

# THE RISKS TO JUDICIAL INDEPENDENCE IN LATVIA: A VIEW EIGHTEEN YEARS SINCE EU ACCESSION

Beatrice Monciunskaitė\*

*Abstract: The European Union (EU) is in the midst of what could be deemed the biggest threat to its current order since its inception: Member States backsliding on EU founding values. Indeed, the EU is showing no sign of having the rule of law backsliding crisis under control in states such as Hungary and Poland, a decade since the first signs of populist takeovers emerged. Since the foundational values of liberal constitutional democracy were first challenged in these two Central Eastern European (CEE) countries, similar issues in other Member States have also come to light, such as in the Czech Republic and Malta, amongst others. However, little information is available about the democratic stability of other States that also acceded to the EU in 2004. This paper is a stocktaking exercise which aims to address this gap in relation to the fidelity of Latvia to the founding EU value of the rule of law 18 years since it became an EU member. It will examine the state of judicial independence in Latvia during the past few years. Attacks on judicial independence are the main battleground on which the EU is fighting Hungary and Poland, and a value that is considered central to the EU's understanding of the rule of law. It is important to understand Latvia's current state of judicial independence in order to build a broader picture of the status of the rule of law in all Member States. This knowledge will help to fight the EU's rule of law crisis and the rise of populism. This is something that needs to be achieved sooner rather than later so that the EU can stand united against an ever more aggressive Russia to the East.*

*Keywords: Latvia, European Union, democracy, rule of law, backsliding, judicial independence.*

## 1 Introduction

This paper will evaluate the state of judicial independence in Latvia, nearly two decades after it acceded to the EU and fulfilled the Copenhagen criteria of stable democratic institutions, the rule of law, human rights, and respect for minorities.<sup>1</sup> Understanding how the rule of law in

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\* Beatrice Monciunskaitė is a PhD Candidate at the School of Law and Government, Dublin City University and an Irish Research Council Scholar. The author is grateful to Professor Federico Fabbrini for his feedback on an earlier draft of this paper. Email: beatrice.monciunskaitė2@mail.dcu.ie (ORCID: 0000-0002-0617-4218). DOI: 10.3935/cyelp.18.2022.482.

<sup>1</sup> Presidency Conclusions, Copenhagen European Council (21–22 June 1993) 7 A iii.

Latvia has been developing since accession is important at a time of great crisis in the EU. Rule of law backsliding has been a major issue within the EU since the early 2010s – most notably regarding Poland and Hungary, although other Member States have been regressing and facing their own battles too. With the foundational values of the EU being challenged from within, and the war in Ukraine threatening to spread to the Union, understanding every Member State's loyalty to the founding values is imperative. To this end, this paper examines the status of judicial independence in Latvia through the lens of recent developments around structural and institutional issues that threaten the independence of courts, namely, personal attacks on the Chairman of the Judicial Council by the Minister of Justice, the recent dialogue amongst some parliamentarians about the abolition of the Constitutional Court and the resulting delays in the replacement of a Constitutional Court judge. This paper argues that interference from the Latvian legislature and government in judicial matters is weakening judicial independence. These systematic attacks on judicial independence correlate with a rise in populist rhetoric in the Saeima (Latvian parliament) after the continuing success of populist parties in elections during the past decade. Although Latvia has had coalition governments which are not ideologically united, anti-establishment politics have played a significant role and have permeated Latvian governance, damaging judicial independence in recent years. The latest parliamentary elections of October 2022 have resulted in another victory for the incumbent New Unity (Jaunā Vienotība, JV) party, with Prime Minister Krišjānis Kariņš receiving the go-ahead from President Levits to form a government coalition.<sup>2</sup> This coalition is likely to include once again the far-right National Alliance (NA) party.<sup>3</sup> The 2022 parliamentary election also produced major losses for the dominant Russophone-representing party, Harmony Social Democracy (Saskaņa, SSD), which led to the rise of a new and more radical party being supported by sections of the Russian speaking minority in Latvia, Stability (Stabilitāte, S).<sup>4</sup> Stability has taken a radical stance against Latvia's support for Ukraine during its invasion, as well as criticising Latvia's mandatory Covid-19 vaccination campaign.<sup>5</sup> It is evident that populist politics still remain central in Latvia, as per previous elections.

