borders for the disproportionate sanctions placed on pro-Russian media sources.¹¹⁹⁶

In recent years there have been multiple incidents of concern raised by the Organization for Security and Co-operation in Europe (OSCE) concerning the deportation of Russian journalists without adequate explanations.¹¹⁹⁷ In late 2020 several journalists working for news outlets owned by the Rossiya Segodnya group were detained and questioned on suspicion of violating EU sanctions.¹¹⁹⁸ They were targeted due to their association with Dmitry Kiselyov, the head of Rossiya Segodnya, who was sanctioned by the EU in 2014 for his role in Russia's annexation of Crimea, Ukraine.¹¹⁹⁹ While in 2019 the NEMMC banned nine TV stations owned by National Media Group, a private Russian holding because Yury Kovalchuk, who is one of the owners of the National Media Group, appeared on the EU sanctions list for his involvement in Russia's Aggression against Ukraine.¹²⁰⁰

In January 2021 there was also an incident where the Latvian state security service (VDD) seized the equipment of Oksana Chelysheva (a member of the Union of Journalists in

¹¹⁹⁵ Aija Krutaine and Andrius Sytas, 'Battle of the Airwaves: Baltics Compete with Russia for Hearts and Minds' *Reuters* (13 February 2015) <<https://www.reuters.com/article/us-baltic-russia-propaganda-idUSKBN0LH10D20150213>> accessed 16 October 2021.

¹¹⁹⁶ Mapping Media Freedom (n 1186); Reporters Without Borders (n 699).

¹¹⁹⁷ OSCE, 'OSCE Representative Concerned about Latvian Authorities' Decision to Deport Russian Journalist' (*Organization for Security and Co-operation in Europe*, 24 October 2016) <<https://www.osce.org/fom/276721>> accessed 16 October 2021; OSCE, 'OSCE Representative on Freedom of the Media Expresses Concern Regarding Expulsion of Russian Journalist Olga Kurlaeva from Latvia' (*Organization for Security and Co-operation in Europe*, 5 January 2018) <<https://www.osce.org/fom/364821>> accessed 16 October 2021.

¹¹⁹⁸ Mapping Media Freedom (n 1186).

¹¹⁹⁹ Andrius Sytas, 'Russia Protests Charges against State Media Journalists in Latvia' *Reuters* (4 December 2020) <<https://www.reuters.com/article/us-baltics-russia-idUSKBN28E1ED>> accessed 16 October 2021.

¹²⁰⁰ Dominik Istrate, 'Latvia Bans Nine Russian-Language TV Channels' (*Emerging Europe*, 25 November 2019) <<https://emerging-europe.com/news/latvia-bans-nine-russian-language-tv-channels/>> accessed 16 October 2021.

Finland) during a raid of journalist Vladimir Linderman's home who she was visiting.¹²⁰¹ Although her phone and laptop were returned the same month, her camera and USB were not returned by the VDD.¹²⁰²

5.6. Deficiencies in Minority and Human Rights

Minority rights are a contentious issue in Latvia as they are closely connected with the post-Soviet history of the country and the enduring presence of a very large Russophone minority. The inability of Latvia to fully protect and enfranchise this group since independence remains one of the greatest failures of the democratisation process after the country's independence movement. Indeed, the 2020 Freedom House report on Latvia repeatedly notes that there is a lack of political representation for minorities and also that policies fail to promote equality for women, and for ethnic and sexual minorities.¹²⁰³ These shortcomings have proven to be the country's main democratic setback as Latvia scores highly in other areas such as their electoral process, political pluralism and governance. Nonetheless, this section will highlight some of the main concerns around minority rights in Latvia. These include restrictive policies designed to diminish language rights of the large Russian-speaking minority. These policies have gotten increasingly more nationalistic since Latvia acceded to the EU as the Satversme was changed in 2014 to strengthen the position of Latvian as the only official language.¹²⁰⁴ The fight over language rights has been most prominent in education which is clear from the string of cases that have been referred to the Constitutional Court since 2005. The Russian-speaking minority has also long struggled with citizenship policies which were specifically designed to exclude Russophones who had settled in Latvia during Soviet times unless a lengthy and difficult naturalisation process was completed. Such policies have led to a large portion of the Russian-speaking population to be left behind in 'citizenship limbo', as they have neither Russian nor Latvian citizenship and therefore are

¹²⁰¹ Mapping Media Freedom (n 1186); OSCE, 'OSCE Representative on Freedom of the Media Meets with Ambassador of Latvia' (*Organization for Security and Co-operation in Europe*, 1 February 2021) <<https://www.osce.org/representative-on-freedom-of-media/477241>> accessed 16 October 2021.

¹²⁰² Mapping Media Freedom (n 1186).

¹²⁰³ 'Freedom in the World 2021: Report on Latvia' (Freedom House 2021)

<<https://freedomhouse.org/country/latvia/freedom-world/2021>> accessed 31 March 2022.

¹²⁰⁴ Preamble, Constitution of the Republic of Latvia.

stripped of various political and economic rights. Aside from Latvia's struggle with its ethnic minority, successive Latvian governments have also been slow to implement some EU standards as they pertain to pursuing equalizing policies for women, LGBTQ+ and Roma people. This is perhaps most evident in successive governing parties rejecting the ratification of the Istanbul Convention or stalling the implementation of legislation which would bring about the possibility of same-sex partnerships. These conservative policies have definite ties to various religious groups in Latvia which have proven to be very influential in Latvian politics.

5.6.1. Ethnic Minority Politics in Latvia

Ethnic minority politics have dominated Latvian political discourse since re-independence and is considered a more controversial subject than both corruption or economics.¹²⁰⁵ Therefore, Latvian politics have been defined by an ethnic cleavage rather than a left-right political spectrum.¹²⁰⁶ This deep divide stems from the fact that democratisation and EU accession in Latvia was led by Latvian ethnic majority elites who occupied the most powerful political positions.¹²⁰⁷ These democratising elites largely excluded Russophone minorities during the democratisation period where strict citizenship and language laws were passed to preserve an ultra-nationalistic view for the future of Latvia.¹²⁰⁸ The dominant political discourse at the time maintained that the Soviet occupation that brought ethnic Russian settlers to Latvia was illegal and therefore, their descendants did not have a legitimate claim to Latvian citizenship and resulting political rights.¹²⁰⁹ Citizenship was only granted to people descendent from citizens of inter-war Latvia.¹²¹⁰ This left an estimated 60 percent of the Russian-speaking population stateless after independence.¹²¹¹ This of course meant that the sizable Russophone minority in

¹²⁰⁵ Eihmanis (n 850) 3; Will Mawhood, 'What Became of Latvia's Left?' (*openDemocracy*) <<https://www.opendemocracy.net/en/odr/what-became-of-latvias-left/>> accessed 24 August 2021.

¹²⁰⁶ Auers, *Comparative Politics and Government of the Baltic States* (n 937) 111.

¹²⁰⁷ Cianetti (n 32) 319–320.

¹²⁰⁸ Richard Mole, *The Baltic States from the Soviet Union to the European Union* (1st edn, Routledge 2012) 98; Cianetti (n 32) 319–320.

¹²⁰⁹ Cianetti (n 32) 319.

¹²¹⁰ *ibid.*

¹²¹¹ David J Smith, David J Galbreath and Geoff Swain (eds), *From Recognition to Restoration: Latvia's History as a Nation-State* (Rodopi 2010) 119.

Latvia were excluded from the democratic process for fears that they may hinder Latvia's reform into a liberal, Western-style democracy.¹²¹² These sentiments were also not limited to extreme nationalistic political forces that generally viewed the Russian minority as a hinderance for Latvia's return to Europe but also by Liberal political forces who were ambiguous about the role of ethnic minorities in Latvia's democratic future.¹²¹³ Democratising elites were wary of including the Russian minority as Latvian citizens for fears they would jeopardise Latvia's Europeanisation as they were seen as incapable of leaving behind their Soviet mindset to embrace liberal democracy.¹²¹⁴ This was of course in contrast to the discourse around their ethnic Latvian counterparts who were painted as progressive and determined under the neoliberal reforms.¹²¹⁵ Due to this strong ethnic dimension to Latvian democracy, the country is often labelled an 'ethnic democracy' i.e. a "democracy that contains the non-democratic institutionalization of dominance of one ethnic group".¹²¹⁶

Democratising elites took inspiration from the West while planning Latvia's return to Europe which mostly meant eagerly following the EU accession criteria of establishing political, economic and institutional conditions such as democracy, rule of law and a functioning market economy, to accede to the EU.¹²¹⁷ EU accession was prioritised by Latvia's democratising elites who collaborated with EU institutions and availed of the EU's expert advice and funding to achieve this goal.¹²¹⁸ Importantly the close collaboration between EU and Latvian elites enforced a technocratic and elite driven reform of a newly free Latvia instead of prioritising inclusive democratic debate. EU officials did little to rectify this flaw during the establishment of Latvian democracy.¹²¹⁹ While the EU empowered and encouraged Latvian reforms through fulfilling EU conditionality criteria,

¹²¹² Cianetti (n 32) 327–328.

¹²¹³ *ibid* 327.

¹²¹⁴ *ibid*.

¹²¹⁵ *ibid*.

¹²¹⁶ Graham Smith, 'The Ethnic Democracy Thesis and the Citizenship Question in Estonia and Latvia' (1996) 24 *Nationalities Papers* 199; Cianetti (n 32) 320; Priit Järve and Sammy Smooha, *The Fate of Ethnic Democracy in Post-Communist Europe* (1st edn, Budapest: Local Government and Public Service Reform Initiative 2005) 21.

¹²¹⁷ Cianetti (n 32) 324.

¹²¹⁸ *ibid* 323.

¹²¹⁹ *ibid*.

they also legitimised the elite-driven efforts in Latvia to drown out democratic debate while pursuing their political agendas.¹²²⁰ This is evidenced by the EU Commission's 2000 progress report which highlighted that the "lack of political consensus regarding the reform process" was one of the country's "main weaknesses".¹²²¹ Thus, the EU's prioritisation of consensus incentivised Latvia's democratising elites to push on with a speedy and smooth transition without creating the time and space for democratic debate.¹²²² This top-down EU accession process enforced elitism and technocracy in Latvia's politics that still remains today.

Due to this deep political and social divide in Latvia regarding ethnicity, scholars have also characterise it as a 'hollow democracy', that is, a democracy that has not fully incorporated ethnic minorities into the democratic process.¹²²³ As a result, significant distrust between the ethnic Russian minority and ethnic Latvian majority exists today within society which inevitably manifests in politics. For example, the Latvian Harmony party has obtained the highest proportion of votes during general elections in previous years, mainly from Russian voters.¹²²⁴ Despite this, Harmony has repeatedly been shut out by other successful "ethnic Latvian" parties due to their representation of the Russian minority.¹²²⁵ Despite garnering consistently large amounts of votes during the general elections of 2010, 2011, 2014 and 2018, Harmony has not been considered 'coalitionable' by other parties due to their close ties with Vladimir Putin's United Russia party and their sympathetic views towards Moscow.¹²²⁶ In recent years Harmony has attempted to rebrand itself as a social democratic party in order to appeal to ethnic Latvian voters and not just the Russophone population.¹²²⁷ However, this has been unsuccessful as the

¹²²⁰ *ibid* 322–323.

¹²²¹ 'European Commission, "Regular Report from the European Commission on Latvia's Progress towards Accession 2000" COM (2000) 706 Final, 8 November 2000' 15.

¹²²² Marika Kirch and Aksel Kirch, 'Ethnic Relations: Estonians and Non-Estonians' (1995) 23 *Nationalities Papers* 43, 10–11; Cianetti (n 32) 324.

¹²²³ Greskovits (n 32) 33; Cianetti (n 32) 318; Cianetti, Dawson and Hanley (n 61) 251–252.

¹²²⁴ Bergmane (n 910).

¹²²⁵ Jānis Ikstens, 'The 2018 Latvian Elections: New Faces, Old Patterns' (*EUROPP*, 16 October 2018) <<https://blogs.lse.ac.uk/europpblog/2018/10/16/the-2018-latvian-elections-new-faces-old-patterns/>> accessed 25 August 2021.

¹²²⁶ *ibid*.

¹²²⁷ Bergmane (n 910).

party, along with its long-time leader Nils Ušakovs, has consistently alienated Latvian voters by attempting to implement Russian as Latvia's second official language through referendum. This referendum failed dramatically and the agenda was rejected by 74.8 percent voters.¹²²⁸ Furthermore, the party has taken a pro-Moscow stance on many important issue such as the Russian invasion of Ukraine in 2014 which did not go down well with Latvian voters.¹²²⁹ As a result, Harmony lost approximately 92,000 votes in the 2018 election compared to the 2014 election.¹²³⁰

5.6.2. Latvia's Ethnic Russian Population: Disenfranchisement and Oppression

The 2011 Latvian census revealed the composition of the small country's population of just under 2 million people: 62.1 percent of the total population is made up of ethnic Latvians. The largest minority ethnic groups are Russians (26.9 percent), Belarusians (3.3 percent), Ukrainians (2.2 percent), Poles (2.2 percent) and Lithuanians (1.2 percent). Similarly, data from the Central Statistical Bureau of Latvia indicated that 60.8 percent of Latvian inhabitants consider their first language Latvian.¹²³¹ However, 36 percent of inhabitants consider Russian their first language along with 3.2 percent considering Belarusian, Ukrainian, Polish or Liv(onian) as their native language.¹²³² Data also shows that 37.7 percent of people mainly use Russian at home as their main language of communication.¹²³³ Approximately 217,000 or 10.4 percent of the Latvian population are "non-citizens" with their official status being "former citizens of the USSR".¹²³⁴ They have neither Latvian nor any other country's citizenship despite nearly half of them (42.93

¹²²⁸ *ibid*; Central Election Commission, 'Referendum of 18 February 2012 on the Adoption of the Draft Law "Amendments to the Constitution of the Republic of Latvia" Results' (2012) <<http://www.tn2012.cvk.lv/report-results.html>> accessed 25 August 2021.

¹²²⁹ Bergmane (n 910).

¹²³⁰ *ibid*.

¹²³¹ European Commission for Democracy through Law (Venice Commission), Latvia: Opinion on the Recent Amendments to the Legislation on Education in Minority Languages, Opinion No. 975/2020, 18 June 2020 (n 879) 4.

¹²³² *ibid*.

¹²³³ *ibid*.

¹²³⁴ *ibid*.

percent) being born in Latvia.¹²³⁵ These people are considered effectively ‘stateless’ despite the Latvian government insisting their status is unique and much less objectionable.¹²³⁶ Latvian non-citizens are excluded from working in the police force, government and civil service and have much more limited pension rights.¹²³⁷ Moreover, non-citizens do not have the right to vote in local or parliamentary elections, meaning they are effectively shutout of political discourse in Latvia.¹²³⁸ Although this group of non-citizens has access to naturalisation in theory, obtaining Latvian citizenship is practically very difficult. Applicants seeking to become Latvian citizens need to reside in Latvia for 5 years prior to their application and need to pass examinations on their Latvian language skills and knowledge of the Latvian Constitution, Latvian history and the Latvian national anthem.¹²³⁹ Therefore, naturalisation for many non-citizens is rendered practically inaccessible due to the difficult exams which have to be passed or due to moral and historical reasons.¹²⁴⁰ Latvia has so far refused to grant voting rights to this group of non-citizens despite international pressure.¹²⁴¹ Latvia adopted the principle of ‘inherited citizenship’ after it regained independence in 1991 which meant that all people in Latvia who were Latvian citizens in 1940 or their descendants would automatically receive Latvian citizenship.¹²⁴² This very deliberately excluded people residing in Latvia who had arrived from Russia, either wilfully or forcibly, during Latvia’s industrialisation after the

¹²³⁵ Council of Europe, ‘Third Report Submitted by Latvia Pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities’ (2016) ACFC/SR/III(2016)001 52 <<https://rm.coe.int/16806c72e5>> accessed 3 October 2022.

¹²³⁶ Martins Paparinskis, ‘Political and Electoral Rights of Non-Citizen Residents in Latvia and Estonia: Current Situation and Perspectives’ (European Parliament 2018) 3–4 <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/604953/IPOL_BRI\(2018\)604953_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/604953/IPOL_BRI(2018)604953_EN.pdf)> accessed 3 October 2022.

¹²³⁷ Artjoms Ivļevs and Roswitha M King, ‘From Immigrants to (Non-)Citizens: Political Economy of Naturalisations in Latvia’ (2012) 1(14) IZA Journal of Migration 2–8.

¹²³⁸ Paparinskis (n 1236) 4.

¹²³⁹ Office of Citizenship and Migration Affairs Republic of Latvia, ‘Naturalisation’ (*Office of Citizenship and Migration Affairs Republic of Latvia*) <https://www.pmlp.gov.lv/en/naturalisation?utm_source=https%3A%2F%2Fwww.integration.lv%2F> accessed 3 March 2022.

¹²⁴⁰ Aleksejs Ivashuk, ‘A European Without a Country’ (*European Network on Statelessness*, 16 September 2020) <<https://www.statelessness.eu/updates/blog/european-without-country>> accessed 3 September 2022.

¹²⁴¹ Jo Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (Cambridge University Press 2007) 331.

¹²⁴² *ibid* 330.

Second World War.¹²⁴³ Latvia continues to push the narrative that the country's problem with a large stateless minority stems from the ethnic Russian minority's inability to detach from their Soviet heritage and that this issue can only be solved by forcing this group to naturalise or assimilate to Latvian culture.¹²⁴⁴ Hence, their argument follows that withholding political rights from non-citizens is needed as a motivation to push non-citizens to apply for naturalisation.¹²⁴⁵

As a normative political principle, non-citizens should be allowed to engage in the democratic process through voting in at least some elections.¹²⁴⁶ A liberal democratic country should make electoral rights available to not just citizens but also residents and the longer a person has resided in a country the stronger their claim to electoral rights becomes.¹²⁴⁷ This is particularly true when thinking in the context of the Latvian non-citizen issue as this group of people did not recently immigrate into Latvia but rather, have been here for multiple generations and have found themselves to be stateless due to a political event that they had no say in i.e. the break-up of the Soviet Union.¹²⁴⁸ Shaw explains:

“...in a liberal democratic, constitutionally based polity which adheres to fundamental rights precepts, lawfully resident non-nationals ought, in principle, to be included amongst the group of persons entitled to participate politically within the host polity, inter alia through rights to vote and stand in some, if perhaps not all, elections.”¹²⁴⁹

Considering Article 2 TEU declares that the EU is formed on the basis of shared values, one of which is “respect for human rights, including the rights of persons belonging to

¹²⁴³ *ibid.*

¹²⁴⁴ *ibid* 331.

¹²⁴⁵ *ibid.*

¹²⁴⁶ *ibid* 53.

¹²⁴⁷ Joseph Carens, ‘Citizenship and Civil Society: What Rights for Residents?’ in Randall Hansen and Patrick Weil, *Dual nationality, social rights, and federal citizenship in the U.S. and Europe: the reinvention of citizenship* (Berghahn Books 2002) 101–102.

¹²⁴⁸ Shaw (n 1241) 332.

¹²⁴⁹ *ibid* 53.

minorities”,¹²⁵⁰ the EU did not do enough to ensure the ethnic Russian minority had their rights guaranteed before Latvia acceded to the EU in 2004. The Copenhagen Criteria also required states to respect and protect minorities before they became an EU member.¹²⁵¹ The issue of discrimination against the ethnic Russian minority in Latvia seemed to capture the attention of EU institutions as on 11 March 2004, just before enlargement, the European Parliament resolution on the comprehensive monitoring report of the European Commission on the state of preparedness for EU membership of the ten countries that were about to accede stated the following:

“...the naturalisation process [of non-citizens] remains too slow; [the Parliament] therefore invites the Latvian authorities to promote that process and considers that minimum language requirements for elderly people may contribute to it; encourages the Latvian authorities to overcome the existing split in society and to favour the genuine integration of "non-citizens", ensuring an equal competitive chance in education and labour; proposes that the Latvian authorities envisage the possibility of allowing non-citizens who are long-time inhabitants to take part in local self-government elections”.¹²⁵²

Despite the concern, the issue was not taken further, and as Shaw notes, a key opportunity to influence change on this issue was lost on the EU’s part.¹²⁵³ Pre-accession conditionality works well in persuading potential Member States to comply with EU rules,¹²⁵⁴ but once EU membership is obtained, the EU loses its leverage as “accession

¹²⁵⁰ Consolidated Version of the Treaty on European Union [2016] OJ C202/24, Art. 2.

¹²⁵¹ Presidency Conclusions, Copenhagen European Council (June 21–22, 1993) 7 A iii.

¹²⁵² European Parliament Resolution P5_TA(2004)0180 of 11 March 2004 on the comprehensive monitoring report of the European Commission on the state of preparedness for EU membership of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (COM(2003) 675 – C5-0532/2003 – 2003/2201(INI)) para 74.

¹²⁵³ Shaw (n 1241) 332.

¹²⁵⁴ Nikolaos Papakostas, ‘Deconstructing the Notion of EU Conditionality as a Panacea in the Context of Enlargement’ (2012) 364(2) *L’Europe en Formation* 215, 216.

advancement rewards” are no longer useful once a country already enjoys the benefits of EU membership.¹²⁵⁵

Following the reestablishment of independence in Latvia in 1991, a struggle became evident between those who spoke primarily in Latvian and those who spoke Russian. Indeed, language rights have been one of the most evocative issues since the reestablishment of Latvian independence which repeatedly spurs protests and demonstrations from ethnic minority groups and their representatives seeking to preserve the prevalence of their language and culture against reforms designed to replace minority languages with Latvian.¹²⁵⁶ The 2012 referendum, which sought to raise the status of the Russian language as a second official language of Latvia, beside Latvian, failed drastically.¹²⁵⁷ With a turnout of around 70 percent, nearly 75 percent of people voted ‘no’ to this proposition.¹²⁵⁸ Despite the failure, the political parties which initiated the referendum hoped that the campaign would at least bring awareness to the issue of Russian minority rights and force the government to initiate policies to bridge the gap between the ethnic majority and ethnic minority.¹²⁵⁹

After independence, Latvia inherited a segregated schooling system where Russians and other minorities were taught through Russian, while Latvians attended Latvian schools but Russian was a compulsory part of the curriculum.¹²⁶⁰ Therefore, in 1991 Russian had

¹²⁵⁵ Eli Gateva, ‘Post-Accession Conditionality – Translating Benchmarks into Political Pressure?’ (2013) 29(4) *East European Politics* 420, 436 <<http://www.tandfonline.com/doi/abs/10.1080/21599165.2013.836491>>.

¹²⁵⁶ Council of Europe: Parliamentary Assembly, Working Papers, 2004 ordinary session (fourth part), Vol. 7: Documents 10280-10321, 4-8 October 2004 130; Euractiv, ‘Latvia’s School Language Reform Irks Russian Minority’ *Euractiv* (25 June 2018) <<https://www.euractiv.com/section/languages-culture/news/in-latvia-school-language-reform-irks-russian-minority/>> accessed 12 July 2021.

¹²⁵⁷ Central Election Commission of Latvia, ‘Referendum for Amendments to the Constitution of Latvia (2012)’ (*Central Election Commission of Latvia*) <<https://www.cvk.lv/en/referendums/referendum-for-amendments-to-the-constitution-of-latvia-2012>> accessed 3 November 2022.

¹²⁵⁸ *ibid.*

¹²⁵⁹ David M Herszenhorn, ‘Latvians Reject Russian as Second Language’ *New York Times* (Moscow, 19 February 2012) <<https://www.nytimes.com/2012/02/20/world/europe/latvia-rejects-bid-to-adopt-russian-as-second-language.html>> accessed 3 November 2022.

¹²⁶⁰ European Commission for Democracy through Law (Venice Commission), *Latvia: Opinion on the Recent Amendments to the Legislation on Education in Minority Languages*, Opinion No. 975/2020, 18 June 2020 (n 879) para 13.

a more prominent position in the school curriculum compared to Latvian.¹²⁶¹ This dynamic was reflected in society where most ethnic Latvians were bilingual, speaking both Latvian and Russian while most ethnic Russians tended to not speak Latvian.¹²⁶² Since the restoration of independence, the authorities have been promoting the reintroduction of the Latvian language as the country's primary language of communication and public discourse.¹²⁶³ As a result, the Latvian language has been granted constitutional protection and is actively promoted in all aspects of public life, including education. The Preamble to the Satversme references the Latvian language multiple times. First, one of the reasons for the existence of Latvia as a state is to ensure the development of the Latvian Language.¹²⁶⁴ Second, the Preamble states that the Latvian language is part of the identity of Latvia.¹²⁶⁵ The Preamble further states that "*the Latvian language as the only official language*" is one of the "foundations of a cohesive society."¹²⁶⁶ Article 4 of the Satversme establishes that "*the Latvian language is the official language in the Republic of Latvia*".¹²⁶⁷ Article 18 requires those elected to the Saeima to swear *inter alia* to strengthen "*the Latvian language as the only official language*" and Article 21 and Article 101 establishes Latvian as the *working language of the Saeima and local governments, respectively*.¹²⁶⁸ However, the Preamble also "*recognises and protects fundamental human rights and respects ethnic minorities*" and similarly Article 114 recognises "*the right of ethnic minorities to preserve and develop their language and their ethnic and cultural identity*".¹²⁶⁹ There is a tension between the need to promote and preserve the official language while also respecting minority rights which is evident from the wording of the Satversme. From 1995 the government

¹²⁶¹ *ibid.*

¹²⁶² *ibid.*

¹²⁶³ *ibid* 14.

¹²⁶⁴ Preamble, Constitution of the Republic of Latvia.

¹²⁶⁵ *ibid.*

¹²⁶⁶ *ibid.*

¹²⁶⁷ Article 4, Constitution of the Republic of Latvia.

¹²⁶⁸ Article 18, Constitution of the Republic of Latvia; Article 21, Constitution of the Republic of Latvia; Article 101, Constitution of the Republic of Latvia.

