Dr DACE ŠULMANE

Adviser at the Supreme Court of the Republic of Latvia

LATVIA – LITHUANIA – ESTONIA

EUROPEAN UNION

I. National practices concerning law-making procedures in case of urgent and/or exceptional circumstances

1/ Does your national legal order identify urgent and/or exceptional cases as the justification for applying special law-making procedures?

Are the concepts of "urgency" and "exceptionality" used cumulatively or alternatively as conditions for the special law-making procedures?

Are there distinct or common law-making procedures applying in urgent and/or exceptional cases?

1.1. Latvia

1.1.1. General law-making procedures in Latvia are regulated by the Satversme (Constitution) and the Rules of Procedure of the Saeima (Parliament). A draft law is adopted after discussion in three readings at Saeima sittings.

In Latvian legislation generally three terms are used: urgent situations/ urgency *(steidzamība)*, emergency situation or extraordinary circumstances[1] *(ārkārtējā situācija, ārkārtīgi apstākļi)* and state of exception *(izņēmuma stāvoklis)*. These terms are used alternatively as a condition for the special law-making/decision-making. Each of the legal statues invokes different legislation procedures due to different level of possible restrictions and limitations of freedoms and rights of individuals.

1.1.2. Definition: Emergency situation is a special legal regime, during which the Cabinet has the right to restrict the rights and freedoms of State administrative and local government institutions, natural persons and legal persons, as well as to impose additional duties to them (no more than three months).

Definition: State of exception is a special legal regime (not exceeding six months) declared by the Cabinet if:

1) the State is endangered by an external enemy;

2) internal disturbances which endanger the democratic structure of the State have arisen or are in danger of arising in the State or any part thereof.

State of exception allows to restrict the rights and freedoms of natural persons and legal persons to the extent and according to the procedures laid down in law, as well as to impose additional duties on them.

[1] The difference in terms used in English might be caused by the various versions of official translations from Latvian language

1.1.3. If the State is threatened by an external enemy, or if an internal insurrection which endangers the existing political system arises or threatens to arise in the State or in any part of the State, the Cabinet has the right to proclaim a state of emergency and shall inform the Presidium of Saeima within twenty-four hours and the Presidium shall, without delay, present such decision of the Cabinet to the Saeima (Art.62 of the Satversme).

1.1.4. Meanwhile, draft laws which, upon a recommendation by the responsible committee or by 10 Members, have been recognized as urgent by a Saeima decision shall be considered in only two readings.[2] The Saeima may rule on urgency before debate on a draft law in its first reading (by not less than a two thirds majority vote). If a draft law which has been recognized as urgent has been adopted in the first reading, the Saeima shall rule when to hold the second reading. If none of the Members object, a deadline for submitting proposals may not be set, and the second reading of the urgent draft law shall take place immediately after its adoption in the first reading.[3]

In practice, passing the law in the Parliament using the fast-track procedure of two readings has been realized even in one day.[4]

1.1.5. Proclamation of the law is different in ordinary and urgent procedures.

In the ordinary procedure, the President proclaims laws passed by the Saeima not earlier than the tenth day and not later than the twenty-first day after the law has been adopted. Law comes into force 14 days after its proclamation unless a different term has been specified in the law.[5] Should the *Saeima* determine a law to be urgent, the President may not request reconsideration of such law, it may not be submitted to national referendum, and the adopted law shall be proclaimed no later than the third day after the President has received it.[6]

1.1.6. As the Constitutional Court has declared, pursuant to Article 75 of the Satversme and Article 92 of the Saeima Rules of Procedure the legislator has the right to consider the expediency of reading a certain draft law in urgent procedure.[7]

The category 'urgent legislation' in Latvian political practice is widely used and not clearly linked with the term 'urgent' in its classical meaning. Laws which have been passed via this

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[2] There is another category of legislative acts which require *expressis verbis* only two readings (Art. 114): a draft budget law and amendments thereto, the draft medium-term budget framework and amendments thereto; draft laws on the ratification of international agreements.

[3] Saeimas kārtības rullis (Saeima Rules of Procedure). 27.07.1994, Art. 92. Available in English: http://www.saeima.lv/en/legislation/rules-of-procedure

[4] For example, the Saeima adopted changes in law regulating the salaries for State Revenue Service employees in urgent legislative procedure. The time for submitting the proposals for the second reading was 15 minutes. See: Saeima verbatim report. 15.09.2016. Available in Latvian: http://www.saeima.lv/lv/transcripts/view/374

[5] Article 69 of the Satversme

[6] Article 75 of the Satversme

[7] Judgement in Case No. 2014-12-013 July 2015 "On Compliance of Para 1 and 2 of Section 3, Para 1 of Section 4, and Section 5 of Subsidized Electricity Tax Law with Article 1 and Article 105 of the Satversme of the Republic of Latvia", para.16.

procedure have been of the most diverse fields,[8] and it is the responsibility of a legislator to choose the form of the legislation procedure.

Until 31 May 2007 the Constitution of Latvia (Article 81) defined the right of the executive to adopt regulations that had the force of law, which caused a significant risk of distorting the balance of state powers (see answer to Question 4).

1.1.7. On April 2017, a working group of Judicial Commission of the Parliament of Latvia published its report regarding possibilities to extend the functions of the State President. According to the Constitution the President has the right to convene and to preside over extraordinary meetings of the Cabinet and to determine the agenda of such meetings (Art.46),[9] which might be done in two occasions: a) the government is incapable to act; b) the Prime Minister needs the support of the State President to make and implement very necessary, but un-popular decision.[10]

1.2. Lithuania[11]

1.2.1. The Constitution of the Republic of Lithuania (hereinafter – the Constitution)[12] foresees two types of emergency rule: a state of emergency and martial law (in case of foreign threats or international obligations, options are: announcing mobilisation, adopting decision to use armed forces or/and imposing direct rule and the martial law).

1.2.2. In Lithuanian legislation regarding the state of exception (in peacetime) generally these definitions are used: urgency/extreme urgency (*skubos/ypatingos skubos*), emergency situation (*ekstremali situacija*) and state of emergency (*nepaprastoji padėtis*).

1.2.3. *Emergency situation (Ekstremali situacija)* – is a situation that occurs due to natural, technological, environmental or social reasons and causes past and a serious threat to human life or health, property or the environment due to human death, injury or significant property damage. This emergency situation is not established in the Constitution, thus is not a ground for temporary restrictions of the use of personal rights and freedoms. Emergency situation allows the government to relocate necessary material and human resources and manage

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[8] Some examples of laws passed via urgent procedure (2016 – 2017): Amendments to the Law on Management of Residential Housing; Amendments to Ķemeri National Park Law; Amendments to Labor Law; Amendments to the Law on Corruption Prevention and Combating Bureau

[9] In practice, the President has very rarely used this option. For example, in 1995 (two times: the question of the submission of an application for Latvian to the EU and bank crisis) , in 1998 (coalition crisis), in 2009 (optimization progress in public administration, as well as in health and education sectors)

[10] Saeimas Juridiskās komisijas deputātu darba grupas Valsts prezidenta pilnvaru iespējamai paplašināšanai un ievēlēšanas kārtības izvērtēšanai atzinums (Opinion of the working group of Saeima Legal Affairs Committee on a possible extention of the mandate and evaluation of the election procedure of the President). Saeima, April 2017, p.14. Available: http://www.saeima.lv/documents/b3c6ec245625d8f94ce23c563ffbd4935d5fbe54

[11] Information regarding Lithuania has been researched in cooperation with dr.iur.cand. Aušra Vainorienė, University of Vilnius, Faculty of Law and dr. Alvidas Lukošaitis, Office of the Seimas Information and Communication Department, Head of Research Department

them in order to cope with an emergency. Extreme emergency situation may be a ground for the state of emergency.

State of Emergency (Nepaprastoji padėtis) – is special legal regime of the country or a part of it, which allows the application of the temporary restrictions of the use of personal rights and freedoms and temporary legal entities operating restrictions, established in the Constitution and the Law on state of emergency. The Government introduces temporary restrictions of the use of personal rights and freedoms and temporary legal entities operating restrictions by invoking emergency measures, which are defined as temporary restrictions, actions applied during the state of emergency in order to eliminate the threat to the constitutional system or social peace.

1.2.4. Article 144 of the Constitution[13] states that: „When a threat arises to the constitutional system or social peace in the State, the Seimas [parliament] may declare a state of emergency throughout the territory of the State or in any part thereof. The period of the state of emergency shall not exceed six months. In cases of urgency, between sessions of the Seimas, the President of the Republic shall have the right to adopt a decision on the state of emergency and convene an extraordinary session of the Seimas for the consideration of this issue. The Seimas shall approve or overrule the decision of the President of the Republic. The state of emergency shall be regulated by law".

1.2.5. Law on State of Emergency (came into force on 6 June 2002)[14] establishes the procedure of introducing emergency and the emergency measures, which include the temporary limitations of personal use of the rights and freedoms, temporary operating restrictions of institutions, temporary state and municipal powers during the state of emergency. State of emergency can be introduced, if there is a threat to the constitutional order of the Republic of Lithuania or social peace and this threat cannot be eliminated without having been used in the emergency measures enshrined in the Constitution and in the law.

Law on Civil Safety (came into force on 31 December 1998 (recast on 1 January 2010))[15] establishes the preventive measures of civil safety, the management of emergency situations and liquidation of its consequences[16].

1.2.6. The criteria for recognition of emergency situations are set out by the Government in "Resolution on the approval of extreme events criteria". It distinguishes different groups of possible causes: Cultural values hazard or destruction; Fearing

[13] Lietuvos Respublikos Konstitucija (the Constitution of the Republic of Lithuania). 1992, Nr. 33-1014. Available in English: http://www3.lrs.lt/home/Konstitucija/Constitution.htm

[14] Lietuvos Respublikos Nepaprastosios Padėties įstatymas (Law on State of Emergency). 6 June 2002, No. IX-938. The latest amendments made in 16 June, 2016. Available: https://www.e-tar.lt/portal/en/legalAct/TAR.845C6618A647/sUPVvvopDo.

[15] Lietuvos Respublikos civilinės saugos įstatymas (Law on Civil Safety), 15 December *1998, No.* VIII-971. The latest amendments made in 1 July 2015. Available: https://www.e-tar.lt/portal/lt/legalAct/TAR.C15592B096FA/hslNzqnsWy

[16] This law implements Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC.

discovery; Fire hazard, danger of ignition or combustion, Events related to terrorist activities, Event frontier zone and the territorial sea, Uncontrolled mass of people, Radiation accident, Catastrophic hydrological phenomenon in the Lithuanian area of responsibility in the Baltic Sea and the Curonian Lagoon, the Lithuanian sea port waters, Human infectious diseases, Human health disorder in humans or other death cases, animal diseases, Transport event, Aviation accidents, Communications services for consumers disorder; emergency services telephone failure; radio and television broadcasting break, power failure, etc.[17]

1.2.7. General law-making procedures in Lithuania are regulated by the Constitution, the Statute of Seimas (Parliament) and the Law on Legislative Framework. Seimas (parliament) passes all laws.

Urgent legislation procedure is established in the Statute of Seimas[18]. The decision to apply urgent or extremely urgent legislative procedure is made by the majority vote of Seimas Members (which should be more than 1/5 of all members for urgent procedure, and ¼ of all members for extremely urgent procedure).

Draft laws which have been recognized as urgent by Seimas decision may be considered in only two readings, which in practice, may be realized even in one day[19].

The Statute of Seimas establishes that the Resolution of Seimas which impose direct rule and martial law, declare states of emergency, announce mobilisation, and adopt a decision to use the armed forces are considered in extremely urgent procedure[20]. During the state of emergency the same forms legislation procedure applies (ordinary, urgent and extremely urgent). The Constitution cannot be amended during the state of emergency (art. 147 of Constitution).

1.2.8. The 'urgent' or extremely urgent legislation in Lithuanian political practice is widely used and not clearly linked with the emergency. Laws which have been passed via this procedure have been of the most diverse fields, and it is the discretion of Seimas to choose the form of the legislation procedure[21].

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[17] N u t a r i m a s dėl ekstremalių įvykių kriterijų patvirtinimo (Resolution on the approval of extreme events criteria). 9 March 2006, No. 241. In accordance with the Lithuanian Civil Protection Act (Official Gazette., 1998, Nr. 115-3230) Article 4, paragraph 8. Available: https://www.e-tar.lt/portal/en/legalAct/TAR.F2432CA5A7F8. The latest amendments were made in 2015.

[18] Lietuvos Respublikos Seimo statutas (Statute of Seimas), 17 February 1994, No. I-399. The latest amendments were made in 16-11-2016. Available: https://www.e-tar.lt/portal/lt/legalAct/TAR.123B53F30F70/RFqfPNVWAl

[19] For example, Lithuania's parliament in the urgent procedure adopted the Statute on the use of military force in peacetime (effective from 01-01-2015). Available: https://www.e-tar.lt/portal/lt/legalAct/TAR.6CADC13B548B/pSrZgRUSNc

[20] Lietuvos Respublikos Seimo statutas (Statute of Seimas), 17 February 1994, No. I-399. The latest amendments were made in 16-11-2016. Available: https://www.e-tar.lt/portal/lt/legalAct/TAR.123B53F30F70/RFqfPNVWAl

[21] For example, Lietuvos Respublikos ūkio subjektų, perkančių–parduodančių žalią pieną ir prekiaujančių pieno gaminiais, nesąžiningų veiksmų draudimo įstatymas (Law on milk sellers-buyers prohibition of unfair competition passed in extrememely urgent procedure) 2015-06-25, No. XII-1907, Available:https://www.e-tar.lt/portal/lt/legalAct/bb38ee90263911e5bf92d6af3f6a2e8b/EwUxGMBkyA.

In general procedure there are 3 hearings, in urgent procedure there are 2 hearings (one in the Responsible committy and one in the Seimas session) and then after at least one day, in session MP's decide on the adoption of law; in extremely urgent procedure there might only be one hearing and the adoption procedure both in the same day.

1.2.9. Urgent and extremely urgent procedure should be used when special social, economic or political circumstances in the state require such measures, i. e. only in exceptional situations of necessity. However, the law in Lithuania does not establish any criteria which would allow evaluating the necessity of the urgent/extremely urgent procedure. The discretion to decide, whether to apply urgent/extremely urgent procedure or not, belongs to Seimas. After analysing some laws that were passed in an urgent/extremely urgent it seems that there might be some instances of abuse of this speedy procedure (for instance the law on milk sellers unfair competition was passed in extremely urgent procedure but there were no justification provided by the Speaker of Seimas why this urgency was necessary). Some scholars in Lithuania have noticed that this discretion at times might be contrary to the public interest to have law that are socially just, especially when new laws are passed or amended that are beneficial to the majority in the government.[22]

3.1. Estonia[23]

3.1.1. According to the Estonian legislation there are common incidents, emergencies and declared states of exceptions and state readiness levels to solve a crisis. Estonia has a system of checks and balances and it should safeguard democracy and constitutional order and protect civil rights and liberties. But most important is to achieve the main goal - to deter attacks and threats against Estonia and ensure that Estonia is capable of defending itself against external and internal threats.

3.1.2. *Common incident* – is an event, situation or accident, which can be dealt by different government institutions within the framework of their regular tasks. Common incidents are the first level from the protection of public order. On the one hand public order is collective legal right provided for in Estonian Constitution and on the other hand according to the Law Enforcement Act (*Korrakaitseseadus*) it is a state of society in which the adherence to legal provisions and the protection of legal rights and persons' subjective rights are guaranteed (art. 4 section 1). Common incident is not defined in Estonian legislation.

3.1.3. *Emergency (Hädaolukord)* – is an emergency an event or a chain of events which endangers the life or health of many people or causes major proprietary damage or major environmental damage or severe and extensive disruptions in the continuous operation of vital services and resolving of which requires the prompt co-ordinated activities of several authorities or persons involved by them (Art. 2 section 1 of the Emergency Act (*Hädaolukorra seadus*), in force until 30.06.2017)[24].

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[22] Andriuškevičius A. Administracinės teisės principai ir normų ribos (Administrative law's principles and the limits of legal norms). Vilnius, 2004. p. 152.

[23] Information regarding Estonia has been researched in cooperation with Margit Gross, Head of the Working Group of the State Defence Law Revision, Ministry of Justice, Republic of Estonia

[24] Emergency Act (Hädaolukorra seadus), in force until 30 June 2017. Available in English: https://www.riigiteataja.ee/en/eli/520062016007/consolide

Starting from 01.07.2017 the new Emergency Act came into force *(Hädaolukord)* and the emergency notion is amended as following:

Emergency is an emergency event or a chain of events or interruption of vital services which endangers the life or health of many people or causes major proprietary damage or major environmental damage or severe and extensive disruptions in the continuous operation of vital services and resolving of which requires the prompt coordinated activities of several authorities or persons involved by them, the special management systems to be taken and involve more people and resources than customarily. (Art. 2 section 1 of the new[25] Emergency Act (Hädaolukorra seadus)). Compared it to the existing emergency, the term is enlarged. As well as the vital service interruption itself may result in danger to human life or health (for example, long-term and large-scale power failure during winter months), the interruption of vital services is also covered by the definition of an emergency. In addition, the law adds two emergency features when the situation is deemed an emergency: need to implement abnormal management system and need to involve more people and resources than customarily.

3.1.4. Emergency differs from ordinary situation in that more co-ordination and additional resources are required. The emergency and common incident are not declared by the organ of the state.

