Eurofederalists under Threat: The Latvian Supreme Court's Ruling on Independence

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On 10 April 2019, the Department of Criminal Cases of the Senate (highest criminal court) confirmed a judgment of the Riga Regional Court which convicted the accused, Maksim Koptelov, for publicly inviting to take action against the national independence of the Republic of Latvia. He had been sentenced to 140 hours of community service. This decision of the Senate not only contradicts European and international human rights law but is also inconsistent with the case law of Latvia's Constitutional Court.

The circumstances of the case are very simple. In March 2014, Koptelov posted a petition titled "Addressing all Latvian residents: collecting signatures on Latvia's incorporation into the Russian Federation" on the website www.avaaz.com. The petition also contained a reservation that it was a joke.

While the idea of incorporating Latvia into the Russian Federation is absurd, the court had to answer another question – is it forbidden call for the renunciation of Latvia's independence? And if so, in which cases?

At first glance, it may seem to be forbidden in all circumstances. Section 82(1) of the Criminal Law (as in force in 2014) penalises the public invitation to eliminate the national independence of the Republic of Latvia, be it with a view to incorporating Latvia into a single state formation with another country or otherwise. In April 2016, however, this provision was replaced by Section 81 of the Criminal Law which limits the scope of application. It is now required that the public invitation calls for action against the national independence, sovereignty, territorial integrity, State power or administrative order of the Republic of Latvia *in a manner not provided for in the Constitution*. The distribution of materials containing such invitation is also punishable.

The requirement "in a manner that is not provided for in the Constitution" is not accidental – the Minister for the Interior tabled the respective proposal for the second reading. It seems that the legislator explicitly wished to decriminalise a public invitation to take action against Latvia's independence in a manner provided for in the Constitution. According to Section 5(2) of the Criminal Law, a law which recognises an offence as not punishable has retrospective effect, unless otherwise provided for in the applicable law. However, the amendments of April 2016 contain a note stating that "[t]he provisions of this Law do not apply to persons who have committed a criminal offense until the day of entry into force of this Law."

It is already from an international and European human rights point of view that this approach is dubious. Article 15(1) of the International Covenant on Civil and Political Rights stipulates that an offender shall benefit of a lighter penalty if the law respectively changes after the commission of the offence. The UN Human Rights Committee in Cochet v. France held that since the article refers to the principle of the retroactive effect of a lighter penalty, it should be understood to refer *a fortiori* to a law abolishing a penalty for an act that no longer constitutes an offence.

In the opinion of the Senate, however, this is irrelevant – it believes that it is not even possible to take action against Latvia's independence in a manner provided for in the Constitution. The Senate thereby upholds the opinion of the Riga Regional Court. The judgment of the Riga Regional Court, in turn, relies on the opinion of an invited expert in the field of constitutional law, Lauris Liepa. In his view, the possibility to amend

Article 1 of the Constitution does not include the voluntary renunciation of Latvia's sovereignty by joining another State. He pointed out that the principle of sovereignty (independence) enshrined in Article 1 of the Constitution forms the inviolable core of the Constitution and, thus, the incorporation into the Russian Federation described in this invitation would violate the Constitution.

The decision of the Senate is questionable in several regards. First of all, the idea that the highest criminal court cannot interpret the Constitution itself but relies on expert opinions, seems strange in itself. There are many fundamental rights aspects in criminal cases – how will the court adjudicate them without interpreting the Constitution? But the most interesting thing is that the expert's opinion contradicts the case law of the Constitutional Court. In its 2007 judgment on the Border Agreement with Russia, the Constitutional Court held that Article 1 of the Constitution – i.e. that Latvia should be an independent state – can be changed. The Constitutional Court also made clear, however, that any such change is subject to a national referendum under Article 77 of the Constitution. According to the Constitutional Court, the lack of a referendum was, among others, the reason that the decision of Latvia's puppet parliament to join the USSR in 1940 was unlawful. This, in turn, means that the renunciation of Latvia's independence is legally possible if the constitutional requirements are fulfilled. Furthermore, the Declaration "On the Restoration of Independence of the Republic of Latvia" of 4 May 1990, which is considered to have a legal value similar to that of the Constitution, also referred to the people's rights to decide on the elimination of the independence by referendum.

Can the expert's opinion disprove all these authorities? The new preamble to the Constitution of 2014 refers to the "unwavering will of the Latvian nation to have its own State". However, Koptelov's petition had been made public before the new preamble came into force. In any case, the new preamble cannot change the content of Article 1 of the Constitution. Any amendment to Article 1 requires a confirmation by referendum, but the preamble was only adopted by the Parliament. The Criminal Law cannot prohibit what is permitted by the Constitution, including a public invitation to address the national independence of the Republic of Latvia through a referendum.

Finally, both the European Court of Human Rights and the Venice Commission have repeatedly stated that the European Convention on Human Rights allows to demand fundamental changes in the constitution, the state structure and even the territory. As indicated in Handyside v. the UK, freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. The preconditions for demanding changes are quite clear: the means used to that end must in every respect be legal and democratic, and secondly, the change proposed must itself be compatible with fundamental democratic principles. Nevertheless, the Senate did not even try to analyse the conviction in the light of the freedom of expression; neither did it pay attention to the reservation on a joke.

Hopefully, Maxim Koptelov will submit a complaint before the Constitutional Court and, if necessary, an application to the European Court of Human Rights. In the meantime, beware European federalists, if you talk about the United States of Europe, where the current Member States would abandon independence: The law does not distinguish between current or future territorial entities and is considered a serious crime which means that even foreigners, who commit it abroad, can be held criminally liable in accordance with the Latvian law. There is already a pending court case regarding a mocking petition to join the US.

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