¹²⁶⁹ Article 114, Constitution of the Republic of Latvia; Preamble, Constitution of the Republic of Latvia.

gradually implemented various policies to promote the use of Latvian in schools.¹²⁷⁰ The measures adopted included language quotas such as mandatory teaching through Latvian in at least two subjects in grades 1 to 9 and at least three subjects in grades 10 to 12 in schools where Latvian was not the primary language of instruction.¹²⁷¹

The progressive introduction of Latvian into minority school curriculums significantly increased Latvian language fluency. While just 23% of non-Latvians residing in Latvia could speak in the state language in 1989, in 2000 Latvian proficiency in this group rose to 53 percent in 2000 and over 90 percent in 2009.¹²⁷² Despite this, research conducted in 2012 at the request of the Latvian Language Agency showed that the proportion of non-Latvian residents who could speak Latvian (92 percent) was still lower than the proportion of Latvian-speaking residents who could speak Russian (98 percent).¹²⁷³ Despite the government's relative effectiveness in promoting the state language, the 2017 research found that the language of communication in society was still more commonly Russian than Latvian.¹²⁷⁴ According to the same research, ethnic minority students who attend a secondary school that used Latvian as the medium of instruction had higher Latvian language proficiency than those who continued to attend ethnic minority schools.¹²⁷⁵ These findings suggest that there is wide scale lack of proficiency in the state language in Latvia amongst members of minority groups, particularly amongst students enrolled in schools implementing minority education programmes.¹²⁷⁶ It is evident that the Latvian education system still does not guarantee sufficient proficiency in Latvian for all students regardless of ethnic background.

¹²⁷⁰ European Commission for Democracy through Law (Venice Commission), Latvia: Opinion on the Recent Amendments to the Legislation on Education in Minority Languages, Opinion No. 975/2020, 18 June 2020 (n 879) para 15.

¹²⁷¹ *ibid.*

¹²⁷² *ibid* 7.

¹²⁷³ Latvian Language Agency, 'Language Situation in Latvia: 2004-2010 Research Summary' (2012) 19 <<https://valoda.lv/en/wp-content/uploads/monitorings%20eng.pdf#page=18>> accessed 12 July 2021.

¹²⁷⁴ Valts Ernštreits and others, *The Language Situation in Latvia. 2010-2015: A Sociolinguistic Study* (Latvian Language Agency 2017) 54.

¹²⁷⁵ *ibid* 82.

¹²⁷⁶ European Commission for Democracy through Law (Venice Commission), Latvia: Opinion on the Recent Amendments to the Legislation on Education in Minority Languages, Opinion No. 975/2020, 18 June 2020 (n 879) 7.

Up to 2018, the most controversial reforms were implemented by the 1998 Education Law where a provision foresaw that grades 10 to 12 would transition to being taught only through Latvian in 2004.¹²⁷⁷ However, following protests in 2003 and 2004 in the run-up to this change, this provision was eased by amendment which required state and local government schools to provide education in Latvian for at least three fifths of the total number of lessons in a school year, implying that up to 40% of the curriculum in grades 10 to 12 could be taught in a minority language.¹²⁷⁸

The Constitutional Court ruled on the validity of the clauses of the Education Law that introduced this requirement on May 13, 2005.¹²⁷⁹ The claim was brought by twenty opposition members of the Saeima who asked the Constitutional Court to rule on the constitutionality of the Latvian language quotas.¹²⁸⁰ They argued that these new quotas were discriminatory to ethnic minorities in Latvia. The applicants relied on Articles 1 (Latvia as an independent democratic republic), 91 (guarantee of equality) and 114 (right of ethnic minorities to preserve and develop their culture and language) of the Satversme.¹²⁸¹ The applicants also claimed that the language quotas did not comply with several international legal norms including Article 2 of the First Protocol and Article 14 of the ECHR, Articles 26 and 27 of the International Covenant on Civil and Political Rights, Article 5 of the International Convention on Elimination of any Form of Race Discrimination, Articles 2 and 30 of the Convention on the Rights of a Child as well as Article 18 of the Vienna Convention on the International Agreement Rights.¹²⁸² The Court held that the new Latvian quotas did indeed comply with the Satversme and Latvia's international obligations. The Court reasoned that the Latvian language should be carefully protected given the threats it faces under conditions of globalisation and the

¹²⁷⁷ *Judgment of the Constitutional Court of the Republic of Latvia 13 May 2005 in case no 2004-18-0106, 2005, Latvia Journal 2.*

¹²⁷⁸ Law of 5 February 2004 Amending the Law on Education (Section 6). 13/02/2004, Latvian Journal. No. 24.

¹²⁷⁹ *Case no. 2004-18-0106 (n 1277).*

¹²⁸⁰ *ibid* 2.

¹²⁸¹ *ibid* 2–4.

¹²⁸² *ibid*.

fact that the use of Latvian during Soviet occupation had drastically decreased.¹²⁸³ The court further agreed that the language quotas served a legitimate aim which not only protected the official state language but also promoted the use of Latvian as the official language of communication which helps ethnic minorities adapt to society and receive the full benefits of the education system.¹²⁸⁴ The Court also referred to the impact of Soviet occupation on Latvia's ethnolinguistic composition.¹²⁸⁵ The Court drew a distinction between post-war inter-Soviet labour migration to Latvia and migration into Western Europe.¹²⁸⁶ It stated that under Soviet occupation, Latvia was unable to form its own migration and integration policies. The Court referred to the migration and language policies of the Soviet authorities and argued that the Soviet "Russification policy" (Latvian: *rusifikcijas politika*) including mass immigration of Russian-speaking USSR citizens and the deportation and killing of Latvians during Soviet occupation had a devastating impact on the ethnic Latvian population.¹²⁸⁷ The Court pointed out that the "Russian-speaking residents" (Latvian: *krievvalodgie iedzīvotji*) are an artificial outcome of the Russification policy which also "forced" various ethnic groups, including Belarusians, Jews, and Ukrainians, to become part of this group.¹²⁸⁸ This was facilitated by a segregated education system.¹²⁸⁹

The Court ruled that the concept of equality demands equal treatment only for individuals in comparable and equal situations; this principle enables and even demands different treatment of people in different circumstances.¹²⁹⁰ The Court agreed with the applicants that being a member of a national minority is not the same as being a member of the "basic nation".¹²⁹¹ The Court acknowledges that the language of instruction in a school may not coincide with every pupils spoken language.¹²⁹² However, Article 9,

¹²⁸³ *ibid* 46.

¹²⁸⁴ *ibid* 46–47.

¹²⁸⁵ Kiryl Kascian, 'A Judicial Path to Nowhere?' (*Verfassungsblog*, 3 October 2019) <https://intr2dok.vifa-recht.de/receive/mir_mods_00007735> accessed 2 December 2021.

¹²⁸⁶ *Case no. 2004-18-0106* (n 1277) 24.

¹²⁸⁷ *ibid* 23.

¹²⁸⁸ *ibid* 23–24.

¹²⁸⁹ *ibid*.

¹²⁹⁰ *ibid* 44.

¹²⁹¹ *ibid*.

¹²⁹² *ibid*.

Paragraph 1 of the Education Law states that education shall be acquired in the official language in State and local government educational institutions. In general, pupils whose native language is Latvian are taught at these schools.¹²⁹³ Article 9, Paragraph 2 of the Education Law does allow for education through another language in State and local government educational institutions where an ethnic minority language can be used. These minority schools will simply need to comply with the requirement to teach at least three-fifths of lessons in the official language.¹²⁹⁴ Therefore, the Court argued that the legislator has allowed for ample space to accommodate special treatment of minority languages to allow for their development while also balancing the need to protect the official state language.¹²⁹⁵

However, reforms approved by the Saeima in March 2018 and designed to be implemented from 2019 to 2021 were more drastic and arguably have provided even more ethnic tension in the country compared to previous reforms.¹²⁹⁶ The proposed changes spurred protests, heated debates in the Saeima and have led to the reforms being referred to the Constitutional Court.¹²⁹⁷ The reforms implemented two major changes to the language quotas in education. First, the reforms implemented the requirement that grades 10 to 12 would be taught through Latvian only.¹²⁹⁸ However, schools would be permitted to teach minority languages and courses linked to minority identity and integration without exceeding a maximum number of sessions. Second, in primary schools, a mandated minimum level of instruction through Latvian was implemented: 50% for students in grades 1 to 6, and 80% for students in grades 7 to 9.¹²⁹⁹

¹²⁹³ *ibid.*

¹²⁹⁴ *ibid* 44–45.

¹²⁹⁵ *ibid.*

¹²⁹⁶ Law of 5 February 2004 Amending the Law on Education (Section 6). 13/02/2004, Latvian Journal. No. 24 6; Aleksejs Dimitrovs, 'A Dangerous Precedent for Minority Rights: The Latvian Constitutional Court's Ruling on Minority Schools' (*Verfassungsblog*, 2 May 2019) <https://intr2dok.vifa-recht.de/receive/mir_mods_00005823> accessed 2 December 2021.

¹²⁹⁷ Euractiv (n 1256) 3; Aigars Lazdins, 'The Deputies of the Saeima Are Emotionally Debating the Expected Transition to Studies Only in the State Language' *TV3 News* (5 February 2019) <https://skaties-lv.translate.google.com/translate/zinas/latvija/sabiedriba/saeimas-deputati-emocionali-debate-par-paredzamo-pareju-uz-macibam-tikai-valsts-valoda/?_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc> accessed 12 July 2021.

¹²⁹⁸ Dimitrovs (n 1296).

¹²⁹⁹ *ibid.*

Finally, the same criteria also applied to private schools, which had previously had autonomy on language matters.¹³⁰⁰ The new law allows for exceptions for schools founded under international agreements, as well as schools that provide teaching in the EU's official languages.¹³⁰¹ Later in 2018 the Saeima approved further reforms to education at higher level institutions. The new Law on Higher Education Institutions provided that courses in languages other than Latvian are only available for international students and those undertaking language and cultural studies.¹³⁰² The law only provided for limited circumstances where another EU language could be used for teaching at higher level institutions. In November 2018 regulations were passed which stipulated that as of 1 September 2019, the primary form of communication during play-based lessons in public and private minority preschools was to be Latvian for children age five and above with only limited exception.¹³⁰³

These reforms spurred a number of referrals to the Constitutional Court to check their compliance with the Constitution. Judgments were delivered in respect to public schools in April 2019,¹³⁰⁴ private schools in November 2019,¹³⁰⁵ on tertiary education in early June 2020¹³⁰⁶ and on pre-school education later the same month.¹³⁰⁷ The Constitutional Court's reasoning in these cases has been criticised by various NGOs, experts and

¹³⁰⁰ *ibid.*

¹³⁰¹ European Commission for Democracy through Law (Venice Commission), Latvia: Opinion on the Recent Amendments to the Legislation on Education in Minority Languages, Opinion No. 975/2020, 18 June 2020 (n 879) 9–10.

¹³⁰² Law of 8 April 2021 Amending the Law on Higher Education Institutions, 26/04/2021, Latvian Journal. No. 79A.

¹³⁰³ Regulations of the Cabinet of Ministers of 21 November 2018 No. 716 (Annex 2 paragraph 9), 30/11/2018, Latvian Journal. no. 236.

¹³⁰⁴ *Judgment of the Constitutional Court of the Republic of Latvia 23 April 2019 in case no 2018-12-01, 2019, Latvia Journal.*

¹³⁰⁵ *Judgment of the Constitutional Court of the Republic of Latvia 13 November 2019 in case no 2018-22-01, 2019, Latvia Journal.*

¹³⁰⁶ *Judgment of the Constitutional Court of the Republic of Latvia 11 June 2020 in case no 2019-12-01, 2020, Latvia Journal.*

¹³⁰⁷ *Judgment of the Constitutional Court of the Republic of Latvia 19 June 2020 in case no 2019-20-03, 2020, Latvia Journal.*

international organisations which expressed fear that the Court's reasoning on minority rights will have an oppressive impact on minorities in Latvia.¹³⁰⁸

The judgment of April 2019 was the first handed down in respect of the 2018 teaching and language reforms. The most notable aspect of this judgment was the Constitutional Court's swift departure from its reasoning in its earlier cases.¹³⁰⁹ A group of 20 opposing Saeima members brought the case arguing that the new reforms were contrary to Articles 112 (the right to education), Article 91 (the guarantee of equality) and Article 114 (right of ethnic minorities to preserve and develop their culture and language) as well as various provisions of international treaties.¹³¹⁰ The Court dismissed the applicants' claim of violation of the right to education as the right to education defined in Article 112 does not constitute the right of learners or their parents to choose the language of instruction in state and local government schools.¹³¹¹ The Court argued that to allow this would be contrary to the principle of unity of the educational system established by the State.¹³¹² The Court also found no violation of minority rights or the principle of equality by the 2018 reform on public education.¹³¹³ However, what is interesting is the change in attitude of the Constitutional Court since its judgment of 2005 approving the requirement of state and local government schools to provide education in Latvian for at least three fifths of the total number of lessons in a school year.¹³¹⁴ As previously mentioned, in this judgment the Court admitted that the principle of equality demands equal treatment only for individuals in comparable and equal situations; this principle enables and even demands different treatment of people in different circumstances.¹³¹⁵ This means that a person in a minority group could demand to be treated differently than others belonging

¹³⁰⁸ European Commission for Democracy through Law (Venice Commission), Latvia: Opinion on the Recent Amendments to the Legislation on Education in Minority Languages, Opinion No. 975/2020, 18 June 2020 (n 879) 26–27; Aleksejs Dimitrovs, 'Riga and Venice on a Collision Course' (*Verfassungsblog*, 23 June 2020) <https://intr2dok.vifa-recht.de/receive/mir_mods_00008999> accessed 2 December 2021; Kascian (n 1285).

¹³⁰⁹ Dimitrovs (n 1308); Kascian (n 1285).

¹³¹⁰ *Case no. 2018-12-01* (n 1304) 4–7.

¹³¹¹ *ibid* 42.

¹³¹² *ibid*.

¹³¹³ *ibid* 73–74.

¹³¹⁴ *Case no. 2004-18-0106* (n 1277) 44–45.

¹³¹⁵ *ibid* 44.

to the ethnic majority to ensure their full equality.¹³¹⁶ In the April 2019 case, the Constitutional Court appears to implement a reversal of this reasoning by arguing that members of minority groups do not have the right to demand exceptional treatment if their native language is not the official state language as used for instruction in public schools.¹³¹⁷ What is even more problematic is the fact that the Court does not offer any explanation of the change in position.¹³¹⁸ Dimitrovs argues this may be due to the fact that a new provision was added in 2014 to the Preamble of the Satversme where the protection of Latvian as the official state language is strengthened.¹³¹⁹ The first paragraph of the preamble reads:

*“The State of Latvia, proclaimed on 18 November 1918, has been established by uniting historical Latvian lands and on the basis of the unwavering will of the Latvian nation to have its own State and its inalienable right of self-determination in order to guarantee the existence and development of the Latvian nation, its language and culture throughout the centuries, to ensure freedom and promote welfare of the people of Latvia and each individual.”*¹³²⁰

The Constitutional Court refers to the mention of the Latvian Language in the preamble throughout this judgment.¹³²¹ However, the lack of explanation for the change in reasoning has allowed the Court to side-line the important consideration of the impact of these new language and teaching reforms on minority education.¹³²² Now, the Court simply denies that language quotas are necessary to elaborate on as special treatment for minorities is deemed unnecessary in the first place.¹³²³ Furthermore, the Constitutional Court dismissed the relevance of the criticism offered by the UN Committee on the Elimination of Racial Discrimination and Advisory Committee for the Framework Convention for the Protection of National Minorities on the 2018 language

¹³¹⁶ Dimitrovs (n 1296).

¹³¹⁷ *Case no. 2018-12-01* (n 1304) 45–47.

¹³¹⁸ Dimitrovs (n 1296).

¹³¹⁹ *ibid.*

¹³²⁰ Preamble, Constitution of the Republic of Latvia.

¹³²¹ *Case no. 2018-12-01* (n 1304) 46,47,67.

¹³²² Dimitrovs (n 1296).

¹³²³ *ibid.*

reforms by deciding that these expert committees may not have had “full and comprehensive information and legal reasoning at their disposal”.¹³²⁴ The dismissal of these expert opinions is an unusual omission on the Courts part given the references to the principle of good faith in the interpretation of international treaties.¹³²⁵ However, since the ratification of the Framework Convention by Latvia in 2005, the Saeima has only further constricted minority rights which defies the very purpose of the Framework Convention.¹³²⁶ Even so, the Court did not see any issue of good faith in its decision.¹³²⁷ Furthermore the Court did not consider the opinion of a similar situation regarding minority language reforms in schools in Ukraine published in 2017.¹³²⁸ The reason for this omission was fleetingly short and ambiguous – the Court considered the two countries too dissimilar to compare.¹³²⁹ The crux of the Court’s lax reasoning might be attributed to the following statement of the Court in its judgment: “Exercising the rights of ethnic minorities may not be aimed at social segregation and threaten social unity”.¹³³⁰ Dimitrovs argues that this phrase in conjunction with the Court’s reliance on the new Preamble of the Satversme is dangerous reasoning as the objective to promote the unity of society could be used to deny minorities of their rights in many other areas.¹³³¹ It is evident the Court believes that to allow each ethnic minority to develop their ethnic identity might lead to a disunited society which is a threat to democracy itself.¹³³²

In November 2019 the Constitutional Court issued its judgment regarding the 2018 reforms as they applied to private schools.¹³³³ The Court in this judgment largely relied on the same reasoning as it did in their judgment on public schools delivered just a few months prior. The Court found no violation of the principle of good law-making, the right to education, the rights of national minorities and the prohibition of discrimination as

¹³²⁴ *Case no. 2018-12-01* (n 1304) 58.

¹³²⁵ *ibid* 57.

¹³²⁶ *Dimitrovs* (n 1296).

¹³²⁷ *ibid*.

¹³²⁸ *Case no. 2018-12-01* (n 1304) 10.

¹³²⁹ *ibid*.

¹³³⁰ *ibid* 59.

¹³³¹ *Dimitrovs* (n 1296).

¹³³² *Case no. 2018-12-01* (n 1304) 59.

¹³³³ *Case no. 2018-22-01* (n 1305).

protected by the Satversme.¹³³⁴ However, two judges issued dissenting judgments in this case. Justice Neimanis drew a distinction between private and public schools regarding the application of the 2018 reforms.¹³³⁵ He contended that the 2018 reforms should have been recognised as non-compliant with Article 112 of the Satversme since they infringed disproportionately on the freedom of private schools by dictating the language of instruction.¹³³⁶ Furthermore, Justice Kučs also gave a dissenting opinion on the case where he disagreed with the majority of judges on many substantive grounds.¹³³⁷ In particular, he did not think the 2018 reforms as they pertained to dictating the teaching of pupils through the official language in private schools, were in compliance with the principle of proper legislative process.¹³³⁸ Therefore, he did not accept the compliance of this provision with Article 112, Article 114 and Article 91 of the Satversme.¹³³⁹ Justice Kučs noted that the court did not satisfactorily consider the opinion of the Advisory Committee of the Framework Convention for the Protection of National Minorities.¹³⁴⁰ He also made reference to the justification of the legacy of Russification in Latvia during Soviet occupation used by the majority to allow for the language mandates in schools to be stricter now. The justice noted that Latvian was not the only language which suffered decline at the hands of this policy; other minority languages which were not Russian also declined drastically.¹³⁴¹ He therefore argued that the exception the 2018 reforms make for languages of the EU as opposed to other minority languages, was unjustified.¹³⁴²

¹³³⁴ *ibid* 65–66.

¹³³⁵ ‘Dissenting Opinion of Justice of the Constitutional Court, Jānis Neimanis, in Riga, 27 November 2019 in the Case No. 2018-22-01’ <https://www.satv.tiesa.gov.lv/wp-content/uploads/2018/11/2018-22-01_dissenting_opinion_Neimanis.pdf> accessed 12 April 2021.

¹³³⁶ *ibid* 1.

¹³³⁷ ‘Dissenting Opinion of Justice of the Constitutional Court, Artūrs Kučs in Riga, 27 November 2019 in Case No. 2018-22-01’ <https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/11/2018-22-01_dissenting-opinion_Kučs.pdf#search=>> accessed 12 April 2021.

¹³³⁸ *ibid* 1–2.

¹³³⁹ *ibid* 2–3.

¹³⁴⁰ *ibid* 6–7.

¹³⁴¹ *ibid* 12.

¹³⁴² ‘Dissenting Opinion of Justice of the Constitutional Court, Artūrs Kučs in Riga, 27 November 2019 in Case No. 2018-22-01’ (n 1337).

These arguments put forward by Justice Kučs seem to be suitable also for criticism of the judgment of public schools also.¹³⁴³

Aside from schools, the Constitutional Court examined the 2018 reforms as they pertained to pre-school and tertiary education. The Court considered whether the expansion of language limitations to private higher education institutions was in line with the constitution in its verdict on 11th June 2020.¹³⁴⁴ Before the 2018 reforms, language rules were only applicable to public higher education institutions. The new Law on Higher Education Institutions stipulates that courses in languages other than Latvian are only available for international students and those undertaking language and cultural studies.¹³⁴⁵ Other EU languages can be used if allowed by a framework of co-operation provided for in interstate agreements or European Union programmes and in joint programmes.¹³⁴⁶ Otherwise, students may only study a maximum of one-fifth of the curriculum in other EU official languages and the remainder must be in Latvian.¹³⁴⁷ Exams and thesis work must be conducted through Latvian also.¹³⁴⁸ The Court did not contest the legitimate aims of the reforms to tertiary education however, the Court did decide that less restrictive means could have been used to achieve the legitimate aim.¹³⁴⁹ Nevertheless, the 2018 reforms regarding tertiary education institutions remained standing despite being deemed contrary to the principles of academic freedom under Article 113 with the legislator given up to the 1st May 2021 to review the provisions on tertiary education and make necessary changes.¹³⁵⁰ On the 8th April 2021 the Saeima adopted further amendments to the Law on Higher Education Institutions. This amendment still maintains the principle that courses in higher education institutions and

¹³⁴³ Dimitrovs (n 1308).

¹³⁴⁴ *Case no. 2019-12-01* (n 1306).

¹³⁴⁵ Law of 8 April 2021 Amending the Law on Higher Education Institutions, 26/04/2021, Latvian Journal. No. 79A.

¹³⁴⁶ Law of 8 April 2021 Amending the Law on Higher Education Institutions (Section 1.4), 26/04/2021, Latvian Journal. No. 79A.

¹³⁴⁷ Dimitrovs (n 1308).

¹³⁴⁸ Law of 8 April 2021 Amending the Law on Higher Education Institutions (Section 2), 26/04/2021, Latvian Journal. No. 79A.

¹³⁴⁹ *Case C-391/20 Request for a preliminary ruling from the Satversmes tiesa (Latvia) lodged on 29 July 2020 - Boriss Cilevičs and Others v Latvijas Republikas Saeima* OJ C 359/10 8.

¹³⁵⁰ *Case no. 2019-12-01* (n 1306) 60.

colleges are implemented in the state language but now the legislator provides exceptions for when the use of foreign languages in higher education is allowed including the provision for no more than one fifth of the credit points of the study programme being allowed to be taught in other official languages of the European Union.¹³⁵¹

The Constitutional Court decided to split its consideration of the 2018 reforms pertaining to tertiary education into two separate cases to ensure efficiency.¹³⁵² The case concerning the compatibility of the contested provisions with Article 112, the right to education, was decided on the 11th June 2020 as described above (case no. 2019-12-01). A separate case was established to deal with the compatibility of the 2018 reforms with Articles 1 and 105 (property rights) and 112 of the Satversme (case no. 2020-33-01)¹³⁵³ as they related to the right of higher education institutions to engage in “commercial activities and to provide a higher education service in return for payment in accordance with the authorisation they have been granted, even though that right is protected by the right to own property recognised in Article 105 of the Constitution.”¹³⁵⁴ The Constitutional Court made a preliminary reference under Article 267 of the Treaty on the Functioning of the European Union on 29 July 2020 to the Court of Justice to clarify the following questions:

“1.1. Does legislation such as that at issue in the main proceedings constitute a restriction on the freedom of establishment enshrined in Article 49 of the Treaty on the Functioning of the European Union or, in the alternative, on the freedom to provide services guaranteed in Article 56 [of that treaty], and on the freedom to conduct a business recognised in Article 16 of the Charter of Fundamental Rights of the European Union?”

1.2. What considerations should be taken into account when assessing whether the legislation in question is justified, suitable and proportionate with regard to its

¹³⁵¹ Law of 8 April 2021 Amending the Law on Higher Education Institutions (Section 1.3), 26/04/2021, Latvian Journal. No. 79A.

¹³⁵² Dimitrovs (n 1308).

¹³⁵³ *Decision of the Constitutional Court of the Republic of Latvia of 14 July 2020 on case No 2020-33-01, 2020, Latvia Journal.*

¹³⁵⁴ *Case C-391/20 (Request for a preliminary ruling)* (n 1349) 5.

legitimate purpose of protecting the official language as a manifestation of national identity?”¹³⁵⁵

The Grand Chamber of the CJEU issued its opinion in Case C-391/20 on the 7th of September 2022 where it affirmed that the obligation on certain third level institutions to teach through the Latvian language was compatible with EU Law and in particular Articles 49 and 56 TFEU, and Article 16 of the Charter of Fundamental Rights.¹³⁵⁶ Following the Court’s opinion, the Latvian Constitutional Court issued its judgment in September 2022 on the constitutionality of the new legislation. The Constitutional Court held that it was allowable for the state to require private higher level institutions restrict study programmes conducted through a non-EU language but private higher education institutions were permitted to teach through languages of the member states other than Latvian.¹³⁵⁷

The Constitutional Court issued its ruling on preschools on 19th June 2020.¹³⁵⁸ According to the new reforms as of 1 September 2019, the primary form of communication during play-based lessons in public and private minority preschools was to be Latvian for children age five and above.¹³⁵⁹ An exception is made for lessons of minority language and culture. The Court determined that this provision is consistent with the government's authority, as well as the right to education, national minority rights, and the prohibition of discrimination.¹³⁶⁰

Clearly the Constitutional Court has taken a more intrusive approach in adjudicating on the minority language situation in educational settings since their decisions in 2005.¹³⁶¹

¹³⁵⁵ *Case C-391/20 (Request for a preliminary ruling)* (n 1349).