This paper is organised as follows: section two will explain the relevant parts of the Latvian court structure, highlighting some adminis-

<sup>2</sup> Jānis Kincis, 'Levits Officially Invites Kariņa to Form the Government' (*LSM.LV*, 22 November 2022) <[https://www-lsm-lv.translate.google.com/raksts/zinas/latvija/levits-oficiali-aicina-karinu-veidot-valdibu.a483584/?utm\\_source=lsm&utm\\_medium=theme&utm\\_campaign=theme&x\\_tr\\_sl=lv&x\\_tr\\_tl=en&x\\_tr\\_hl=en&x\\_tr\\_pto=sc](https://www-lsm-lv.translate.google.com/raksts/zinas/latvija/levits-oficiali-aicina-karinu-veidot-valdibu.a483584/?utm_source=lsm&utm_medium=theme&utm_campaign=theme&x_tr_sl=lv&x_tr_tl=en&x_tr_hl=en&x_tr_pto=sc)> accessed 29 November 2022.

<sup>3</sup> Daunis Auers, 'Continuity and Change after Latvia's 2022 Parliamentary Election' (*London School of Economics*, 25 October 2022) <<https://blogs.lse.ac.uk/europpblog/2022/10/25/continuity-and-change-after-latvias-2022-parliamentary-election/>> accessed 29 November 2022.

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid.*

trative issues which constrains the financial freedom of Latvian courts. Third, this paper will describe the personal attacks on the Chairman of the Judicial Council by the Minister of Justice which occurred in early 2021. In section four, the legislature's backlash against the same sex partnership judgment issued by the Constitutional Court in late 2020 will be evaluated. Section five will highlight the dispute which broke out between the Constitutional Court and the legislature regarding the merger of the Vārakļāni and Rēzekne self-governing regions. Section six explains how the government's and the legislature's disapproval of the Constitutional Court's reasoning led to the unacceptable politicisation of Constitutional Court appointments, which disrupted the work of that court. Section seven will analyse the EU Commission's response to the judicial independence issues highlighted in this paper, noting the lack of efficacy of the Annual Rule of Law Reports on Latvia. The article will conclude by reiterating that anti-establishment populist parties are a danger to judicial independence and the rule of law as made evident by the fact that populist politics have been behind much of the worrying developments around judicial independence in Latvia that are highlighted in this paper. Such developments should be closely monitored and researched as political movements like those in Latvia are similar to what has happened in Poland and Hungary which means that there is also the very real danger of a populist power grab in Latvia.

## 2 Latvia's judicial and court administration structure

Latvia's court system and judiciary have come under pressure from the executive in recent years. The excessive supervisory capacity of the Court Administration over judicial budgets and the excessive influence of the Minister of Justice in the day-to-day functioning of courts are causes for concern. Latvian judges have themselves admitted they believe their work is under excessive political pressure at the hands of the Minister of Justice.<sup>6</sup> The Latvian court system is divided into three tiers. The courts of first instance are nine district courts which hear civil and criminal cases, and one district administrative court.<sup>7</sup> As of 31 March 2021, there is a new specialised district court, the Court of Economic Cases, which was set up to manage the large amount of financial crimes in Latvia.<sup>8</sup> New judges of this court are specially trained in matters of money laundering, commercial law, competition law, financial law, and insurance matters.<sup>9</sup> There was disagreement about the need to establish this specialised court as the Judicial Council feared the new court's scope and jurisdic-

<sup>6</sup> Linda Spundiņa, 'Latvian Judges Feel Political Pressure from Justice Ministry, Study Shows' (*LSM.LV*, 5 November 2021) <<https://eng.lsm.lv/article/politics/diplomacy/latvian-judges-feel-political-pressure-from-justice-ministry-study-shows.a403936/>> accessed 29 November 2022.

<sup>7</sup> Commission, 'Commission staff working document – 2021 Rule of Law Report Country Chapter on the rule of law situation in Latvia' SWD (2021) 719 final 2.

<sup>8</sup> *ibid* 5.