Estonian constitution stipulates three types of states of exception what different constitutional institutions can declare to resolve the situations: 1) emergency situation; 2) state of emergency and 3) state of war.

Emergency situation (*Eriolukord*) is declared by the Government in an emergency situation for resolving an emergency arising from a natural disaster, catastrophe or spread of a communicable disease (Art. 87 section 8 of the Constitution and Emergency Act art 13[26]). Emergency situation involves additional measures and different lines of command and control.

State of emergency is declared by the *Riigikogu* (parliament) on a proposal of the President of the Republic or the Government (not exceeding three months).[27] In case of a threat to the constitutional order of Estonia, which may arise from terrorist activity, collective coercion, an attempt to overthrow the constitutional order by violence, extensive conflict between groups, prolonged mass disorder or a forceful isolation of an area of the Republic. A state of emergency is declared in case it is not possible to eliminate a threat to the constitutional order of Estonia without the implementation of the special relevant measures (Art. 129, art 65 point 14, art 78 point 17 of the Constitution and art. 2 and 3 of the State of Emergency Act[28]).

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[25] On 08.02.2017 the Parliament adopted a new Emergency Act (Hädaolukorra seadus). This law enters into force on 1 July 2017. Available in Estonian language: https://www.riigiteataja.ee/akt/103032017001

[26] Emergency Act (Hädaolukorra seadus), in force until 30 June 2017. Available in English: https://www.riigiteataja.ee/en/eli/520062016007/consolide

[27] Erakorralise seisukorra seadus (State of Emergency Act). 10.01.1996. Available in English: https://www.riigiteataja.ee/en/eli/529012016004/consolide

[28] Erakorralise seisukorra seadus (State of Emergency Act). 10.01.1996. Available in English: https://www.riigiteataja.ee/en/eli/ee/529012016004/consolide

State of war is declared by the Riigikogu (parliament) on a proposal of the President of the Republic (Art. 128, art. 65 point 15 and art. 78 point 17 of the Constitution). In the case of aggression against the Republic of Estonia, the President declares a state of war and orders mobilisation without awaiting the corresponding resolution of the *Riigikogu* (art 128 and art. 78 p 18 of the Constitution). State of war can be declared in case of armed attack, threat of armed attack, aggression etc. There is no determination (either in Constitution and National Defence Act) on what situation state can declare war – it is Estonian constitutional institutions decision based on threat perception.

The three level system and strict power balancing conditions are formed based on the historical experience of the authoritarian regime what was in Estonia in 1930ies.

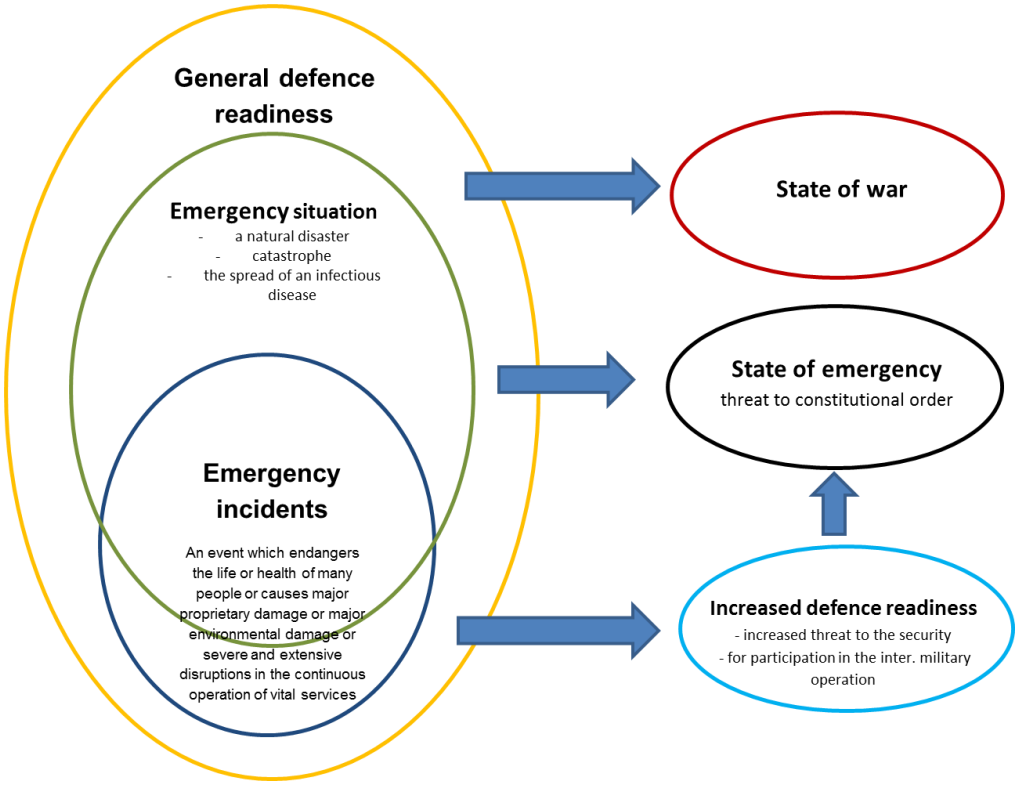
3.1.5. New National Defence Act (*Riigikaitseseadus*), which entered into force 2016, created in addition a three level system of stages of readiness: general defence readiness, increased defence readiness and state of war (National Defence Act art. 8)[29]. General defence readiness is the defence readiness level of the state by which an authority and person with national defence tasks performs the tasks related to their ordinary main activities and prepares for acting during other defence levels of the state and mobilisation and demobilisation (National Defence Act art. 12 section 1).

Increased defence readiness is the defence readiness level of the state by which an authority and person with national defence tasks performs additional tasks in addition to the tasks related to their ordinary main activities in the case of the increased threat to the security of the Republic of Estonia and for participation in an collective self-defence operation of this Act (National Defence Act art. 30 section 1) in order to counter the threat and ensure the functioning of the state (National Defence Act art. 12 section 2).

3.1.6. The figure below illustrates the interconnectivity of states of exception and state readiness levels. As can be seen in figure some emergencies can entail emergency situation declaration for example flood in a high-density area, extensive forest and brush fire, Extensive, third-degree (oil) spill at sea, nuclear accident with cross-border impact, domestic incident involving source of radiation, epizootic etc.). But some emergencies can entail also state of emergency – threat to constitutional order – mass unrests, strikes, cyber-attacks etc.

It is to be mentioned that the state of exception, emergency situation and increased defence readiness can be in force in the same time. A state of emergency is deemed as ceased upon declaration of a state of war, but state of exception can be still in force.

[29] Riigikaitseseadus (National Defence Act). 01.01.2016. Available in English: https://www.riigiteataja.ee/en/eli/ee/513072016005/consolide



3.1.7. Due to the broad spectrum of hybrid threats, the need to embed the comprehensive national defence concept, including enhancing resistance, resilience, military responsiveness and agility, Estonia has been started a defence law revision during which all defence and security related laws and regulations will be reviewed.

The revision aim is to overlook, to harmonize and further develop the comprehensive national defence field.

Each of the legal statues invoke different legislation procedures due to different level of possible restrictions and limitations of freedoms and rights of individuals.

Estonian institutional organisation follows the principle of the separation and balance of powers (Art. 4 of the Constitution). General law-making procedures in Estonia are regulated by the Constitution and the Riigikogu Rules of Procedure and Internal Rules Act[30]. The legislative process in the Estonian Parliament comprises the following stages: initiation of draft legislation; examination of draft legislation; adoption of draft legislation. According to the general rule a draft law must pass three readings at Riigikogu sittings. After an Act is adopted and signed, it is sent to the President of the Republic to be promulgated. Laws enter into force on the tenth day following their publication in the Riigi Teataja (Estonia's official online publication and the central database of legal instruments) unless they contain a contrary provision (Art. 108 of the Constitution). Acts and Regulations gain legal force only once they have been published in Riigi Teataja.

[30] Riigikogu kodu- ja töökorra seadus (Riigikogu Rules of Procedure and Internal Rules Act) Available in English:. https://www.riigiteataja.ee/en/eli/528122016004/consolide

3.1.8. Proclamation of the law is different in ordinary and urgent procedures. Draft resolutions of the Riigikogu that concern the declaration of the state of emergency, state of war, mobilisation or demobilisation, or that are related to increasing the level of defence readiness are deliberated in a single reading. At the reading of the draft resolution, a report is made by the Prime Minister or, if he or she has been correspondingly authorised by the Prime Minister, another member of the Government. Members of the Riigikogu may each ask one oral question to the presenter. At the reading of the draft resolution, the floor is opened for debate for representatives of the factions to present comments. No motions to amend the draft resolution are submitted. After the debate is closed, the draft resolution is put to the final vote. (Art. 118 of the Riigikogu Rules of Procedure and Internal Rules Act). There is also simplified inner procedures. There is no special rules that apply to Riigikogu legislative procedures when turning the states of exception arises an urgent and/or exceptional need to make amendments in the laws or to pass new acts. Estonian legal order does not identify urgent and/or exceptional cases as the justification for applying special law-making procedures.

An order of the Government of the Republic regarding declaration of an emergency situation shall enter into force on signing, unless a later date has been provided for in the order itself. The order shall be immediately published in the media (Art. 15 section 2 section 1 of the Emergency Act (*Hädaolukorra seadus*), in force until 30.06.2017).

A resolution on the declaration of a state of emergency enters into force upon its publication in national mass media. Broadcasters shall publish the resolution in unaltered form and promptly. The resolution shall be published in the Riigi Teataja on the first working day following the day on which the resolution was made. (Art. 14 section 2 and 3 of the State of Emergency Act).

3.1.9. An order of the Government of the Republic on increased defence readiness, a resolution of the Riigikogu on declaration of a state of war, ordering mobilisation and demobilisation and approval of and termination of approval of increased defence readiness, the decision of the President of the Republic on declaration of a state of war and ordering mobilisation, as well as an administrative act issued for organisation of increased defence readiness, mobilisation and demobilisation and settlement of a state of war shall be published in an unaltered state as follows unless other term or procedure is provided for in the legislation:

1) in Riigi Teataja at the latest on the day following the submission thereof for publication;

2) immediately in a national mass media. (Art. 11 section 2 National Defence Act).

In addition the President may, in matters of national urgency, issue decrees which have the force of law and which have been countersigned by the President of the Riigikogu and the Prime Minister, if the Riigikogu is unable to convene. The “matters of national urgency” is undeffined legal term. When the Riigikogu convenes, the President presents the decrees to the Riigikogu, which promptly passes a law regarding their confirmation or repeal (Art. 109 of the Constitution).

2/ Do the eventual special law-making procedures in case of urgent and/or exceptional circumstances derive from de facto practices or are they set out in the Constitution and/or in ordinary legislation?

What are the main principles and the concrete proceedings of law-making in urgent and/or exceptional circumstances in your national legal order?

In all three Baltic States the main principles of special law-making procedures in case of urgent and/or exceptional circumstances are set in the Constitution, while more detailed regulation is found in the relevant laws and Parliament Rules of Procedure.

2.1. Latvia

The Constitution provides only general principles of law-making procedures in exceptional cases, therefore coordinated plan of action (including decision-making with close involvement of the Parliament) is provided in the law "On Emergency Situation and State of Exception".[31]

2.1.1. **Emergency Situation** (Chapter II, Art. 4 – 10)

Emergency situation may be declared in case of such threat to national security, which is related to a disaster, danger thereof or threat to the critical infrastructure, if safety of the State, society, environment, economic activity or health and life of human beings is significantly endangered. It is the Competence of the *Saeima* to decide on Justification of Emergency Situation or on such amendments to a decision on emergency situation which determine additional territorial restrictions or restrictions of rights.

- Cabinet has the right to stipulate:

special movement and gathering procedures or movement and gathering restrictions;

special procedures for the movement of vehicles or restrictions to such movement;

special procedures for economic activity or restrictions to such activity;

special procedures for access to goods, medicinal products, energy resources, services and other material and technical resources;

the right of State administrative and local government institutions to take a decision to evacuate inhabitants and their movable property, as well as, if necessary, to ensure the carrying out of the decision taken by forced movement;

the right of officials of State administrative and local government institutions to access a private property;

additional right for officials of State administrative and local government institutions to detain and hand over persons who refuse to obey lawful requests of officials or commit other infringements, to officials of law enforcement authorities for taking a decision;

the right of State administrative and local government institutions to determine a prohibition for persons to be at certain places without special authorisations or personal identification documents;

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[31] Par ārkārtējo situāciju un izņēmuma stāvokli (On Emergency Situation and State of Exception), law adopted by Saeima 07.03.2013. Available in English: https://likumi.lv/doc.php?id=255713

complete or partial suspension of execution of the liabilities laid down in international agreements, if execution thereof may have a negative impact on the ability to prevent or overcome threat to national security.

In declaring emergency situation, in addition to the rights referred to above the Cabinet has the right to determine measures necessary in the particular emergency situation, which are provided for the prevention or overcoming of threat to national security and consequences thereof in laws, as well as the competence of State administrative and local government institutions in the prevention or overcoming of threat to national security.

In taking a decision on emergency situation, the Cabinet may determine international organisations and states to be informed regarding declaration of emergency situation and its reasons, the territory in which emergency situation has been declared and the time period for which it has been declared (Art.9 (2))

2.1.2. **State of Exception** (Chapter III, Art. 11-18)

The Cabinet shall notify a decision on state of exception to the *Saeima* within 24 hours. It has to decide on justification of state of exception.

If it is necessary for national security and national defence, the Cabinet may amend the form of subordination of State institutions of direct administration and derived public persons during state of exception, change the subordination of State institutions of direct administration to a particular member of the Cabinet, including substitute supervision with subordination.

2.1.3. **Rights of the Cabinet during State of Exception**

Depending on the type, intensity and nature of threat to national security the Cabinet may determine:

1) a special regime for entering Latvia and departing from Latvia, as well as movement and residence restrictions;

2) a prohibition for persons to be at specific locations without special authorisations or personal identification documents, as well as permanent checks of personal documents;

3) special procedures or restrictions for organising meetings, processions and pickets, as well as other mass events or a prohibition to organise them;

4) restrictions for organising strikes or a prohibition to organise them;

5) restrictions for movement of persons, vehicles and cargoes across the State border or a prohibition of such movement, as well as restoring of border control on internal State borders;

6) special procedures for access to food products, essential goods, medicinal products and medicinal goods, alcoholic beverages, fuel and energy resources, as well as services and other material and technical resources, including rationed supply of inhabitants with food, essential goods and medical goods;

7) special procedures or restrictions for the handling of weapons, ammunition, special means, explosives, explosive devices and pyrotehnic articles, specific hazardous chemical, biological and radioactive substances, including removal of weapons, ammunition, special

means, explosives, explosive devices and pyrotehnic articles, specific hazardous chemical, biological and radioactive substances owned by persons;

8) the creation of reserves of raw materials and goods of strategic significance, as well as prohibition to export goods and raw materials of certain categories from the State;

9) the State administrative and local government institutions, which shall prepare and distribute official information regarding state of exception;

10) reinforced safeguarding measures of the public order and guarding of individual objects;

11) the provision of the State administrative and local government institutions involved in and the civil defence units mobilised for overcoming of the threat to national security with energy resources;

12) partial or complete suspending of carrying out of the liabilities laid down in international agreements, if their carrying out may have a negative impact on the capacity to prevent or overcome the threat to national security;

13) the provision of operation of mass media;

14) the provision of aid functions of the host country in hosting armed forces of the North Atlantic Treaty Organisation or the European Union, as well as non-application of the requirements of environmental, construction and other laws and regulations to measures which are related to the hosting, deployment of the referred-to armed forces and preparation thereof for provision of the aid necessary for national defence;

15) the operation mode of State administrative and local government institutions;

16) special procedures for the circulation of information of State authorities;

17) involving of inhabitants in voluntary work necessary for the liquidation of disasters caused by internal disturbances or external military threat and the consequences thereof;

18) an authorisation for the Minister for Finance to change the appropriation determined in the law on the State budget for the current year, if the Budget and Finance (Taxation) Committee of the *Saeima* has reviewed changes in appropriation within 24 hours and has not objected against them, as well as to ensure financial resources and making of payments;

19) an authorisation for the Prime Minister and the Minister for Finance to take decisions on changing the appropriation determined in the law on the State budget for the current year, if the Budget and Finance (Taxation) Committee of the *Saeima* has not reviewed changes in appropriation within 24 hours.

(2) In declaring state of exception, in addition to the rights referred to in Paragraph one of this Article the Cabinet has the right to determine measures necessary in the particular state of exception, which are provided for the prevention or overcoming of threat to national security and consequences thereof in laws, as well as the competence of State administrative and local government institutions in the prevention or overcoming of threat to national security.

2.2. Lithuania

2.2.1. According to Law on State of Emergency[32], and the Constitution (Art. 144) the decision to impose a state of emergency is adopted by the Seimas (a resolution during the session). Between the sessions of the Seimas – decision is made by President of the Republic[33]. Immediately an extraordinary session of the Seimas is called to review (approve/withdraw) the decision of the President. The term for a state of emergency is up to six months.

Parliament, approving the President's decision to impose a state of emergency, can change its settings, reducing or increasing:

1) in areas of introduced emergency;

2) the duration of an emergency;

3) establish the constitutional rights and freedoms and the emergency measures that can be applied to the scale.

Presidential Decree on emergency power should be co-signed by the Prime Minister.