¹³⁵⁶ *Case C-391/20 Boriss Cilevičs and Others [2022] OJ C 359.*

¹³⁵⁷ *Judgment of the Constitutional Court of the Republic of Latvia 9 February 2023 in case no 2020-33-01 2023 Latvia Journal.*

¹³⁵⁸ *Case no. 2019-20-03* (n 1307).

¹³⁵⁹ Regulations of the Cabinet of Ministers of 21 November 2018 No. 716 (Annex 2 paragraph 9), 30/11/2018, *Latvian Journal*. no. 236.

¹³⁶⁰ *Case no. 2019-20-03* (n 1307) 69–70.

¹³⁶¹ *Judgment of the Constitutional Court of the Republic of Latvia 14 September 2005 in case no 2005-02-0106, 2005, Latvia Journal.*

In 2005, the Constitutional Court recognised that the state and local governments needed to either stop financing private schools or to provide funding for private schools on an equal basis, without discriminating based on the language of instruction in these schools.¹³⁶² The Court further said that there are more fair ways to achieve the legitimate aim of promoting the Latvian language in education. That is, to specifically target minority schools by providing funding to encourage the use of the official language there.¹³⁶³ This would be a more positive way to achieve the legitimate aim without harsh language quotas. Therefore, it is unclear why the Constitutional Court has performed a U-turn on such issues since the 2005 judgments after proficiency in Latvian has only improved amongst minority groups since 2005.¹³⁶⁴ The Court does not provide any clear reasoning in its judgments on why they have abandoned their previous approach which only leaves room for speculation for scholars.

5.6.3. Rights of Women and Sexual Minorities in Latvia

The EU's accession conditionality played a role in crystallising Latvia's issues around entrenched prejudice against the LGBTQ+ community.¹³⁶⁵ The EU's calls to protect sexual minority rights in legislation in Latvia emboldened the LGBTQ+ community and made them more visible in public discourse in the run up to accession.¹³⁶⁶ The Saeima largely failed to answer the calls of the international community, including the EU, to legislate against discrimination based on sexual orientation.¹³⁶⁷ Furthermore, in 2005 a constitutional amendment was inserted into the Satversme which explicitly stated that marriage was only possible between a man and a woman.¹³⁶⁸ This is not surprising given that Latvia remains one of the least tolerant societies in the EU with a 2019 European Commission barometer indicating that only 49 percent of Latvians believe that LGBTQ+

¹³⁶² *ibid* 14–15.

¹³⁶³ *ibid* 14–16.

¹³⁶⁴ Dimitrovs (n 1308).

¹³⁶⁵ Eihmanis (n 850) 7.

¹³⁶⁶ *ibid*.

¹³⁶⁷ *ibid*.

¹³⁶⁸ *ibid*.

people deserve the same rights as heterosexual people.¹³⁶⁹ This was the sixth lowest ranking in the EU and on par with Poland.

Tolerance for LGBTQ+ people in Latvia is low compared to other EU Member States. Just 49% of people believe that LGBTQ+ individuals should be afforded the same rights as heterosexual people according to the 2019 Eurobarometer survey on discrimination in the EU.¹³⁷⁰ This figure is the sixth lowest in the EU and on par with Poland, another Member State that has become infamous for its intolerance for the LGBTQ+ community, made evident by oppressive policies such as ‘LGBTQ+ free zones’.¹³⁷¹ The Saeima’s progress on LGBTQ+ rights has been largely stagnant up until recently as now national courts have shown great leadership in helping Latvia achieve Western-type LGBTQ+ acceptance. The Saeima has repeatedly stalled the introduction of a way to legally recognise same sex couples and to afford them equal rights to heterosexual married couples. A law which recognises hate-crimes on the basis of “social hatred” as an aggravating circumstance were only introduced recently in 2021.¹³⁷² This lack of progress is not surprising considering the lack of appetite for progressive change amongst the general public. However, various dominant religious groups have been instrumental in maintaining the conservative status quo and pushing NGO groups who strive to implement pro-LGBTQ+ policies to the margins of political consideration.¹³⁷³ Indeed, heads of dominant religious groups have been very influential in what type of policies are

¹³⁶⁹ European Commission, ‘Eurobarometer on Discrimination 2019: The Social Acceptance of LGBTI People in the EU’ (2019) <https://ec.europa.eu/info/sites/default/files/ebs_493_data_fact_lgbti_eu_en-1.pdf> accessed 13 December 2021.

¹³⁷⁰ European Commission, ‘Special Eurobarometer 493 - Discrimination in the European Union, Perception of Minorities in the EU: LGBTI People, Factsheet on Latvia’ (2019).

¹³⁷¹ Monika Pronczuk, ‘Polish Towns That Declared Themselves “L.G.B.T. Free” Are Denied E.U. Funds’ *New York Times* (Brussels, 30 July 2020) <<https://www.nytimes.com/2020/07/30/world/europe/LGBT-free-poland-EU-funds.html>> accessed 3 October 2022.

¹³⁷² Law of 6 July 2021 Amending the Criminal Law. 22/07/2021, Latvian Journal. No. 139.

¹³⁷³ Kaspars Zālītis, ‘Latvia: “Faced with Hatred, We Focus on Delivering a Human Rights Message”’ (*Civicus*, 4 September 2018) <<https://www.civicus.org/index.php/media-resources/news/interviews/3434-latvia-faced-with-hatred-we-focus-on-delivering-a-human-rights-message>> accessed 3 June 2022.

adopted by politicians despite Article 99 of the Latvian Constitution separating church and state.¹³⁷⁴

The EU Fundamental Rights Agency's (FRA) 2020 report on the LGBTQ+ communities experience in Europe revealed that 48 percent of respondents from the LGBTQ+ community in Latvia were never open about being part of the LGBTQ+ community, this was one of the highest numbers in the EU.¹³⁷⁵ Similarly, ILGA Rainbow Europe Map of 2021 ranks Latvia 41st out of 49 other European countries.¹³⁷⁶ The FRA report also showed that respondents in Latvia are the least likely to report discrimination on the grounds of their LGBTQ+ status to any organisation or institution.¹³⁷⁷ Respondents in Latvia reported such discrimination just 4 percent of the time which is the lowest rate amongst the countries under study.¹³⁷⁸ The survey asked LGBTQ+ respondents who felt discriminated against in the year before the survey if they or anyone else reported the most recent incident to any organisation or institution.¹³⁷⁹ On average, 25 percent of all respondents in the EU said that they feared of a homophobic and/or transphobic response from police and so did not report physical or sexual attacks.¹³⁸⁰ This was the reason given by 47 percent of Latvian respondents, a significantly larger portion of respondents than the EU average.¹³⁸¹

The ECRI's 2019 report concluded that LGBTQ+ people in Latvia are one of the groups most vulnerable to hate speech.¹³⁸² This is a fact also supported by the Council of Europe's Human Rights Commissioner.¹³⁸³ There have been many instances of violent

¹³⁷⁴ Valdis Tēraudkalns, 'Religion in Latvia after the Fall of the Soviet System: Fragmentation and Postsecularism' (2020) 40(6), Article 2 Occasional Papers on Religion in Eastern Europe 14.

¹³⁷⁵ European Union Agency for Fundamental Rights, *A Long Way To Go for LGBTI Equality* (Publications Office of the European Union 2020) 24.

¹³⁷⁶ ILGA Europe, 'Rainbow Europe Map 2021' (*Rainbow Europe*) <<https://www.rainbow-europe.org/#8642/0/0>> accessed 18 February 2022.

¹³⁷⁷ European Union Agency for Fundamental Rights (n 1375) 35.

¹³⁷⁸ *ibid.*

¹³⁷⁹ *ibid.*

¹³⁸⁰ *ibid.* 48.

¹³⁸¹ *ibid.*

¹³⁸² Council of Europe, 'European Commission against Racism and Intolerance (ECRI) Report on Latvia (Fifth Monitoring Cycle)' (2019) CRI(2019)1 16.

¹³⁸³ Nils Muižnieks, 'Report by Nils Muižnieks, Commissioner for Human Rights of The Council of Europe Following His Visit to Latvia from 5 to 9 September 2016' (Council of Europe 2016) CommDH(2016)41 21

hate crimes against individuals belonging to the LGBTQ+ community. The NGO Mozaika identified that several assaults against LGBTQ+ people were carried out in 2013 but in at least one of these incidents the police urged the victim not to report the assault.¹³⁸⁴ Similarly, in the first nine months of 2015, fourteen attacks occurred. However, the victims did not report the incidents to police.¹³⁸⁵ It is clear that such hate crimes are being underreported in Latvia by LGBTQ+ victims because they know that there is a deeply rooted prejudice against sexual minorities both within the police force and wider society.

Important progress is taking place regarding combating hate crime against the LGBTQ+ community in Latvia. This includes the Saeima finally recognising hate crime against the LGBTQ+ community by introducing legislation which lists crimes committed on grounds of “social hatred” as an aggravating circumstance.¹³⁸⁶ Although this does not explicitly protect sexual minorities, civil society groups believe it is a step in the right direction.¹³⁸⁷ Also, the ECRI report of 2019 praises Latvia for issuing guidelines to police and other relevant authorities on how to investigate hate crime although it is too early to tell if this is going to have a significant impact generally.¹³⁸⁸

Latvian law also does not provide for equal treatment of LGBTQ+ couples and heterosexual couples. Latvia remains one of the few countries in the EU that constitutionally limits marriage only to opposite sex couples. Both the ECRI and Council of Europe’s Committee of Ministers have issued recommendations to Latvia to legally recognise same-sex unions as the current situation is detrimental to the social rights of sexual minorities.¹³⁸⁹ Article 110 of the Latvian Constitution defines marriage as a union

<https://www.ecoi.net/en/file/local/1044263/1226_1482316067_commdh-2016-41-en.pdf> accessed 18 February 2022.

¹³⁸⁴ Council of Europe, ‘European Commission against Racism and Intolerance (ECRI) Report on Latvia (Fifth Monitoring Cycle)’ (n 1382) 19.

¹³⁸⁵ *ibid.*

¹³⁸⁶ Law of 6 July 2021 Amending the Criminal Law. 22/07/2021, Latvian Journal. No. 139.

¹³⁸⁷ ILGA Europe (n 1376).

¹³⁸⁸ Council of Europe, ‘European Commission against Racism and Intolerance (ECRI) Report on Latvia (Fifth Monitoring Cycle)’ (n 1382) 18.

¹³⁸⁹ *ibid* 30; ‘Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity’ s 25 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a> accessed 18 February 2022.

between a man and a woman. While Article 35 of the Civil Law explicitly prohibits marriage between two persons of the same sex.¹³⁹⁰ The Saeima has been particularly resistant to the possibility of legally recognising same-sex couples. In 2018, the Saeima dismissed a public initiative aimed at establishing a Civil Partnership law for both same-sex couples and opposite-sex couples even though the initiative received 10,000 signatures.¹³⁹¹ However, the apex courts in Latvia have played a much more proactive role in helping same-sex couples gain the same rights as heterosexual couples. The Constitutional Court, in its 12 November 2020 decision established that same-sex partners have the same right to leave after the birth of a child as heterosexual couples and that the legislature should recognise this through enacting legislation.¹³⁹² However, after a year had passed and no progress was made to recognise same-sex couples on the Saeima's part. The Supreme Court stepped in to remind the Saeima that they now have a duty to formulate legislation that recognises same-sex couples.¹³⁹³ As a result of the mounting pressure from courts, the Minister of Justice presented the Civil Unions bill to the Saeima for consideration on 2 February 2022. If passed this bill will legalise and regulate a partnership between two adults regardless of their sex.

Latvia has positioned itself firmly in the middle of the 'war on gender' much like the rest of Central and Eastern Europe.¹³⁹⁴ This is evident through the Latvian government's stance on the Convention on preventing and combating violence against women and

¹³⁹⁰ Law of 25 May 1993 On Amendments and Supplements to the Family Law Part of the Civil Law of the Republic of Latvia of 1937 (Article 35) 08/06/1993, Latvian Journal. No. 35.

¹³⁹¹ Council of Europe, 'European Commission against Racism and Intolerance (ECRI) Report on Latvia (Fifth Monitoring Cycle)' (n 1382) 30.

¹³⁹² *Judgment of the Constitutional Court of the Republic of Latvia 12 November 2020 in case no. 2019-33-01. 2020. Latvia Journal* <[https://www.satv.tiesa.gov.lv/en/cases/?search\[number\]=2019-33-01](https://www.satv.tiesa.gov.lv/en/cases/?search[number]=2019-33-01)> (n 1028).

¹³⁹³ The Department of Administrative Cases of the Supreme Court, 'In the Case Regarding the Legal Recognition of the Family of a Same-Sex Couple, the Senate Applies to the Constitutional Court' (*Republic of Latvia Supreme Court*, 7 June 2021) <<https://www.at.gov.lv/en/jaunumi/par-tiesu-lietam/administrativo-lietu-departamenta/lieta-par-viena-dzimuma-para-gimenes-juridisku-atzisanu-senats-versas-ar-pieteikumu-satversmes-tiesa-10667?year=2021&month=06>>.

¹³⁹⁴ Elizabete Vizgunova and Elīna Graudiņa, 'The Trouble with "Gender" in Latvia: Europeanisation Through the Prism of the Istanbul Convention' (2020) 13(1) *Baltic Journal of Law & Politics* 108, 112.

domestic violence, also known as the Istanbul Convention.¹³⁹⁵ Much like neighbouring Lithuania or other CEE states such as Poland, Hungary and the Czech Republic, Latvia refuses to ratify the Istanbul Convention as it is believed to be an affront to traditional family values.¹³⁹⁶ In particular, Article 12 of the Istanbul Convention which *inter alia* acknowledges that violence against women arises from gender stereotypes and that ascribing states should take “necessary measures to encourage all members of society, especially men and boys, to contribute actively to preventing all forms of violence” covered by the Convention.¹³⁹⁷ Article 14 of the Istanbul Convention *inter alia* asks ascribing states to take the necessary steps to include teaching material on issues such as equality between women and men and “non-stereotyped gender roles” at all levels of education.¹³⁹⁸ Furthermore, the Istanbul Convention describes gender as “the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men”.¹³⁹⁹ These features of the Istanbul Convention are considered dangerous by conservative Latvian leaders due to an alleged hidden Western agenda of imposing ‘gender ideology’ on the Latvian people.¹⁴⁰⁰ Vizgunova and Graudiņa argue that inclusive formulations of gender have long been framed by conservative politicians as a “Trojan horse” that can erode the traditional values of Latvian society.¹⁴⁰¹

The refusal to ratify the Istanbul Convention is an acknowledgment by Latvian authorities that the issue of violence against women is not a priority. This denial has major implications for democracy in Latvia as Krizsán and Roggeband identify three axes on which violence against women impacts democracy. First, on the individual level, violence against women is a breach of their liberty and therefore is “incompatible with liberal democracy”.¹⁴⁰² Second, violence against women is incompatible with liberal democracy

¹³⁹⁵ The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence: a tool to end female genital mutilation; Istanbul Convention (adopted 11 May 2011, entered into force 1 August 2014) CETS No. 210.

¹³⁹⁶ Vizgunova and Graudiņa (n 1394) 111.

¹³⁹⁷ Istanbul Convention Article 12.

¹³⁹⁸ *ibid* Article 14.

¹³⁹⁹ *ibid* Article 3.

¹⁴⁰⁰ Vizgunova and Graudiņa (n 1394) 132.

¹⁴⁰¹ *ibid* 112.

¹⁴⁰² Krizsán and Roggeband (n 212) 19.

at a group level as this form of oppression limits the freedom of women as a group within society.¹⁴⁰³ Third, violence against women “distorts democratic processes of political representation and policymaking” as violence or the threat of violence has a quietening effect on women which limits their participation within the public sphere.¹⁴⁰⁴ Krizsán and Roggeband identify that violence or the threat of violence limits women’s equal access to political positions or other positions of public influence within civil society.¹⁴⁰⁵

The Latvian Ministry of Justice issued a document detailing their opposition to the ratification of the Istanbul Convention in 2016. It stated the Convention seeks to introduce gender ideology into Latvia without the peoples’ consent and if ratified, the Convention would open the door to same-sex marriage and take away a parents right to educate their children in line with their own religious and philosophical beliefs.¹⁴⁰⁶ This view point has been widely supported by conservative forces in the Latvian Government such as NA and ZZS as they strongly oppose the introduction of same-sex marriage.¹⁴⁰⁷ Conservative political parties have also been highly effective at pushing through policies against the LGBTQ+ minority and women’s rights. For example, Ainārs Šlesers (LPP), during his position as Deputy Prime Minister, was highly influential in amending Article 110 of the Satversme in 2005 which inserted the exclusionary definition of marriage as a union between a man and a woman.¹⁴⁰⁸ Šlesers was outspoken about his Christian beliefs and justified this amendment to the Satversme by proclaiming that entrenched traditional values in Latvia were under threat.¹⁴⁰⁹ Despite his party only holding 10

¹⁴⁰³ *ibid.*

¹⁴⁰⁴ *ibid* 19–20.

¹⁴⁰⁵ *ibid* 20.

¹⁴⁰⁶ Inga Kačevskas Office, ‘On the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence the Possible Impact on the Latvian Legal System, Report Prepared on Behalf of the Ministry of Justice in Accordance with Agreement No. 1/53’ 4 <https://www.tm.gov.lv/sites/tm/files/data_content/tminf_250416_stambulkonv_dok.pdf> accessed 3 May 2022.

¹⁴⁰⁷ Vizgunova and Graudiņa (n 1394) 125.

¹⁴⁰⁸ *ibid* 119.

¹⁴⁰⁹ *ibid.*

percent of seats in the Saeima the party played an active role in lobbying for the change to Article 110.¹⁴¹⁰

Imants Parādnieks (NA) is the current advisor of Prime Minister Krišjānis Kariņš on demographic issues.¹⁴¹¹ Parādnieks has a significant history of lobbying to restrict women's reproductive rights. He backed attempts between 2014-2018 to amend the Law Sexual and Reproductive Health which would have banned women who had not given birth to donate their ova.¹⁴¹² The justification provided for this was that women may struggle to conceive after donating their ova.¹⁴¹³ While in 2012, Parādnieks was a member of the subcommittee of Demographic Affairs of the Saeima where he passed around figurines of fetuses at a committee meeting while trying to persuade committee members to introduce stricter laws on abortion.¹⁴¹⁴ Since 2016, Parādnieks is serving as the director of the Centre for Demographic Issues, which provides expert advice to the government on strengthening the demographic situation in Latvia.¹⁴¹⁵ These examples raise another concern over certain conservative politicians' claims over women's reproductive rights and how women's bodies are often viewed as a commodity and a means of resolving Latvia's ongoing demographic decline.¹⁴¹⁶

The four major religious groups in Latvia, i.e. the Roman Catholic Church, Evangelical Lutheran Church of Latvia, the Latvian Orthodox Church and the Union of Baptist Churches in Latvia, have been a major influence on the Latvian government regarding the development of women's rights and sexual minorities rights.¹⁴¹⁷ Despite Latvia being declared a secular state by the Satversme, religious groups have been very influential in the political field either through lobbying or through religious pastors entering high-level

¹⁴¹⁰ *ibid.*

¹⁴¹¹ *ibid* 120.

¹⁴¹² *ibid.*

¹⁴¹³ *ibid.*

¹⁴¹⁴ Laura Dzerve, 'Parādnieks Shares Figurines of Unborn Children at the Saeima Sitting' *Diena* (13 June 2012) <<https://www.diena.lv/raksts/latvija/politika/paradnieks-saeimas-%20sede-dala-nedzimusu-bernu-figurinas-13952300>> accessed 2 May 2022; Vizgunova and Graudiņa (n 1394) 120.

¹⁴¹⁵ Vizgunova and Graudiņa (n 1394) 120.

¹⁴¹⁶ *ibid.*

¹⁴¹⁷ Tēraudkalns (n 1374) 12, 20; Zālītis (n 1373).

political positions.¹⁴¹⁸ There are many reports of government ministers and other parliamentarians openly meeting with leaders of these religious groups to discuss various policies.¹⁴¹⁹ Indeed, homosexuality has been a pressing issue for Latvian church leaders for many years now with priests who defend LGBTQ+ rights often being punished or excommunicated for doing so.¹⁴²⁰ In 2007, pressure from religious groups persuaded Oskars Kastēns, the then Special Assignments Minister for Social Integration, to exclude discrimination based on sexual orientation in an initiative designed to promote tolerance which ran from 2009-2013.¹⁴²¹ When the Istanbul Convention was signed by the Latvian government in 2016, Latvian church leaders began to lobby members of the Saeima heavily, having met with members of the ZZS, NA and Harmony parties in the Saeima.¹⁴²² They were also quite successful as all three of these parties have taken a strong stance against the ratification of the Istanbul Convention and the Minister of Justice headed by Dzintars Rasnačš also ceasing to consider ratification.¹⁴²³ In 2019 church leaders signed a letter thanking the Latvian government for not ratifying the Istanbul Convention and rejecting a draft bill for a new partnership law which would have legally recognized same-sex relationships.¹⁴²⁴

5.6.4. Racial Discrimination in Latvia: The Roma Community and Immigration Crises

Latvia has also faced significant challenges in combating ethnic and racial discrimination. The ECRI 2019 report notes that the Roma population in Latvia is systematically

¹⁴¹⁸ Tēraudkalns (n 1374) 14.

¹⁴¹⁹ Zālītis (n 1373); Michael Mustillo, 'Latvia Bristles against the Istanbul Convention Combating Violence against Women' *The Baltic Times* (28 February 2018) <https://www.baltictimes.com/latvia_bristles_against_the_istanbul_convention_combating_violence_against_women/> accessed 3 June 2022.

¹⁴²⁰ Tēraudkalns (n 1374) 12.

¹⁴²¹ *ibid.*

¹⁴²² Mustillo (n 1419); Māris Klūga, 'Latvia Unlikely to Ratify Istanbul Convention Any Time Soon' *LSM.LV* (22 January 2018) <<https://eng.lsm.lv/article/politics/politics/latvia-unlikely-to-ratify-istanbul-convention-any-time-soon.a265133/>> accessed 3 June 2022.

¹⁴²³ Vizgunova and Graudiņa (n 1394) 121, 125–127; LSM.LV, 'Latvia Signs Istanbul Convention' *LSM.LV* (18 May 2016) <<https://eng.lsm.lv/article/politics/politics/latvia-signs-istanbul-convention.a183463/>> accessed 5 June 2022.

¹⁴²⁴ Tēraudkalns (n 1374) 13.

disadvantaged and the Latvian authorities are largely failing to meet the needs of this minority group.¹⁴²⁵ This is an issue that continues to persist despite previous ECRI reports continuously bringing issues around Roma integration to the authorities attention.¹⁴²⁶ There are approximately 5,191 people living in Latvia who have declared they are from the Roma community.¹⁴²⁷ However, experts suggest that this number is likely two or three times higher as Roma people avoid declaring their ethnic backgrounds due to the widespread prejudice against the Roma community in Latvian society.¹⁴²⁸ The Roma community has a general low level of formal education with research suggesting around 48.8 percent had not completed the compulsory level of primary education.¹⁴²⁹ The practice of segregating Roma children in schools by having them taught in separate special classrooms seems to have ceased which the ECRI report notes as a positive development.¹⁴³⁰ However, an unusually high number of Roma children are enrolled in special needs programmes at 34.2 percent. 22.4 percent of student in the special primary education programme for students with learning disabilities are Roma children despite the fact the Roma community represents less than 1 percent of the overall population.¹⁴³¹ Given these statistics, it is no surprise that the unemployment rate amongst Roma people stands at around two-thirds.¹⁴³²

Latvia has also faced criticism for its handling of the refugee crisis of late 2021. This crisis developed after Belarussian president, Alexander Lukashenko, funnelled refugees mainly from Iraq and Africa into Poland, Lithuania and Latvia.¹⁴³³ Much like Poland and Lithuania, Latvia framed the crisis as an orchestrated assault on Latvia and the EU by the

¹⁴²⁵ Council of Europe, 'European Commission against Racism and Intolerance (ECRI) Report on Latvia (Fifth Monitoring Cycle)' (n 1382) 23–26.

¹⁴²⁶ *ibid* 23–24.

¹⁴²⁷ *ibid* 23.

¹⁴²⁸ *ibid*.

¹⁴²⁹ *ibid* 24.

¹⁴³⁰ *ibid*.

¹⁴³¹ *ibid* 24–25.

¹⁴³² *ibid* 25.

¹⁴³³ Rankin, Roth and Henley (n 826).

authoritarian president of Belarus, Alexander Lukashenko.¹⁴³⁴ The Latvian Ministry of Foreign Affairs called President Lukashenko's actions a form of hybrid warfare.¹⁴³⁵ However, there were worrying reports that Latvian border guards were pushing back migrants into Belarus while Belarussian border officials were pushing them into Latvia, which would constitute a breach of international law by Latvia, namely Articles 2 (right to life) and 3 (prohibition on inhuman and degrading treatment) of the European Convention on Human Rights.¹⁴³⁶ No matter what the circumstances are for migrants flooding into Latvia, they still have a right to apply for asylum. These reports prompted the ECtHR to issue interim measures under Rule 39 of the Rule of Courts, demanding that the Latvian (and Lithuanian and Polish) government provide the applicants with food, water, clothing, medical care and, if possible, temporary housing.¹⁴³⁷ Although the interim measures against Latvia were lifted as the applicants were either admitted into Latvian territory for processing or had left the Latvian border, this nevertheless is evidence of dangerous tactics being adopted by Latvian authorities in relation to this migrant crisis.¹⁴³⁸ In contrast, the migrant crisis which is developing at the time of this writing regarding the war between Ukraine and Russia is being treated differently by the

¹⁴³⁴ Dimitry Vladimirovich Kochenov and Barbara Grabowska-Moroz, 'The EU's Face in Łukašenka's Mirror' (*Verfassungsblog*, 26 August 2021) <<https://verfassungsblog.de/the-eus-face-in-lukasenkas-mirror/>> accessed 3 May 2022.