<sup>9</sup> *ibid*.

tion would be too wide and its implementation superfluous. It was argued that a similar objective could be reached through the existing court structure.<sup>10</sup> At the second tier there are five regional courts which hear civil and commercial cases and one regional administrative court.<sup>11</sup> The Supreme Court, at third instance, hears criminal, civil and administrative cases.<sup>12</sup> The Constitutional Court is separate from the court hierarchy and carries out constitutional review.<sup>13</sup> The Judicial Council is a collegial authority which is charged with the development and improvement of policies and strategies for the judicial system.<sup>14</sup> The Judicial Council is also responsible for nominating candidate judges, selecting and dismissing court presidents, overseeing the judicial map and approving the content of judicial training.<sup>15</sup> The Judicial Council nominates prospective judges through an open competition. Candidate judges are ranked and placed on a list, from which the Minister of Justice suggests a suitable candidate to the Saeima for consideration.<sup>16</sup> Article 83 of the Constitution of the Republic of Latvia states that 'Judges shall be independent and subject only to the law'.<sup>17</sup> The Constitutional Court has reaffirmed that judges should have financial independence and that judicial power is free from the influence of the political branches of State.<sup>18</sup> Article 85 of the Constitution further strengthens the independence of the Constitutional Court as it is separate from the ordinary court structure.<sup>19</sup> As Constitutional Court justices are appointed for ten-year terms and by a qualified vote of the Saeima, their democratic legitimacy is further reinforced. Therefore, the principle of judicial independence is well elaborated in Latvian constitutional jurisprudence.

<sup>10</sup> Supreme Court of the Republic of Latvia, 'The Judicial Council Does Not Support the Draft Resolution of the Minister of Justice' (26 April 2021) <<https://at.gov.lv/en/jaunumi/par-tieslietu-padomi/the-judicial-council-does-not-support-the-draft-resolution-of-the-minister-of-justice-10590?year=2021&month=04>> accessed 29 November 2022.

<sup>11</sup> 2021 Rule of Law Report on Latvia (n 7) 2.

<sup>12</sup> *ibid.*

<sup>13</sup> Marko Aavik and others, 'Evaluation of the Latvian Judicial System' (European Commission for the Efficiency of Justice 2018) CEPEJ-COOP(2018)1 33.

<sup>14</sup> Law on Judicial Power (Article 89(1) of 1993). 01/01/1993 Reporter of the Supreme Council and Government of the Republic of Latvia <<https://likumi.lv/ta/en/en/id/62847-on-judicial-power>> accessed 29 November 2022.

<sup>15</sup> 2021 Rule of Law Report on Latvia (n 7) 2.

<sup>16</sup> *ibid.*

<sup>17</sup> Constitution of the Republic of Latvia, Article 83.

<sup>18</sup> Judgment of the Constitutional Court of the Republic of Latvia 18 January 2010 in case no 2009-11-01 2009 Latvia Journal, para 8.2, Press release <<https://www.satv.tiesa.gov.lv/en/press-release/judgment-in-the-case-on-the-cut-of-judges-remuneration-and-the-minimum-amount-of-their-wage-has-been-announced/>> accessed 29 November 2022.

<sup>19</sup> Constitution of the Republic of Latvia, Article 85; Ineta Ziemele, Alla Spale and Laila Jurcēna, 'The Constitutional Court of The Republic of Latvia' in Armin von Bogdandy, Alla Peter Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law* (OUP 2020) 525.

The Court Administration is an institution established in the Law on Judicial Power and is tasked with handling all administrative duties related to the district courts, regional courts, and the land registries office.<sup>20</sup> The Supreme Court is in charge of its own administrative duties.<sup>21</sup> The Court Administration was established in 2004 with the aim of centralising the administrative duties of Latvian courts.<sup>22</sup> Originally, this institution was intended to be run under the authority of the Judicial Council, but this was not accepted by policy makers.<sup>23</sup> Therefore, a 2018 report of Latvian judicial independence issued by the European Commission for the Efficiency of Justice noted that although the Court Administration was created as an independent body, its true independence is difficult to ascertain for various reasons.<sup>24</sup> Notably, the Court Administration is directly subordinate to the Minister of Justice and is controlled by a director who is appointed by the Minister of Justice for a term of five years and can be reappointed without limitation.<sup>25</sup> Furthermore, the Court Administration has vast scope in court budgetary matters. The Court Administration prepares the budget for both district and regional courts and the land registry office. This draft is sent to the Minister of Justice who asks the Judicial Council for an opinion before the Minister of Finance presents the courts' budget to the Saeima for implementation.<sup>26</sup> Importantly, if the Judicial Council disagrees with the draft budget, the Minister of Justice can ignore this and proceed with presenting the budget to the Minister of Finance.<sup>27</sup>