2.2.2. Law on State of Emergency (Article 8) gives more details on the procedure of announcement of a state of emergency. Presidential Decree on the state of national emergency throughout the national territory, the state capital, or more than half of the territory of the State administrative units is to be submitted to the extraordinary session of Parliament within 24 hours from the time of its publication, while in other cases – no later than 48 hours from the time of its publication. According to Article 18 introduction of the rights and freedoms restrictions cannot contradict Lithuanian Republic's obligations under international law.

Although law provides for a formal definition of a state of emergency, it is still discretion of the Seimas and President to evaluate the scope of threat.

It is the responsibility of Seimas to ensure that the necessary legislation for the national security would be passed in time[34]. Seimas is also responsible for the law making during the state of emergency. According to the Constitution, the following human rights and freedoms may be temporary limited: private life, inviolability of home, freedom to have and express convictions, free movement, right of assembly, associations and gatherings. Emergency measures are established in the articles 19-28 of Law on State of Emergency. Seimas, President of the Republic and/or Government shall decide on the use of emergency measures. The institutions responsible for the management of the emergency situation might temporary apply the following measures that restrict human rights during the state of emergency:

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[32] Article 6, Law on State of Emergency (Lietuvos Respublikos Nepaprastosios Padėties įstatymas). 2002 m. birželio 6 d. Nr. IX-938.

[33] As the 1992 Constitution provides: Lithuania has the President *of the Republic*. According to the previous Constitution (1922) – it was the *State* President. The difference is in the scope of powers of a President. Latvia has chosen the model of the *State* President according to its 1922 Constitution.

[34] Lietuvos Respublikos nacionalinio saugumo pagrindų įstatymas (Law on national security), 1996-12-19, No. VIII-49. The latest amendments were made in 2017-01-01. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.34169/tykvizRmiG.

1) emergency measures allows to inspect and control mail and other communication;
2) emergency measures allows officers to enter homes, use homes for the purposes of emergency management, evacuate residents;
3) restrictions on the right to receive information from the state authorities;
4) restriction of movement, introducing special permit ions;
5) restriction on entering into the Republic of Lithuania;
6) restrictions on the activities of political parties, organizations and other associations,
7) prohibition of meetings, gatherings in certain places;
8) requirement to carry personal ID;
9) mandatory rescue or liquidation work for all who are in capacity to work.

2.2.3. In addition to the already mentioned temporary restrictions of human rights, the following measures may also be invoked:

1) using state reserve;
2) strengthened (armed) security of the strategic objects of national security;
3) strengthened protections of the state boarder;
4) prohibition of gun trade, temporary restrictions on gun owners;
5) restrictions of vehicle movement;
6) curfew;
7) restrictions on entering certain territories;
8) restrictions on foreign citizens staying or transiting the territory of Lithuania, restrictions of visa regime.
9) restrictions on gatherings of more than 50 people;
10) searches of vehicles and persons, their belongings;
11) temporary requisition of vehicles or other property;
12) medical or veterinary quarantine;
13) temporal evacuations of residents from the territory of emergency;
14) special food and other basic goods distribution (supply) to the territory of emergency or for the evacuated residents;
15) temporal changes to the working time or economic activity of legal entities in order to assist for the rescue operations, it may be compensated;
16) temporal detention of persons in order to prevent the spread of contagious diseases, hospitalisation, isolation and treatment.

2.2.4. In case of emergency situation the above mentioned limitations of human rights do not apply. Emergency situation is declared by a resolution of Government (state-wide) or by the decision of Municipality (in a district). It allows the government to

relocate necessary material and human resources and manage them in order to cope with an emergency. If it is necessary, exceptional measures could be used, such as decontamination and other radiation, chemical and biological decontamination measures in emergencies, evacuation, restrictions of entering certain territory of emergency, etc.

2.3. Estonia

2.3.1. "Pursuant to § 109 of the Constitution, the President of the Republic can, in matters of urgent state need, issue decrees. Decrees are not laws in the formal sense, but they have equal legal force with laws, i.e. in the hierarchy of legal provisions they are at the same level as laws. The President's legislative right is an extraordinary legislative right, the aim of which is to preserve legislative continuity and to establish generally valid regulations to resolve specific individual emergency situations".[35] The decress must be also countersigned by the President (speaker) of the Parliament and the Prime Minister. When the *Riigikogu* convenes, the President presents the decrees to the *Riigikogu*, which promptly passes a law regarding their confirmation or repeal (parliamentary *ex post* decision).[36]

2.3.2. "The Constitution establishes two prerequisites for the President of the Republic for issuing decrees. Firstly, that the Riigikogu is unable to convene; secondly, that there are matters of urgent state need. Many constitutions of other states have given the head of state the right to issue decrees while the parliament is in recess. What is meant in the Constitution, however, is not the interim period between sessions of the Riigikogu, but the inability of the Riigikogu to convene for a session or a sitting. Urgent state need is associated with the concept of danger. The danger must be objective, the evidence thereof must be reliable and the degree thereof such that, without issuing a decree, the state would suffer irreparable damage".[37]

Already in 1994, the Constitutional Review Chamber of the Supreme Court in Estonia made a judgment regarding the §2(2) of the President of the Republic Rules of Procedure Act, which entitled the Prime Minister to determine whether an issue amounts to a matter of urgent state need. The Court stated that "the role of the Chairman of the Riigikogu and the Prime Minister in deciding on the issuing of decrees is limited to countersigning. Thus, § 2(2) of the President of the Republic Rules of Procedure Act has unconstitutionally deprived the President of the Republic of his right to independently decide on the initiation of decrees and, therefore, the Act is in conflict with § 109(1) of the Constitution".[38]

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[35] Estonia Supreme Court. ACA Europe seminar - December 18, 2013 Notes sur la hiérarchie des normes – Notes on the hierarchy of norms, p.3. Available: http://www.aca-europe.eu/seminars/Paris2013bis/Estonie.pdf

[36] Eesti Vabariigi põhiseadus - kommenteeritud väljaanne. University of Tartu, 2012. Available: http://www.pohiseadus.ee/ptk-7/pg-109/

[37] Judgment of the Constitutional Review Chamber of the Supreme Court of 13 June 1994, III-4/A-4/94. Available in English: http://www.nc.ee/?id=483

[38] Judgment of the Constitutional Review Chamber of the Supreme Court of 13 June 1994, III-4/A-4/94. Available in English: http://www.nc.ee/?id=483

During the Defence Law revision Estonia it is also considered to provide the ammendmets of the President of the Republic Rules of Procedure Act.

2.3.3. In case of state of emergency and state of war the goverment, prime minister, some ministers have the right to stipulate legal regulations (in accordance with Art. 87 and 94 of the Constitution, the Government of the Republic and Ministers are authorised to issue Regulations on the basis of and for the purpose of complying with an Act. In order to deal with issues of local importance or in cases laid down in an act[39]).

During a state of emergency, the Government of the Republic may, for the purpose of eliminating a threat to the constitutional order of Estonia:

1) suspend the execution of legislation issued by a state authority or legislation of general application issued by a local government body, promptly notifying the Chancellor of Justice thereof;

2) establish restrictions on entry into Estonia and departure from Estonia;

3) establish a curfew – prohibition to be in streets and other public places during a specified period of time without an access card specifically issued for this purpose and an identity document;

4) establish the types of documents which are required for being in streets and other public places at a time when being in the specified places is prohibited without the corresponding documents, and the format of such documents, if necessary;

5) prohibit the organisation of strikes and lock-outs;

6) prohibit the organisation of meetings, demonstrations and pickets, and other gatherings of people in public places;

7) prohibit the forwarding of certain types of information in the mass media;

8) suspend the transmission of radio and television programmes and the issuing of periodicals;

9) oblige broadcasters to preserve recordings of transmitted radio and television programmes until the end of the state of emergency;

10) submit a draft supplementary budget of a state of emergency to the Riigikogu;

11) restrict or prohibit the sale of weapons, toxic substances and alcoholic beverages;

12) establish a special procedure for sale of foodstuffs;

13) establish a special procedure for sale of motor fuel;

14) establish restrictions on the use of modes of communication;

15) establish restrictions on the movement of modes of transport;

16) prohibit governmental authorities and local government bodies to provide certain types of information;

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[39] European e-justice. Member State law – Estonia. Available https://e-justice.europa.eu/content_member_state_law-6-ee-en.do?member=1

17) provide broadcasters with information relating to the state of emergency for mandatory publication in mass media. (Art 17 section 1of the State of Emergency Act)

During a state of emergency, the head of state of emergency (the prime minister) may, for the purpose of eliminating a threat to the constitutional order of Estonia:

1) give to the chief of internal defence and to heads of governmental authorities and local government bodies orders concerning the activity arising from the state of emergency;

2) suspend, until the end of the state of emergency, the service relationship of an official of a state executive power if there is reason to believe that he or she is endangering the constitutional order of Estonia by his or her activity, notifying the Government of the Republic thereof;

3) suspend, until the end of the state of emergency, the service relationship of an official of a rural municipality or city government if there is reason to believe that he or she is endangering the constitutional order of Estonia by his or her activity, notifying the corresponding rural municipality or city council thereof;

4) transfer an official of a state executive power or of a rural municipality or city government to another position or to another locality until the end of the state of emergency, and assign to the official without his or her consent duties other than those related to the office;

5) restrict the freedom of movement in the entire territory of Estonia or in a part thereof;

6) provide broadcasters with information relating to the state of emergency for mandatory publication in mass media;

7) issue other orders by authorisation of the Government of the Republic. (Art 18 section 2of the State of Emergency Act).

In state of emergency Chief of internal defence has also special rights.

2.3.4. In state of war the goverment, the prime minister, the minister responsible for the internal security and Commander of the Defence Forces have a right to restrict extensively rights and freedoms of individuals and they may impose duties upon individuals in the interests of national security and public order. For example work obligation may be applied to a natural person, impose a prohibition on leaving Estonia on a person with work obligation arising from the employment or service relationship, imposed national defence duties for preparation of military activities – those measures are applicable also in increase defence readiness. Only in time of war (art. 20 of the National Defence Act) following measures can be taken in use:

For the prevention of a threat to public order the Government of the Republic may prohibit the holding of public events and meetings, regardless of their objective and venue, until the end of a state of war.

For the prevention of a threat to public order the Government of the Republic may suspend strikes and lock-outs and prohibit the holding thereof, regardless of the body or organisation, until the end of a state of war.

The Government of the Republic may, until the end of a state of war, restrict the sales of movables of certain type or corresponding to certain features, prohibit the export thereof from the state or certain region, as well as determine the compulsory price in the case these movables are necessary to meet the immediate needs of the population or for the supporting of the military defence of the state.

The Government of the Republic may, until the end of a state of war, restrict the use of the means of communication if there is reason to believe that information disseminated by means thereof may pose a threat to military defence of the state or otherwise endanger the security of the state.

The Government of the Republic, the Prime Minister and a minister responsible for internal security may, until the end of a state of war, prohibit communication of data with certain contents in a mass medium, if the disclosure thereof may pose a threat to the military defence of the state or otherwise endanger the security of the state.

The Government of the Republic, the Prime Minister and a minister responsible for internal security may, until the end of a state of war, suspend the provision of media services and publication of a periodical if there is a reason to believe that the information disclosed by means thereof may pose a threat to military defence of the state or otherwise endanger the security of the state.

2.3.5. Furthermore, in case it is absolutely necessary to establish and apply a restrictive measure of limiting the fundamental rights and freedoms of a person, *which is not provided for by law,* for the prevention or combating of the threat to the national security, the Government of the Republic may apply the measures not provided for by law as long as it is absolutely necessary (art. 19 of the National Defence Act).

The Government of the Republic, the Prime Minister, the Commander of the Defence Forces and a minister responsible for internal security may issue administrative acts for organisation of increased defence readiness and handling of a state of war, which are absolutely necessary to quickly prevent or combat a threat to national security (art. 9 of the National Defence Act).

3/ What is the respective role of the legislative and the executive power, and eventually of other institutions, in dealing with urgent and/or exceptional circumstances?

Do the Head of the State, the Parliament and the Government retain a particular role?

3.1. Latvia

3.1.1. As the answer to Question 2 has illustrated, the main responsibility of substantial reaction to the emergency situations/ state of exception is given to the Cabinet of Ministers. The main coordination institution of extraordinary/ emergency situations is the Crisis Management Council (Krīzes vadības padome), which holds its ordinary meetings at least two times per year.[40]

Nevertheless, it has to receive approval from the Parliament for such decisions. It is the Competence of the *Saeima* to decide on justification of emergency situation/ state of exception.

[40] Crisis Management Council is chaired by the Prime Minister. Crisis Management Council members are the Minister of Defense, Minister of Foreign Affairs, the Minister of Economy, Finance Minister, Interior Minister, Minister of Justice, Minister of Health, Minister of Transport, Minister of Environmental Protection and Regional Development.

If such an approval is not received[41], then the *Saeima* rejects it, and the relevant decision shall be repealed and the measures introduced according thereto shall be revoked without delay. Political or economic crisis, social upheavals, protests or strikes, as well as wide-range natural disasters are not the reasons to obstruct the legislator to convene meetings. Such a situation may arise only in the case of war, if it is held in the territory of a state. Only then it is justified to let the Cabinet of Ministers partially fulfill the role of a legislator.[42]

3.1.2. The administrative decisions taken during emergency situation and state of exception, which determine restrictions and additional duties, must have a legitimate purpose, must be commensurate, non-discriminating, justified and necessary in each particular case of threat to national security. Measures for the provision of emergency situation and state of exception may not be in contradiction with the international norms of human rights, which are binding on the Republic of Latvia. Emergency situation and state of exception may not be the grounds for restricting the competence of the institutions referred to in the Constitution of the Republic of Latvia.[43] Therefore, all the most important institutions: Parliament, Cabinet of Ministers, State Control, courts, the President of the State are not restricted in their competence, although the emergency situation is declared.

3.1.3. The decisive role of the President of the State in emergency situations (floods, economic crisis etc) is not foreseen by legislation. Besides the State President (being politically not responsible) cannot be giving orders to State administration institutions and managing their activities without the consent of the accountable to the Saeima or Cabinet of Ministers. [44] Only in cases if another state declares war on Latvia or an enemy invades its borders, the President gets involved. In such occasions concurrently and without delay, the President shall convene the *Saeima*, which shall decide as to the declaration and commencement of war. The President shall declare war on the basis of a decision of the *Saeima (Art. 43 and 44 of the Constitution).*

3.2. Lithuania

3.2.1. The decision to impose a state of emergency is adopted by:

1) Seimas, taking a respective resolution;

2) President of the Republic (between sessions of the Seimas) (Art. 144 of the Constitution).

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[41] Up until now it has never been a case

[42] Informative report on implementation practice of former Article 81 of the Constitution of Latvia. Informatīvais ziņojums par iepriekš Latvijas Republikas Satversmē noteiktā 81.panta piemērošanas praksi. Ministry of Justice. 11.05.2009, p. 4. Available in Latvian: *https://www.tm.gov.lv/.../Par%20Latvijas%20Republikas%20Satversmes%2081.panta*

[43] Par ārkārtējo situāciju un izņēmuma stāvokli (On Emergency Situation and State of Exception), law adopted by Saeima 07.03.2013, Art.19.

[44] Judgement in Case No. No. 2006-05-01, 16.10.2006. On Compliance of the Sixth, Seventh, Eighth and Ninth part of Section 46 of Radio and Television Law with Article 58 and Article 91 of the Satversme of the Republic of Latvia, para.15.1.

The Constitution ensures legal safeguards in cases of a state of emergency (protection against abuse of power)[45]. In Lithuania, it is the Parliament (Seimas) that shall impose direct administration and martial law[46], declare states of emergency, announce mobilization, and adopt decisions to use the armed forces (Article 67 (20) of the Lithuanian Constitution).

3.2.2. Lithuanian Constitutional Court has stated that: "Article 145 of the Constitution prescribes that under special conditions—during martial law or a state of emergency—the rights and freedoms specified in Articles 22, 24, 25, 32, 35, and 36 of the Constitution may be temporarily limited. This could be done by suspending the validity of certain norms of respective laws. The Constitution does not provide for any other cases of suspension of the law"[47].

Generally all laws are to be applied during the emergency period, with exception of specific regulations/ provisions based on the decision on emergency (Art. 29, Law on State of Emergency). The Seimas carries parliamentary control during the state of emergency. If necessary, the Seimas sets up a special emergency control commission. (Art.30, Law on State of Emergency). Under Article 9 of the Law on State of Emergency, a state of emergency is revoked when the Seimas overrules the President's decision to declare a state of emergency or when the Seimas adopts a resolution on revocation of the state of emergency after the reasons disappear for which it was introduced.

Upon the end of the duration of the state of emergency mentioned in the resolution on its declaration, it is considered that the state of emergency is revoked in the absence of a separate decision to revoke it.

3.2.3. The decision on declaration of a state of emergency or a state of war is made in the plenary sitting by adopting a resolution. In accordance with Article 113 of the Statute of the Seimas (Rules of Procedure), Seimas resolutions are adopted by a simple (i.e., more than half) majority of the Members of the Seimas present at the sitting.

Under Article 186^2 of the Statute draft resolutions of the Seimas regarding the announcement of mobilisation, imposition or lifting of the state of emergency or martial law, or the use of armed forces are drawn up and submitted by the Speaker of the Seimas. The draft resolutions are entered on an agenda of Seimas sittings as a matter of priority on the recommendation of the Board of the Seimas or the Speaker of the Seimas and are considered in accordance with special urgency procedure. No lead committee is assigned for the consideration of these draft resolutions. Adjournments of deliberation of the draft resolutions are not be taken. Proposals of Members of the Seimas regarding the resolutions are not submitted and considered.