¹⁴³⁵ Ministry of Foreign Affairs, 'The Foreign Ministry's Parliamentary Secretary Draws the Attention of the European Parliament to a Targeted Hybrid Attack by Belarus on the EU' (*Ministry of Foreign Affairs Republic of Latvia*, 9 February 2021) <https://www.mfa.gov.lv/en/article/foreign-ministrys-parliamentary-secretary-draws-attention-european-parliament-targeted-hybrid-attack-belarus-eu?utm_source=https%3A%2F%2Fwww.google.com%2F>.

¹⁴³⁶ Sergey Pavlov and Editorial board Rus.LSM.lv, 'UN Refugee Agency Concerned about Latvia's Actions' *RUS.LSM.LV* (13 August 2021) <https://rus-lsm-lv.translate.goog/statja/novosti/politika/vedomstvo-oon-po-delam-bezhencev-obespokoeno-deystvijami-latvii.a416847/?fbclid=IwAR3DTM3DWAQpg-BYqclsmecTtyrAP6As87o6lq5d0cnHLo7YvKuGWTpfyeY&_x_tr_sl=ru&_x_tr_tl=en&_x_tr_hl=en-US&_x_tr_pto=op,wapp> accessed 3 May 2022; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

¹⁴³⁷ European Court of Human Rights, 'Press Release Issued by the Registrar of the Court: Requests for Interim Measures Concerning the Situation at the Borders with Belarus' (2021) (ECHR 372) <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjB2LGK5rL2AhVimeAKHeXxBwAQFnoECBEQAw&url=https%3A%2F%2Fhudoc.echr.coe.int%2Fapp%2Fconversion%2Fpdf%2F%3Flibrary%3DECHR%26id%3D003-7202976-9785391%26filename%3DRequests%2520for%2520interim%2520measures%2520concerning%2520the%2520situation%2520at%2520the%2520Polish-Belarussian%2520border.pdf&usq=AOvVaw0MpmMwnK5YRgnSxTVnHO82s>> accessed 3 June 2022.

¹⁴³⁸ *ibid.*

Latvian government. Ukrainians fleeing war and seeking asylum in Latvia are generally being received very generously by Latvian authorities.¹⁴³⁹ This only bolsters previous accusations against the Latvian government regarding their strict policy against accepting refugees during the 2015 and the late 2021 migration crises having racist reasoning behind it. Their policies around refugees seem to be significantly stricter if the migrants seeking asylum are non-white.

The lack of inclusion for various minorities within Latvia have many consequences for the quality of the country's democracy. Most notably, the exclusion of the Latvian Russophone community either directly by imposing strict naturalisation laws, or indirectly, by the introduction of strict language quotas for all educational settings, has an alienating effect on this community. It sends a signal that the political rights of ethnic Latvians are more important than the rights of the Russian speaking minority, relegating this section of society to being mere imposters in Latvia. This type of discourse was recently endorsed and justified by the Constitutional Court in case no. 2004-18-0106 where the Court condoned restrictive language quotas in education based on the narrative that Russian settlers had arrived in Latvia during Soviet occupation but Latvians did not have the means to prevent this due to the very fact they were under occupation.¹⁴⁴⁰ This means these settlers are expected to leave behind their heritage completely in order to be accepted by Latvia today. A similar deficit for political rights is evident for other minorities in Latvia, although perhaps to a lesser extent. The rejection of the Istanbul Convention by governing elites is indicative of the Latvian authorities' disregard for genuine women's equality. The lost political will to implement policies and laws to eliminate systemic discrimination towards the LGBTQ+ and Roma community is another indication that these issues only mattered to democratising elites when appearances needed to be kept during accession negotiations in the early 2000s.¹⁴⁴¹ The failures in the field of minority rights in Latvia are significant for the status of Latvian democracy as without genuine attempts to create an equal society, true democratic

¹⁴³⁹ Iveta Čigāne, 'First Ukrainian Refugees Arrive in Latvia' *LSM.LV* (26 February 2022)

<<https://eng.lsm.lv/article/society/society/first-ukrainian-refugees-arrive-in-latvia.a445412/>> accessed 3 November 2022.

¹⁴⁴⁰ *Case no. 2004-18-0106* (n 1277) 23.

¹⁴⁴¹ Eihmanis (n 850) 8.

representation cannot be achieved. Similar to the arguments presented by Krizsán and Roggeband, oppression of minority groups in any form is a denial of their liberty on an individual and group level.¹⁴⁴² Oppression of minorities has a silencing effect within a polity as the groups that are being oppressed are denied access to political representation and are therefore, not able to meaningfully participate in democracy.¹⁴⁴³ This is not compatible with our idea of a liberal constitutional democracy.

5.7. Conclusion

This chapter has examined the most concerning threats to liberal, democratic and constitutional values that Latvia faces today. The Latvian political party system shows significant evidence of volatility and instability. The most recent general election in 2018 has been declared a victory of populist parties marking the rise of anti-establishment and illiberal forces in Latvia.¹⁴⁴⁴ The political party landscape in Latvia was poorly regulated in the early years of the country's re-independence which created optimal conditions for the development of a volatile political party system.¹⁴⁴⁵ The Latvian judiciary is also found to be suffering a crisis of independence; structural issues which effect Latvian judicial independence stem from the executive's excessive powers over court budgets.¹⁴⁴⁶ Besides this, it has become evident that the Minister of Justice has been attempting to attack the Chairman of the Judicial Council in retaliation for the Chairman's politically inconvenient opinions of the current judicial system in Latvia.¹⁴⁴⁷ There is also a resounding lack of trust and respect for the authority of courts within the political branches of state. The Constitutional Court has been criticised and attacked by parliamentarians over decisions in the recent parental leave case¹⁴⁴⁸ and the Varakļāni

¹⁴⁴² Krizsán and Roggeband (n 212) 19.

¹⁴⁴³ *ibid* 19–20.

¹⁴⁴⁴ Higgins (n 990); Auers and Kasekamp (n 906).

¹⁴⁴⁵ Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (n 114) 345–349.

¹⁴⁴⁶ Law on Judicial Power (Article 50.2(3) of 1993). 01/01/1993 Reporter of the Supreme Council and Government of the Republic of Latvia <<https://likumi.lv/ta/en/en/id/62847-on-judicial-power>>.

¹⁴⁴⁷ Dreiblat and Rozenbergs (n 1027).

¹⁴⁴⁸ *Judgment of the Constitutional Court of the Republic of Latvia 12 November 2020 in case no. 2019-33-01. 2020. Latvia Journal* <[https://www.satv.tiesa.gov.lv/en/cases/?search\[number\]=2019-33-01](https://www.satv.tiesa.gov.lv/en/cases/?search[number]=2019-33-01)> (n 1028).

and Rēzekne regions case.¹⁴⁴⁹ These attacks were not comments disagreeing with the Court's reasoning or legal approach but rather a fundamental attack on the legitimacy of the Constitutional Court's standing. Parliamentarians refused to perform their duties and nominate a replacement judge to the Constitutional Court for this very reason.¹⁴⁵⁰ This is a clear indication that the foundations of Latvia's democratic institutions are being put into question by populist parliamentarians. Similarly, there is evidence to suggest that journalists still face pressure from politicians despite many formal laws forbidding political interference with journalists' freedom.¹⁴⁵¹ Moreover, the political will to introduce measures to promote minority rights has diminished since Latvia acceded to the EU.¹⁴⁵² In fact, the situation for ethnic minorities has gotten progressively worse with successive governments promoting nationalistic policies aimed at protecting The Latvian language at the expense of minority language rights. The apparent backlash against the EU's liberal values and policies in Latvia leaves the country vulnerable to populist power-grabs.

¹⁴⁴⁹ *Judgment of the Constitutional Court of the Republic of Latvia, 28 May 2021 in case no. 2020-43-0106, 2021, Latvia Journal* <[https://www.satv.tiesa.gov.lv/en/cases/?search\[number\]=2019-33-01](https://www.satv.tiesa.gov.lv/en/cases/?search[number]=2019-33-01)> (n 1029).

¹⁴⁵⁰ Upleja (n 1092).

¹⁴⁵¹ Anda Rozukalne (n 1155) 13–15.

¹⁴⁵² Eihmanis (n 850) 8.

6. Case Study Comparison: Lithuania and Latvia in Light of the Hungarian and Polish Experience

6.1. Introduction

The issues highlighted in chapters four and five on Lithuanian and Latvian democracy make it clear that all is not well in this part of Europe. After the valiant effort of both countries to return to Europe after the end of the Cold War, it is clear now that they are currently going through a democratic downturn. This is in spite of the fact Freedom House continues to list these countries as consolidated democracies.¹⁴⁵³ Hungary was once also classified as a consolidated democracy but was only recently downgraded. This serves as a reminder that no democracy is ever fully ‘complete’ and the threat of regression is always on the horizon if we are not vigilant.¹⁴⁵⁴

This chapter will reflect on the complex reality of the state of liberal constitutional democracy in Lithuania and Latvia from a comparative perspective. This will be done by building on the analytical case studies of Lithuania and Latvia in chapters four and five, respectively, and using the benchmark of the well-documented democratic regression in Poland and Hungary, which I discussed in chapter three. Ultimately the goal is to answer the overall research question: ‘are Lithuania and Latvia undergoing democratic backsliding right now?’ In short, based on the empirical research conducted for the prior two chapters, the answer is yes. However, this view should be nuanced due to the fact there are different types of democratic deficits besides just backsliding including democratic hollowness which is a significant phenomenon in the countries under study.¹⁴⁵⁵ Both concepts need to be unpacked to fully understand the democratic reality in Lithuania and Latvia as it is different from that of Poland and Hungary even though

¹⁴⁵³ Freedom House, ‘Freedom House Interactive Map’ <<https://freedomhouse.org/explore-the-map?type=fiw&year=2022&country=LTU>> accessed 18 August 2022.

¹⁴⁵⁴ Jacques Rupnik and Jan Zielonka, ‘Introduction: The State of Democracy 20 Years on: Domestic and External Factors’ (2013) 27 *East European Politics and Societies: and Cultures* 3, 21; Bugarič (n 15) 221.

¹⁴⁵⁵ Greskovits (n 32); Cianetti (n 32).

they can be put under the same umbrella term of ‘democratic backsliding’. This chapter will first compare the experience of Lithuania and Latvia with that of Poland and Hungary using the framework adopted throughout this thesis. Section 6.3 and 6.4 will seek to nuance the findings of this thesis that Lithuanian and Latvian democracy is backsliding by considering some factors that are significant to understanding the current state of Lithuanian and Latvian democracy, but are outside the analytical framework used in section 6.2. Thus, section 6.3 will zoom in on the difference between democratic hollowness and democratic backsliding and how these two different phenomena interact to create a unique risk for democracy in Lithuania and Latvia. Section 6.4 finally will delve into the agentic theory of democratic breakdowns to explain why Lithuania and Latvia have experienced an array of crises and attacks on democratic institutions but they have not yet turned into outright authoritarian regression.

6.2. Assessing backsliding in Lithuania and Latvia

Democratic backsliding involves the regression of the rule of law, liberal principles and constitutional checks and balances and has arisen as part of a general trend of illiberalism in the CEE region.¹⁴⁵⁶ As chapters two and three have identified, the breakdown of democracy happens incrementally,¹⁴⁵⁷ and tends to follow a similar pattern or ‘blueprint’.¹⁴⁵⁸ These are attempts to manipulate electoral rules, attacks on judicial independence, limitations on media and academic freedom and attacks on minority rights. These have been identified as tell-tale signs that a democracy is backsliding from the experience of Poland and Hungary.¹⁴⁵⁹ Therefore, this chapter will rely on these most established features of democratic regression to assess whether Lithuania and Latvia are also at risk. The results are that both Lithuania and Latvia show similar issues that have contributed to the erosion of Polish and Hungarian democracy although to varying degrees.

¹⁴⁵⁶ Anders and Lorenz (n 219) 3–4; Halmai, ‘Illiberalism in East-Central Europe’ (n 76).

¹⁴⁵⁷ Huq and Ginsburg (n 37) 118.

¹⁴⁵⁸ Pech and Scheppele (n 221); Scheppele, ‘Autocratic Legalism’ (n 12); Uitz, ‘Constitutional Practices in Times “After Liberty”’ (n 31) 447.

¹⁴⁵⁹ Holtz-Bacha (n 222) 225–226; Moliterno and Čuroš (n 222) 1172–1185; Huq and Ginsburg (n 37).

On the one hand, the elements of similarity between Lithuania and Latvia, and Poland and Hungary include interference with judicial freedom. In Lithuania and Latvia, attacks on judicial freedom have been severe with both countries' executives politicising judicial appointments, diminishing the reputation of judges and courts publicly and attempting to influence politically sensitive judicial decisions. Similarly, all the countries under study have undermined minority rights in a significant way. Poland and Hungary have shown more severe attacks on minority rights but similar sentiments around the war on gender and lack of progress on same-sex partnership legal recognition underpins both Latvian and Lithuanian political discourse. On the other hand, elements of difference between Lithuania and Latvia, and Poland and Hungary are around the distortion of electoral laws and attacks on media freedom and civil society. For example, attacks on media freedom are prominent in Poland and Hungary and have also featured in Lithuania and Latvia, but have either been unsuccessful or very minor. LFGU's attempted coup of media freedom was thwarted by a successful defence by civil society and opposition between 2016 and 2020 and infringements on media freedom in Latvia have been minor. However, both Lithuania and Latvia did not undergo a populist revolution of their electoral laws as their parliaments and executives simply lacked an ideologically united majority.

The table below maps the forms of backsliding examined in the prior chapters of this thesis and assesses the existence of risk factors for democratic regression in Poland and Hungary on the one hand and Lithuania and Latvia on the other. In what follows, each of the 4 factors will be surveyed from a comparative perspective.

Country	Distortion of Electoral Landscape	Attacks on Judicial Independence	Limitations on Media Freedom and Civil Society	Attack on Minority Rights
Poland	✓	✓	✓	✓
Hungary	✓	✓	✓	✓
Lithuania	X	✓	✓	✓
Latvia	X	✓	X	✓

6.2.1. Distortion of the Electoral Landscape

One of the most important tactics both Fidesz and PiS have utilised to win consecutive elections over the last decade or so have been their careful manipulation of electoral rules. Both political forces wasted no time in passing electoral reforms once they entered power in 2010 in Fidesz's case and 2015 in PiS's case. The various tactics they used are described at length in chapter three. Amongst them the use of postal voting for Hungarians residing abroad, who were major supporters of Fidesz, and the restructuring of the PKW in Poland which meant that the PiS controlled executive had vast influence over elections.¹⁴⁶⁰ Besides these concrete changes, both PiS and Fidesz are skilful in the way they interact with the electorate. They have proven they have a robust understanding of what their voters want. Both parties promised voters more monetary support during difficult economic times and raised pensions just before elections.¹⁴⁶¹ Most recently, Fidesz showed just how in-tune with their electorate they are as they secured their fourth general election win in April 2022. Of course, their success is largely attributed to the fact they have been cultivating a favourable electoral landscape since 2010, but, just before the ballots were counted, it was unclear if Fidesz could pull-off yet another win.¹⁴⁶² And yet, they did. The win can be attributed to Fidesz taking a very measured approach to Russia's invasion of Ukraine which had just begun weeks prior to the election. Orbán distanced his party from the harsh criticism of his friend, Putin and promised that Hungary would not be dragged into the war itself.¹⁴⁶³ In addition, he pledged to keep good relations with Russia to secure Hungary's access to affordable natural resources.¹⁴⁶⁴ And so, at a time of great uncertainty and fear amongst the Hungarian people, the stability Orbán offered was exceptionally appealing given the unprecedented geopolitical circumstances.

The case studies of Lithuania and Latvia on the other hand, did not display overt capture of electoral mechanisms. This can largely be attributed to the lack of a single party holding

¹⁴⁶⁰ Sadurski, *Poland's Constitutional Breakdown* (n 101) 140–143; Schmidt (n 226) 82.

¹⁴⁶¹ Scheppele, 'How Viktor Orbán Wins' (n 239) 46.

¹⁴⁶² *ibid* 45.

¹⁴⁶³ *ibid* 48.

¹⁴⁶⁴ *ibid*.

a supermajority in the national parliaments which would have the power to push through such reforms. Indeed, both Lithuania and Latvia have fragmented and unstable political party landscapes which means votes have been dispersed amongst many parties leading to multi-party coalitions.¹⁴⁶⁵ After the 2018 general election in Latvia, the parliament struggled to agree on a cabinet for months until eventually Prime Minister Arturs Krišjānis Kariņš managed to form a cabinet based on a coalition of five parties.¹⁴⁶⁶ Similarly, in the most recent Lithuanian general election no one party managed to gain a majority of votes which led to a coalition of three parties in government.¹⁴⁶⁷ The formation of multi-party coalitions means that no one single party is able to dominate parliament or government as counter balances are present from within coalition and also the opposition meaning that vast electoral reforms to entrench a single party's power are very unlikely to succeed.

Despite the lack of abuse of the electoral system there are other weaknesses within the Lithuanian and Latvian political landscape which can lead to a populist party or political force emerging and attempting a power grab. The most pressing issues in Lithuanian and Latvian politics today are populism and political polarisation which have been driving forces behind the authoritarian reversal in Poland and Hungary. Populism can be dangerous for democracy as populists adopt an ideology which perceives society as separated into two homogenous and opposite groups, the 'pure people' and the 'corrupt elites', they use this world view to legitimise breaking laws and norms of traditional governance.¹⁴⁶⁸ This, they insist, is the only way to save the titular nation from the perceived threats. In other words, populist parties and their supporters employ a 'winner takes all' approach to democracy which allows them to pursue policies of majoritarian democracy at the expense of minority rights and constitutional checks and balances.

¹⁴⁶⁵ Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (n 114) 350.

¹⁴⁶⁶ LSM, Latvian Public Broadcasting), 'Krišjānis Kariņš Nominated to Be Latvia's next Prime Minister' *LSM.LV* (7 January 2019) <<https://eng.lsm.lv/article/politics/politics/krisjanis-karins-nominated-to-be-latvias-next-prime-minister.a304989/>> accessed 11 July 2022.

¹⁴⁶⁷ Gabrieliūš Landsbergis, 'Trijų Partijų Vadovai Paskelbė Bendrą Deklaraciją' (26 October 2020) <<https://tsajunga.lt/aktualijos/triju-partiju-vadovai-paskelbe-bendra-deklaracija/>> accessed 10 July 2022.

¹⁴⁶⁸ Cas Mudde, 'The Populist Zeitgeist' (2004) 39(4) *Government and Opposition* 541, 544.

Latvia is currently riding its third, and strongest populist wave since independence. As noted in chapter five, NA and KPV LV are the most prominent populist parties in the country and they were both included in the government coalition after the 2018 parliamentary election. Both NA and KPV LV campaigned on an anti-establishment, anti-globalisation and nativist platform, with their main policy goals being to increase the Latvian population, restore the prominence and glory of the Latvian state and to exclude immigrants and refugees.¹⁴⁶⁹ Both these parties, utilise politics of fear by claiming the nation's existence is threatened by immigrants, refugees and Russia.¹⁴⁷⁰ Both parties also push for the national dominance of the Latvian language in public life and education. These policies are mainly driven by geopolitical anxieties about the dominance of Russia and the fact that Latvia is at high risk of invasion from Russia due to its sizable Russophone minority.¹⁴⁷¹ Both parties also consider refugees an enemy that needs to be kept out of Latvia due to fears they might 'dilute' the Latvian nation. Therefore, policies that entice Latvian emigrants who have settled in Western Europe and beyond to return along with cash incentives for families who have children are principle pillars for both parties.¹⁴⁷² Fears of extinction also drive Euroscepticism in Latvia. Populist parties oppose migrant quotas, seeing them as impositions of elites and a move towards Euro-federalism.¹⁴⁷³

Populist rhetoric has long been a major part of Lithuanian politics as it is utilised by both main-stream parties and newcomers. The general election of 2016 brought LFGU, a centrist populist party to power. The party, headed by Ramūnas Karbauskis, an agriculture businessman, enjoyed their popularity only briefly as the party suffered major losses once the subsequent European parliament, presidential and government elections came around.¹⁴⁷⁴ Their style of governance was characterised by authoritarian

¹⁴⁶⁹ Vassilis Petsinis and Louis Wierenga, 'Report on Radical Right Populism in Estonia and Latvia' (2022) POPREBEL Working Paper no. 7 <<https://populism-europe.com/wp-content/uploads/2021/03/Working-Paper-7.pdf>> accessed 26 June 2022.

¹⁴⁷⁰ *ibid* 7–10.

¹⁴⁷¹ *ibid* 7.

¹⁴⁷² *ibid* 7–8.

¹⁴⁷³ *ibid* 13.

¹⁴⁷⁴ Liutauras Gudžinskas, 'Elections in Lithuania: An Anti-Populist Turn?' (*The Progressive Post*, 30 October 2020) <<https://progressivepost.eu/elections-in-lithuania-an-anti-populist-turn/>> accessed 29 June 2022.

tendencies and a business-like structure with attempted power grabs of the Constitutional Court and the national broadcaster.¹⁴⁷⁵ These anti-democratic attacks were disruptive but lacked organisation on LFGU's behalf and this meant that their efforts of constitutional capture were hindered. Once the 2020 parliamentary elections came around, LFGU's approach to governance proved unsatisfactory as the TS-LKD party received 50 seats in the Seimas and formed a government coalition with LRLS and LP. Although the 2020 government has not raised significant issues regarding their use of populist tactics, their poor performance and lack of popular support half way through their term is indicative of the public's discontent with their governance style and push for progressive policies. This may indicate that the Lithuanian polity will be further inclined to vote for an anti-establishment populist party on the back of the failure of the current ensemble. Beyond this, discontent with politics and democracy itself has been evident for some time now. Electoral turnouts have been waning during the past decade and the fact political parties choose to run in elections having nominated non-partisan candidates for the Prime Minister position indicates an awareness that political parties lack trust and entrenchment in Lithuania.¹⁴⁷⁶ This was a successful tactic in the last two parliamentary elections with Prime Minister Saulius Skvernelis who served for LFGU from 2016-2020 and current Prime Minister Ingrida Šimonytė who were appointed to their roles as independent politicians. This volatility and distrust create fertile soil for an authoritarian populist party to take control.

Political polarisation has also been established as an underlying condition which makes the emergence of populist political forces more likely.¹⁴⁷⁷ This is because polarisation makes consensus on important policy issues more difficult to obtain and encourages dissatisfaction amongst voters which makes bold populist appeals even more enticing as they "promise to cut through the politics of the swamp."¹⁴⁷⁸ Polarisation has come to the

¹⁴⁷⁵ *ibid.*

¹⁴⁷⁶ *ibid.*

¹⁴⁷⁷ Przeworski (n 106) 113; Stephan Haggard and Robert R Kaufman, 'The Anatomy of Democratic Backsliding: Could It Happen Here?' (*The Constitution Unit*, 10 June 2021) <<https://constitution-unit.com/2021/06/10/the-anatomy-of-democratic-backsliding-could-it-happen-here/>> accessed 22 June 2022.

¹⁴⁷⁸ Haggard and Kaufman (n 1477).

forefront in Lithuania since the beginning of the covid-19 global pandemic.¹⁴⁷⁹ The government which came to power in late November 2020 has the lowest public approval ratings since the global recession in 2009.¹⁴⁸⁰ The coalition comprised of TS-LKD, LRLS and LP has struggled to satisfy an increasingly more fragmented polity. This is evidenced by the multiple protests that have occurred against the government since they have come to power, some turning violent.¹⁴⁸¹ Accusations of corruption and ineffectiveness of the government have dominated the headlines which has weakened their authority in the public's eye. The government has, so far, struggled to address the intense discontent effectively which further accelerates the problem of polarisation.¹⁴⁸² Evidence of intense polarisation and political discontent is also ample in Latvia. A further complicating factor in Latvia is the ever-prominent ethnic dimension. Tension between the dominant ethnic majority and the sizable ethnic minority makes political consensus on various policies even more difficult to attain.¹⁴⁸³ This is evident from the recent struggle of the Russian-speaking minority in Latvia to preserve their language rights in education which has resulted in a long legal battle in the Latvian courts and also the ECJ. The enduring success of anti-establishment and populist parties in Latvia is further evidence of chronic public discontent with the current political status quo.

6.2.2. Attacks on Judicial Independence

A common feature of many CEE democracies is their weak entrenchment of liberal constitutional traditions compared to countries in Western Europe which have

¹⁴⁷⁹ Valdemaras Šukšta, 'Amid "Dramatic" Polarisation, Lithuania May End up like Hungary and Poland' *LRT* (20 January 2022) <<https://www.lrt.lt/en/news-in-english/19/1592679/amid-dramatic-polarisation-lithuania-may-end-up-like-hungary-and-poland>> accessed 22 June 2022.

¹⁴⁸⁰ Saulius Jakučionis, 'Lithuanian Government's Approval Ratings Lowest in Decade – Poll' *LRT* (28 December 2021) <<https://www.lrt.lt/en/news-in-english/19/1571937/lithuanian-government-s-approval-ratings-lowest-in-decade-poll>> accessed 22 June 2022.

¹⁴⁸¹ Šukšta (n 1479); Ramūnas Jakubauskas, 'Prie Seimo Po Sausio 13-Osios Minėjimo Surengtas Protestas: Jame – Apie 750 Žmonių' *DELFI* (13 January 2022) <<https://www.delfi.lt/news/daily/lithuania/prie-seimo-po-sausio-13-osios-minejimo-surengtas-protestas-jame-apie-750-zmoniu.d?id=89191075>> accessed 22 June 2022.