It is not unusual for court administration to be professionalised and centralised in a single body.<sup>28</sup> It might also be efficient to have administrative tasks centralised as the presidents of individual courts could then spend most of their time on judicial duties.<sup>29</sup> However, there are concerns within the current Latvian system that are impossible to ignore. As the Court Administration has vast control over the day-to-day running of courts, it is always a concern that judicial behaviours might be directly or indirectly impacted by the knowledge that the Minister of Justice ultimately oversees the essential functions of courts such as budget

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<sup>20</sup> Law on Judicial Power, 1 January 1993, Reporter of the Supreme Council and Government of the Republic of Latvia <<https://likumi.lv/ta/en/en/id/62847-on-judicial-power>> accessed 29 November 2022; Aavik and others (n 13) 11.

<sup>21</sup> Aavik and others (n 13) 11.

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid* 11–12.

<sup>24</sup> *ibid* 11.

<sup>25</sup> Law on State Civil Service Law (Article 11 of 2000) 22/09/2000, Latvian Journal No 331/333 <<https://likumi.lv/ta/en/en/id/10944>> accessed 29 November 2022; Aavik and others (n 13) 12.

<sup>26</sup> Law on Judicial Power (Article 50.2(3) of 1993).

<sup>27</sup> *ibid.*

<sup>28</sup> Aavik and others (n 13) 14.

<sup>29</sup> *ibid.*

allocation.<sup>30</sup> The Judicial Council would be a more appropriate authority to run the Court Administration as this is the only body that largely includes legal professionals and lawyers whose goal is to implement the best practice of the profession.<sup>31</sup> Nevertheless, the control of the Court Administration by the Minister of Justice constantly runs the risk of the government exerting influence over the judiciary for political gain or entrenchment of power.

The 2018 report of Latvian judicial independence issued by the European Commission for the Efficiency of Justice also draws attention to the concerns surrounding the appointment of the director of the Court Administration.<sup>32</sup> If the government wishes to entrench its power and influence over the judiciary, the appointment of a favourable director of the Court Administration would be particularly beneficial to their agenda. Furthermore, the fact that the director is appointed for a term of five years and the term can be renewed indefinitely indicates that a director sympathetic to the government's or the Minister of Justice's agenda is likely to be re-elected and continue to exert significant control over the judiciary's essential services.<sup>33</sup> Therefore, the directors' actions can be heavily influenced by the knowledge that their reappointment depends on the Minister of Justice approving their work and policies so far.

There are also solid grounds for concerns for Latvia's judicial independence. A 2021 survey of judicial independence carried out by the University of Latvia on behalf of the Judicial Council unveiled that 70.7 per cent of the surveyed judges feel they are under political pressure from the Minister of Justice.<sup>34</sup> Furthermore, 25.4 per cent of the judges believe that judicial independence is negatively impacted by the government, while 23.3 per cent said judicial independence is also negatively affected by the Saeima.<sup>35</sup> Judges expressed concern over the pressure exerted by the Minister of Justice, political parties, and also the quality of other work of law enforcement bodies which affects judicial work as well.<sup>36</sup> The Chairman of the Judicial Council, Aigars Strupiņš, called for a reform of the judicial system to improve judicial independence and reduce the systemic dependence of courts on the executive.<sup>37</sup> In particular, he said that political pressure from the Minister of Justice is felt in budgetary and training matters, which corroborates the concerns of the 2018 report of Latvian

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<sup>30</sup> *ibid.*

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.*

<sup>34</sup> Spundiņa (n 6).

<sup>35</sup> *ibid.*

<sup>36</sup> 'Study: Majority of Judges in Latvia Unhappy with Ministry of Justice Interference' (*Baltic News Network*, 5 October 2021) <<https://bnn-news.com/study-majority-of-judges-in-latvia-unhappy-with-ministry-of-justice-interference-224672>> accessed 29 November 2022.