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[45] The current Constitution of Lithuania was aproved in referendum in 1992. Vainorienė A. Konstitucinė Išimtinės Padėties Samprata: Teisėtumo ir Būtinumo Santykis Viešojoje Teisėje, *Teisė.* 2014, 91, p. 221. Available: http://www.zurnalai.vu.lt/files/journals/5/articles/3364/public/212-227.pdf

[46] The application of various human rights is to be suspended, when martial law is in force or during the time of the state of emergency according to the Art. 145.

[47] Constitutional Court of the Rebublic of Lithuania, decision of 13 November 1997, Case No. 6/97, Available in English: http://www.lrkt.lt/data/public/uploads/2015/04/1997-11-13_s_decision.pdf.

The abovementioned provisions of the Statute also apply to those resolutions of the Seimas which approve or overrule the decisions of the President of the Republic to declare a state of emergency or a state of war.

3.2.4. Under Article 186^3 of the Statute of the Seimas, upon the announcement of mobilisation or imposition of martial law, the Board of the Seimas executes the powers laid down in the Statute; it also considers work programmes of a Seimas session, agendas of Seimas sittings and approve them, instructs to hold meetings of Seimas committees and commissions, solves matters pertaining to the organisation of work of political groups and submits to the Seimas draft decisions on these matters.

Meetings of Seimas committees and commissions, with the exception of the Seimas Committee on European Affairs, the Seimas Committee of National Security and Defence, the Seimas Committee on Legal Affairs and the Seimas Committee on Foreign Affairs, are held only on the instruction of the Board of the Seimas. Meetings of the Conference of Chairs are not held. Where necessary, the chairs of the political groups of the Seimas are invited to meetings of the Board of the Seimas. Activities of other structural subdivisions of the Seimas are coordinated with the Board of the Seimas.

Issues related to mobilisation, martial law and national defence are included in a work programme of the Seimas session and deliberated as a matter of priority. A draft work programme of a Seimas session shall be drawn up by the Speaker of the Seimas submitted for consideration to the Board of the Seimas.

When mobilisation is announced or martial law is imposed during a Seimas session, Seimas sittings are prepared only by the decision of the Board of the Seimas, however, at least one a week. The schedule of sittings of a Seimas session during mobilisation or martial law are not drawn up and approved. Draft agendas of Seimas sittings are drawn up by the Speaker of the Seimas who submits them to the Board of the Seimas for consideration.

3.2.5. Members of the Seimas are notified of an extraordinary session of the Seimas or an extraordinary sitting of the Seimas in accordance with the procedure set by the Board of the Seimas not later than with four hours remaining until the beginning of the extraordinary session of the Seimas or the extraordinary sitting of the Seimas. Where the Seimas cannot convene in the Seimas premises, the Board of the Seimas must temporarily designate another venue of sittings. In urgent cases such a decision may be taken by the Speaker of the Seimas.

In case of emergency situation, it may be announced state-wide by the Resolution of Government (on the advisement of Commission for Emergency Situations) or in the concrete district by the decision of Municipality (if the emergency is local, not more than 3 districts). The decision is made according to the criteria set out in the already mentioned “Resolution on the approval of extreme events criteria”. The measures are listed in the articles 27-30 of the Law on Civil Safety.

3.2.6. In 2015 the Statute on the use of military force in peacetime was adopted. It was adopted in urgent procedure, without public consultations. It provides legal grounds for the use of military force to react to local armed incident and violation of the state border, which are not acts of aggression. It was adopted in relation to

the crisis in Eastern part of Ukraine. It establishes exceptional measures that the President and the Minister of Defence could apply in case of a threat without declaring the state of emergency, e. g. the Minister of Defence (alone) could decide on shooting down an airplane, using military force against foreign ships, etc.[48]

Lithuanian Constitutional Court has expressed the position that "if the delegation of legislation is allowed, relevant limits and other constitutional guarantees are set and determined".[49]

3.3. Estonia

3.3.1. According to the Constitution, laws related to the state security may only be passed and amended by a majority of the members of the *Riigikogu*: the State of Emergency Act; the Peace-Time National Defence Act and the War-Time National Defence Act (Art. 104). Issues regarding the budget, taxation, financial obligations of the national government, ratification and denunciation of international treaties, the declaration or termination of a state of emergency, or national defence may not be submitted to a referendum (Art.106).

Parliament also declares by a majority of its members a state of emergency (upon proposal by the President or Government) in the entire national territory for a period not exceeding three months, state of war and orders mobilisation and demobilisation (upon proposal by the President) (Art. 128, 129 and 65 of the Constitution) and approves the government decision to increase defence readiness (Art. 13 of the National Defence Act).

Parliament also „resolves other issues of national importance which the Constitution does not assign to the President, the Government of the Republic, other public bodies or local authorities" (Art. 65 of the Constitution). Therefore the legislator has the most fundamental legislative powers in states of *exception*.

3.3.2. As for many Parliaments, the Rules of procedures define the main time –limits for submission of amendments before the readings. In Estonia, there is a clause of flexibility: „At the proposal of the lead committee, the President of the *Riigikogu* may set a different time-limit for the submission of amendments".[50] Therefore, upon a necessity, the emergency issues could be decided in a fast-speed procedure. The only exceptions (only two or one reading necessary) for issuing decrees are provided in following cases:

- Bills concerning international agreements (para 115),
- bills to approve or repeal decrees of the President of the Republic, draft resolutions of the *Riigikogu* that concern the declaration of a state of emergency, a state of war, mobilisation or demobilisation, or that are related to increasing the level of military readiness (single reading, paras 116, 118),

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[48] Statute on the use of military force in peacetime (effective from 01-01-2015). Available: https://www.e-tar.lt/portal/lt/legalAct/TAR.6CADC13B548B/pSrZgRUSNc

[49] Republic of Lithuania Constitutional Court October 26, 1995 Judgment in Case No. 2/95 On the restoration of the ownership rights of citizens to land, Item 1 of the establishing part. Availabel in English: http://www.lrkt.lt/en/court-acts/search/170/ta982/content

[50] Riigikogu Rules of Procedure and Internal Rules Act, Passed 11.02.2003, para. 56. Available in English: https://www.riigiteataja.ee/en/eli/518112014003/consolide

- Special rules for conducting as a matter of urgency proceedings on draft resolutions of the *Riigikogu* that are related to ensuring financial stability (single reading, para 118)[2].

3.3.3. The Government is the executive power and it carries out the nation's domestic and foreign policy.

The Government decides to increase general defence readiness in the case of an increased threat to the security and for participation in the international military operation and makes proposals to the Riigikogu to declare a state of emergency; decides the involvement of the Defence Forces or the Defence League in the civil crises (with the right to use force); imposes these measures and gives decrees/orders; gives the tasks to reorganize their activities and redistribute resources.

Prime minister directs the organization in case of state of exception (except in an emergency situation); imposes measures and gives orders and administrative acts; decides other national defence issues that are not in the competence of another authority or person.

3.3.4. The Emergency Act provides that the government declares emergency situation in the whole country, or of one or more regional or local government units in the case of a natural disaster or a catastrophe, or to prevent the spread of an infectious disease. Therefore, the Parliament is not involved in the decision-making regarding emergency situations. This is different from, for example, Latvia where the legislator has to approve all the emergency decisions made by the Cabinet of Ministers.

As it was noted during the Parliamentary debates, "Estonian crisis management system have four important principles. First, decentralization, under which the government is responsible for each area of its emergency preparedness and response activities. Secondly, the authorities-border cooperation that is needed to prepare for emergency situations and in resolving them. Thirdly, the principle of conservation of the functions, which means that all the institutions and persons performing their usual tasks in crisis situations, including a state of emergency and martial law. Fourth, the principle of subsidiarity, ie the principle of subsidiarity, whereby crises are resolved at the lowest possible level".[51]

3.3.5. According to the Constitution the President is the head of the State and the supreme commander of national defence of Estonia (Art. 77 and 127). The President makes proposals to the Riigikogu to declare a state of war, to order mobilisation and demobilisation, to declare a state of emergency (Art. 128 of the Constitution)

The President also gives the approval to the involvement of the Defence Forces or the Defence League in protection of public order, emergency situations, state of emergency (right to use force).

The role of the President of the State rests upon declaring a state of war in case of aggression against Estonia and ordering mobilisation without awaiting the corresponding resolution of the *Riigikogu* in the case of aggression against the Republic of Estonia (Art. 129 of the

[51] Minister of the Interior Mr. Hanno Pevkur. XIII Riigikogu stenogramm III istungjärk Kolmapäev, 01. juuni 2016. Hädaolukorra seaduse eelnõu (205 SE) esimene lugemine. Available: http://stenogrammid.riigikogu.ee/201606011400#PKP-19081

Constitution). In his role as the supreme commander of national defence, the President is advised by the National Defence Council. Members of the council are the Speaker of the Parliament, Chairmen of the National Defence Committee and the Foreign Affairs Committees of the Riigikogu, the Prime Minister, the ministers responsible for the areas related to national defence and the Commander of the Defence Forces. National Defence Council discusses matters of significant importance to national defence and provides opinions on such matters.

3.3.6. Nevertheless, the primary responsibility for planning and execution of comprehensive national defence lies with the national government. Within the government, the leading role in coordinating activities related to national defence is carried out by the Government Security Committee. In general terms the Committee focuses on major security and national defence issues of strategic importance - for example issues concerning operational and capabilities planning, threats assessments, conducting strategic level exercises etc. The Committee has leading role in working out strategic documents and planning.

3.3.7. If the Riigikogu is unable to convene, the President may, in matters of urgent state need, issue decrees which have the force of law, and which shall bear the counter-signatures of the Chairman of the Riigikogu and the Prime Minister. The powers of the President as declared by the Constitution has been a subject of a Constitutional review in Estonia already in 1990ies.[52] As it is pointed in the commentaries of the Constitution, recently there has been a theoretical discussion in the Constitutional Assembly on whether "it is still necessary to both the Prime Minister and the Chairman of the *Riigikogu* to co-signature the degrees of the Head of State". It was concluded that in such a way the procedure is granting a greater objectivity and minimize the possibility of the use of emergency legislative power, rather independently of exclusively in national interests. It should take into account that due to using this possibility only in extreme situations, it will be the country's top leaders who understand the need for consensus on the granting of a decree to be the most appropriate solution.[53]

4/ On what occasions and how frequently have the urgent and/or exceptional law-making procedures been applied in your national legal order?

Have they been activated in abusive ways and has there been a political criticism against their application?

Generally, in all three Baltic States the emergency situations in the latest years have been mostly invoked by natural causes (animal diseases, floods etc). Mostly introduction of an emergency situation is connected with pragmatic reasons, as the state should be able to give legitimate reasons for its citizens if a deviation from the guarantees, such as, a freedom of movement, use of property, are to be partially limited. "National security is considered to be a legal justification

[52] Supreme Court Constitutional Review Chamber (Riigikohtu Põhiseaduslikkuse järelevalve kohtukolleegiumi otsus) RT I 1994, 45, 768. Vastu võetud 13.06.1994. Vabariigi Presidendi taotluse tunnistada 3. mail 1994. a. vastu võetud Vabariigi Presidendi töökorra seaduse § 2 lg 2 põhiseaduse §-ga 109 vastuolus olevaks läbivaatamine. Available: https://www.riigiteataja.ee/akt/13106686

[53] Eesti Vabariigi põhiseadus - kommenteeritud väljaanne. University of Tartu, 2012. Art. 109, 7th point. Available: http://www.pohiseadus.ee/ptk-7/pg-109/

for the partial limitation of human rights in non-emergency situations (except non-derogable rights)".[54]

4.1. Latvia

4.1.1. *Emergency situation* in Latvia has been announced approximately once per two years. The reasons for the decisions have been mainly connected with weather damages or health (animals – for example, in 2017 an emergency situation was announced due to African swine fever). All the decisions by Cabinet of Ministers are available in the Official Publisher's website,[55] as well as the announcement of the Saeima to support the decision made by the executive.[56]

State of exception has been declared in Latvia when an authoritarian regime was introduced in 15 May 1934 after a coup by Prime Minister Kārlis Ulmanis. It was regularly prolonged, and preserved until 15 February 1938.

Up until 2007 the Constitution of Latvia (Article 81) explicitly gave the rights to legislate in urgent situations to the executive power:

Article 81 [Regulations by Government]

During the time between sessions of the Parliament the Government has the right, if necessary and if not able to be postponed, to issue regulations which have the force of law. Such regulations may not amend the law regarding elections of the Parliament, laws governing the court system and court proceedings, the Budget and rights pertaining to the Budget, as well as laws adopted during the term of the current Parliament, and they may not pertain to amnesty, state taxes, customs duties, and loans and they shall cease to be in force unless submitted to the Parliament not later than three days after the next session of the Parliament has been convened.

Due to the practice, when the Cabinet of Ministers had used the Article 81 of the Satversme for many years not in an appropriate way (or sometimes even abusive way), it was decided to abolish this article.

4.1.2. The application scope of this regulation had been analyzed by the Constitutional Court: "The Satversme, when authorizing the Saeima and the citizens of Latvia with the right to legislate, permits also an exception of the above principle. Namely, Article 81 of the Satversme endows the executive power – the Cabinet of Ministers – with an extraordinary right to issue regulations, which have the force of law, inter alia also amending of the valid laws. However, the above right, granted to the Cabinet of Ministers is an exception as concerns the division of

[54] Feinberg M. Sovereignity in the Age of Global Terrorism. The Role of International Organisations, Leiden, Boston: Brill Nijhoff, p.15.

[55] Par ārkārtējās situācijas izsludināšanu. Available: https://likumi.lv

[56] For example: Saeimas paziņojums „Par ārkārtējās situācijas izsludināšanu". Rīgā 2017. gada 19. janvārī. Available: https://likumi.lv/doc.php?id=288192

the legislative power, determined in Article 64 of the Satversme; and the above right shall be interpreted and made use of to the maximum narrowly. [57]

4.1.3. The objective of Article 81 of the Satversme was not to create an independent institution, which realizes the legislative right side by side with the subjects, determined in Article 64 of the Satversme, but to determine a substitute of the legislator, which is able to operatively and efficiently react in extraordinary situations. It would ensure adoption of necessary decisions in a legislative way also under conditions, when the possibilities of the Saeima and citizens of Latvia to implement the legislative right are prevented or essentially burdened. On the one hand the above competence, granted to the Cabinet of Ministers, allows the executive power to implement its functions under extraordinary circumstances, however, on the other hand there exists a serious risk of unsettling the balance of powers for the sake of the executive power.[58] As Ministry of Justice has pointed out regarding legislation practice in accordance with Article 81 of the Satversme, 'such legislation always is a temporary regulation, which has to be re-confirmed by the ordinary legislator'[59].

4.2. Lithuania

4.2.1. *State of exception* has been declared in Lithuania after the declarations of independence in 1919, it was regularly prolonged, and preserved (with exception of short period of 6 months in 1926) until 1939.

After regaining independence in 1991 and after the Constitution entered into force in 1992, there has been no official declaration of the state of emergency or state of war in Lithuania.

Emergency situations in Lithuania have been announced at times (usually once a year or less), the reasons for the decisions have been mainly connected with nature disasters, fire or health (animals – for example, in 2014 an emergency situation was announced due to African swine fever). All the decisions made by the Resolutions of Government are available in the Official website[60]. As mentioned above, emergency situations allow government to allocate the necessary material and human resources in order to manage the crisis and eliminate damage. There have been some criticism in the African swine fever case but compensations were paid.

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[57] Constitutional Court of Latvia. Judgment in case No. 2005-12-0103. On Compliance of the Cabinet of Ministers November 11, 2005 Regulations No. 17 "Amendments to Law "On Coercive Expropriation of Real Estate for State or Public Needs"" and June 9, 2005 Law "Amendments to Law "On Coercive Expropriation of Real Estate for State or Public Needs"" with Articles 1 and 105 of the Republic of Latvia Satversme, para. 12. It should be noted that the Court declared the Cabinet of Ministers Regulations as unconformable with Article 81 of the Satversme and null and void as of the moment of its issuance. Available in English: http://www.satv.tiesa.gov.lv/wp-content/uploads/2005/05/2005-12-0103_Spriedums_ENG.pdf

[58] Ibid, para.12.

[59] Informative report on implementation practice of former Article 81 of the Constitution of Latvia. (Informatīvais ziņojums par iepriekš Latvijas Republikas Satversmē noteiktā 81.panta piemērošanas praksi). Ministry of Justice. 11.05.2009. Available in Latvian: https://www.tm.gov.lv/.../Par%20Latvijas%20Republikas%20Satversmes%2081.panta

[60] Resolutions of Government on declating emergency: https://www.e-tar.lt/portal/lt/legalAct/TAR.4B50A49D0476. However, there is no source of emergencies in districts.

4.2.2. The biggest wave of political criticism was against the application of measures in economic crisis of 2008-2009 (increased taxes, cut down of social benefits). Scholars of the University of Vilnius (Lithuania) carried out the multifaceted research on whether (and, if so, then how) the global economic crisis, which gripped Lithuania in 2008, has altered the standards of the rule of law and human rights enshrined in Lithuanian law[61]. They have found that the crisis was used as a reason for narrowing of the scope of the human rights protection and the subsequent justification of this narrowing, as the relevant legal standards were interpreted flexibly or, at times, event not applied.