¹⁴⁸² Interview with Ainė Ramonaitė, 'Prof. Ainė Ramonaitė: Pati Vyriausybė Padeda Labai Stipriai Rusijos Propagandai Silpninti Lietuvos Visuomenę' (13 February 2022) <<https://www.lrt.lt/mediateka/irasas/2000200997/prof-aine-ramonaite-pati-vyriausybe-padede-labai-stipriai-rusijos-propagandai-silpninti-lietuvos-visuomene>> accessed 22 June 2022.

¹⁴⁸³ Agarín and Nakai (n 911) 3.

established these values over many decades or even centuries.¹⁴⁸⁴ This has been attributed to the inexperience of CEE countries with these concepts having emerged from decades of communism relatively recently.¹⁴⁸⁵ It is important to understand that this lack of entrenchment creates distinct circumstances under which independent courts were established in newly democratic CEE countries.¹⁴⁸⁶ Because these states have a weak tradition of protecting minority rights from the majoritarian consequences of electoral democracy, courts which attempt to safeguard minority rights especially of sexual minorities, Roma community or migrants, are likely to receive backlash from citizens, legislatures and government.¹⁴⁸⁷ This region also experiences raised levels of distrust in courts compared to citizens in Western Europe.¹⁴⁸⁸ Many factors contribute to this fault including lack of a tradition of justice and judicial independence combined with judicial corruption and chronic inefficiencies of the justice system which leave citizens disenchanted with this institution.¹⁴⁸⁹ Crucially, this weakness in the relationship between courts and their citizens can be manipulated by populist governments who seek to abolish judicial independence and the court's power to review government actions.¹⁴⁹⁰ This curtailment has been achieved by PiS and Fidesz by their packing of strategic courts and implantation of oppressive judicial disciplinary regimes.¹⁴⁹¹ In order to justify their actions they tarnished the reputation and trustworthiness of courts in the citizens' eyes.¹⁴⁹² For example, this was achieved by PiS in Poland by using targeted media campaigns to discredit the judiciary and make the need for reform seem undeniable.¹⁴⁹³

¹⁴⁸⁴ Bugarič (n 15) 235–236.

¹⁴⁸⁵ Bugarič (n 15).

¹⁴⁸⁶ *ibid* 236.

¹⁴⁸⁷ *ibid*.

¹⁴⁸⁸ Martin Dimitrov, 'Trust In Courts Declining In Eastern Europe, Commissioner Warns' (*Reporting Democracy*, 26 April 2019) <<https://balkaninsight.com/2019/04/26/trust-in-courts-declining-in-eastern-europe-commissioner-warns/>> accessed 7 January 2022.

¹⁴⁸⁹ Bugarič (n 15) 228.

¹⁴⁹⁰ Frans van Dijk, *Perceptions of the Independence of Judges in Europe: Congruence of Society and Judiciary* (Palgrave Macmillan 2021) 3.

¹⁴⁹¹ Bard and others (n 279) 7–18; Sadurski, *Poland's Constitutional Breakdown* (n 101) 61–70.

¹⁴⁹² Moliterno and Čuroš (n 222) 1172–1185.

¹⁴⁹³ *ibid* 1172–1173.

The Polish government even hired a Washington, D.C. based consulting firm to help with the campaign.¹⁴⁹⁴ Van Dijk notes:

“The larger the lack of alignment between judges and citizens, the easier it becomes for governments to curtail the independence of the judiciary and to diminish the rule of law, but also the more difficult the daily functioning of the courts becomes.”¹⁴⁹⁵

In Lithuania and Latvia the courts are also under constant threat of capture or delegitimization as highlighted in chapters four and five. This is evident from the baseless attacks on the Lithuanian Constitutional Court after certain politically sensitive judgments in 2020 and the subsequent personal attacks on the Court’s President, Dainius Žalimas, by the then LFGU government.¹⁴⁹⁶ The manipulation of judicial nominations for both the Lithuanian Constitutional Court and Supreme Court stand as further evidence of attempted curtailment of judicial independence. While in Latvia similar sentiments also exist, the government and legislature have shown lack of professionalism during the 2018-2022 term as they have clearly attempted to diminish the citizens trust and respect in the Constitutional Court due to progressive judgments. Legislators also outwardly questioned the legitimacy and constitutional standing of this court, evidently attempting to prime the electorate for a Constitutional Court reform. There are also more subtle ways of influencing the work of the judiciary, such as, by tightening court budgets and manipulating caseloads.¹⁴⁹⁷ In this regard, the Latvian Minister of Justice’s tight control of court budgets raises concern as judges feel political pressure which can directly or indirectly lead to judgments that are favourable to a powerful government. This fear is clearly reflected in surveys of judges in Latvia, of which 70.7 percent feel they are under political pressure from the Minister of Justice.¹⁴⁹⁸

¹⁴⁹⁴ *ibid.*

¹⁴⁹⁵ Dijk (n 1490) 3.

¹⁴⁹⁶ Beatrice Monciunskaitė, ‘To Live and to Learn: The EU Commission’s Failure to Recognise Rule of Law Deficiencies in Lithuania’ (2022) 14(1) *Hague Journal on the Rule of Law* 49, 56–63.

¹⁴⁹⁷ Dijk (n 1490) 105.

¹⁴⁹⁸ Linda Spundiņa (n 1026).

6.2.3. Limitations on Media Freedom and Civil Society

Similarly to a populist governments need to undermine judicial independence, the curtailment of media independence is also a sign of the beginning of an illiberal turn. Manipulation of the media space, like the manipulation of the public's trust in their judiciary, allows populist governments to eliminate another immediate and powerful check on their authority. This has been achieved by the Polish and Hungarian governments by cultivating a media environment where pro-government media outlets receive unlimited access to market sources, their growth is supported by a controlled media authority, and the governing party utilises the established media landscape "to exercise tight control of public discourse".¹⁴⁹⁹ Such illiberal goals were achieved by passing laws that allow governments excessive control over national public service broadcasters and also the packing of national media council authorities.¹⁵⁰⁰ In Lithuania, the LFGU -led government led an orchestrated attack on media freedom and attempted to pass an unprecedented number of laws which would have allowed excessive government control of the national broadcaster, LRT. However, LFGU proved to be unorganised and these attempts were largely hindered by the opposition and NGOs. However, in Latvia, similar systemic attacks on media freedom were not found to exist in recent years.

The experience between Lithuania and Latvia on the one hand, and Poland and Hungary on the other, further diverge regarding attacks on other features of accountability such as academic freedom and respect for NGOs. Both Poland and Hungary have become infamous for their curtailment of academic freedom and attacks on NGOs that do not support the government's conservative policies. Hungary has come under scrutiny by the CJEU for their hostility towards certain NGOs and academic institutions, most notable, the CEU, which was chased out of Budapest by the Fidesz government.¹⁵⁰¹ In Poland, PiS has also been waging war against free speech and curbing dissenting voices by taking

¹⁴⁹⁹ Polyák (n 199) 283.

¹⁵⁰⁰ Eva Połońska, 'Watchdog, Lapdog, or Attack Dog? Public Service Media and the Law and Justice Government in Poland' in Eva Połońska and Charlie Beckett (eds), *Public Service Broadcasting and Media Systems in Troubled European Democracies* (Springer International Publishing 2019) 232–234.

¹⁵⁰¹ Halmai, 'Illiberalism in East-Central Europe' (n 76) 818; *Case C-66/18 European Commission v Hungary* ECLI:EU:C:2020:792; *Case C-78/18 European Commission v Hungary* ECLI:EU:C:2020:476.

control of funding allocation for civil society organisations and bringing critics to court.¹⁵⁰² The threat of legal action towards those who oppose the government is a particularly effective method of silencing critics as it has a chilling effect on all other forms of dissent. On the other hand, aside from the apparent attacks on media freedom during LFGU's term in Lithuania, there have not been other notable attacks on free speech in either Lithuania or Latvia that are comparable to what has been happening in Poland and Hungary. Again, this could be attributed to the lack of a decisive majority in parliament that would be needed to push through controversial legislation such as Lex-NGO or Lex-CEU.¹⁵⁰³

6.2.4. Attack on Minority Rights

In Poland and Hungary a characteristic feature of their populist movements has been the undermining of minority rights. The painting of certain minority groups as enemies to the 'true' Polish or Hungarian people is a useful tool for populists as it cultivates fear within an electorate which has led to better political outcomes for PiS and Fidesz. In particular, the 'war on gender' including the restriction of reproductive rights for women, an intolerance to the LGBTQ+ community and discrimination against migrants have been the main points on which PiS and Fidesz have built their social ideology. In Poland, the PiS government has cultivated strong ties with the Catholic church which is considered to have significant political influence especially concerning matters around women's reproductive rights and the rights of the LGBTQ+ community. Now, the prevailing sentiment of the PiS party is that "Polishness" is intrinsically linked to Catholicism and the accompanying traditional values.¹⁵⁰⁴ This has led to the restriction of abortion rights at national level and the establishment of "LGBT-free zones" by some Polish local authorities.¹⁵⁰⁵ The latter attracting the condemnation of the European Parliament and a

¹⁵⁰² Sadurski, 'How Democracy Dies (in Poland)' (n 714) 154–157; John Morijn, 'A Trial That Wasn't, an Impact That Was' (*Verfassungsblog*, 28 January 2020) <<https://verfassungsblog.de/a-trial-that-wasnt-an-impact-that-was/>>.

¹⁵⁰³ Act LXXVI of 2017 on the Transparency of Organisations Receiving Foreign Funds; Act XXV of 2017 modifying Act CCIV of 2011 on National Higher Education.

¹⁵⁰⁴ Kinowska-Mazaraki (n 468) 113.

¹⁵⁰⁵ *ibid* 113, 122.

call to ensure that EU funds are not being used for “discriminatory purposes”.¹⁵⁰⁶ Fidesz in Hungary also wasted no time in implementing illiberal policies to reverse minority rights protection once in power. In 2012, the Fidesz-KDNP government amended the Constitution to include a right to life of the unborn, effectively outlawing abortions along with accompanying legislation, the Family Protection Act.¹⁵⁰⁷ There were also a number of government-funded anti-abortion campaigns which depicted women who had an abortion as murderers.¹⁵⁰⁸ The new Hungarian Constitution also restricted marriage to heterosexual relationships which excluded the prospect of same-sex marriage.¹⁵⁰⁹ Both PiS and Fidesz have manipulated the migrant crisis, which began in 2015, for their own political gain by presenting migrants as an invasion that threatened the Polish and Hungarian way of life.¹⁵¹⁰ By positioning themselves as saviours of ‘traditional values’ threatened by an imagined enemy, PiS and Fidesz raised their chances of (re)election.¹⁵¹¹

Lithuania and Latvia have had a similar experience regarding the undermining of minority rights at national level. These countries have also battled the idea of gender ideology including the rejection and public criticism of the Istanbul Convention and LGBTQ+ rights.¹⁵¹² Although, drastic limitations on reproductive rights were not seen in Lithuania and Latvia, the criticism of the Istanbul Convention by prominent government and parliament members is indicative of the lack of respect for gender equality. Because of this, both Lithuania and Latvia have failed to ratify the Istanbul Convention for fear it may diminish the role of ‘traditional’ families and introduce a ‘backdoor’ for the legalisation

¹⁵⁰⁶ European Parliament resolution of 18 December 2019 on public discrimination and hate speech against LGBTI people, including LGBTI free zones [2019] 2019/2933(RSP).

¹⁵⁰⁷ Vida (n 203) 14.

¹⁵⁰⁸ *ibid.*

¹⁵⁰⁹ *ibid.*

¹⁵¹⁰ Jenne (n 110) 550; Anna Vachudova (n 107) 3.

¹⁵¹¹ Anna Vachudova (n 107) 4.

¹⁵¹² Vizgunova and Graudiņa (n 1394) 111; United Nations Committee on Elimination of Discrimination against Women, ‘In Dialogue with Lithuania, Committee on the Elimination of Discrimination against Women Calls for the Full Implementation of the Istanbul Convention and Improvements to Gender Equality Legislation’ (*United Nations*, 31 October 2019) <<https://www.ohchr.org/en/press-releases/2019/11/dialogue-lithuania-committee-elimination-discrimination-against-women-calls>> accessed 11 August 2022.

of same-sex unions.¹⁵¹³ Equally, the lack of initiative shown by successive governments in Lithuania and Latvia around expanding LGBTQ+ rights, including the enactment of same-sex partnership laws is deeply damaging to these minority groups.

A further dimension of minority rights issues exists in Latvia as a quarter of the country's population is comprised of a Russian-speaking minority. The dynamic both in politics and society between the Latvian ethnic majority and the large Russophone minority is deeply antagonistic and has been a source of tension in the country since the establishment of independence in the 1990s. As detailed in chapter five, these tensions have most recently led to the controversial restriction of the use of the Russian language in schools. However, Latvia has failed to address the issue of statelessness within its borders. Approximately 217,000 of the Latvian population are considered "former citizens of the USSR".¹⁵¹⁴ They have neither Latvian nor any other country's citizenship despite nearly half of them being born in Latvia which leaves this group stateless.¹⁵¹⁵ These non-citizens are excluded from working in the police force, government and civil service and have much more limited pension rights.¹⁵¹⁶ Furthermore, non-citizens do not have the right to vote in local or parliamentary elections, meaning they are shut out of the process of democracy.¹⁵¹⁷ With access to naturalisation being particularly difficult in Latvia,¹⁵¹⁸ and the authorities failing to grant voting rights to this group despite international pressure, this issue presents a severe and immediate risk to the democratic legitimacy of Latvia as well as a violation of minority rights.¹⁵¹⁹ The political difficulties Latvia faces will be further discussed in the next section.

¹⁵¹³ United Nations Committee on Elimination of Discrimination against Women (n 1512); Vizgunova and Graudiņa (n 1394).

¹⁵¹⁴ European Commission for Democracy through Law (Venice Commission), Latvia: Opinion on the Recent Amendments to the Legislation on Education in Minority Languages, Opinion No. 975/2020, 18 June 2020 (n 879) 4.

¹⁵¹⁵ Council of Europe, 'Third Report Submitted by Latvia Pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities' (n 1235) 52.

¹⁵¹⁶ Ivļevs and King (n 1237) 2–8.

¹⁵¹⁷ Papparinskis (n 1236) 4.

¹⁵¹⁸ Ivashuk (n 1240).

¹⁵¹⁹ Shaw (n 1241) 331.

Although Latvia and Lithuania avoided bearing much responsibility during the migrant crises that begun in 2015, in 2021 Lithuania and Latvia fell victim to a migrant crisis created by Belarus in political retaliation. In Lithuania, most recent government protests and riots have had anti-migrant and Eurosceptic undertones with protesters often chanting “Lithuania for Lithuanians” protesting against migrants and all other groups that are not seen as ‘true’ Lithuanians.¹⁵²⁰ This hostile response to migrants from Africa and the Middle-East in particular can be contrasted with the generous accommodation of Ukrainian refugees fleeing the Russian invasion of their country. This dichotomy in responses serves as further evidence of the dominance of ethno-populist narratives in the countries under study. One in four Lithuanian citizens have been shown to support a Muslim ban in their country, this is in line with Islamophobic sentiments in both Poland and Hungary.¹⁵²¹ Worryingly, both Lithuania and Latvia have also engaged in controversial push-backs of migrants and introduced tighter asylum laws which NGO’s have said are unfair and potentially illegal.¹⁵²² Such recent negative developments are damaging to democracy and demonstrates that these states are lagging behind in promoting basic EU foundational values of respect for human rights and minority rights.

¹⁵²⁰ Jūratė Skėrytė, ‘Vilniuje – Tautininkų Eitynės: Skandavo „Lietuva Lietuviams“ Ir Ragino Atriboti KT Galias’ *DELFI* (11 March 2020) <<https://www.delfi.lt/news/daily/lithuania/vilniuje-tautininku-eitynes-skandavo-lietuva-lietuviams-ir-ragino-apriboti-kt-galias.d?id=83747831>> accessed 23 June 2022; Šukšta (n 1479); Jakubauskas (n 1481); Andresa Repšytė, ‘Protestuotojai Sukilo: Reikalauja Neįleisti Pabėgėlių į Lietuvą, Jau Atvykusius – į Lukiškes’ *TV3 News* (13 July 2021) <<https://www.tv3.lt/naujiena/lietuva/protestuotojai-sukilo-reikalauja-neileisti-pabegeliu-i-lietuva-jau-atvykusius-i-lukiskes-n1104689>> accessed 23 June 2022.

¹⁵²¹ Gert Pickel and Cemal Öztürk, ‘The Varying Challenge of Islamophobia for the EU: On Anti-Muslim Resentments and Its Dividend for Right-Wing Populists and Eurosceptics—Central and Eastern Europe in a Comparative Perspective’ in Astrid Lorenz and Lisa H Anders (eds), *Illiberal Trends and Anti-EU Politics in East Central Europe* (Springer International Publishing 2021) 65–66.

¹⁵²² Balčaitė (n 825); Nikolaj Nielsen, ‘EU Commission Evasive on Polish/Lithuanian Pushbacks’ *EUobserver* (30 September 2021) <<https://euobserver.com/migration/153075>> accessed 23 June 2022; Domantė Platūkytė, ‘Politicians in Lithuania Are “Dehumanising” Migrants, Experts Say’ (17 June 2021) <<https://www.lrt.lt/en/news-in-english/19/1433962/politicians-in-lithuania-are-dehumanising-migrants-experts-say>> accessed 23 June 2022.

6.3. Democratic Hollowness and Backsliding: Distinct Lessons from Lithuania and Latvia

Democratic backsliding and democratic hollowness are two distinct but intertwined phenomena that threaten liberal constitutional democracy. Democratic hollowness is characterised by “citizens’ exit from the democratic arena and political parties’ exit from bonds with their constituencies and alliances with civil society organizations.”¹⁵²³ Hollowness can be identified in a country through falling electoral turnout rates, declining political party membership numbers indicating lack of alignment between individuals and their representatives, diminished relations between parties and civil society and increasing electoral volatility.¹⁵²⁴ Democratic backsliding can be characterised as a marked decline of democratic and rule of law standards leading to democratic deconsolidation facilitated by authoritarian-leaning executives.¹⁵²⁵ The beginning of democratic backsliding is difficult to pinpoint as it is a subtle and ongoing process.¹⁵²⁶ In this way hollowness and backsliding share a commonality through their subtle but destructive nature; hollowness might present itself in a stable democracy but one void of popular participation and a backsliding democracy will seem strong on the governance front but will be implementing policies that are increasingly illiberal and authoritarian.

Hollowness has been regarded as a feature of all Baltic states and many other post-socialist countries as they are said to have been “born with a hollow core”.¹⁵²⁷ This indicates this region’s lack of democratic experience and democratisation that was pushed by technocratic elites rather than popular involvement.¹⁵²⁸ Therefore, it is important to understand that one phenomenon is not better or worse than the other as both backsliding and hollowness represent a failure of liberal constitutional democracy on some level. Backsliding is problematic for its rollbacks of liberal rights, standards of rule of law and counter-majoritarian protections while hollowness undermines the very

¹⁵²³ Greskovits (n 32) 29.

¹⁵²⁴ *ibid.*

¹⁵²⁵ Cianetti (n 32) 317–318.

¹⁵²⁶ Ruzha Smilova, ‘The Ideational Core of Democratic Illiberalism’ in András Sajó, Renáta Uitz and Stephen Holmes, *Routledge Handbook of Illiberalism* (1st edn, Routledge 2021) 185; Greskovits (n 32) 30.

¹⁵²⁷ Greskovits (n 32) 30–31.

¹⁵²⁸ *ibid.* 35.

premise of liberal constitutional democracy in that it either deliberately or carelessly precludes large portions of society from suffrage leading to the (sometimes inadvertent) rise of a class system: the ruling class and those who are ruled. While there is ambiguity in the literature about whether extreme hollowness is a precursor to backsliding,¹⁵²⁹ I would argue that it can be, however, there are many factors to consider. For example, Greskovitz in 2015 identifies that Hungary presented an instance of very high democratic backsliding and low hollowing, Poland presented low levels of backsliding and moderate hollowing.¹⁵³⁰ On the other hand, Lithuania had high hollowing and low backsliding and Latvia represented both very high hollowing and high backsliding.¹⁵³¹ Clearly, the experience of Poland and Hungary shows that low levels of hollowness do not prevent backsliding. Similarly, high levels of hollowing in the two Baltic states has not yet led to accelerated and catastrophic backsliding as seen in Poland and Hungary. Therefore, this chapter will present hollowing as its own distinct democratic ‘illness’ while simultaneously also presenting it as a risk factor for backsliding.

High levels of hollowness in Latvia can be traced back to their introduction of strict citizenship laws which excluded the Russian minority.¹⁵³² Almost one-third of residents in Latvia were disenfranchised as a result.¹⁵³³ This has been called a ‘birth defect’ of Latvian democracy as it paved the way for many more exclusionary policies which have alienated the Russophone minority since.¹⁵³⁴ Therefore, it is no surprise that only 35% of non-citizens in Latvia would consider applying for citizenship today.¹⁵³⁵ Importantly, Cianetti highlights that ethnic exclusion is a form of hollowness that is not only a problem for ethnic minorities but has a detrimental “effect on democracy as a whole, by narrowing the democratic debate and emptying it of oppositional minority voices.”¹⁵³⁶ Furthermore, this elite-driven ethnocentric quality to Latvian democracy still persists today despite some of the harshest citizenship and language laws being softened before EU

¹⁵²⁹ Greskovits (n 32); Cianetti (n 32).

¹⁵³⁰ Greskovits (n 32) 31–34.

¹⁵³¹ *ibid.*

¹⁵³² Cianetti (n 32) 328.

¹⁵³³ Greskovits (n 32) 32.

¹⁵³⁴ *ibid* 31–32.

¹⁵³⁵ Agarín and Nakai (n 911) 2.

¹⁵³⁶ Cianetti (n 32) 318.

accession.¹⁵³⁷ Indeed, the ethnic cleavage is the dominant political divide in Latvia with mainstream politics often dominated by discourse painting Russophones as a potential ‘fifth column’ in Latvia.¹⁵³⁸ So much so, that Latvia has often been categorised as an ethnic democracy which is built for the titular people only.¹⁵³⁹ Nation state building and democratisation led by technocratic elites in Latvia have left behind a legacy of political dejection and separation which can be seen clearly in how the Harmony party are practically ostracised by other parties in the Saeima due to the parties mostly Russophone voters.¹⁵⁴⁰ Hence, Latvia is said to suffer from ‘double hollowness’, both ethnic and technocratic hollowness.¹⁵⁴¹ This explains the higher instance of hollowness in Latvia compared to Lithuania as the latter has not had to struggle to reconcile with a large Russian-speaking minority. Technocratic hollowness is an issue for both states as the democratisation process in the 1990s was led by technocratic political elites who largely compromised popular democratic debate in order to achieve key goals of NATO and EU membership quickly.¹⁵⁴²

Other factors also contribute to diminished popular democratic involvement, the systemic discrimination and exclusion of other minority groups detailed in chapters four and five such as sexual minorities, the Roma community and women also has chilling effects on democratic participation. It is feasible that if these key groups in society feel that the political parties on offer do not represent their interests they will be less likely to turn out to vote in elections. Empirical evidence also demonstrate high levels of hollowness in Lithuania and Latvia. Both countries have waning electoral turnout rates which may serve as evidence for a disconnect between the political parties on offer and the representation voters want. In Latvia the lowest turnout yet for a general election was in 2018 at just 54.6 percent.¹⁵⁴³ More than 4 percent less than for the previous

¹⁵³⁷ *ibid* 319.

¹⁵³⁸ *ibid*.

¹⁵³⁹ *ibid* 320.

¹⁵⁴⁰ Agarin and Nakai (n 911) 4–17.

¹⁵⁴¹ Cianetti (n 32) 317–320.

¹⁵⁴² *ibid* 328–330; Greskovits (n 32) 35–36; Ainė Ramonaitė, ‘Why People Do Not Join Political Parties? Analysing The Attitudes Of Lithuanians Towards Party Membership’ (2015) 58(2) *Politologija* 3, 4 <<https://www.journals.vu.lt/politologija/article/view/8307>> accessed 14 July 2022.

¹⁵⁴³ Helmane (n 912).

general election in 2014.¹⁵⁴⁴ Overall, since the first democratic election after the reestablishment of Latvian independence in 1993, electoral turnout rates have been rapidly decreasing from 88.4 percent in 1993 to the lowest turnout yet in 2018 of 54.6 percent.¹⁵⁴⁵ While in Lithuania, one of the lowest electoral turnout in Lithuania's democratic history was during the 2020 general election at just 47.8 percent of eligible voters voted.¹⁵⁴⁶ Both Lithuania and Latvia have low political party membership rates when compared to Western Europe which signals voters' apathy towards politics and the political parties on offer.¹⁵⁴⁷ This thesis has also already noted the high volatility of the Latvian and Lithuanian political party systems which indicates a fundamental lack of entrenchment of a relationship between parties and who they claim to represent. This has most recently been demonstrated by the instability of the governing coalition in Lithuania which has struggled to address the basic needs of their people leading to protests.

Cianetti argues that Latvia's double hollowness has been instrumental in stabilising its democracy.¹⁵⁴⁸ This can seem counterintuitive as a prominent ethnic divide in democratising countries has given rise to concerns of instability and backsliding.¹⁵⁴⁹ In particular, during the democratising process in Latvia, the large Russophone population was seen as a hinderance to developing western-style democracy as this minority group was perceived as loyal to their fatherland, Russia, and in turn unable to move forward from communism.¹⁵⁵⁰ These perceptions of Russophones in Latvia as an obstacle to democratisation further drove nation building to be led by ethnic Latvian elites. This exclusionary nature of democratisation is argued to be the major reason Latvian democracy has been stable but ultimately hollow.¹⁵⁵¹ Cianetti proposes this as a reason

¹⁵⁴⁴ *ibid.*

¹⁵⁴⁵ *ibid.*

¹⁵⁴⁶ International IDEA, 'Voter Turnout Statistics for Lithuania' (*International Institute for Democracy and Electoral Assistance (International IDEA)*) <<https://www.idea.int/data-tools/country-view/175/40>> accessed 14 July 2022.

¹⁵⁴⁷ Ramonaitė (n 1542) 5; Agarin and Nakai (n 911).