4.2.3. Lithuanian legal scholars have pointed on the experienced difficulties to ensure good quality legislation in emergency situations. *Ad hoc* reforms during financial crisis were "not adapted to the political cycle arrangements (as both the legislative and the executive powers had to change at the time of budget drafting and approval). An absolute majority of such legislation enacted in late 2008 or early 2009 became effective and were to be applied immediately, at times even retrospectively. (..) As changes in the legal regulation in the area of finance (in particular, taxes) were numerous and hasty, often with the obligatory coordination procedures undertaken only formally, all this resulted in the compromised quality of such newly released legal acts, their integration into the existing legal regulation and administration practice. Therefore, freshly released legal acts would undergo almost immediate changes to correct the mistakes made, irregularities and conflicts, fill out gaps and review the rationale and validity of the decisions made, react to criticism and observations, respond to changes in the conduct of the population and businesses, as well as build a more solid legislative basis for substantial reforms in the future".[62]

Furthermore, the case, when Seimas adopted the law based on the economic crisis, which severely cut the pensions, even went to the Constitutional Court of the Republic of Lithuania. This case is analysed in the 5th question.

4.3. Estonia

4.3.1. In Estonia there has been no official declaration of emergency situation, state of emergency, increased defence readiness or state of war after regaining independence in 1991 and after the Estonian Constitution entered into force on 3. July 1992.

In Estonia in April 2007 there was a mass riots (so-called "Bronze Soldier" events), but the state of emergency was not declared.

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[61] Crisis, the Rule of Law and Human Rights in Lithuania. Kūris E. (ed). SC "TITNAGAS": Šiauliai, 2015 („Krizė, teisės viešpatavimas ir žmogaus teisės") Available in English: http://www.tf.vu.lt/publikacijos/crisis-the-rule-of-law-and-human-rights-in-lithuania/.

[62] Crisis, the Rule of Law and Human Rights in Lithuania. Kūris E. (ed). SC "TITNAGAS": Šiauliai, 2015, p. 181-182. Available in English: http://www.tf.vu.lt/publikacijos/crisis-the-rule-of-law-and-human-rights-in-lithuania/.

4.3.2. In Estonia there has been recently two major natural disaster (catastrophes) in 2005 a storm and in 2010 blizzard, but the government did not announce an emergency situation. Clear definitions and procedure of announcement of emergency situations is introduced by the new law Emergency Act (Hädaolukorra seadus), which enters into force on 1 July 2017.

5/ Are the urgent and/or exceptional regulatory procedures and measures subject to judicial review in your country?

In particular, is this review the task of a constitutional court?

Is the existence of the "urgent" and/or the "exceptional" situation a factual or a legal issue?

Is there a special duty for the executive to give reasons for the application of an urgent and/or exceptional regulatory procedure? Are these reasons subject to judicial control, and, if so, to what extend?

5.1. The existence of an exceptional situation (state of exception, state of emergency) in all three Baltic States can be described as a factual issue, which has to be adequately evaluated by the decision-maker. It is up to the executive/ and legislative power to measure, if the danger (not always explicitly named or *expressis verbis* described – as the definition is vague) threatens the state. It is assumed that such a threat would be a military aggression or state coup/violent overthrow of state power.

5.2. Not always factual emergency situation (severe difficulties/ crisis in political, economic field, natural disaster etc) lead to procedural state of exception as defined by law.[63] It is due to the fact that the main reason to declare official "emergency" is caused by the reasons to give a permission for the responsible institutions to fulfil their obligations restricting/ limiting the usual rights and freedoms of persons. For example, in 2017 the decision in Latvia regarding the African swine fever was made, generally to give a permission to the health and veterinary institutions to enter (even without receiving accept of the owners) the animal farms and to control the dangerous situation.[64]

5.3. The term "emergency situation" is used when describing problematic situations and accordingly – legislation – which is designed to solve the problems. Therefore, the legislator/ executive power has to give adequate reasoning for the legislation. Such kind of "state of emergency" was faced in Lithuania (similarly as in many other countries) due to the economic crisis. As a result of that the government severely cut the pensions, consequently raising a case before the Constitutional Court. Lithuanian constitutional law scholar Vaidotas Vaičaitis has questioned, how strict should be the judicial review of such decisions. He argues that "although the court usually does not question the need of Government's announcement of particular state of exception (e.g. state of emergency or economic crisis), the judiciary has attributed to itself rather large discretion to

[63] For instance, the so called "Bronze Soldier" emergency events in 2007 caused severe problems in political/ security field in Estonia. No official emergency situation was announced, as the legislation did not provide for a procedure of declaring emergency situation.

[64] Interview with the representative of Crisis Management Council of Latvia, Mr. Mārtiņš Baltmanis, May, 2017.

examine whether a particular "exceptional" measure is proportional".[65] "As concerns the executive's decision on the reduction in the size of pensions, the Lithuanian Constitutional Court decided that even during the economic crisis the Lithuanian government is not absolutely free to reduce the size of different social payments, for these reductions should be i) provisional, they have to be ii) proportional according to their previous size, and they should be iii) compensated in rational time after the end of economic crisis."[66] In conclusion, the Lithuanian Constitutional Court did not acknowledge the economic crisis as a ground for the state of emergency and emergency measures.

5.4. Furthermore, a similar case was decided also by the Constitutional Court of Latvia. It stated that "the principle of protection of legitimate expectations does not preclude the State from making changes to the existing legal order. The principle cannot be interpreted so widely that it would safeguard persons from every possible dissatisfaction. Otherwise the State would not be able to react to changing conditions of life. Nevertheless, the principle of protection of legitimate expectations requires the State, when it changes an existing legal order, to observe a reasonable balance between persons' confidence in the currently effective legal order and those interests for the sake of which this legal order is being changed".[67]

5.5. The Constitutional Court of Latvia has analysed the regulations issued by the Cabinet of Ministers according to Article 81 of the Satversme (in force until 2007). Therefore, it is assumed that in cases of urgency the decisions made/ regulations will be a subject to a judicial review. The task of the Constitutional Court is to scrutinize all the legislation adopted, therefore the State would be responsible for the adequacy of legislation in all the circumstances.

If the executive has started implementation of the ruling, which later can be annulled, the risk of violating the principle of legal certainty is high. The state might be obliged to compensate the loss caused by implementing a rule, which is later declared void.[68]

5.6. In Lithuania, the evaluation of the emergency situation can be called "procedural" model. This model clearly distinguishes the ability of courts to apply and assess the

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[65] Vaičaitis V.A. State Of Exception and Judicial Power. Baltic Journal of Law & Politics VOLUME 3, NUMBER 2 (2010), p.26.

[66] Ibid, p.37.

[67] Constitutional Court of Latvia. 21 December 2009, Case No. 2009-43-01. On Compliance of the First Part of Section 3 of the Law "On State Pension and Allowance Disbursement from 2009 to 2012" insofar as it Applies to State Old-Age Pension with Article 1, Article 91, Article 105 and Article 109 of the Satversme (Constitution) of the Republic of Latvia. Para 32. Available in English: http://www.satv.tiesa.gov.lv/en/cases/?case-filter-years=[2009]&case-filter-status=&case-filter-types=&case-filter-result=&searchtext=&page=4

[68] Informative report on implementation practice of former Article 81 of the Constitution of Latvia. (Informatīvais ziņojums par iepriekš Latvijas Republikas Satversmē noteiktā 81.panta piemērošanas praksi). Ministry of Justice. 11.05.2009. Available in Latvian: *https://www.tm.gov.lv/.../Par%20Latvijas%20Republikas%20Satversmes%2081.panta*

situation by the principles of the rule of law.[69] According to Article 32 of State of Emergency Law it is possible to appeal to court the emergency actions by the state and municipal authorities and other officials with administrative powers.[70]

Meanwhile, "from the perspective of judicial intervention in the economic policy (including anti-crisis policy) entrenched in statutory law, the self-restraint stance formulated in the case-law of the Constitutional Court is highly important" as the Constitutional Court of Lithuania in 2006 has defined that "the assessment of the content, measures and methods of the state economic policy (..), even if it turns out later that there were better alternatives for choosing its economic policies (..) in itself cannot be the reason to question the compliance of the legal regulation (..) with the Constitution".[71]

5.7. In Estonia there is no special judicial review regulation with regards to the executive act declaring emergency rule that means ordinary rules apply. Judicial review may be limited to the question of whether there has been compliance with the relevant constitutional provisions because reasons for a decision have also a political nature.

Recently published commentaries of the Constitution of Estonia *expressis verbis* provide for a clear position that all the instruments of state legislation are a subject of judicial review including President's decrees.[72] Art.15 of the Estonian Constitution declares "Everyone whose rights and freedoms have been violated has the right of recourse to the courts. Everyone is entitled to petition the court that hears his or her case to declare unconstitutional any law, other legislative instrument, administrative decision or measure which is relevant in the case". It means the urgent and/or exceptional government measures or orders from other agencies orders are subject to judicial review generally according to ordinary judiciary procedures.

5.8. In Estonia, the Supreme Court is also the court of a constitutional review. The Supreme Court declares invalid any law or other legislation or administrative decision that is in conflict with the letter and spirit of the Constitution. The Supreme Court shall verify the conformity of a legislative act with the Constitution on the basis of a reasoned request of the President of the Republic, the Chancellor of Justice, a local government council and the Riigikogu, court judgment or court ruling (Art. 4 of the Constitutional Review Court Procedure Act).[73] According to the constitution the creation of extraordinary courts is prohibited (Art. 148 section 3).

5.9. The Supreme Court shall review the head of state of emergency application to suspend the activity of non-profit associations and their alliances, including political parties and

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[69] Vainorienė A. Konstitucinė Išimtinės Padėties Samprata: Teisėtumo ir Būtinumo Santykis Viešojoje Teisėje, p. 222. Available: http://www.zurnalai.vu.lt/files/journals/5/articles/3364/public/212-227.pdf

[70] Lietuvos Respublikos Nepaprastosios Padėties įstatymas (State of Emergency Law). 2002 m. birželio 6 d. Nr. IX-938. The latest amendments made in 16 June, 2016

[71] Constitutional Court of Lithuania. Ruling of 31 May 2006. Official gazette, 2006, no. 62–2283. In: Crisis, the Rule of Law and Human Rights in Lithuania. Kūris E. (ed). SC "TITNAGAS": Šiauliai, 2015, p. 53.

[72] See commentary of Article 109, 15th point. Available: Eesti Vabariigi põhiseadus - kommenteeritud väljaanne. University of Tartu, 2012. Available: http://www.pohiseadus.ee/ptk-7/pg-109/

[73] Constitutional Review Court Procedure Act. Põhiseaduslikkuse järelevalve kohtumenetluse seadus. Available in English: https://www.riigiteataja.ee/en/eli/528122016013/consolide

associations of employees and of employers, until the end of the state of emergency for the reason that the activity of the association or the alliance thereof or the political party endangers the constitutional order of Estonia. The Supreme Court shall decide to suspend the activity of an association or an alliance thereof or a political party until the end of the state of emergency or shall deny the application of the head of state of emergency. (Art. 19 of State of Emergency Act)

During a state of emergency, the Chief Justice of the Supreme Court has the right to change the territorial jurisdiction of the hearing of criminal and misdemeanour matters (Art. 30 of State of Emergency Act).

Supervision over legality of legislation of application regulating state of emergency differs from ordinary cases. Distinction lies in the speed of execution of orders the supervisior has given. If the Chancellor of Justice finds that legislation of general application regulating state of emergency passed during a state of emergency or a provision thereof endangers the life or health of natural persons or violates an international agreement or is in conflict with the Constitution the Chancellor of Justice shall propose to the body which passed the legislation that its force be suspended immidietly until the legislation is brought into conformity with the Constitution or the law. In ordinary cases there is determined time limit for completion.

5.10. If the legislation is not brought into conformity with the Constitution or the law within the specified period of time, the Chancellor of Justice shall immediately propose to the Supreme Court to declare the legislation null and void. The Supreme Court shall deliberate the conformity of the contested legislation of general application with the Constitution and the law immediately. (Art. 40 of State of Emergency Act)

6/ Do you think that any general or particular feature of your national special law-making procedures could be used at a European level for the management of urgent and/or exceptional circumstances?

Which criteria could be apt to guide this transposition?

6.1. Taking into account numerous argumentation and observations of legal scholars in Baltic States regarding EU not being a state or a federal state, no clear relevance to the theory of three powers (legislative, executive and judicial) should be made as the main principles of possible EU legislation dealing with state of exception providing and aiming for the remaining of the independence/sovereignty/ existence of the state. "The EU does not require it be regarded as a state; therefore the fact that the states have delegated certain competence to it does not mean that the Union would become a state".[74] EU's as international institution's mission and main goals although are similar and close (principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law) is still not directly connected to defending the independence, existence of a state. Consequently, in the EU level political efforts should be continued to ensure that the Member States are never obliged/ come to a point to introduce an official "state of exception".

[74] Opinion of an invited expert Mārtiņš Paparinskis, para.8, p.33. In: Constitutional Court of Latvia. Decision No. 2008-35-01 On Compliance of the Law "On Lisbon Agreement Amending the Treaty on European Union and the Treaty Establishing the European Community" with Article 101 of the Satversme of the Republic of Latvia

6.2. Totally different approach should be developed when dealing with emergency cases in wider regions or the whole EU. Similarly to the national level, several options/issues should be considered:

1) The possibility for representatives of EU member states (Council level, as pragmatic analysis would not allow for a provision that it would consist of less than 28 (27) members) to issue binding regulations with clear provisions of special regime of implementing existing EU legislation (time limits, restrictions etc). However, as national legislation (in the Baltic States, at least), does not require unanimous decisions in emergency cases, the aspect of necessary votes for a positive decision in EU level should be discussed.

2) Fast-track procedure for issuing relevant legislation (24-28 hour clause);

3) As the States provide for the possible compensation for damages/loss due to unreasoned decision/ regulation due to the emergency situation (if it is later declared void by the Parliament or Court), such "insurance"/ responsibility instruments in EU level also should be considered;

4) Necessity to publish emergency legislation of EU in national Official Journals within a short period as it is doubtful that society might use various information sources during special legal orders. It should be noted that national governments might also have the powers to limit the use of communication/ media /internet sources, if necessary.

7/ Do you think that under the current circumstances your national Government would be willing to grant competence for urgent and/or exceptional legislation to the EU?

7.1. So far, in the wording of the current constitution and emergency legislation in the Baltic States there is no (or very limited) *expressis verbis* references to the EU, which might lead to a conclusion that currently the national governments have not raised a discussion on the necessity to introduce an emergency legislation in the EU. This might be caused by the lack of practical experience dealing with/facing Europe-wide mass catastrophes/ or implementation (accordance of the taken measures) of the regulation dealing with emergency situation within the existing order. Several authors have raised the issue of the necessity to separate the terms of national legislation against terrorism and implementation of it, and the role of EU, which is not to replace the Member States, but to complement it by assisting. Member states have not transferred excusive competence in this matter to the EU. [75]

7.2. The term "urgent/exceptional legislation" contains two complex sets of decision-making procedures:

1) Classical legislation (by the legislator) – laws (the difference is in speed, the argumentation/reasoning for the necessity of a law);

2) binding decisions, rules, which in ordinary situation would not be possible to issue, if the emergency/ exceptional situation was not officially proclaimed (for example, rights of the

[75] Feinberg M. Sovereignity in the Age of Global Terrorism. The Role of International Organisations, Leiden, Boston: Brill Nijhoff, p.106.

Cabinet during state of exception in determination a different the operation mode of state administrative and local government institutions).

7.3. It should be noted that additional point of reference should be made on those regulations of national laws, which provide for complete or partial suspension of execution of the liabilities laid down in international agreements, if execution thereof may have a negative impact on the ability to prevent or overcome threat to national security. The aspect of possible collision among different general legal principles, which might lead EU to act, and the Member State to act, should be considered. Moreover (at least to authors' knowledge), in the Baltic States, there is no fundamental legal analysis provided yet regarding the principle of direct effect and supremacy of EU law in the situation of emergency/ state of exception.

7.4. In Estonia, "the formulation of the domains of exclusive competence in Article 3(1) TFEU are generally accepted without criticism. With regards to the creation of the catalogue of competences it can be said that both the Estonian official position and the scholarship have been supportive of the idea. (..) Uno Lõhmus, a former judge at the ECJ, wrote that the flexibility clause together with Articles I-12 to I-17 of the Constitutional Treaty (the articles regarding the division of competences) determine the scope of the competence of the Union more precisely than before. The Lisbon Treaty, that made the catalogue of competences a reality, was later, in 2008, praised for bringing a clearer "division of labour" that enabled to understand which obligations were to be fulfilled by the Member States themselves and which competences had been delegated to the Union.[76]

7.5. "The entry into force of the Treaty of Lisbon has not changed the perception of the doctrine of implicit competences in Estonia. The Estonian scholarship shows more concern towards the Union implicitly expanding its competence if the Union's competence potentially conflicts with the Estonian Constitution. For example, the rules on the acquisition and loss of nationality fall within the competence of the Member States. In Estonia those rules are considered to be at the core of the Estonian sovereignty as per Article 1 of the Estonian Constitution".[77]

7.6. The content of the term "sovereignty" has to be regarded in the context of the type of the organization to which the competences have been partially delegated as "one should assess the nature of the respective international organization. Delegation of competencies to an organization unifying democratic and law-governed states should be assessed differently if compared to delegation of the same competencies to a union of authoritarian states. Secondly, one could also assess the extent of the competencies delegated to an international organization. Delegation of the competencies in the field of economy, security and foreign affairs to similar international organizations could

[76] Uustalu H. Lissaboni leping- samm demokraatlikuma, efektiivsema ja läbipaistvama Euroopa poole, Juridica 2008, p.315. Cited after: Ernits M., Roostar K., Kubinyi E., Hiio J. Preliminary remarks. FIDE Conference 2016, Topic 3, p. 6. Available: http://www.juristideliit.ee/wp-content/uploads/2015/12/FIDE-2016-Topic-3-EE.pdf

[77] Ernits M., Roostar K., Kubinyi E., Hiio J. Preliminary remarks. FIDE Conference 2016, Topic 3, p. 8.

imply a different influence form the point of view of sovereignty".[78] As noted by Estonian legal scholars, amendment to the Constitution before the accession to the European Union is vague: "There are no clear limits to the transfer or delegation of powers to the EU. The brief wording of the CREAA[79] left some major questions, i.e. the effect of the EU law, to be interpreted by the judiciary".[80]

7.7. "It has been argued, with reference to the pre-Lisbon provision of Article 6 (3) TEU, that the obligation under Article 4 (2) TEU is subordinate to the obligations of the Member States to respect the EU's objectives in Article 3 TEU, and would thus also be subordinate to Article 4 (3) TEU".[81] The formulation of the Article 4 TEU puts emphasis on the respect of each Member's "essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State".

7.8. The crisis management/ emergency situation systems already existing in the Baltic States (taking into account the great reform of emergency legislation in Estonia in 2017) are oriented on the general clause that security and peace in the country is primarily the responsibility of the state. This includes the mechanisms of legislative solutions in exceptional situations. Finding the right balance of the two powers (legislative/ executive) in crisis situations is probably in the core of the national state identity. The choice of each emergency legislation mechanism is deeply rooted in the history of a state, contemporary political context etc. If any reform in these matters is taking a place, it needs to be carefully substantiated. The role of the EU and its existing mechanisms are seen as a necessary and even inalienable tool for the state to fulfill its obligations before its citizens to perform adequate responses in a case of a threat.

7.9. Nevertheless, while encouraging signals to an even closer integration within the EU are given, its emergency law-making in future might cause the necessity to transform the existing urgent legislation models, if, for instance, another additional step (agreement from the EU) is needed for the Parliament to adopt the decision for declaration of a state of emergency. "So far, enhanced cooperation in the field of CFSP has not been in demand owing perhaps to the need to maintain credibility and unity in EU external action while military and defence matters are already intrinsically differentiated".[82] "The adoption of legislative acts in this area is excluded by Articles 24 and 31 TEU. Softer forms of action- general guidelines, decisions and strengthening co-operation – are envisaged by

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[78] Constitutional Court of Latvia. Decision No. 2008-35-01 On Compliance of the Law "On Lisbon Agreement Amending the Treaty on European Union and the Treaty Establishing the European Community" with Article 101 of the Satversme of the Republic of Latvia, para. 8.

[79] The Constitution of the Republic of Estonia Amendment Act

[80] Ernits M., Roostar K., Kubinyi E., Hiio J. Preliminary remarks. FIDE Conference 2016, Topic 3, p. 3.

[81] Klamert M. The Principle of Loyalty in EU Law. Oxford University Press, 2014, p.21.

[82] Gosalbo-Bono R., Naert F. The Reluctant (Lisbon) Treaty and Its Implementation in the Practice of the Counci. In: The European Union's external action in times of crisis. Eeckhout P., Lopez-Escudero M. (eds). Portland, Oregon: Hart Publishing, 2016, p.31

Article 25 TEU".[83] "The Treaty of Lisbon has also made clear that CFSP decisions, although binding and committing the Member States (Articles 28(2) and 29 TEU), are not legislative acts since they are not adopted in accordance with the legislative procedure".[84] Recently, introduction of new initiatives for a new single Permanent Structured Cooperation (PESCO) for those Member States willing to undertake higher commitments on security and defence inevitably should be regarded in the context of national decision-making procedures and powers of the Head of the State, the Parliament and the Government. Moreover, as it is admitted by researchers, recent initiatives regarding the European Border and Coast Guard[85] have caused numerous concerns from the Member States, as the question on "[how] to deal with emergency situations at the external borders of Member States unwilling to act – that was the only matter of serious contention during the legislative process".[86]

7.10. One could presume that in all Member States, including the Baltic States, in a more or less explicit way following statement is valid: "if the EU is the site for solving such problems but is seen not to do so, its legitimacy is imperilled. Its alienation from popular support is likely to be exacerbated if national politicians shift the blame for policy failures to it – which, acting rationally and exploiting the endemic intransparency of the EU, they will".[87] It should be noted that the Baltic States due to their geographical and political state have not faced explicit criticism or populism tendencies, which could cause serious discussions on these issues.

[83] Weatherill S. Law and Values in the European Union. Oxford University Press, 2016, p.122.

[84] Gosalbo-Bono R., Naert F. The Reluctant (Lisbon) Treaty and Its Implementation in the Practice of the Counci. In: The European Union's external action in times of crisis. Eeckhout P., Lopez-Escudero M. (eds). Portland, Oregon: Hart Publishing, 2016, p.27

[85] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard.

[86] Rosenfeldt H. Establishing the European Border and Coast Guard: all-new or Frontex reloaded? 16 October 2016, EU Law Analysis. Available: http://eulawanalysis.blogspot.com/2016/10/establishing-european-border-and-coast.html

[87] Weatherill S. Law and Values in the European Union. Oxford University Press, 2016, p.419.

II. Potentialities of an urgent and/or exceptional law-making procedure at the European level

1/ How could an urgent and/or exceptional law-making procedure be established at the EU level?

In particular, could one use the current EU rules by broadening their scope of the application or is it necessary to introduce new provisions, exclusively destined to address urgent and/or exceptional circumstances?

Is a revision of the Treaties necessary or is it possible to reach a solution by means of secondary law? In the former case, would it be sufficient a simplified procedure according to the article 40 TEU?

1. Reaction to the crisis is directly linked to the question regarding the available means to react, and also on the responsibility (competence) of a given actor to react in a given situation.

Contemporary national legislators, as well as decision-makers in the EU level constantly assess and monitor situation in various fields in order to give adequate background analysis. So far, "in the EU, crisis does not equal inaction. All of the above crises have triggered panoply of responses, political, legal and institutional. The questions which are raised are rather about the adequacy of those responses, their substance and effectiveness, and indeed their legitimacy".[88]

2. Generally, the Lisbon Treaty has introduced only minor changes as regards to introduction of the EU as a crisis manager and dispute settler. The existing practice of decision-making within the EU to tackle the emergency situations or processes has been marked by technical/ administrative provisions of a limited scope (for example, Regulation 2016/369, Regulation (EU) No 516/2014) or political decisions/ declarations. Therefore up until now mostly non- legislative acts have been introduced. The difference between legislative and non-legislative acts should be taken into account before analyzing the possible/ necessary models for urgent/exceptional EU law-making. Although the definition of legislative acts in the Treaty simply refers to legislative procedures, it is also important to consider the content of legislative acts. The European Union is an international organization *(sui generis)*, not a state. However, the Member States have conferred on the Union legislative powers. Above all, the EU institutions adopt legal acts that may impose duties not only on Member States or EU institutions, but also on individuals. Thus, the democratic principles of law-making have to be applied at the EU level as well.[89]

3. The notion of "EU level law-making procedures" implies very different sets of institutional procedures, legal definitions and discussions related to such European values as 'democracy' and 'rule of law'. Moreover, it raises constant legal debates, as the decisions taken strictly vary depending on their adoption procedures, constitutional rank, involved institutions and content. There are several key terms and general legal

[88] The European Union's external action in times of crisis. Eeckhout P., Lopez-Escudero M. (eds). Introduction. Portland, Oregon: Hart Publishing, 2016, p.3.

[89] Svobodová M. On the Concept of Legislative Acts in the European Union Law. TLQ 4/2016, pp.258-259. Available: www.ilaw.cas.cz/tlq

principles to be addressed in order to determine how urgent law-making procedures might be incorporated /introduced in EU law *corpus*, which is explicitly defined in Article 288 TFEU by listing the legal acts of the Union.

4. Admittedly, the rhetoric used for creation of the Economic and monetary union (EMU) as not being "an end in itself", but rather "an instrument to further the objectives of the European Union and improve the lives of citizens in EU countries"[90] is adequate and appropriate to all the fields of competences of EU, which have a substantial effect on the economies and life standarts in Member States. Contemporary model of the EU structure still would allow for existence of possibly less-effective national procedures, as EU covers only part of the responsible competences. "The EU's mandate is broad and, as part of the design of a flexible system apt to solve unforeseen problems as they emerge, it is not tied down by detail". This nevertheless should not be regarded as a direct invitation for the EU to fill the gaps, as "there are limits to the load the EU should be asked to bear, for fear that its activities come to be seen as illegitimate. This might mean that even where the EU is better at performing a particular task than its Member States acting unilaterally, it nevertheless should *not* do so because there is not enough popular support for the very notion that the EU, rather than the national level, is the right place to make the relevant decisions".[91]

5. Therefore an estimation and prognosis of necessary legislative means to react in urgencies are best to follow a systemic and field-to field approach: by indicating the existing instruments and defining the necessity to establish new instruments to enable the EU to react more efficiently in exceptional circumstances. Not all the crisis situations require legislative response. On the other hand, if a legislative regulation of the solution is more appropriate, existence of time-efficient legislative procedures is of a special significance.

6. Therefore, modelling the possible law-making procedures to resolve urgent occurrences and dealing with extraordinary circumstances in the EU should have a firm grounding and clear justification, whether:

- there is a necessity to adopt legislation with a content fully in accordance with the existing Treaties – therefore the only issue is the speed of decision-making process (legislation procedure);
- there is an urgent unexpected necessity to provide for a legislation in a different legislative procedure (excluding some elements/ involved institutions, for example);
- the legislation in extraordinary circumstances might change the powers of institutions;
- the legislation in extraordinary circumstances might temporarily change the contents of existing legislation (limiting freedoms and rights/ limiting the scope of application; enforcing some additional safeguards).

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[90] https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/economic-and-monetary-union/how-economic-and-monetary-union-works_en

[91] Weatherill S. Law and Values in the European Union. Oxford University Press, 2016, p.10.

- It is important to clarify, whether the temporary legal regime is planned in the field within the exclusive or non-exclusive competencies as EU, when exercising its non-exclusive competencies, must observe the principle of subsidiarity and principle of proportionality that restrict the possibility to broaden competencies.

7. The principle of subsidiarity and principle of proportionality restrict the possibility to broaden competencies; moreover, national parliaments would be involved to monitor application of these principles (see: Article 5 of Protocol No. 2 of the TFEU "On the Application of the Principles of Subsidiary and Proportionality"). The abovementioned norms and the principles form a sufficiently distinct normative framework to clearly define the extent of competences that would be delegated to the EU according to the TL.[92] Urgent/exceptional situations occurring within the territory of the EU are to be dealt taking into account the "equal protection that CFSP and TFEU competences now enjoy under Article 40 TEU".[93]

8. The principle of conferral provides that the Union's competences are limited to those listed in the Treaties. Such provisions, although *expressis verbis* introduced by the Treaty of Lisbon (Art 4 (I) TEU, Art. 5 (2) TEU), have been developed before. In practice conferred competence borders are impossible to set clearly, as "important elements of EU law are defined with reference to functionally broad objectives, most of all the internal market, with the consequence that such limits as they possess are wide and hard to fix".[94] As it is noted in legal literature, "the Treaties present a picture of thematically limited competences in distinct policy areas", which might give a partly misleading picture due to the rise of teleological interpretation, the rise of the Union's general competences and the doctrine of implied powers.[95]

9. Notwithstanding that the Article 5 (3) TEU creates a constant debate in legal literature,[96] it is also in a way giving a possibility to develop most adequate reasoning when facing new challenges. The subsidiarity principle is to be referred to only in those areas, which do not fall within EU's exclusive competence. Therefore, decision on the necessary means to deal with emergency/ urgent situations has to, first of all, indicate and set a clear profile of areas, which should be tackled in the EU – wide level. Any application of a general principle is an issue of evaluation. The principle of subsidiarity is essential, if unusual legislative measures are considered to be taken in the name of achieving common goals and political targets. It should be evaluated, if the national level is insufficient to deal with the issue, or in other words, if "according to the subsidiarity

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[92] Constitutional Court of Latvia. Decision No. 2008-35-01 On Compliance of the Law "On Lisbon Agreement Amending the Treaty on European Union and the Treaty Establishing the European Community" with Article 101 of the Satversme of the Republic of Latvia, para. 18.3.

[93] Dashwood A. Conflicts of Competence in Responding to Global Emergencies. In: Antonis Antoniadis (Editor), Robert Schutze (Editor), Eleanor Spaventa (Editor) The European Union and Global Emergencies: A Law and Policy Analysis, Hart Publishing, 2011, p.47

[94] Weatherill S. Law and Values in the European Union. Oxford University Press, 2016, p.33.

[95] See: Schutze R. European Constitutional law. Sec.ed. Cambridge University Press, 2016, p.225.

[96] For example, prof. R. Schutze would name the article „a terrible textual failure". In: Schutze R. European Constitutional law. Sec.ed. Cambridge University Press, 2016, p.253.

principle, in so far as the objectives cannot be sufficiently achieved by the Member States, the European Union is pressed to elaborate appropriate answers to this *globalisation of social disasters*."[97]

10. "The former second pillar –common foreign and security policy has been included into Title V of the TEU "General Provisions of the Union's Action and Specific Provisions on the Common Foreign and Security Policy". This is the only pillar that was preserved at the intergovernmental level. (..) Under Article 275 of the TFEU, neither the EU court would have the jurisdiction regarding these provisions. The only exception when the EU Court is entitled to review the CFSP decisions is the cases when these decisions are related with the rights of individuals (Article 40 of the TEU and Article 75 of the TFEU).(..) Consequently, the only substantial difference is that the decisions, too, would be adopted in the frameworks of the CFSP. As to the common foreign and security policy, it is provided that this policy is an integral part of the CFSP and the performance of these tasks shall be undertaken using capabilities provided by the Member States (see: Article 42 of the TEU). The TEU provides for elaboration of such policy based on unanimous decisions of the European Council, and it particularly emphasizes the fact that the common foreign and security policy shall not regulate the duties of the Member States in the North Atlantic Treaty organization and shall be consistent with the commitments. In general, the TEU requires adoption of unanimous decisions and does not provide that international liabilities of the Member States would exceed those established in the treaty establishing NATO".[98] Besides, 'in its substance, the CFSP has been strengthened with regard to the Union's defence policy[99] (Art 42 (2) TEU).

11. "While the EU is not required to implement UN obligations because it is not a Member state of the UN, Declaration 13 to the Lisbon Treaty states that "the European Union and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its Members for the maintenance of international peace and security."[100] As Freiburg states, "the fact that *various international organisations have acted against terrorism means that there is a potential conflict of legal regimes*. They "have been created, originally at the UN level and then copied by the EU and by Member States".[101]

12. Meanwhile, it is acknowledged by legal scholars that based on objectives of EU Treaties, "it would be difficult for the EU to deny that it is subject to Chapter VIII UNC, even in the absence of internal conflict management mechanisms," although "nothing in the EU

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[97] Raccah A. Reframing Legal Risk in EU Law. In: Mišćenić E., Raccah A. (eds). Legal risks in EU law: interdisciplinary studies on legal risk management and better regulation in Europe. Switzerland: Springer International, 2016, p.14.

[98] Constitutional Court of Latvia. Decision No. 2008-35-01 On Compliance of the Law "On Lisbon Agreement Amending the Treaty on European Union and the Treaty Establishing the European Community" with Article 101 of the Satversme of the Republic of Latvia, para. 18.5.

[99] Schutze R. European Constitutional law. Sec.ed. Cambridge University Press, 2016, p.39.

[100] Feinberg M. Sovereignity in the Age of Global Terrorism. The Role of International Organisations, Leiden, Boston: Brill Nijhoff, p.126.

[101] Feinberg M. Sovereignity in the Age of Global Terrorism. The Role of International Organisations, Leiden, Boston: Brill Nijhoff, p.21.

Treaties seems sufficient to enable the EU to fulfil this task internally. The Union's policies in this area are primarily (if not exclusively) related to threats to or breaches of the peace within or by states that are *not* members of the EU".[102] Therefore, depending on the character of extraordinary circumstances, introduction of new EU legislation to resolve the crisis situation might be put within the framework of the CFSP. There exists a distinct procedural regime for CFSP (general competence – intergovernmental), and Union's special external policies (supranational), as Art 40 explicitly puts it. "The first indent protects the Union's supranational procedures and powers. It is designed to prevent the (European) Council from using the Union's CFSP competences, where recourse to one of the Union's supranational competences is possible".[103] Union's Common Foreign and Security Policy is "heavily dominated by the intergovernmental patterns of control."[104]

13. The Constitutional Court of Latvia indicates that "delegation of certain competencies to the EU shall be regarded as the use of sovereignty of people for reaching the aims set forth in the EU treaties rather than weakening of sovereignty of people. Neither the effective treaties, nor the objectives mentioned in article 3 of the TEU that the EU is striving to achieve within the frameworks of its competency in accordance with the sixth part of this Article, contradict the values and interests enshrined in the Satversme. At the same time, as the EU integration develops, it is necessary to take into consideration the fact that Article 2 of the Satversme does not provide for an unlimited delegation of competencies, which would prohibit considering Latvia as a sovereign State."[105]

14. Although Kadi case[106] reasoning concerned the issue of the EC regulation (annulment of it), its remark concerning the time aspect should be taken into account in cases, where security issues are analysed: "ECJ accepted that the success of sanctions lies partly on an element of surprise", in the meantime stressing that after sanctions are imposed on suspects, the authorities should then provide them with information and reasons (..).[107] The regulations therefore are legitimate if contain adequate reasoning. What is also important, is that the ECJ has agreed with the position of necessity to be able to adopt speedy decisions. The "element of surprise" includes also the ability to react in a fast, efficient way, which gives the attained result. If the institution nowadays is not able to tackle the problem in a speedy procedure, its inefficiency causes many

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[102] Blockmans S., A Wessel R. The European Union and Peaceful Settlement of Disputes in its Neighbourhood: the Emergence of a New Regional Security Actor? In: Antoniadis A., Schutze R. (Editor), Spaventa E. (Editor) The European Union and Global Emergencies: A Law and Policy Analysis, Hart Publishing, 2011, pp. 81-82.