¹⁵⁴⁸ Cianetti (n 32) 318.

¹⁵⁴⁹ *ibid.*; Grzegorz Ekiert, Jan Kubik and Milada Anna Vachudova, 'Democracy in the Post-Communist World: An Unending Quest?' (2007) 21(1) *East European Politics and Societies: and Cultures* 7, 14.

¹⁵⁵⁰ Cianetti (n 32) 327.

¹⁵⁵¹ *ibid* 318.

democratic backsliding is unlikely to occur, as backsliding requires instability to flourish.¹⁵⁵² Therefore, there is a trade-off between stability and reconstituting a democracy.¹⁵⁵³ In other words, Latvian democracy would need to first destabilise in order for hollowness to be rectified by populating the political landscape with meaningful debate and minority involvement. However, this interpretation overlooks the potentially destructive and dangerous consequences of destabilisation. Democratic destabilisation may produce positive outcomes regarding de-hollowing but they might equally create destruction of democratic institutions. If Latvia was to go through some form of political/democratic crisis, improvement of hollowness is not necessarily guaranteed and might make it worse. Significantly, destabilisation to improve hollowness might also lead to democratic backsliding due to the emergence of a democratic or political crisis which can make power grabs easier.

Another way to reconstitute Latvian democracy in a safer although significantly more arduous and lengthy way might be through policy changes incentivised by the international community. For example, through meaningful discourse with EU and the Council of Europe human rights institutions such as the ECRI and vigilant international courts which address minority discrimination issues that are brought by individuals or civil society organisations. However, the key with this solution would be that this engagement would need to be meaningful in that the Latvian government would need to heed the advice of international reports and to rectify any discriminatory policies that have been identified by international courts. Something that Latvia (and Lithuania, for that matter) have a poor track record of.

6.4. Autocratic Politics as a Catalyst for Backsliding

The discussion of democratic backsliding and hollowness so far in this chapter has distinguished between the two different kinds of democratic deficit present in various forms in Lithuania, Latvia, Poland and Hungary (as well as much of CEE, for that matter). However, it has still not been clear why Poland and Hungary have so dramatically departed from the liberal constitutional democracy status quo and Lithuania and Latvia

¹⁵⁵² *ibid.*

¹⁵⁵³ *ibid.*

have so far not. This section will propose a framework of how to understand these different outcomes for largely similar case studies. In the prior sections, qualities such as populism, attacks on judicial independence, assault on media freedom and democratic hollowness have all been identified as risk factors for democratic decay. However, without the correct actors, these features will remain just that, risk factors. In order for them to ignite and cause democratic backsliding *à la* Poland and Hungary, in Lithuania and Latvia, a successful illiberal and autocratic party in government is needed. In other words, illiberal political forces act as catalysts for democratic decay as they manipulate circumstances to favour their political cause. This explains the experience of Poland and Hungary as the Fidesz party led by Viktor Orbán and then the PiS party led by Jarosław Kaczyński succeeded in capturing various weaknesses in the electorates trust of liberal democracy, and synthesised them to garner support for their illiberal cause.

The importance of a catalyst is emphasized by the agentic theory which is a concept adopted by political scientists such as Ellen Lust and David Waldner, and also legal scholars such as Wojciech Sadurski, to explain the significance of the human factor in democratic reversal.¹⁵⁵⁴ The agentic theory places emphasis on the lure of charismatic political leaders who are elected via democratic means but who use their new powers for undemocratic ends.¹⁵⁵⁵ In the cases of Orbán and Kaczyński, their approach to governance is autocratic and illiberal due to their lack of respect for liberal constitutional constraints, their willingness to depart from constitutional norms, lack of respect for their opponents, democratic rivalry and ultimately the democratic process itself.¹⁵⁵⁶ Orbán and Kaczyński have been successful due to their ingenuity and determination to achieve their illiberal goals. Put differently, the democratic breakdowns of these two countries did not occur by accident but were cultivated by these political agents who were particularly skilful in leveraging existing domestic issues such as economic insecurity, cultural conservatism and political polarisation to garner support for their cause by pushing

¹⁵⁵⁴ Lust and Waldner (n 122) 9–10; Sadurski, 'How Democracy Dies (in Poland)' (n 714) 163–167.

¹⁵⁵⁵ Sadurski, *Poland's Constitutional Breakdown* (n 101) 163.

¹⁵⁵⁶ Lust and Waldner (n 122) 20; Sadurski, *Poland's Constitutional Breakdown* (n 101) 163–165; Levitsky and Ziblatt (n 81) 6–16.

exaggerated narratives and paranoia.¹⁵⁵⁷ For example, Kaczyński is infamous for gaining votes through disseminating and nurturing the conspiracy theory that the Smolensk airplane disaster of 2010 which killed his brother and many other important political and religious leaders was a deliberate attack by Russia even though an investigation concluded that it was an accident caused by a series of unfortunate errors.¹⁵⁵⁸ Similarly, PiS came to power in 2015 by campaigning on a platform of anti-migration. In the midst of the EU migrant crisis PiS used xenophobic and racist language to justify their anti-migrant stance even going as far as stating refugees will bring ‘parasites’ into Poland that native Polish people do not have immunity to.¹⁵⁵⁹ Likewise, Orbán used rhetoric that rejected immigration altogether and he positioned himself as a protector of ‘Christian Europe’ against the oncoming ‘Muslim invasion’.¹⁵⁶⁰ Orbán also successfully linked the issue of immigration and loss of dominance of ethnic Hungarians in society to financial uncertainty by claiming migrants will steal Hungarian jobs.¹⁵⁶¹ PiS and Fidesz owe their continuing success in pushing this propaganda to their expert execution of media control. Their influence and control over public broadcasters, private media outlets and media regulatory bodies meant their rhetoric was far reaching amongst the electorate and opposing voices were dampened successfully.¹⁵⁶²

Once PiS and Fidesz were successful in gaining popular support through cultivating fear, they were free to dismantle constitutional checks and balances with relative ease as they could claim this was permitted by gaining a popular mandate. In turn, attacks on the Polish Constitutional Tribunal in 2015, the replacement of the Hungarian Constitution in 2011 and the tampering with electoral laws in the governments’ favour were all executed with precision and determination.

¹⁵⁵⁷ Sadurski, *Poland’s Constitutional Breakdown* (n 101) 162–167.

¹⁵⁵⁸ *ibid* 163–167.

¹⁵⁵⁹ *ibid* 168–170.

¹⁵⁶⁰ Bíró-Nagy (n 462) 406.

¹⁵⁶¹ *ibid* 410.

¹⁵⁶² Sadurski, *Poland’s Constitutional Breakdown* (n 101) 138–140; Fábíán Tamás, ‘Orbán’s Influence on the Media Is without Rival in Hungary’ *Euractiv* (29 March 2021)

<<https://www.euractiv.com/section/media/news/orbans-influence-on-the-media-is-without-rival-in-hungary/>> accessed 27 July 2022.

This reveals a very important reason for why Lithuania and Latvia have not seen the same level of abrupt democratic crisis. These countries have not had the experience of an illiberal party with strong determination to undermine liberal constitutional democracy and the skill and know-how of how to achieve this. For example, Lithuania's LFGU party which served in government between 2016 and 2020 had many characteristics that PiS and Fidesz have. These include having an influential party leader (Karbauskis) who occupied a marginal role in government but was very much at the forefront of decision making, similar to Kaczyński. LFGU also engaged in worrying illiberal behaviour which has been detailed in chapter four including attacks on the Constitutional Court and attempts to rush through legislation which restricts media freedom. But crucially where PiS and Fidesz succeeded in these endeavours, LFGU failed, either by making critical errors in their execution or due to simply being blocked by opposition parliamentarians and the Constitutional Court. So, when the then LFGU Prime Minister, Saulius Skvernelis, made statements in 2020 applauding Poland's illiberal revolution under PiS and added that Lithuania should also "de-sovietise" their judiciary, this could have been the beginning of Lithuania's illiberal turn.¹⁵⁶³ Yet, LFGU's support waned in the proceeding months and they lost the 2020 parliamentary election. LFGU also attempted to expand their influence during the crucial 2019 electoral year when the European Parliament, presidential and municipal elections were taking place. The party nominated Prime Minister Skvernelis who was a close friend and ally of Karbauskis, as presidential candidate. If LFGU had succeeded in winning the presidency while also being coalition leaders in parliament they would have had extensive influence over the appointment of three new Constitutional Court justices in 2020. However, Skvernelis came third in the presidential race and LFGU suffered losses in the European Parliament election meaning their popular support was beginning to slip and they were unlikely to garner enough support to produce a Lithuanian illiberal turn.¹⁵⁶⁴

¹⁵⁶³ Brzozowski and Gerdžiūnas (n 839).

¹⁵⁶⁴ The Central Electoral Commission of the Republic of Lithuania, 'Presidential Election Results 2019' (26 May 2019) <<https://www.vrk.lt/2019-prezidento/rezultatai?srcUrl=/rinkimai/904/2/1544/rezultatai/lt/rezultataiPreRezultatai.html>> accessed 28 July 2022.

In Latvia a sudden undemocratic shift has not been seen for similar reasons as for Lithuania. Although attempts have been apparent to subvert democratic institutions or influence free media and judicial independence, they have all been largely unsuccessful. For example, the political scandal which erupted after the conversations of former Minister of Transportation Ainārs Šlesers, the Mayor of Ventspils, Aivars Lembergs, and former Prime Minister Andris Šķēle were leaked in 2011 revealed that the three oligarchs were planning to undermine the government.¹⁵⁶⁵ The recordings revealed that the three oligarchs and members of prominent political parties, discussed their control over popular media outlets and how to further increase it, their plan to infiltrate and subvert the government and opposition to secure their own political gain and how to influence the upcoming presidential election.¹⁵⁶⁶ However, due to the leak their associated political parties (ZZS, AŠ and Harmony) also suffered as many voters withdrew their support in light of the scandal. Similarly and as mentioned in chapter five, distrust in the judiciary, especially the Constitutional Court of Latvia since their decision on LGBTQ+ rights and the regional dispute has culminated in members of the Saeima from a diverse array of the political spectrum, although mostly right-wing members, to call for the abolition of the Constitutional Court, to limit its competence or ignore their judgments. Despite this, the Constitutional Court still remains standing although worrying attempts at politicisation are always a concern. The reluctance to introduce same-sex partnership laws and a general acceptance of the LGBTQ+ community is a contentious issue for many prominent parties in government. Despite this, Latvia has not seen the establishment of ‘LGBT-free zones’ as seen in Poland. It is clear that although strong illiberal sentiments resonate throughout the highest levels of Latvian politics, it has been disorganised and scattered meaning it fails to produce the robust democratic breakdown one might expect.

Of course there is more to democratic backsliding than just the agentic theory which relies heavily on explaining democratic regression using ‘supply-side’ logic, i.e. the notion that autocratic politicians are supplying illiberal reforms rather than the electorate asking for them.¹⁵⁶⁷ In reality, democratic backsliding in CEE has been achieved by a careful

¹⁵⁶⁵ Bergmane (n 1001).

¹⁵⁶⁶ *ibid.*

¹⁵⁶⁷ Sadurski, *Poland’s Constitutional Breakdown* (n 101) 167.

combination of both supply- and demand-side illiberalism.¹⁵⁶⁸ In other words, democratic backsliding occurs when autocratic leaders harness the electorates fear and existing concerns to rally popular support around their own radical solutions. This is explained well by Bonikowski who states:

“In the case of radical politics, this would suggest a process whereby populist, ethno-nationalist and authoritarian discourse leads those in the target public to connect their experiences (e.g., fears associated with social, cultural, and economic changes) with their pre-existing beliefs (e.g., ethno-nationalism, distrust of elites, scepticism toward democratic institutions), and to support candidates that offer radical solutions to the resulting problem (i.e., minorities, immigrants and politicians being jointly responsible for undesirable social changes).”¹⁵⁶⁹

The success or failure of autocratic and illiberal forces depends on many factors including their own perception of how risky illiberal actions might be in relation to maintaining popular support. After all, autocratic parties are in the business of staying in office long enough so they can entrench their power. That is, push and pull factors exist in Lithuania and Latvia which have likely influenced their current state of liberal constitutional democracy. Pull factors are factors which persuade political leaders to remain loyal to EU and constitutional norms while push factors are factors which might entice political leaders to veer away from the liberal constitutional democracy status quo. Logical push factors might be the ease and speed of political decision making that comes with abolishing democratic and constitutional checks and balances. After all, PiS and Fidesz have been very successful in maintaining their support amongst voters and therefore, have remained in power for multiple terms. There is also the push to tap into certain powerful majoritarian forces that are present in the electorate, such as ethnonationalism, for political gain.

¹⁵⁶⁸ *ibid.*

¹⁵⁶⁹ Bart Bonikowski, ‘Ethno-Nationalist Populism and the Mobilization of Collective Resentment: Ethno-Nationalist Populism’ (2017) 68 *The British Journal of Sociology* S181, 193.

On the other hand, pull factors that keep political leaders in Lithuania and Latvia loyal to the EU status quo are their countries' proximity to Russia and the existing lessons that have emerged from Poland and Hungary's fight over the rule of law with the EU. Fear of Russian interference or even invasion has never loomed over Lithuania and Latvia more than since the annexation of Crimea in 2014 or the invasion of Ukraine in 2022. Tensions are high as both countries have a direct border with Russia (Lithuania borders Kaliningrad) and have suffered various threats and attacks in the form of cyber-attacks or the orchestrated migration crisis imposed on Lithuania and Latvia by Belarus, a puppet state of Putin's for all intents and purposes.¹⁵⁷⁰ Therefore, good relations with the EU are imperative now more than ever. This is why also both Lithuania and Latvia, unlike Poland and Hungary, have joined the Eurozone – becoming members of the core of the EU integration project. Similarly, the experience of Poland and Hungary over the last decade might also serve as a warning sign for Lithuanian and Latvian political leaders. The bureaucracy and bad publicity that has followed for Poland and Hungary since they began their dispute with the EU over rule of law breaches has been palpable and has even led to financial consequences as the EU recovery fund was withheld from Poland and Hungary for their rule of law breaches.¹⁵⁷¹ This is even more important considering the enactment of the Conditionality Regulation in 2021, its confirmation by the CJEU in 2022 and subsequent use against Hungary.¹⁵⁷² Lithuania and Latvia are Member States that

¹⁵⁷⁰ Rankin, Roth and Henley (n 826); Adela Suliman and Emily Rauhala, 'Russia Threatens to Move Nukes to Baltic Region If Finland, Sweden Join NATO' *The Washington Post* (Brussels, 14 April 2022) <<https://www.washingtonpost.com/world/2022/04/14/russia-baltic-nuclear-deployment-finland-sweden-nato/>> accessed 28 July 2022; Laurens Cerulus, 'Cyber "Spillover" from Ukraine Looms in the Baltics' *POLITICO* (22 February 2022) <<https://www.politico.eu/article/baltic-cyber-spillover-ukraine-russia-attack/>> accessed 28 July 2022.

¹⁵⁷¹ Jan Strupczewski, 'EU Lists Rule of Law Concerns for Hungary, Poland, Pivotal in Releasing COVID Funds' *Reuters* (20 July 2021) <<https://www.reuters.com/world/europe/eu-lists-rule-of-law-concerns-hungary-poland-could-withhold-funds-2021-07-20/>> accessed 28 July 2022.

¹⁵⁷² Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, Article 2 (a); *Case C-156/21 Hungary v European Parliament and Council of the European Union* ECLI:EU:C:2022:97; *Case C-157/21 Republic of Poland v European Parliament and Council of the European Union* ECLI:EU:C:2022:98 (n 79); Kati Cseres and Michael Borgers, 'Competition and Conditionality: The Missing Piece of the Puzzle in the Case of Hungary?' (*Verfassungsblog*, 2 June 2022) <<https://verfassungsblog.de/competition-and-conditionality/>> accessed 11 August 2022.

benefit from EU funds greatly as they are net recipients of the EU budget.¹⁵⁷³ Jeopardising this could be perceived as politically risky as it is unlikely to be popular with voters.

Besides these factors, further factors which can affect democratic health are also likely to be at play. For example, Lithuania and Latvia's structural characteristics such as the lack of electoral quirks or anomalies similar to those that helped Fidesz secure a two-thirds supermajority with only 53 percent of the vote, is relevant.¹⁵⁷⁴ Lithuania is a semi-presidential system which means both the president and government are in a complex relationship of competing for authority.¹⁵⁷⁵ The effects of semi-presidentialism have been cited as possibly weakening democratic resilience.¹⁵⁷⁶ However, what is clear is that many circumstances can have an effect on the health of a liberal constitutional democracy and extensive research on each is needed from an array of disciplines including law, political science and sociology.

6.5. Conclusion

This chapter has aimed to demonstrate the complexity of the status of liberal constitutional democracy in the countries under study. Lithuania and Latvia feature definitive symptoms of backsliding such as attacks on judicial independence, media freedom and minority rights, similar to Poland and Hungary. Although some of the attempts at undermining judicial independence and media freedom were unsuccessful, they are important to acknowledge as they serve as evidence of illiberal sentiments that exist in these countries and that form a risk to liberal constitutional democracy. Understanding the similarities and also the adjacent differences between the two groups of countries is important in order to create a full picture of Europe's fidelity to liberal constitutional democracy. Notable findings in section 6.2 of this chapter include the

¹⁵⁷³ Tamara Kovacevic, 'EU Budget: Who Pays Most in and Who Gets Most Back?' (*BBC*, 28 May 2019) <<https://www.bbc.com/news/uk-politics-48256318>> accessed 28 July 2022.

¹⁵⁷⁴ Gabor Halmai, 'The Rise and Fall of Constitutionalism in Hungary' in Paul Blokker (ed), *Constitutional Acceleration within the European Union and Beyond* (1st edn, Routledge 2017) 255.

¹⁵⁷⁵ Robert Elgie and Sophia Moestrup, 'Variation in the Durability of Semi-Presidential Democracies' in Robert Elgie, Sophia Moestrup and Yushan Wu (eds), *Semi-Presidentialism and Democracy* (Palgrave Macmillan 2011) 44–45; Robert Elgie, 'The Perils of Semi-Presidentialism. Are They Exaggerated?' (2008) 15(1) *Democratization* 49.

¹⁵⁷⁶ Robert Elgie and Sophia Moestrup (n 1575) 43–44.

empirical evidence of attacks on judicial freedom in both Lithuania and Latvia which were perpetrated by government and parliament to undermine the role of the judicial branch of state. In Lithuania, there was also an attack on media freedom by the then LFGU-led government which sought to limit free speech and seize control of the national broadcaster, while Latvia has not experienced attacks on their media freedom as severely as Lithuania, or Poland and Hungary, for that matter.

Similarly, all the countries under study have undermined minority rights in a significant way. Poland and Hungary have demonstrated severe breaches of minority rights but similar sentiments around the war on gender and lack of progress on same-sex partnership legal recognition is present on both Latvian and Lithuanian political discourse. This section concludes by pointing out that the lack of long-term and successful illiberal movements in Latvia and Lithuania can be attributed to a lack of an ideological majority in these countries. The fact that there have not been a super-majority in either parliament or simply an ideological consensus across governing coalition members means that, for example, anti-democratic reforms of electoral laws in one party's favour are not possible. Therefore, Lithuania and Latvia have for now demonstrated that internal checks on executive power are working effectively. Section 6.3 of this chapter addressed the differences between democratic hollowness and democratic backsliding with the aim of distinguishing the two concepts within the taxonomy of democratic 'illnesses'. Notably, hollowness is framed as its own worrying feature of a low-quality democracy which is pertinent to understanding the experience of Lithuania and Latvia, where Latvia, in particular, suffers from 'double hollowness'.¹⁵⁷⁷

Aside from democratic hollowness being a symptom of a democratic deficit in itself it can also present as a risk factor for destabilisation of democracy and lead to backsliding. Section 6.4 returned to the issue of ideologically united majorities and their absence so far in Lithuania and Latvia. Here, the agentic theory is used to illustrate the power of prominent political actors and their influence over the democratic trajectory of a country.

¹⁵⁷⁷ Cianetti (n 32) 317–320.

In short, strong-man leadership styles of Orbán and Kaczyński have been instrumental in producing both Hungary's and Poland's illiberal revolutions.

7. The Role of the EU in Tackling Rule of Law Backsliding

7.1. Introduction

Having established the various risk factors that threaten to induce a democratic crisis in Lithuania and Latvia, this chapter endeavours to examine the actual and potential responses of the EU. The rule of law crisis poses an existential threat to the EU. It is clear now that there are two competing views of what the future of the EU should look like. The prevailing view is that it should remain a union of states based on the values of democracy, the rule of law and human rights. However, this view is being successfully challenged by established Member States like Hungary and Poland, which have a more illiberal future in mind for the Union. The EU has been fighting a losing battle against illiberal governments for over a decade now, proving that this is an issue the EU cannot easily shake. The EU's losses in this fight have been widely documented and include the EU Commission failing to adequately carry out its duty to defend the Treaties due to indecision and delays.¹⁵⁷⁸ Therefore, the issue of noncompliance with the rule of law within the Union threatens to unravel the basic foundations of the EU. Crucially, the Article 7 TEU procedure and infringement actions were once deemed the most potent weapons against the destruction of the rule of law in the Commission's arsenal. However, since these tools have proven to be practically useless in preventing and stopping rule of law breaches, it is imperative to understand the nature of rule of law backsliding so that an appropriate response can be devised. This thesis has so far presented new empirical research about the status of liberal constitutional democracy in two understudied countries where breaches of the rule of law are also present. This leads to a need to understand how the further spread of rule of law breaches can be prevented and contained. The EU, as a supranational organisation, is well placed to act as a guardian of

¹⁵⁷⁸ Dimitry Kochenov, 'Elephants in the Room: The European Commission's 2019 Communication on the Rule of Law' (2019) 11 *Hague Journal on the Rule of Law* 423, 433–434; Kim Lane Scheppele, Dimitry Vladimirovich Kochenov and Barbara Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39(1) *Yearbook of European Law* 3, 3–10.

liberal constitutional democracy, both for the benefit of its Member States and the integrity of the Union itself.

Two clear observations can be drawn from the analysis of the state of liberal constitutional democracy in Lithuania and Latvia in the previous chapters. One revolves around what *can* be done now realistically to mitigate the damage already unravelling. This would involve some very practical solutions from the EU side, most notably effective post-accession monitoring and sanctioning through Annual Rule of Law Reports and the new Conditionality Mechanism. However, it is clear that the EU is struggling to control the rule of law crisis at the highest levels as the well-documented and catastrophic breakdown of the rule of law in Hungary and Poland indicates. It is no surprise that the burgeoning issues of illiberalism and democratic deficit in Lithuania and Latvia have also received very little attention from EU institutions. This chapter will outline why many tools have been so ineffective in fighting the rule of law crisis and highlight that if the Annual Rule of Law Reports are utilised correctly, they can become a competent tool for monitoring and deterring rule of law deviations in Lithuania and Latvia as well as the rest of the EU.

There is also a second lesson that can be drawn from the analysis of risk factors for backsliding in chapter six. A lot can be learned by exploring what *should* have been done to make liberal constitutional democracy more genuinely entrenched and stable in Lithuania and Latvia (as well as the wider CEE region). This line of thought is, of course, mostly academic. We cannot go back in time to fix the crucial ‘errors’ of the past and as explained further, ‘error’ might be an inappropriate term given that each country can only do the best it can to achieve liberal democracy and there is no ideal way to proceed except for moving forward the only way one knows how. However, discussion of what could have been done better is still very useful. It might be too late to learn from experience for the CEE region but with the possible accession of Ukraine, Moldova and Serbia in the near future, this insight is beneficial.

Before delving into the role of the EU in preventing and fighting the breakdown of the rule of law in Lithuania and Latvia, it is first important to address why existing measures,

especially the Article 7 TEU procedure, have failed in protecting the EU from the precise breaches we are seeing now. This will help elucidate the possible approaches that could be taken from the EU's side to halt rule of law backsliding. In this final chapter, section 7.2 will map out the EU rule of law instruments. Section 7.3 will describe the inaction of EU institutions in addressing the rule of law deficit in both Lithuania and Latvia. Section 7.4 will address some practical ways the EU can address its rule of law crisis and turn the tide back in its favour. The final section will explore some explanations on why Lithuania and Latvia (and also much of the CEE region) continues to suffer various democratic 'illnesses'.

7.2. The EU Rule of Law Toolbox

The EU's political institutions have a number of tools in their arsenal to monitor and address breaches of the rule of law in Member States. Article 7 TEU is a 'political' procedure which allows a Member State to be sanctioned by removal of some membership rights if a 'serious and persistent breach' of fundamental values under Article 2 TEU are established.¹⁵⁷⁹ Article 7(1) TEU contains an early warning system which can be triggered if there is a serious risk of a breach to EU values occurring, while, Article 7(2) and (3) TEU are the sanctioning arms of this measure and are initiated if a serious and persistent breach of EU values has already occurred.¹⁵⁸⁰ Infringement proceedings under Article 258 TFEU are a 'legal' measure which can bring a Member State to the Court of Justice to ensure that EU law is being applied correctly.¹⁵⁸¹ If an infringement on EU law is established this may lead to sanctions being placed upon a Member State. Both of these reactive measures have been widely criticised for being ineffective and failing to acknowledge the gravity of many minor assaults on the rule of law adding up to a systemic breach.¹⁵⁸² Moreover, Article 7 TEU has been considered a nuclear option which is

¹⁵⁷⁹ *Case C-619/18 European Commission v Republic of Poland [2019] ECR I-325, Opinion of AG Tanchev, para 50.*

¹⁵⁸⁰ Eva-Maria Poptcheva, 'Understanding the EU Rule of Law Mechanisms' (European Parliamentary Research Service 2016) PE 573.922 4
<https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573922/EPRS_BRI%282016%29573922_EN.pdf> accessed 29 May 2021.

¹⁵⁸¹ *Commission v. Poland* (n 181).