[103] Schutze R. European Constitutional law. Sec.ed. Cambridge University Press, 2016, pp.228 - 274.

[104] Weatherill S. Law and Values in the European Union. Oxford University Press, 2016, p.122.

[105] Constitutional Court of Latvia. Decision No. 2008-35-01 On Compliance of the Law "On Lisbon Agreement Amending the Treaty on European Union and the Treaty Establishing the European Community" with Article 101 of the Satversme of the Republic of Latvia, para. 18.3.

[106] Kadi v Council (2005), para. 340

[107] Feinberg M. Sovereignty in the Age of Global Terrorism. The Role of International Organisations, Leiden, Boston: Brill Nijhoff, p.142.

risks. A very similar argument is given also by the Estonian Supreme Court. It argued that "the purpose of Article 4(4) of the Treaty is to guarantee for the ESM in an emergency the efficiency of the decision-making mechanism to eliminate a threat to the economic and financial sustainability of the euro area".[108]

2/ Which cases are to be considered as "urgent" and/or "exceptional" in the EU legal order? Is it necessary to distinguish between "urgent" and/or "exceptional" cases? Are there any sensitive domains that should be excluded from the application of urgent and/or exceptional EU law-making procedures?

15. Contemporary world has been affected by various fields of possibly threatening crisis which the EU should be able to face and successfully overcome in order to ensure achievement of common goals of the Member States.

16. It is possible to distinguish several types of threats, which cause urgent reaction: cyber attacks, financial crisis, terrorist attacks, environmental disasters, social crisis and migratory flows, military threats. Each of the crisis is to be regarded and treated differently, although central coordination or approval is nevertheless required, as often reasons and consequences of crisis are interconnected. What is even more evident, is that most of above-mentioned threats and crisis are not anymore regarded as unattended, exceptional and absolutely sudden. Besides "the new approach is exacerbated at the international level for several reasons including the predominant executive branch and the lack of accountability mechanisms (emergency is norm)".[109]

17. Reaction by the EU to emerging, threatening developments, which risk to cause urgently solvable situations, is in a concise way defined in the Article 352 TFEU, which states that "if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures".

18. In order to adequately react to the "urgent" and "exceptional" problematic situations within the EU, they should clearly overlap with the common goals and aims of the EU, as it is the Member States which raise the necessity to react in a regional level. The Treaty has foreseen limitations to such an approach, namely: for attaining objectives pertaining to the common foreign and security policy. "This codifies past jurisprudence, and is designed to protect the constitutional boundary drawn between the Treaty on European Union and the TFEU. In Estonia, legal analysis of the flexibility clause have been mostly developed after 2004, and no special additional researches are made since entry into force of the Treaty of Lisbon. Current judge of the ECHR from Estonia, prof."J.Laffranque explained in 2006 that the (aut. – flexibility) clause is described as

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[108] CRCSCr 12.07.2012, Case No 3-4-1-6-12. A request of the Chancellor of Justice to declare Article 4(4) of the Treaty establishing the European Stability Mechanism signed on 2 February 2012 in Brussels to be in conflict with the Constitution, para. 223, 207. Note: This case was decided by the Supreme Court en banc (all 19 judges of the Supreme Court).This Decision contains five dissending opinions. Available in English: http://www.riigikohus.ee/?id=1347

[109] Feinberg M. Sovereignity in the Age of Global Terrorism. The Role of International Organisations, Leiden, Boston: Brill Nijhoff, p.16.

giving the Union the opportunity and the right to expand its competences in matters that are within the goals or aims of the Union according to the Treaties, but in relation to which the Member States "have forgotten" to confer the Union the powers to act and take measures to achieve these goals."[110]

19. Although the range of legal domains of competences in Member States and EU varies, definitions of "urgent" and "exceptional" cases should be based on the same principles (therefore avoiding vast terminology differences). This would contribute to the common understanding of steps to be taken for solving the caused problems. It is hard to imagine situations, when an event would be described "urgent" or "exceptional" in EU level, but not in Member States, besides purely administrative catastrophe for the existence of the EU itself, for example, several Member States in the same week announce activation of the *Article 50 TEU*: Withdrawal of a Member State from the EU.

20. The distinction is necessary, as depending on seriousness of the catastrophe different legal/ administrative/ financial measures should be taken. The notion "exceptional" should be attributed only to unexpected, *force majeure* circumstances. It is not appropriate to define domains that should be included or excluded from the application of urgent and/or exceptional EU law-making procedures. The only filter for attribution of a special legislative/ decision-making procedure should be an appropriate legitimization from the Member States to introduce and activate the actions necessary to deal with the crisis situation.

21. Furthermore, it should be acknowledged that there might be a necessity to take protective measures, not only react *post factum*. In Case Bovine Spongiform Encephalopathy (BSE) the Court has stated: "where there is uncertainty as to the existence or extents of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent".[111]

22. Specific types of emergency systems already have been implemented, although being "increasingly codified in European legislation. However, national emergency measures are today no longer viewed as ersatz for missing European measures, but are seen to complement a centralized emergency system operated by the Commission".[112]

23. Although Lisbon Treaty requires for non- interference (or even protection from encroachment) between the CFSP and the other Union policies (Art 40 EU), a clear distinction between the both is likely impossible, at least in the direction CFSP – other policies. Definition of clear provisions regarding the shared competences of the EU, as well as parallel competences is a crucial point for several Member States.

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[110] Laffranque J. Euroopa Liidu õigussüsteem ja Eesti õiguse koht selles, Tallinn 2006, p. 101. Cited after: Ernits M., Roostar K., Kubinyi E., Hiio J. Preliminary remarks. FIDE Conference 2016, Topic 3, p. 10.

[111] Case C-180/96 UK v. Commission (1998) ECR I-2265, para.99

[112] Schutze R. Constitutional Limits to Delegated Powers. In: Antonis Antoniadis (Editor), Robert Schutze (Editor), Eleanor Spaventa (Editor) The European Union and Global Emergencies: A Law and Policy Analysis, Hart Publishing, 2011, p. 66.

24. "While the EU is not required to implement UN obligations because it is not a Member state of the UN, Declaration 13 to the Lisbon Treaty states that "the European Union and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its Members for the maintenance of international peace and security."[113] Therefore, one of the most sensitive domains where EU's competence is not approved is the legislation relating to maintenance of peace and security. It should be noted that in a parallel to national states, where generally laws in state of exception/ emergency situation still are to be applied with the exact exceptions given by the legislator, when an emergency legislation is put into force, the main principle of the EU law as a source of law will remain. "The necessary corollary element to direct effect in the EU legal order is the primacy of EU law, namely the ability of EU law norms to take precedence over conflicting norms of national law".[114]

25. In order not to jeopardize the achievement of the objectives of the Union (..), EU law has to be applied in a uniform manner in all Member States. This implies that there is no space for Member States' claims questioning the application of EU law and ultimately the authority of the EU legal order.[115]

Meanwhile, it is doubtful, whether the existence of an urgent/exceptional occasion *per se* gives the EU additional exclusive[116] competences, which would be substituted on the account of shared[117], coordinating[118] or complementary[119] competences.

3/ Can you suggest a possible model for urgent and/or exceptional EU law-making procedures?

In particular, what would be the different phases of such procedures, the institutions involved and their respective roles as well as the applicable timetable for the issuing of an urgent and/or exceptional EU regulatory measure?

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[113] Feinberg M. Sovereignity in the Age of Global Terrorism. The Role of International Organisations, Leiden, Boston: Brill Nijhoff, p.126.

[114] Piqani D. Legal Risks in the Relation Betwen National Constitutional Law and EU Law. In: Mišćenić E., Raccah A. (eds). Legal risks in EU law: interdisciplinary studies on legal risk management and better regulation in Europe. Switzerland: Springer International, 2016, p.26.

[115] Piqani D. Legal Risks in the Relation Betwen National Constitutional Law and EU Law. In: Mišćenić E., Raccah A. (eds). Legal risks in EU law: interdisciplinary studies on legal risk management and better regulation in Europe. Switzerland: Springer International, 2016, p.24.

[116] Art.3. Exclusive competences (policy areas – for example, the customs union, competition rules etc) - this is important to note that, although exclusive competences give the EU the sole authority to act, Art.2 (1) TFEU give the possibility of EU to empower Member States to be enabled to act whithin this scope.

[117] Art.4. Shared competences give a field of both the Union and Member States for legislation. Art 2 (2) TFEU

[118]Coordinating Competences put economic, employment and social policy in this area. Art 2 (3) and 5 TFEU

[119] The category of complementary competences is not explicitly defined, but referes to seven areas, mentioned in Art.6 TFEU, where exclusion of harmonisation is forseen.

26. If the regulation procedures in urgent/exceptional circumstances within the Member States is clear this is mainly because there is also a clear distinction between the competences of institutions (especially legislative and executive branch of state power). As EU is a supranational organisation, the question of competence categories (as distinguished in Article 2 TFEU) is of a special importance, as the question of competences closely relates to the possibilities and responsibilities in urgent/ exceptional situations. It should be assumed that possible models for urgent and/or exceptional EU law-making procedures within the EU should be based on pragmatic evaluation of the possible realization of any innovations in the legislation in such an organization as the EU. Therefore, existing challenges in the work of the existing institutions can be regarded as appropriate in order to select the most appropriate model and to adopt it to the challenging circumstances as EU-wide emergencies.

27. The legislative competence of EU has to be regarded in its widest understanding also as a negative dimension. There are numerous provisions "that forbid particular practices that are incompatible with the EU's objectives". Even more: "the scope of these prohibitions exceeds the scope of the *legislative* competences. The functional breadth of EU law pushes it into some areas of activity that would not be subject (at all or only under strict limits) to the legislative competence of the EU".[120]

In most cases, the European Parliament together with the Council play a key part in the EU legislative process.

28. European Parliament:

"The current Lisbon Treaty grants information and consulting powers to the EP on "the main aspects and basic choices" of both CFSP and CSDP (Art. 25 TEU). (..) These new powers are actually limited and vague, since the text fails to spell out what "the main aspects and basic choices of the CFSP and CSDP" are".[121]

The executive power in the Member States is most usually addressed when emergency situations arise. This is mainly the reason of ability to respond to the changing situation rapidly. However, 'essential elements' have to be still kept in hands of the legislator.

"European legal order has not adopted a strict hierarchical subordination of delegated legislation. The clear border is set by the specificity principle, codified by the Lisbon Treaty: "objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative act".[122] Delegation of implementing power also to the Council should be sufficiently argumented in duly justified cases.

Article 229 TFEU also provides for a possibility to act in-time in urgent situations: "the European Parliament may meet in extraordinary part-session at the request of a majority of its component Members or at the request of the Council or of the Commission."

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[120] Weatherill S. Law and Values in the European Union. Oxford University Press, 2016, p.46.

[121] Greco E., Pirozzi N, Silvestri S. EU Crisis Management: Institutions and Capabilities in the Making. Quaderni IAI 19, 2010, p. 85. Available: http://www.iai.it/en/ricerche/eu-crisis-management-institutions-and-capabilities-making

[122] TFEU Art. 290, 291.

29. It is not clear whether European Parliament resolution of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty (2014/2249(INI)) should be used as a guiding direction for searching the possibilities for the EU to be able to develop a clear route of legislation fast-track in cases when urgent issues might be indispensable. However, it should be noted that this resolution clearly sets the main outline of the current readiness of Parliament members and leaders to give a louder voice in the legislation procedure, when dealing with "major challenges, which no Member State can tackle on its own".[123] Meanwhile, the problematic issue with the European Parliament as the European legislator is the lack of clear accountability of the members of the EU Parliament before the national governments. Although the ideal model would entail the common policies and cooperation between the Member State and the respective deputies of the EU Parliament, different platforms of political activity entail different accountability rules. As the recent example of EU Parliament representative from Latvia has showed[124], clear accountability instruments towards the decisions, voting choice and representation policy is lacking in the national level. Therefore, it is possible to conclude that in a way, although a direct legitimization via EU Parliament elections is ensured to the deputies, it might risk with a confrontation of official Member State position. The work of EU Parliament is organized according to political, not national criteria. Deputies work in ideological party groups, where representatives of various Member States are present.

30. *Council and Commission*

The executive rule- making is the most active type of regulation both in national and EU level: "within the Union legal order, executive rule-making accounts today for about 90 per cent of all law-making".[125] In Member States it is the strong role of executive that deals with counterterrorism regime – (in EU that is mostly the Council and the Commission). Traditionally the EP and the ECJ had not been involved.

The Council (also "Foreign Affairs Council) is the "key decision –making organ, but, unlike the other Council configurations, is chaired not by Member State representatives, but by the High Representative (Article 18(3) TEU). [126]

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[123] European Parliament resolution of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty (2014/2249(INI)), point A. Available: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2017-0049

[124] Grigule kopā ar Mamikinu un Ždanoku nobalsojusi pret rezolūciju saistībā ar cīņu pret Krievijas propagandu (Grigule together with Mamikin and Ždanoka have voted against the resolution concerning fight against Russian propaganda). www.irir.lv. 24.11. 2016. Available: http://www.irlv.lv/2016/11/24/grigule-kopa-ar-mamikinu-un-zdanoku-nobalsojusi-pret-rezoluciju-saistiba-ar-cinu-pret-krievijas-propagandu

[125] Schutze R. European Constitutional law. Sec.ed. Cambridge University Press, 2016, pp.319-309.

[126] Blockmans S., A Wessel R. The European Union and Peaceful Settlement of Disputes in its Neighbourhood: the Emergence of a New Regional Security Actor? In: Antonis Antoniadis (Editor), Robert Schutze (Editor), Eleanor Spaventa (Editor) The European Union and Global Emergencies: A Law and Policy Analysis, Hart Publishing, 2011, p. 83.

In an emergency situation, when the reaction of a decision-maker is needed, the crucial role should be given to the representatives of the governments of Member States (resp, the Council), which has the direct legitimisation from the Member States.

The Council's structure by consisting of the Member States should not be regarded as monolith. There are definitely some of the Members carefully following the competence issue between EU and the states, so to keep the desire to maintain a space for independent decision – making and strategies.

"After all, every delegation of power away from the intergovernmental Council to the supranational Commission would have a significant unitary effect on the decision-making in the European Union; and every delegation away from the directly elected European Parliament to the indirectly elected Commission would have a significant anti-democratic effect".[127]

31. The role of the Commission in adopting the enabling provision, is to be defined according to three limitations: 1) the provision must be sufficiently specific (the Council must clearly specify the bound of the power conferred on the Commission); 2) provisions which are intended to give concrete shape to the fundamental guidelines of Community policy are beyond delegation; 3) Commission cannot use its wide implementing powers in one policy area to interfere with the powers of the Council in another.[128]

32. The Commission in its "White Paper on the Future of Europe" (2017) has initiated consideration of five scenarios of the future EU. One of them proposes certain Member States to form one or several "coalitions of the willing" therefore emerging common work in "specific policy areas. These may cover policies such as defence, internal security, taxation or social matters".[129] If this scenario is to be realized, adequate legislation procedure within the EU is appropriate. Centralized decision-making regarding issues relevant for only a part of Member States could be substituted by more target-oriented legislation mechanism, avoiding lengthy search for a compromise.

The instrument of the new Comitology regulation under the Articles 290 and 291 TFEU gives a possible path for the legislator to the delegation of legislative power. The difference between them lies in the constitutional background through which the delegation is realized: "if Article 290 is designed directly to protect *democratic* values,[130] Article 291[131] is primarily designed to protect *federal* values".[132] In this matter the Court has argumented that "the EU legislature has

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[127] Schutze R. European Constitutional law. Sec.ed. Cambridge University Press, 2016, pp.319-309.

[128] Schutze R. Constitutional Limits to Delegated Powers. In: Antonis Antoniadis (Editor), Robert Schutze (Editor), Eleanor Spaventa (Editor) The European Union and Global Emergencies: A Law and Policy Analysis, Hart Publishing, 2011, p.52.

[129] White Paper on the Future of Europe. Reflections and scenarios for the EU27 by 2025. European Commission. Scenario 3: Those who want more do more, p. 20.

[130] By a possibility to amend non-essential elements

[131] By responisibilty to issue legally binding acts, exercise o fan executive power by the Commission, cumpulsory delegation of executive power

[132] Schutze R. European Constitutional law. Sec.ed. Cambridge University Press, 2016, pp.319-320.

discretion when it decides to confer a delegated power in the Commission pursuant to"[133] either of the above mentioned Articles. The new reformed Comitology system provides for advisory procedure and the examination procedure in adoption of implementing acts. Member States are involved in this procedure (committee is composed of representatives of the Member States).[134]

In addition, the role of the founded institutions (agencies) which particularily deal with emergency situations in EU[135] should be clarified.

33. Legislation procedure

Comparing legislation procedure in an ordinary process with the one which is foreseen in national legislations regarding emergency / urgent situations it is evident that the main actors involved are the same. What is different, though, is their changed position as regards to the time resources and availability of well- practiced experience. Legislation procedure in exceptional occasions therefore should involve (mainly) the same actors, but with changed roles of activity, putting an accent to the actors, which are capable of making decisions and are structured in an easy- accessible way in order to make fast decision in the name of the respective Member State.

34. Legislation in the EU in an *ordinary* legislative procedure involves two equally important players - the EP and the Council - who act as co-legislators. Meanwhile, the other type of legislation – *special* legislation- would entail differentiated centres of gravitation: in one option, the EU parliament acts as a dominating institution, whereas, in the other – the Council is dominating. As it is concluded in legal literature, "(t)here is no constitutional rationale or procedure catalogue, (..) there is no specific definition of what constitutes 'special' legislative procedures",[136] even the main responsible institution for submitting a proposal, except special cases, is the Commission.[137]

35. Specific Treaty provisions detail whether a given legislative act is to be adopted by an ordinary or by a special legislative procedure. The ordinary legislative procedure is a single process and is described in Article 294 TFEU. Apart from the ordinary legislative procedure, there are different procedures for decision-making called special legislative

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[133] Case 427/12, Commission v Parliament &Council EU:C:2014:170, para 40.

[134] Regulation 182/2011 (16.02.2011) laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers

[135] In order to increase the efficiency European Commission organizes trainings for Memberstates (European Disaster Response Exercise (EDREX)), which provide different scenarios (for example, earthquaque, which causes a great nuclear accident in the third country). Therefore the responsible ministries (their institutions) of Memberstates are constantly acquiring knowledge and practical experience regarding combined emergency situations analysing how to implement EC crisis management and solidarity clause. See: Eiropas Komisijas organizētās civilās

aizsardzības mācības (EDREX). Available: http://vugd.gov.lv/lat/par_vugd/darbibas_sferas/krizes_vadibas_padomes_2016_gada_sedes/krizes_vadibas_padomes_2016_gada_25_maija_sedes_darba_kartiba/

[136] Schutze R. European Constitutional law. Sec.ed. Cambridge University Press, 2016, p.245.

[137] Schwarze J. (HRSG). EU-Kommentar. 3 Aufl.- Helbing Lichtenhahn Verlag, 2012, p.2337. After: Eiropas Savienības Tiesības. I. daļa. Schewe C., Buka A., Gailītis K., Strazdiņš Ģ. (zin.red.). Rīga: Tiesu namu aģentūra, 2014, p.203.

procedures and the given Treaty provision always specifies which special procedure will be used in a specific case (if the ordinary legislative procedure is not to be used).

36. In order to react in a speedy way to the emergency/ urgent situations, the ordinary legislation procedure does not offer the necessary flexibility and a reasonable assurance that ordinary legislation is an optimal choice for decision-making in EU in special problematic situations. Therefore, a closer look to the special legislation procedure should be taken. There are two special legislation procedures, which are foreseen by the Treaties. Only one of them might be considered as the most appropriate solution, taken into account such pragmatic criteria as the number of decision-makers and the possible speed of reaction to emerging crisis situations.

37. The difference between several possible measures is the question which is the institution giving a 'consent' or 'being consulted' and which is making a 'decision'. Analysis of the both forms (consent vs consultation) gives an indication of the seriousness of both forms (as the consultation procedure does not entail more freedom). For example, already in 1995 the ECJ has held that in urgent cases "inter-institutional dialogue, on which the consultation procedure in particular is based, is subject to the same mutual duties of sincere cooperation as those which govern relations between Member States and the Community institutions".[138]

38. The crisis situations can be considered as such to be appropriate as being with far-reaching consequences, therefore the consent of the Parliament would offer an additional legitimacy to the legislation measure.[139] This argument can be confirmed by the Court's decision in Case 138/79: "The consultation (..) is the means which allows the Parliament to play an actual part in the legislative process of the Community, such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly".[140]

39. Another point of departure, resp, law-making among part of the Member States, is possible (Art 20 TEU) providing decentralized solutions. In this case the CJEU argumentation on the necessary basis for such a solution is crucial: "only those situations in which it is impossible to adopt such legislation in the foreseeable future may give rise to the adoption of a decision authorising enhanced cooperation."[141]

40. "It will not be possible to change the EU competencies in accordance with the Passerelle procedure, whilst it will be possible to introduce amendments into the procedure of the decision-making procedure within the EU by transiting from the special decision-making procedure to the codecision procedure. (..) As substantial change in the present

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[138] See Case C-65/93, Parliament v. Council (1995) ECR I-643, para.23.

[139] See also Streinz R. Europarecht.9.Aufl. – Heidelberg: C.F.Müller, 2012, S.200. After: Eiropas Savienības Tiesības. I. daļa. Schewe C., Buka A., Gailītis K., Strazdiņš Ģ. (zin.red.). Rīga: Tiesu namu aģentūra, 2014, p.203.

[140] Case 138/79, Roquette Freres v Council (Isoglucose) (1980) ECR 3333, para 33.

[141] Joined Cases C-274-5/11, Spain and Italy v Council, EU:C:2013: 240, para 50

regulation regarding decision-making procedure can be regarded the fact that other national Parliaments must be informed on the planned changes in the decision-making procedure, the Parliaments being allowed to use their veto rights during the period of six months".[142]

41. "After analyzing relevant legal bases in the TFEU and innominate acts themselves it must be concluded that innominate acts have mostly normative content and may have substantial impact on rights of individuals. As a result, (..) such innominate acts having a normative character should be considered to be legislative acts. (..) Moreover, the Council shall meet in public when it deliberates and votes on a draft legislative act. These rules make the decision-making process at the EU level more democratic and transparent. Therefore, *de lege ferenda*, explicit reference to legislative procedure should be inserted in the TFEU in these cases".[143]

4/ What kind of control is to be provided for the eventual urgent and/or exceptional EU law-making procedures and measures?

Would you consider a system of judicial review or rather a system of political accountability?

In what terms should either system operate?

42. It has to be taken into account that urgent and unexpected crisis situations in Member States might involve even more scrutiny into the relationship between national and supra-national decision-making powers. Several ECJ cases have indicated that urgent measures taken in EU level, although might seem more appropriate, might not receive full support in the national level.

As the recent years clearly show, the tension between the "power points": Council, Commission and Parliament is formulated in legal argumentation which is to be settled by the CJEU.[144]

43. For example, the recent cases C-647/15 Hungary v Council (date of the hearing 10/05/2017) and Slovakia v Council (C-643/15) demonstrate the necessity to introduce clear and transparent separation of the criteria for distinguishing legislative and non-legislative acts, which provides for different procedures, especially what concerns the involvement of national parliaments. The applicant pointed out following: "Article 78(3) TFEU does not empower the Council to adopt a legislative act, nor, therefore, to adopt the measures established in the contested decision, specifically those which involve a binding exception in respect of a legislative act, in the present case Regulation (EU) No 604/2013. (..) The contested decision exceeds the power granted to the Council by Article 78(3) TFEU.(..) In adopting the contested decision, the Council infringed Article 293(1) TFEU, since it departed from the Commission's

[142] Constitutional Court of Latvia. Decision No. 2008-35-01 On Compliance of the Law "On Lisbon Agreement Amending the Treaty on European Union and the Treaty Establishing the European Community" with Article 101 of the Satversme of the Republic of Latvia, para. 18.6.

[143] Svobodová M. On the Concept of Legislative Acts in the European Union Law. TLQ 4/2016, p.267. Available: www.ilaw.cas.cz/tlq

[144] See: Case C-91/05 Commission v Council (ECOWAS) (2008) ECR I-3651, C-427/12 Commission v Parliament and Council (Biocides) (EU:C:2014:170) etc.

proposal without reaching unanimity. The contested decision establishes an exception in respect of a legislative act and itself constitutes, in view of its content, a legislative act, with the result that, in order to adopt it — even assuming that it were possible to do so on the basis of Article 78(3) TFEU — the Council would have had to respect the right of the national parliaments to issue an opinion on legislative acts".[145]

44. Another case - Pringle v Government of Ireland and Others (Case C-370/12)[146] - was invoked when the Article 48(6) process was used, therefore the CJEU was asked whether the revision of the FEU Treaty increases the competences conferred on the Union in the Treaties and is it valid. The Court stated that "amendment does not confer any new competence on the Union. The amendment of Article 136 TFEU which is effected by Decision 2011/199 creates no legal basis for the Union to be able to undertake any action which was not possible before the entry into force of the amendment of the FEU Treaty"(para. 73).

45. Besides, "the Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union, such as the task of coordinating a collective action undertaken by the Member States or managing financial assistance (..), provided that those tasks do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties" (para 158).

46. The Pringle ruling has echoed also the Baltic States' judicial practice. In Estonia, "on the 12th of March 2012 the Chancellor of Justice filed to the Supreme Court an application for constitutional review as he considered Article 4(4) of the ESM Treaty to be in conflict with the Constitution.[147] This Article states that in exceptional circumstances, when the economic and financial sustainability of the euro area are threatened, it shall be possible to grant a contracting party financial assistance under an emergency procedure which requires a qualified majority of 85% of the votes cast. Thus, financial assistance may be granted regardless of the opposition of Estonia.

47. On the 12th of July 2012 the Supreme Court *en banc* dismissed the application of the Chancellor of Justice by a narrow minority of ten votes to nine.[148] The Supreme Court found that although the contested article restricts the financial competence of *Riigikogu*, the principle of rule of law and the sovereignty of Estonia, the restriction was justified. The Supreme Court weighed the restriction arising from the article, the decrease of the power to decide the use of public finances, against the purpose of the contested article, to ensure an efficient decision-making procedure in case of a threat to the financial stability of the euro area, including Estonia. As stability is necessary in order for Estonia

[145] Action brought on 3 December 2015 — Hungary v Council of the European Union (Case C-647/15).

[146] Judgment of the Court, 27 November 2012. Thomas Pringle v Government of Ireland and Others. Case C-370/12.

[147] Õiguskantsleri taotlus nr 8, 12.03.2012.

[148] CRCSCr 12.07.2012, 3-4-1-6-12, para. 10.

to be able to perform its obligations arising from the Constitution, including ensuring the fundamental rights of people, the restriction was considered justified".[149]

48. Review of EU law by national constitutional courts still might give a reason of concern in cases, when the decision-making procedure within EU is transformed. The issue of constitutional reservation "represents potential legal risks for the uniform and effective application of the EU legal order because constitutional courts claim that they would declare EU law within the Member States concerned inapplicable".[150]

49. Challenging, but also promising is the current innovative approach of the ECJ interpreting the legislative norms of the Treaties, allowing the development of the EU by minimizing the necessity to formally amend the existing legislative *corpus*. Teleological interpretation "looks behind the legal text in search for a legal solution to a social problem that may not have been anticipated when the text was drafted. Teleological interpretation can therefore – partly- constitute a "small" amendment of the original rule. (..) This technique can be seen in relation to interpretation of the Union's *competences*, as well as in relation to the interpretation to European *legislation*."[151]

50. The "European Court generally accepts all the teleological interpretations of Union competences by the Union legislator. More than that: the Court itself interprets Union legislation in a teleological manner", which in several cases "thus 'spilled over' into spheres that the Member States had believed to have remained within their exclusive competences"[152] due to the tendency that "the legislative competences of the European Union expand with each of its Treaty revisions"[153]

51. "As well, the ECJ does not have jurisdiction over the Common Foreign and Security Policy, except to review the legality of decisions on restrictive measures for combating terrorism. The Court can review compliance with Article 40 TEU and the legality of decision adopted under Article 163(4) TEU.[154] It is generally observed that over time courts have widened their competence, starting "applying an enhanced level of scrutiny in an area they once characterised as too sensitive for judicial involvement".[155]

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[149] CRCSCr 12.07.2012, 3-4-1-6-12, paras. 158-166. Cited after: Ernits M., Roostar K., Kubinyi E., Hiio J. Preliminary remarks. FIDE Conference 2016, Topic 3, p. 7. Available: http://www.juristideliit.ee/wp-content/uploads/2015/12/FIDE-2016-Topic-3-EE.pdf

[150] Piqani D. Legal Risks in the Relation Betwen National Constitutional Law and EU Law. In: Mišćenić E., Raccah A. (eds). Legal risks in EU law: interdisciplinary studies on legal risk management and better regulation in Europe. Switzerland: Springer International, 2016, p.33.

[151] Schutze R. European Constitutional law. Sec.ed. Cambridge University Press, 2016, p.227.

[152] Schutze R. European Constitutional law. Sec.ed. Cambridge University Press, 2016, pp.228 - 229.

[153] De Witte B., Thies A. Why Choose Europe? The Place of the European Union in the Architecture of International Legal Cooperation. In: Van Vooren B., Blockmans S., Wouters J. (eds) The EU's Role in Global Governance: The Legal Dimension. Oxford: Oxford University Press, 2013, p.25.

[154] Feinberg M. Sovereignity in the Age of Global Terrorism. The Role of International Organisations, Leiden, Boston: Brill Nijhoff, p.115.

[155] Bonner D. "Executive Measures, Terrorisms and Cational Security: Have the Rules of the Game Changed? Ashgate Publishing, Ltd, 2007, ix. In: Feinberg M. Sovereignity in the Age of Global Terrorism. The Role of International Organisations, Leiden, Boston: Brill Nijhoff, p.117.

52. "The Commission and Parliament have carefully confined roles. The Court's role is confined to two matters alone: its jurisdiction to monitor compliance with Article 40 TEU (which directs that implementation of the CFSP shall not undermine the operation of the TFEU and vice versa) and to review the legality of decisions providing for restrictive measures taken against natural or legal persons pursuant to Chapter 2 of Title V TEU as provided for by Article 275 (2) TFEU".[156]

53. Estonian legal authors "have argued it to be certain that if the court of the last instance ignores the obligation to ask for a preliminary ruling, it raises a doubt to whether EU law is implemented in a uniform and effective manner on the one hand, and whether a fair trial and effective judicial protection are granted on the other hand."[157]

54. The involvement of the ECJ in giving a final say if the Union legislation in emergency situation is valid should not raise doubts. As the national courts are obliged to apply European law, they are not entitled to annul a Union legislative act. Only the ECJ has this exclusive competence, and it can be used to confirm the validity or declare void the specific legislation, if adopted within EU due to the emergency/ urgent situation.

55. K.Lenaerts has recently pointed on the fact that "the risk of terrorist attacks taking place is extremely real (..). Nevertheless, the Court of Justice is a Constitutional Court in such matters. It has to balance the legitimate concern of the Member States to protect their public order and their national security and the safety of their populations on the one hand. Yet, on the other hand they cannot be without further redue be authorized by using the word war or terrorism to sort of liberate them from all the fundamental rights".[158]

56. It should be noted that the Gauweiler case (2015) has pointed on the necessity to widen the scope of review done by the ECJ in order to adequately react to new solutions (not necessarily legislative) within the EU to various crisis situations. However, as seen in the Gauweiler case, not all Member States welcome such an EU activism risking raising various concerns of the parties (in this case - the BVerfG, as well as other Member States). Advocate General Cruz Villalón has accented the option to use "atypical techniques" and conclude that even programmes of action in fact are capable of having a decisive impact on the legal situation of third parties, therefore justifying "a non-formalistic approach when considering whether it should be treated as an 'act'".[159] As the Court indicated, "according to the settled case-law of the Court, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is

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[156] Weatherill S. Law and Values in the European Union. Oxford University Press, 2016, p.122.

[157] P. Schaschmin, . Ginter C., Euroopa Liidu õigusest tulenevad võimalused jõustunud kohtuotsuste ja haldusaktide uueks läbivaatamiseks, Juridica, 2015, p. 193. Cited from: Ernits M., Roostar K., Kubinyi E., Hiio J. Preliminary remarks. Available: http://www.juristideliit.ee/wp-content/uploads/2015/12/FIDE-2016-Topic-3-EE.pdf

[158] Lenaerts K. The Court of Justice in an Uncertain World. Speech, IIEA, 16.12.2016, 38-39 min. Available: https://www.youtube.com/watch?v=CnHN2x1Oe2I

[159] Opinion of Advocate General Cruz Villalón delivered on 14 January 2015, Case C-62/14, para 76.

necessary in order to achieve those objectives"[160]. Although such an argument might seem obvious, the Gauweiler case has explicitly demonstrated that in such emergency cases responsible institutions are given "enormous discretion"[161] and the restrictive conditions are not firm, laying trust on the competence of the expert institutions. Such a review - "a soft proportionality review" - therefore leads to a prognosis of the possible approach of the ECJ towards future emergency legislation.

[160] JUDGMENT OF THE COURT (Grand Chamber), 16 June 2015, in Case C-62/14, para 67.

[161] Tridimas T., Xanthoulis N. A LEGAL ANALYSIS OF THE GAUWEILER CASE Between Monetary Policy and Constitutional Conflict. *Maastricht Journal of European & Comparative Law 1* (2016) *23,* p.31.