¹⁵⁸² Anna Śledzińska-Simon and Petra Bárd, 'Rule of Law Infringement Procedures A Proposal to Extend the EU's Rule of Law Toolbox' (2019) CEPS Paper in Liberty and Security in Europe No 2019-09 5

exceptionally difficult to trigger.¹⁵⁸³ This is because of the high political thresholds for action with the preventive measure requiring four-fifths of Member States and the sanctioning measure requiring unanimity among EU heads of state.¹⁵⁸⁴ Also, Member States are reluctant to place sanctions on each other regarding rule of law breaches as leaders of Member States fear their own countries may be scrutinised for their compliance with EU values.¹⁵⁸⁵

In the wake of the limited success of Article 7 TEU measures, the EU has also formulated more flexible preventative tools to protect the rule of law. These preventative measures include the EU Justice Scoreboard, the Rule of Law Framework and the Cooperation and Verification Mechanism for Bulgaria and Romania (CVM), amongst others. A brand new pre-emptive measure in the EU's toolbox are the Rule of Law Reports which were launched in 2020 and aim to prevent rule of law issues from arising or deepening by creating a forum for dialogue between the EU institutions, Member States, civil society and other stakeholders on the rule of law.¹⁵⁸⁶ The new Rule of Law Reports form the basis of the Rule of Law Mechanism and are produced on an annual basis aiming to identify and highlight rule of law concerns through annual reporting and the input of the EU Commission, individual Member States and other stakeholders.¹⁵⁸⁷ The reports are also in line with the Commission's aim of building a culture of respect for the rule of law in the Union.¹⁵⁸⁸

<https://www.ceps.eu/wp-content/uploads/2019/05/LSE-2019-09_ENGAGE-II-Rule-of-Law-infringement-procedures.pdf> accessed 7 May 2021; Pech, Wachowiec and Mazur (n 179); Kochenov, 'Elephants in the Room: The European Commission's 2019 Communication on the Rule of Law' (n 1578).

¹⁵⁸³ Dimitry Kochenov, 'Article 7: A Commentary on a Much Talked-About "Dead" Provision' in Armin von Bogdandy and others, *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions*, vol 298 (Springer 2021) 132.

¹⁵⁸⁴ Eva-Maria Poptcheva (n 1580) 4.

¹⁵⁸⁵ *ibid* 5.

¹⁵⁸⁶ European Commission, '2020 Rule of Law Report - Questions and Answers' (*European Commission*, 30 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1757> accessed 7 May 2021.

¹⁵⁸⁷ *ibid*; Federico Fabbrini, 'Next Generation EU: Legal Structure and Constitutional Consequences' [2022] *Cambridge Yearbook of European Legal Studies* 1, 10–13.

¹⁵⁸⁸ Alessandro Nato, 'A "Rule of Law Mechanism in Action" to Strengthen Legitimacy and Authority in the EU' (*Reconnect*, 2 September 2021) <<https://reconnect-europe.eu/blog/a-rule-of-law-mechanism-in-action-to-strengthen-legitimacy-and-authority-in-the-eu/>> accessed 6 May 2021.

The Rule of Law Reports offer an opportunity for the EU Commission to start measuring the status of the rule of law in all Member States on an equal basis. This is intended to bolster compliance with the rule of law under Article 2 TEU, a value that has suffered abuse in some Member States due to its limited enforceability in law.¹⁵⁸⁹ Importantly the Rule of Law Reports are a soft-law measure and not intended to be a sanctioning tool. Rather, the reports aim to identify possible problems in relation to the rule of law as early as possible by applying a “coherent and equivalent” approach and remaining “proportionate to the situation and developments”.¹⁵⁹⁰ This system of reports builds upon the recent line of case law from the Court of Justice establishing the importance of the rule of law for the functioning of EU law, preservation of fundamental rights and judicial independence.¹⁵⁹¹ However, because the reports seek to preserve the rule of law in Member States through creating awareness rather than imposing sanctions, this preventative measure remains respectful of national constitutional systems and traditions.¹⁵⁹²

Another tool to respond to Member States violating the rule of law is the new Rule of Law Conditionality Mechanism which makes EU funding contingent on respect for the rule of law.¹⁵⁹³ The idea for linking EU funding to rule of law compliance had begun to develop in 2017, with the then EU Commissioner for Justice, Vera Jourova, suggesting this in a speech.¹⁵⁹⁴ Following a series of negotiations and amendments to the first draft

¹⁵⁸⁹ Oliver Mader, ‘Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law’ (2019) 11 *Hague Journal on the Rule of Law* 133, 137–138 <<http://link.springer.com/10.1007/s40803-018-00083-x>> accessed 7 May 2021.

¹⁵⁹⁰ European Commission, ‘2020 Rule of Law Report - Questions and Answers’ (n 1586).

¹⁵⁹¹ For example see: *Associação Sindical dos Juízes Portugueses* (n 154); *L.M.* (n 155); *Case C-619/18, European Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531 (n 355); *Case C-192/18 Commission v Poland (Independence of the ordinary courts)* ECLI:EU:C:2019:924 (n 355).

¹⁵⁹² Nato (n 1588).

¹⁵⁹³ Article 1 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget OJ L 433I.

¹⁵⁹⁴ Eszter Zalan, ‘Justice Commissioner Links EU Funds to “Rule of Law”’ *EUobserver* (Brussels, 31 October 2017) <<https://euobserver.com/political/139720>> accessed 17 August 2022.

regulation proposed by the EU Commission in 2018,¹⁵⁹⁵ Regulation 2020/2092 was approved by the European Parliament on 16 December 2020 and became effective from the beginning of January 2021. However, Poland and Hungary applied to the Court of Justice to have the Mechanism annulled the same year which led to the EU Commission refusing to initiate the Mechanism until it was approved by the Court in early 2022.¹⁵⁹⁶ The Mechanism establishes the rules necessary to protect the Union budget in the case of breaches of the rule of law in the Member States.¹⁵⁹⁷ Section 7.4 of this chapter will return to these new tools and argue that the Conditionality Mechanism is so far the most promising tool the EU has to protect the rule of law in the Union. This is particularly true when the Mechanism is combined with the Annual Rule of Law Reports, as a yearly stock-taking exercise on each Member States rule of law compliance. The possibility of the suspension of EU funding is likely to be a compelling measure in dissuading political leaders from engaging in rule of law breaches at national level.

7.3. The EU Commission's Failure to Recognise Rule of Law Deficiencies in Lithuania and Latvia

The Annual Rule of Law Reports contain the only substantial record of the EU's opinions on the current rule of law situation in Lithuania and Latvia since they have acceded to the EU. Unlike Poland and Hungary, Lithuania and Latvia have not been subjected to any formal mechanisms due to rule of law breaches. Nevertheless, holding Member States accountable, post-accession, for breaches of fundamental values is especially difficult. This has proven to be painfully true for the EU given the ineffectiveness of the Article 7 Treaty on European Union (TEU) procedure.¹⁵⁹⁸ Therefore, the Commission has sought alternative routes. More specifically, the Commission has rightfully invested resources in establishing pre-emptive measures to protect the rule of law following the logic of

¹⁵⁹⁵ Proposal for a Regulation of the European Parliament and the Council on the Protection of the Union's Budget in Case of Generalised Deficiencies as Regards the Rule of Law in the Member States COM(2018) 324 final - 2018/0136(COD).

¹⁵⁹⁶ *Case C-156/21 Hungary v European Parliament and Council of the European Union* ECLI:EU:C:2022:97 (n 1572); *Case C-157/21 Republic of Poland v European Parliament and Council of the European Union* ECLI:EU:C:2022:98 (n 79).

¹⁵⁹⁷ Regulation 2020/2092.

¹⁵⁹⁸ Gateva (n 1255) 436.

‘prevention is better than cure.’ The newest preventative tools are the Commission’s Rule of Law Mechanism and the annual Rule of Law Reports designed to stop rule of law issues before they reach the status of ‘serious and persistent breach’.¹⁵⁹⁹ However, given the substantial risks present in both Lithuania and Latvia for democratic backsliding and rule of law breaches, the Rule of Law Reports have failed to highlight the severity of the situation at hand.

The Rule of Law Reports were published for the first time in September 2020 and form the basis of the new annual rule of law cycle – the Rule of Law Mechanism.¹⁶⁰⁰ This new tool offers the Commission a unique opportunity to measure each Member States compliance with the rule of law on an annual basis and promote respect for the rule of law through raising awareness of recent national developments. However, there is worrying evidence suggesting that the Commission is repeating the same mistakes as it did at the beginning of Poland and Hungary’s backsliding journey. The Commission’s reports on Latvia and Lithuania’s rule of law compliance have so far failed to condemn the executives’ systemic attempts to harass and politicise the judiciary. The latest report published in July 2022 now features a new recommendations section which was inserted to address widespread concern amongst experts that the reports are ineffective due to their superficial analyses.¹⁶⁰¹ Despite this effort, the recommendation sections of the reports are in line with the nature of the rest of the report in their inadequacy. The Commission’s silence on these threats to judicial independence in Lithuania and Latvia diminishes the purpose of the reports as a preventative tool, encourages further assaults on the rule of law and judicial independence and undermines the equality of Member States. More importantly, the Commission’s characteristic inaction on rule of law

¹⁵⁹⁹ Vasiliki Poula and Eponine Howarth, ‘The Rule of Law Report: A Story of Preemption, Political Symbolism, and Dialogue in the European Union’ (*The Journal of International Affairs*, 28 October 2020).

¹⁶⁰⁰ European Commission, ‘2020 Rule of Law Report - Questions and Answers’ (n 1586).

¹⁶⁰¹ European Parliament Resolution 2021/2025(INI) of 24 June 2021 on the Commission’s 2020 Rule of Law Report; Petra Bárd, ‘Diagnostic Autopsy: The Commission’s 2020 Annual Rule of Law Report’ (*Reconnect*, 28 October 2020) <<https://reconnect-europe.eu/blog/diagnostic-autopsy-the-commissions-2020-annual-rule-of-law-report/>> accessed 6 May 2021; Kerstin McCourt, ‘European Commission Lacks Tenacity on the Rule of Law Rule of Law Report Lacks Consequences for Law Breaking’ (*Human Rights Watch*, 20 July 2022) <<https://www.hrw.org/news/2022/07/20/european-commission-lacks-tenacity-rule-law>> accessed 23 August 2022; Monciunskaitė (n 1496).

breaches, while they are still emerging, has had a devastating impact on the rule of law in Poland and Hungary. Thus, the EU's inability to "call a spade a spade" exacerbates the EU's rule of law crisis further.¹⁶⁰² If nothing is done to rectify the situation in Lithuania and Latvia, the Commission risks allowing other Member States to walk down a similar destructive path as Poland and Hungary have.

Both Lithuania and Latvia received reasonably favourable rule of law evaluations in the 2020, 2021 and 2022 reports. In particular, the sections on judicial independence were concise, identifying corruption within the judiciary and controversies surrounding the politicisation of judicial appointments, as a cause for concern.¹⁶⁰³ However, the reports failed to appreciate the scale of damage imposed on judicial independence in both countries after the multiple instances of politicising courts, the attacks of individual judges' character by politicians and the general tarnishing of the reputation of the legislature. The reports on Lithuania neglected to link an escalating constitutional crisis caused by the government's persistent refusal to replace three Constitutional Court Judges with a politically motivated smear campaign against the President of that same court which was unravelling at the same time.¹⁶⁰⁴ For example, the 2021 Rule of Law Report on Lithuania highlighted the excessive delays in appointment procedure of judges to the Constitutional Court but failed to acknowledge that this was directly caused by politicisation of the Court, and in particular, the previous LFGU governments' attempt to exert pressure on the Constitutional Court for issuing unfavourable decisions and an attempt to assert their own political dominance at the judiciary's expense.¹⁶⁰⁵ Furthermore, the reports failed to link the attempted attack on media freedom and the

¹⁶⁰² Kochenov, 'Elephants in the Room: The European Commission's 2019 Communication on the Rule of Law' (n 1578) 426.

¹⁶⁰³ European Commission, 'Commission staff working document – 2020 Rule of Law Report Country Chapter on the rule of law situation in Latvia' SWD (2020) 313 final; European Commission, 'Commission staff working document – 2020 Rule of Law Report Country Chapter on the rule of law situation in Lithuania' SWD (2020) 314 final.

¹⁶⁰⁴ European Commission, 'Commission staff working document – 2020 Rule of Law Report Country Chapter on the rule of law situation in Lithuania' SWD (2020) 314 final.

¹⁶⁰⁵ Beatrice Monciunskaitė, 'To Live and to Learn: The EU Commission's Failure to Recognise Rule of Law Deficiencies in Lithuania' (2022) 14(1) Hague Journal on the Rule of Law 49, 56–63.

national broadcaster by the same government during the same term.¹⁶⁰⁶ Instead the reports list these concerns as isolated issues which overlooks the fact that such interferences with judicial independence and media freedom are deliberate and organised attempts to undermine the rule of law and are not mere coincidences.

Similarly, the reports on Latvia's rule of law status offer only a shallow account of the true situation on the ground. The 2021 report on Latvia failed to highlight the extent of the attacks on judicial independence during the previous year. As noted in section 5.4 of this thesis, the Constitutional Court received severe backlash from legislators over their November 2020 decision which affirmed the right to parental leave for same-sex couples as well as the decision against the merger of Vārakļāni with Rēzekne less than ten days before planned municipal elections. These decisions were proceeded with a constitutional crisis in which members of the Saeima attempted to ignore Constitutional Court decisions and even called for the abolition of the Constitutional Court altogether.¹⁶⁰⁷ What is further concerning is that despite the 2022 report raising the issue of politicisation of the appointment of a Supreme Court President in early 2022, the two prior reports failed to mention the similar situation that arose regarding the appointment of a Constitutional Court judge in late 2020 and early 2021. The President of the Constitutional Court, Ineta Ziemele, left her position on 2 October 2020 as she was appointed as a judge of the Court of Justice of the European Union.¹⁶⁰⁸ This created a vacancy in the Constitutional Court that the Saeima struggled to fill due to their concern that the Constitutional Court had become too politically active given their previous decisions. It was over five months before Judge Ziemele was replaced. Such events are deeply damaging for the Latvian judiciary as their work is compromised due to excessive reappointment times, not to mention the damage to their reputation repeated attacks from the other branches of state pose. Once again, the rule of law reports failed to acknowledge how deeply rooted such issues are and instead paint them as isolated incidents.

¹⁶⁰⁶ European Commission, 'Commission staff working document – 2020 Rule of Law Report Country Chapter on the rule of law situation in Lithuania' SWD (2020) 314 final 9–10.

¹⁶⁰⁷ Office of the President (n 1125).

¹⁶⁰⁸ Constitutional Court of the Republic of Latvia (n 1130).

These are serious oversights on the EU Commission's part if the purpose of these annual reports are considered. Following the publication of the first Rule of Law Report on Lithuania, the President of the Constitutional Court of Lithuania criticised the reports for ignoring mounting political interference with judicial independence.¹⁶⁰⁹ Given the significant issues described in the previous section, the Rule of Law Reports evidently fail to live up to their purpose by ignoring threats to judicial independence in these countries. Unfortunately, this silence on the threats to judicial independence in a Member State is not surprising given the Commission's track record on this issue as described in the context of Poland and Hungary in section 3.3 of this thesis. In many ways, we can see the Commission repeating its same mistakes only this time by ignoring systemic threats to the rule of law in the very reports designed to flag them. The Commission seems too preoccupied with describing levels of digitalisation within judicial systems to notice the deliberate and systemic nature of the attacks on judicial independence.¹⁶¹⁰ Although the reports mention vast delays in judicial appointments and the unlawful removal of the a Supreme Court Judge from her post, they fail to connect the dots and put these events into context. That is, the described events in chapters four and five came about due to a deliberate attempt to put pressure on the judiciary to give favourable judgments and undermine the institution's independence. These were acts that seem legal or allowable on the surface but when analysed more carefully prove to be disingenuous acts of aggression by the executive seeking to exert pressure on judges. A situation such as this should be setting off alarm bells for the Commission as it has been in this situation before. A number of individual legalistic assaults on the rule of law, combining to create a rule of crisis, is how both Hungary and Poland became the first Member States to be subjected to the Article 7 TEU procedure.

It is also surprising and concerning that the Rule of Law Reports failed to pick up on attacks on the judiciary as EU institutions place significant importance on judicial

¹⁶⁰⁹ Jurga Bakaite (n 692).

¹⁶¹⁰ European Commission, 'Commission staff working document – 2020 Rule of Law Report Country Chapter on the rule of law situation in Lithuania' SWD (2020) 314 final 5.

independence as the cornerstone of the rule of law. This is made evident from both the Commission's communications where it describes judicial independence as a key principle of the rule of law and essential for democracy to thrive.¹⁶¹¹ The centrality of judicial independence to the Commission's conception of the rule of law is logical given that national courts apply EU law and form an integral part of the EU legal order.¹⁶¹² Therefore, a breach of the rule of law at national level threatens the integrity of the whole EU legal order.¹⁶¹³ Also, the Court of Justice has developed a line of case law specifically designed to bolster the value of the rule of law under Art. 2 TEU through coupling it with the principle of effective judicial protection under Art.19(1) TEU.¹⁶¹⁴ Not to mention, that an executive tampering with judicial independence, especially that of higher courts such as a Constitutional Court or Supreme Court, can be considered a 'canary in the coalmine' moment, a warning that all is not well with the rule of law in a country.¹⁶¹⁵ Indeed, PiS packed the Polish Constitutional Tribunal just a few weeks after their electoral victory of 2015, a shocking event that foreshadowed a multitude of attacks on the wider Polish judiciary still ongoing to this day.¹⁶¹⁶ Therefore, it would seem reasonable for the Rule of Law Reports to flag the multiple attack on judicial authority, independence and reputation in Lithuanian and Latvia that occurred in a short space of time as a concern.

The Commission's inability to identify and highlight possible threats to the rule of law in Lithuania and Latvia undermines the Rule of Law Mechanism's aim of preventing breaches before they evolve into a full-blown rule of law crises. The first three Rule of Law Reports should have identified the attacks on judicial independence as a systemic attempt to undermine the independence of the countries' Constitutional Court and the Supreme Court. Instead, what the reports produced was a description of isolated events,

¹⁶¹¹ European Commission, '2021 Rule of Law Report: The rule of law situation in the European Union' (European Commission 2021) COM(2021) 700 final; European Commission, 'Strengthening the rule of law within the Union' (European Commission 2019) COM(2019) 343 final.

¹⁶¹² *Case C-106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA* ECLI:EU:C:1978:49.

¹⁶¹³ Kustra-Rogatka, 'The Rule of Law Crisis as the Watershed Moment for the European Constitutionalism' (*Verfassungsblog*, 14 November 2019) <<https://verfassungsblog.de/the-rule-of-law-crisis-as-the-watershed-moment-for-the-european-constitutionalism/>> accessed 7 November 2021.

¹⁶¹⁴ *Associação Sindical dos Juizes Portugueses* (n 154); *L.M.* (n 155).

¹⁶¹⁵ Pech and Scheppele (n 221) 27–28.

¹⁶¹⁶ Pech, Wachowiec and Mazur (n 179).

absent of context or analysis. It is important to note here that this thesis is not calling on the Commission to impose sanctions or initiate official dialogue with Member States over minor national rule of law setbacks. This would, of course, be impractical and illegitimate – Member States have the prerogative to deal with internal affairs on a national level, without intervention from the EU at the earliest sign of trouble. However, the Rule of Law Reports are a soft-law measure which are minimally invasive in sovereign matters.¹⁶¹⁷ It is a tool designed to observe and flag developments that might possibly lead to a rule of law crisis in the future and not a sanctioning tool in itself. Any initial worrisome developments might very well fizzle-out and resolve themselves. However, if these developments evolve into a bigger rule of law problem, then the Commission has a record of the issues it has described in its yearly reports which can be used as evidence for invoking EU funding conditionality, litigation or the Art. 7 TEU procedure. Therefore, the reports simply need to truthfully account for domestic rule of law issues, and this does not necessarily equate to an accusation of rule of law backsliding, but rather would put a Member State on notice that the EU (and wider civil society and international community) are aware of a threat to the rule of law domestically. This in itself has significant deterrent value against rule of law breaches.

In summary, the first three Rule of Law Reports have failed to thoroughly address the emerging rule of law issues in Lithuania and Latvia and this has three broad consequences. First, the Commission turning a blind eye to ongoing threats to judicial independence sets a dangerous precedent for the future of the rule of law in both countries. Politicians who are seeking to undermine the rule of law and other fundamental values may take the Commission's inaction as permission to continue undermining the rule of law and judicial independence in the future. Politicians learning from each other how to systemically push the EU's boundaries is nothing new. PiS officials in Poland have been learning from Prime Minister Orbán's illiberal revolution in Hungary and eagerly taking notes on the Commission's indecision and inaction.¹⁶¹⁸

¹⁶¹⁷ European Commission, '2020 Rule of Law Report - Questions and Answers' (n 1586).

¹⁶¹⁸ Pech and Scheppele (n 221) 27–28.

Second, the problem with ignoring an emerging rule of law issue within one Member State can impact the whole Union. The rule of law is essential to maintaining the healthy functioning of the EU internal market, the execution of the EAW and the maintenance of EU citizens' fundamental rights. One Member State being allowed to violate the rule of law can disrupt the EU's equilibrium as a whole and may encourage other Member States to also deviate from the rule of law.¹⁶¹⁹

Third, the EU Commission, by failing to take the earliest opportunity to highlight the threats to judicial independence in their Rule of Law Reports, undermines the purpose of these reports and the Rule of Law Mechanism. The Rule of Law Reports form the foundation of the Rule of Law Mechanism which is designed "to prevent problems from emerging or deepening further".¹⁶²⁰ The Commission states that the aim of the annual reports is to "identify possible problems in relation to the rule of law as early as possible... by applying the same methodology and examining the same topics in all Member States" to ensure "a coherent and equivalent approach".¹⁶²¹ This means that the aim of the reports along with the broader aim of the Rule of Law Mechanism is twofold: First, it aims to prevent rule of law breaches from emerging or from escalating and second, it aims to scrutinise the rule of law status in all Member States on an equal basis. These are admirable aims as Polish and Hungarian politicians have criticised the EU for applying high rule of law standards unevenly amongst Member States.¹⁶²² It is important to note that the ECtHR has recently condemned the Polish government for improper appointments to their Constitutional Tribunal, a very similar situation to the one resulting from the Lithuanian Constitutional Court deadlock.¹⁶²³ This judgment will be likely used by the EU Commission as further evidence of violations to Polish judicial independence so it is equally important for the Commission to condemn the situation in Lithuania. By failing to

¹⁶¹⁹ Bárd, 'Diagnostic Autopsy: The Commission's 2020 Annual Rule of Law Report' (n 1601).

¹⁶²⁰ European Commission, '2020 Rule of Law Report - Questions and Answers' (n 1586).

¹⁶²¹ *ibid.*

¹⁶²² Quentin Ariès and Michael Birnbaum, 'E.U. Issues Its First Rule-of-Law Report, Angering Leaders of Hungary and Poland' *Washington Post* (30 September 2020) <https://www.washingtonpost.com/world/europe/eu-rule-of-law-report/2020/09/30/20a93e42-026c-11eb-b92e-029676f9ebec_story.html> accessed 7 May 2021.

¹⁶²³ *Xero Flor w Polsce sp z o.o v Poland App No 4907/18 (ECHR, 7 May 2021).*

identify the extent of rule of law issues in some Member States but not others, the Commission undermines the aims of the Rule of law Mechanism and their annual reports. They at once fail to identify and stop rule of law breaches at their inception and also create fertile ground for countries like Poland and Hungary to discredit the EU as biased and unfair.

7.4. A Possible Way Out of Liberal Constitutional Democratic Crises

Solutions to rule of law issues can arise from within the effected democracy or be imposed or encouraged by supranational bodies such as the EU. First, it is important that a democracy has developed a natural immunity to threats towards its democratic institutions. This immunity comes from strong institutional checks and balances and leaders who are faithful to liberal democracy as well as resilient civil society and media organisations.¹⁶²⁴ The resilience of a liberal democracy can also be supported by supranational organisations such as the EU and the international community, e.g. ECHR. Therefore, there is hope that the EU could adopt measures which would persuade backsliding states back on to the correct path or deter backsliding in the first place.

It is best if autocratic tendencies are quashed before they become fully-fledged problems. However, it has become clear that the EU is fighting a losing battle against the PiS and Fidesz governments in an effort to halt rule of law backsliding. CJEU judgments condemning interference with judicial independence in Poland have been largely ignored or dismissed and dialogue between the EU Commission and Warsaw and Budapest has yielded little change to the Member States' regimes.¹⁶²⁵ Importantly, the Article 7 TEU procedure which is designed to prevent and rectify breaches of the EUs fundamental values has failed dramatically as noted in section 7.2 of this chapter. However, the recent developments around the Conditionality Mechanism enacted under Regulation

¹⁶²⁴ David Andersen, 'Comparative Democratization and Democratic Backsliding' (2019) 51(4) *Comparative Politics* 645, 649–651.

¹⁶²⁵ Petra Bárd and Dimitry V Kochenov, 'War as a Pretext to Wave the Rule of Law Goodbye? The Case for an EU Constitutional Awakening' (2022) 27 *European Law Journal* 39; Sam Fleming and Henry Foy, 'EU Calls for Fines against Poland for Ignoring Court Rulings' *The Financial Times* (Brussels, 7 September 2021) <<https://www.ft.com/content/d2b5d608-3517-4e6b-8c3a-b0aab84447f2>> accessed 17 August 2022.

2020/2092 is the most promising new tool in the EU's toolbox to fight rule of law backsliding. The Conditionality Mechanism, supported by the Rule of Law reports has potential to turn the tide in the EU's favour.

The new Rule of Law Conditionality Mechanism makes EU funding contingent on respect for the rule of law and has the potential to make a real difference in the rule of law crisis.¹⁶²⁶ For this regulation to apply, breaches of the rule of law in a Member State must affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.¹⁶²⁷ Therefore, Regulation 2020/2092 has the power to protect the rule of law in Member States and safeguard the integrity of the Union's finances. This will help the EU prevent the largest net recipients of EU funding, including most of CEE countries, from using EU funds to further their illiberal agendas.¹⁶²⁸ This is also somewhat of a breakthrough for the EU in their battle to protect the rule of law as traditionally, post-accession conditionality has been considered a weak tool for incentivising compliance with the EU's normative initiatives.¹⁶²⁹ While pre-accession conditionality has worked exceptionally well to persuade potential Member States to comply with EU rules,¹⁶³⁰ once accession is complete, the EU loses its leverage as "accession advancement rewards" are no longer useful once a country already enjoys the benefits of EU membership.¹⁶³¹

Importantly, the rule of law conditionality regulation not only applies to the Union budget, but also to the EU Recovery Fund and other loans and instruments guaranteed by the Union budget.¹⁶³² The Commission has reprimanded Poland and Hungary by using their position as gatekeepers to the EU Recovery Fund as leverage to compel compliance

¹⁶²⁶ Article 1 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget OJ L 433I.

¹⁶²⁷ Regulation 2020/2092.

¹⁶²⁸ Justyna Łacny, 'The Rule of Law Conditionality Under Regulation No 2092/2020—Is It All About the Money?' (2021) 13 *Hague Journal on the Rule of Law* 79, 80.

¹⁶²⁹ Papakostas (n 1254) 216; Gateva (n 1255) 436.

¹⁶³⁰ Papakostas (n 1254) 216.

¹⁶³¹ Gateva (n 1255) 436.

¹⁶³² Łacny (n 1628) 85.

with EU standards.¹⁶³³ Hungary and Poland's share of the Recovery Fund, which is designed to remedy the economic impact of the Covid-19 pandemic, has been withheld by the Commission due to their concerns over the rule of law in these Member States. The Commission states that findings of the annual Rule of Law Reports may be taken into consideration when assessing breaches of the principles of the rule of law that affect the financial interests of the Union.¹⁶³⁴ This proves that the EU is not afraid to utilise financial sanctions to demand compliance with EU values.

There is real potential for progress on the rule of law crisis if the Rule of Law Reports are utilised in a way that supports the Conditionality Mechanism. Despite the seemingly 'soft-touch' nature of the annual reports, they present an importantly opportunity to create a record of developments around the rule of law in each Member State that can be useful further down the line. Precise and truthful documentation of rule of law breaches in individual Member States can be valuable in future litigation of rule of law breaches as made evident by the Court of Justice's emphasis on reliable sources in *L.M.* as a way for a court to evaluate the extent of rule of law compliance in another Member State.¹⁶³⁵ Furthermore, the Commission has already said the findings of the annual reports can be used as evidence to withhold the release of the EU Recovery Fund and they have done so already for Hungary due to rule of law deficiencies.¹⁶³⁶ Therefore, these reports have the potential to be a strong deterrent to rule of law breaches domestically. If Member States see that the annual reports have been used as evidence of rule of law breaches for the purpose of withholding EU funds then governments might think twice before compromising the rule of law domestically. As the CEE is mostly a net recipient of EU funds, unfavourable Rule of Law Reports have a real possibility of being used as evidence to launch the new Conditionality Mechanism. Authoritarian-leaning leaders are likely to realise the disadvantages of their planned illiberal reforms after a simple cost-benefit analysis as losing EU funding is almost guaranteed to be politically costly for leaders. Of

¹⁶³³ Strupczewski (n 1571).

¹⁶³⁴ *ibid.*

¹⁶³⁵ *L.M.* (n 155) para 61.

¹⁶³⁶ Strupczewski (n 1571); Alice Hancock and Marton Dunai, 'EU Set to Hold Back €7.5bn from Hungary over Rule of Law Violations' *financial Times* (18 September 2022) <<https://www.ft.com/content/b510fcd7-396d-4909-a91f-2221f9c55a0b>> accessed 11 April 2022.

course, for the Reports to work effectively in preventing rule of law backsliding, they must reflect the actual reality of the rule of law in each Member State, which, as evident from the previous section, is currently not the case.

7.5. Lessons to be Learnt for the Future

Perhaps the most important lesson that can be learned from the democratic experience of Latvia and Lithuania, is the fact that there is no linear path to liberal constitutional democracy. What has been written here about these two countries is simply confirming what Bugarič wrote in 2015 using the case studies of Slovenia and Hungary and other scholars suspected even before democratic backsliding really took hold in the CEE region.¹⁶³⁷ We cannot look at Lithuania and Latvia (or indeed the rest of the region) and compare their experience to that of a democratising Western Europe a few centuries ago. Although their early struggles might seem similar, they are also fundamentally different due to their unique contexts and place in time. This nuanced understanding was not prevalent during the late 1980s and early 1990s when CEE was emerging from communism and experts from the West were hard at work trying to formulate an ‘ideal path’ for this region to achieve liberal constitutional democracy.¹⁶³⁸ This took the form of following the Washington Consensus which was a set of policies adopted in the 1980s and early 1990s originally developed to help Latin America emerge from an economic crisis. These policies were designed by the IMF, the World Bank, and the US Treasury and advocated for economic liberalisation, privatisation and fiscal austerity.¹⁶³⁹ The role of the EU during the transition period was also problematic as the Copenhagen criteria placed emphasis on adopting laws in CEE countries to make them look similar to their counterparts in the West but little attention was paid to whether there was genuine compliance with these new rules.¹⁶⁴⁰ Therefore, democratising reforms “were too much about ‘copying and pasting’ formal rules instead of creating adequate institutions with

¹⁶³⁷ Bugarič (n 15); Wojciech Sadurski, ‘Transitional Constitutionalism: Simplistic and Fancy Theories’ in Adam W Czarnota (ed), *Rethinking the Rule of Law After Communism* (Central European University Press 2005); Kim Lane Scheppele, ‘Democracy by Judiciary. Or, Why Courts Can Be More Democratic than Parliaments’, *Rethinking the Rule of Law After Communism* (Central European University Press 2005).

¹⁶³⁸ Bugarič (n 15) 232–234.

¹⁶³⁹ *ibid* 233.

¹⁶⁴⁰ *ibid* 228.

the right incentive structures.”¹⁶⁴¹ This led to chronic “shallow institutionalization” in the region which is made evident by the presence of democratic institutions which strongly resemble Western ones but are currently going through crisis due to the lack of support and trust they receive from both executives and citizens.¹⁶⁴² The truth is that there is no ‘ideal path’ to liberal constitutional democracy and it has taken a while for this to be fully accepted. Bugarič explains:

*“... the history of democracy in the West clearly reveals the importance of continuous civic and political struggle for successful democratization. This aspect of democracy building was almost “lost in translation” in the CEE context, where the process of democracy building was often portrayed and perceived as an elitist project based on the assumption that political elites knew exactly how to get from the point A (failed Communism) to point B (idealized Western democracy).”*¹⁶⁴³

The result of this misunderstanding has led to the development of legal constitutionalism which emphasised judicialization of politics and the need for a strong executive over dialogue and civil society involvement.¹⁶⁴⁴ The race to achieve full democratic status and accede to the EU led to elite-driven democratisation which inevitably left many groups in society out of the conversation. The consequences of elite-driven politics is probably most prevalent in Latvia today where the Russian-speaking minority has been systemically marginalised in political debate.¹⁶⁴⁵

The democratisation effort in the CEE region also had a reckless disregard for the historical difference between the West and East of Europe.¹⁶⁴⁶ The most crucial difference being that the rule of law came first in Western Europe and democracy came a few centuries after.¹⁶⁴⁷ An example of this being the *Rechtsstaat* in nineteenth-century

¹⁶⁴¹ *ibid.*

¹⁶⁴² *ibid.*

¹⁶⁴³ *ibid* 235.

¹⁶⁴⁴ *ibid* 238.

¹⁶⁴⁵ Eihmanis (n 850) 8.

¹⁶⁴⁶ Bugarič (n 15) 238.

¹⁶⁴⁷ *ibid.*

Prussia where constitutional checks on the executive were developed long before democracy.¹⁶⁴⁸ Lithuania and Latvia did not have adequate experience with the rule of law or democracy prior to their current period of independence. There was limited experience with these traditions through the Polish-Lithuanian Commonwealth and later during the beginning of the 20th century before the occupations by Germany and the Soviet Union commenced.¹⁶⁴⁹ Although this experience was important, it was not strong enough.¹⁶⁵⁰ The beginning of the 20th century was promising as the Baltic states followed a parliamentary democracy model of governance but with growing unrest in Europe and a socioeconomic crisis looming, both Lithuania and Latvia descended into antiliberal dictatorships by the end of the 1920s.¹⁶⁵¹ Indeed, even then, the political elite who were building the new nation-states of Lithuania and Latvia were heavily influenced by the institutions established in the Western Europe.¹⁶⁵² So, mimicking the West has always been seen as a reliable way to achieve prosperity.

Although interesting, it is important to refrain from exaggerating the importance of historical context when writing about paths to liberal democracy as this could lead to historical determinism.¹⁶⁵³ Along the same lines of caution, it is important to understand the relevant historical contexts of the region but avoid ascribing to the tempting argument of sequentialism.¹⁶⁵⁴ Sequentialism might look like an obvious outcome considering that Western European democracies have been comparably more successful than those in the CEE region. Therefore, it is tempting to conclude that if only the CEE region was also allowed to first develop the rule of law and later develop democracy maybe the problems we have today would not exist.¹⁶⁵⁵ However, this is an unfair and also an unhelpful interpretation of the situation at hand. This line of thought is obsolete

¹⁶⁴⁸ Ian D Armour, *A History of Eastern Europe 1740-1918: Empires, Nations and Modernisation* (Second edition, Bloomsbury Academic 2012) 99; Bugarič (n 15) 238.

¹⁶⁴⁹ Bugarič (n 15) 239; Tibor Iván Berend, *Decades of Crisis: Central and Eastern Europe before World War II* (Univ of California Press 2001) 195–197.

¹⁶⁵⁰ Bugarič (n 15) 239.

¹⁶⁵¹ Berend (n 1649) 195–197.

¹⁶⁵² *ibid* 195–196; T Iván Berend, *History Derailed: Central and Eastern Europe in the Long Nineteenth Century* (University of California Press 2003) 235–236.

¹⁶⁵³ Bugarič (n 15) 239–240.

¹⁶⁵⁴ *ibid*.

¹⁶⁵⁵ *ibid*.

because it is impossible to go back in time and implement such a policy. More importantly, it is impractical and unfair to presume that what was successful in terms of democratisation in the West many centuries ago is the only way to achieve stability and prosperity. What worked then might not necessarily work now.¹⁶⁵⁶

What can be learned from this is that history cannot determine the future of any state nor is there a prerequisite ‘template’ that needs to be implemented to achieve liberal constitutional democracy. What can be taken from this knowledge is that popular support for political causes, a robust set of checks and balances and political actors who are faithful to the rule of law are key features that have been proven to lead to successful democratisation in the West. In particular, leaders who uphold unwritten democratic norms when in office and the popular support of candidates that embody democratic values is imperative at stopping democratic rot from the inside.¹⁶⁵⁷ Striving to strengthen these features simultaneously would seem to be useful.

Leaving aside what could have been done differently on a national level, on a supranational level the EU also bears responsibility for the current state of democracy in Lithuania and Latvia given their powerful leverage during accession negotiations. It is widely agreed that the Copenhagen Criteria did not go far enough to guarantee the fidelity of new Member States to the founding EU values contained in Article 2 TEU.¹⁶⁵⁸ As mentioned above, it is likely that Article 7 TEU, which was intended to protect fundamental values, has proven to be toothless because the EUs political elite simply lack the political will to act effectively.¹⁶⁵⁹ It is also possible that no one could have anticipated that the very foundations of the EU would ever be so fervently challenged as they are now. Therefore, it is true that the Copenhagen Criteria failed to protect against a rule of law crises such as the one we are experiencing right now. Indeed, what has become clear in the past two decades is that the conditions given to the candidate states at the time

¹⁶⁵⁶ *ibid* 240.

¹⁶⁵⁷ Levitsky and Ziblatt (n 81) 20–22; Andersen (n 1624) 649–650.

¹⁶⁵⁸ Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Wolters Kluwer Law & Business ; Kluwer Law International 2008) 305; Ronald Janse, ‘Is the European Commission a Credible Guardian of the Values?’ (2019) 17 *International Journal of Constitutional Law* 43, 44–46; Bugarič (n 15) 228.

¹⁶⁵⁹ Kochenov, ‘Article 7: A Commentary on a Much Talked-About “Dead” Provision’ (n 1583) 135.

were mostly superficial, creating a façade of liberal constitutional democracy for these new states and hoping they would grow into their new shoes over time. A clear example of this being the failure of the EU to push for genuine integration of Latvia's Russian minority. Although Latvia amended some of its harshest policies targeting Russophones, many damaging laws remained and the EU failed to seize the opportunity to push for genuine minority inclusion during accession negotiations.¹⁶⁶⁰ Once EU membership was achieved, it was too late, as the EU lost its bargaining power.

For the Copenhagen Criteria to work a competent system of post-accession monitoring should be developed. Of course, the CVM attempted this but failed. However, a crucial reason it did fail was because it was designed to work only for those two countries which ultimately singled them out. Furthermore, the CVM was even irregularly applied between Romania and Bulgaria, with Bulgaria receiving better evaluations from the European Commission than Romania despite their performance being comparably poor.¹⁶⁶¹ Such irregular application inevitably leads to distrust between Member States and towards EU institutions. The key is to develop a monitoring system which has equal application amongst all Member States which would ensure fairness and uniformity. The new Conditionality Mechanism aims to achieve this as it is equally applicable to all Member States that place the Union budget at risk. On a less severe level the European Commission's Rule of law Reports are also useful soft-law tools as they create a culture of observation in the Union.¹⁶⁶² In other words, all member states, whether they are model-pupils or troublemakers receive a report annually. Of course, these reports also need to be written truthfully and fairly in order to be effective at showing Member States and observers that the EU is not biased. This is something that has been harder to achieve, as I have argued elsewhere.¹⁶⁶³

¹⁶⁶⁰ Eihmanis (n 850) 8.

¹⁶⁶¹ Radosveta Vassileva, 'On Coins, Parallel Universes and the Cooperation and Verification Mechanism' (12 September 2020) <<https://verfassungsblog.de/on-coins-parallel-universes-and-the-cooperation-and-verification-mechanism/>>.

¹⁶⁶² Monciunskaitė (n 1496) 54–55.

¹⁶⁶³ Monciunskaitė (n 1496).

7.6. Conclusion

So far, the EU Commission has failed to prove that it has the rule of law crisis under control. It continues to emphasise the importance of maintaining rule of law standards and promoting rule of law culture, which completely ignores the fact that, in some parts of the Union, there is not much rule of law left to maintain.¹⁶⁶⁴ What seems to be lost on the Commission is that dialogue will only work if a Member State genuinely intends to operate within the parameters of the fundamental values.¹⁶⁶⁵ What has happened in Poland and Hungary over the past decade has proven that dialogue only exacerbates rule of law backsliding in countries that no longer want to play by the rules.¹⁶⁶⁶

The EU Commission's response to the rule of law crisis continues to be fragmented and incoherent, as made evident by its inadequate reporting of the rule of law situation in Lithuania and Latvia. In order to fulfil the purpose of the Rule of Law Mechanism, future reports need to reflect upon the failings of the first three reports in order to serve any practical benefit in the fight against rule of law backsliding in the Union. Specifically, the overly positive tone and failure to report rule of law violations truthfully render the reports ineffective.¹⁶⁶⁷ This being said, this chapter has pointed out that despite the shortcomings of the Rule of Law Reports so far, they remain a very promising tool which has the potential to help turn the tide in favour of the EU in the fight to protect the rule of law. However, in order for reporting to work, the Commission must reconsider their approach so far and engage in finding ways to strengthen the current blueprint of this tool. Crucially, the Commission needs to learn from the mistakes it has made in dealing with Poland and Hungary and use the rule of law tools it has created effectively. It must heed the advice of experts and refrain from viewing individual breaches of the rule of law in isolation.¹⁶⁶⁸ This means that the next Rule of Law Report on Lithuania and Latvia must recognise that an executive's persistent tampering with the nomination of Constitutional Court Judges, illegal dismissal of an apex court judge, and attempts to curb free media

¹⁶⁶⁴ Bárd (n 104).

¹⁶⁶⁵ Pech and Scheppele 2017, p. 27.

¹⁶⁶⁶ *ibid*, p. 27–28.

¹⁶⁶⁷ Priebus, 'Too Little, Too Late' (*Verfassungsblog*, 2 October 2020) <<https://verfassungsblog.de/too-little-too-late/>> accessed 8 May 2021; Bárd (n 104).

¹⁶⁶⁸ Jakab and Kirchmair (2020), p. 947-949; Bárd (n 104).

over a short period are not accidental. These breaches represent a systemic attack on the rule of law, and turning a blind eye to this fact undermines the whole endeavour of protecting the EU's fundamental values. Furthermore, these superficial reports enable what Bárd terms 'whataboutery' – the ability of countries which consciously exploit the weaknesses of the rule of law to feed a conspiracy theory that the EU is treating them inequitably.¹⁶⁶⁹ Unless these reports join the dots between individual breaches of the rule of law in a Member State to unveil its systemic nature, the future of the EU is unthinkable.

It is also time that the EU begins taking conditionality for EU membership and the attached benefits seriously. This, of course, includes the proper use of the new Conditionality Mechanism to prevent the EU budget from being drained by corrupt authoritarian governments. The fact the Conditionality Mechanism has only been used against Hungary, but not Poland, so far, is indicative that subversive politics are at play as the EU wants to remain on the good side of Poland which is bearing the brunt of the migration crisis that has ensued after the invasion of Ukraine.¹⁶⁷⁰ Furthermore, pre-accession conditionality needs to be taken more seriously by the EU as it has a unique opportunity to shape potential candidates into upstanding and resilient Member States. However, for this to work, criteria such as respect for minority rights and the rule of law need to be demanded by the EU side in a rigorous manner which would avoid superficial adherence that has resulted in serious problems in much of the CEE region today.

¹⁶⁶⁹ *ibid.*

¹⁶⁷⁰ Federico Fabbrini, *The Euro after Covid-19 and the War in Ukraine: The Case for a Permanent Fiscal Capacity* (First edition, Oxford University Press 2023) 194–195.

8. Conclusion

This thesis set out to assess the state of liberal constitutional democracy in Lithuania and Latvia through the lens of democratic backsliding in Poland and Hungary. This research is important to understand the fidelity of the CEE region to the values of constitutional democracy and liberalism so that measures can be developed and used to prevent and halt the breakdown of liberal constitutional democracy in member states. This research has established that Lithuania and Latvia also display instances of democratic regression similar to that seen in Poland and Hungary. However, the experience of Lithuania and Latvia on the one hand and Poland and Hungary on the other is distinct as other factors are also at play. Significant differences between the two groups of countries include the much higher instance of democratic hollowness in Lithuania and Latvia and also the essential role that prominent political leaders play in cultivating democratic backsliding through their attempts to entrench power.

It is evident that achieving electoral democracy in Lithuania and Latvia was significantly easier than developing liberal democracy and the rule of law.¹⁶⁷¹ After all, organising fair and free elections takes less time than reproducing centuries of rule of law and liberalism tradition. This means that both countries are at a heightened risk of dramatic democratic regression during a time when they are still getting to grips with these values. Some regression in democratic standards has already become evident. Particularly, regarding authoritarian tendencies in elected leaders, disrespect for minority rights and attacks on media and judicial freedom. The fact both Latvia and Lithuania also experience high instances of democratic hollowness means they are at a heightened risk of destabilisation besides also being low quality democracies. These factors create a real risk of authoritarian reversal similar to what Poland and Hungary have undergone.

¹⁶⁷¹ Bugarič (n 15) 240.

Chapter two identified and explained the essential constituent parts of liberal constitutional democracy, namely the role of a functioning political party landscape and civil society in democratic stability, the importance of judicial independence for upholding the rule of law and the stabilising role of free media and respect for minority rights. This framework of understanding liberal constitutional democracy was used as the foundation for comparison of liberal constitutional democracy between Poland, Hungary, Lithuania and Latvia throughout this thesis. While chapter three illustrated how the identified pillars of liberal constitutional democracy have been systemically undermined by the Fidesz government in Hungary since 2010 and the PiS government in Poland since 2015. Notably, the combination of manipulating electoral laws, stripping courts of independence, hijacking the media landscape and undermining minority rights has led to democratic backsliding in both Poland and Hungary.

Chapter four highlighted the most concerning threats to liberal constitutional democracy in Lithuania. Here, the issues of the executive branch intimidating and interfering with the independence of the Constitutional Court and the Supreme Court and systemic attempts to undermine media freedom are discussed in detail. Lithuania also displays features of a volatile political party landscape, with populist rhetoric a key feature of most mainstream and protest parties. Chapter five on Latvia similarly identified that populist parties have been gaining traction in recent elections, and there are also significant issues regarding the interference of politicians, including members of government, in undermining judicial independence and respect for minority rights. This chapter also identifies the deeply rooted issue of inequality between ethnic Latvians and the country's sizable Russophone minority.

Chapter six demonstrated the complexity of the status of liberal constitutional democracy in the countries under study. Lithuania and Latvia feature definitive symptoms of backsliding such as attacks on judicial independence, media freedom and minority rights, similar to Poland and Hungary. Notable findings in this chapter include evidence of attacks on judicial freedom in both Lithuania and Latvia which were perpetrated by government and parliament to undermine the role of courts and, in particular, the Supreme Court and Constitutional Court. In Lithuania, there was also an attack on media

freedom by the then LFGU-led government which sought to limit free speech and seize control of the national broadcaster. While Latvia has not experienced attacks on their media freedom as severely as Lithuania, or Poland and Hungary, for that matter. However, all the countries under study have undermined minority rights in a significant way. Poland and Hungary have demonstrated severe breaches of minority rights but similar sentiments around the ‘war on gender’ and lack of progress on same-sex partnership legal recognition is present in both Latvian and Lithuanian political discourse.

Chapter six highlights that the lack of a long-term and successful illiberal movement in Latvia and Lithuania can be attributed to a lack of an ideological majority in these countries. The fact that there has not been a super-majority in either parliament or simply an ideological consensus across governing coalition members means that anti-democratic reforms are not possible. Therefore, Lithuania and Latvia have for now demonstrated that internal checks on executive power are working effectively. The differences between democratic hollowness and democratic backsliding are also addressed in this chapter. Notably, hollowness is framed as its own worrying feature of a low-quality democracy which is pertinent to understanding the experience of Lithuania and Latvia, where Latvia, in particular, suffers from ‘double hollowness’.¹⁶⁷² Aside from democratic hollowness being a symptom of a democratic deficit in itself it is also argued hollowness can be a risk factor for destabilisation of democracy that can lead to backsliding. The agentic theory was used in this chapter to illustrate the power of prominent political actors and their influence over the democratic trajectory of a country. In short, strong-man leadership styles of Orbán and Kaczyński have been instrumental in producing both Hungary’s and Poland’s illiberal revolutions.

Chapter seven critically analysed the EU Commission’s response to the rule of law crisis and places the discussion of the risks to liberal constitutional democracy in the countries under study within the EU context. This chapter analysed the EU Commission’s only substantive accounts of the rule of law situation in Lithuania and Latvia, the annual Rule of Law Reports. It was argued that the first three reports have been inadequate but that

¹⁶⁷² Cianetti (n 32) 317–320.

the reporting framework under the Rule of Law Mechanism has promising deterring potential for future rule of law breaches within the EU. Chapter seven further analyses the pre-accession procedure for EU membership and argues that pre-accession conditionality is a unique and vital opportunity for the EU to shape candidate countries and to ensure that liberal constitutional democracy becomes authentically incorporated into a countries ideology and identity.

Although the analysis of the state of liberal constitutional democracy in Lithuania and Latvia has uncovered worrying developments and risk factors around the relationship these countries have with liberal constitutional democracy, all is not lost. History has shown that struggles during the democratisation process can serve to strengthen democratic resilience further down the line. Therefore, punishing voting patterns, polarisation and general unrest in Lithuania and Latvia might indicate a genuine struggle of a polity to hold elites to account.¹⁶⁷³ Along the same lines, short-term illiberal populist successes might not be disastrous to democracy either as “shorter term ebbs and flows, including perhaps episodes of backsliding and democratic regression, are to be expected” given our understanding of past successful democratisation experiences.¹⁶⁷⁴ Comparative constitutional scholarship and the wider international community must understand that democratic disfunction comes in various forms. Democratic backsliding of the type and magnitude observed in Hungary and Poland has become the yardstick for understanding democratic regression today. However, this thesis has highlighted that symptoms of dysfunction do not have to be as severe as in Poland and Hungary for them to warrant concern. This understanding is critical to further efforts in preventing and halting democratic and rule of law regression within the EU.

The empirical research conducted on Lithuania and Latvia in this thesis further adds to existing knowledge on the CEE region’s experience with constitutional democracy, liberalism and democratisation. This knowledge is particularly relevant and important at a time when liberal constitutional democracy is facing challenges regionally and globally.

¹⁶⁷³ *ibid* 248.

¹⁶⁷⁴ *ibid* 247.

The research in this thesis aims to offer a jumping-off point for future research into European democratisation and constitutionalism and is intended to bring the field a step closer towards a comprehensive understanding of the experience of all member states with constitutional democracy and liberalism. This knowledge is essential to protect these ideals within the EU and domestically. This research offers a foundation for further research into the democratic experience of the Baltic states and other countries in the CEE region. In particular, the analytical framework developed in this thesis for assessing the state of liberal constitutional democracy in Lithuania and Latvia can be applied to Estonia, the third Baltic State, so that a comprehensive understanding of the state of liberal constitutional democracy can be developed for the Baltic region. The theory and methodology adopted in this thesis are further applicable and timely considering the recent EU candidacy of Moldova, Ukraine and Bosnia and Herzegovina. The recommendations in chapter seven of this thesis pertaining to the need for careful consideration of accession criteria to ensure true fidelity to EU values of potential member states are significant in this context.

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