<sup>37</sup> *ibid.*

judicial independence issued by the European Commission for the Efficiency of Justice.<sup>38</sup> The Chairman stated that the judicial system needs to be distanced from the executive, for example where courts' budgetary issues should be handled directly with the Minister of Finance instead of needing to go through the Minister of Justice first.<sup>39</sup> The Chairman also attributes the judiciary's negative opinion of the Minister of Justice to his numerous baseless and public criticisms of judicial decisions.<sup>40</sup>

### 3 Latvia's judicial council under pressure from the Minister of Justice

In early 2021, a public dispute broke out between the Minister of Justice, Jānis Bordāns, and the Chief Justice of the Supreme Court of Latvia and Chair of the Judicial Council, Aigars Strupišs.<sup>41</sup> Minister Bordāns issued a resolution on the Ministry of Justice website accusing Chairman Strupišs of violating judicial ethics by criticising the judgment of the Riga Regional Court on the high profile case of Aivars Lembergs.<sup>42</sup> The resolution has since been removed from the Ministry's website after Minister Bordāns' attacks were deemed by the Judicial Ethics Committee to be baseless.<sup>43</sup> Minister Bordāns attempted to turn the Judicial Council against their Chairman in a vote as he claimed that Chairman Strupišs was damaging the reputation of the judiciary and preventing foreign investments by commenting on a court's decision to the media.<sup>44</sup> However, the Judicial Ethics Committee disagreed with the Minister's evaluations and found that Chairman Strupišs was acting within his competence when he spoke to the media about his belief that the Lembergs trial was too lengthy and that many lessons should be drawn from this trial for the Latvian justice system.<sup>45</sup> Former Minister of Justice, Guntars Grīnvalds, condemned the attacks of Minister Bordāns on the Chairman of the Judicial Council as the worst possible attack on judicial independence.<sup>46</sup> It is now clear that the Minister of Justice was attempting to censor the polit-

<sup>38</sup> *ibid.*

<sup>39</sup> Spundiņa (n 6).

<sup>40</sup> 'Study: Majority of Judges in Latvia Unhappy with Ministry of Justice Interference' (n 36).

<sup>41</sup> Supreme Court of the Republic of Latvia (n 10).

<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.*

<sup>44</sup> Uldis Dreiblat and Ritums Rozenbergs, 'Former Minister of Justice Guntars Grīnvalds: Bordāns Is Trying to Influence Court Decisions' *Neatkarīgā Rīta Avīze* (12 March 2021) <[https://neatkariga-nra-lv.translate.googleusercontent.com/341724-bijusais-tieslietu-ministrs-guntars-grinvalds-bordans-megina-ietekmet-tiesu-lemumus?\\_x\\_tr\\_sl=lv&\\_x\\_tr\\_tl=en&\\_x\\_tr\\_hl=en-GB&\\_x\\_tr\\_pto=nui,elem](https://neatkariga-nra-lv.translate.googleusercontent.com/341724-bijusais-tieslietu-ministrs-guntars-grinvalds-bordans-megina-ietekmet-tiesu-lemumus?_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en-GB&_x_tr_pto=nui,elem)> accessed 2 December 2022.

<sup>45</sup> 'Strupišs: The Length of the Lembergs Case Is an Example for Judges of How Not to Do It' (*LSM.LV*, 26 February 2021) <[https://www-lsm-lv.translate.googleusercontent.com/raksts/zinas/latvija/strupiss-lemberga-lietas-ilgums--piemers-tiesnesiem-ka-nevajag-darit.a394493/?\\_x\\_tr\\_sl=lv&\\_x\\_tr\\_tl=en&\\_x\\_tr\\_hl=en&\\_x\\_tr\\_pto=nui,sc](https://www-lsm-lv.translate.googleusercontent.com/raksts/zinas/latvija/strupiss-lemberga-lietas-ilgums--piemers-tiesnesiem-ka-nevajag-darit.a394493/?_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=nui,sc)> accessed 29 November 2022.

<sup>46</sup> Dreiblat and Rozenbergs (n 44).

ically inconvenient opinions of Chairman Strupiņš which threatened the Minister's reputation and competence. It has also been reported that the Minister's public criticism of Chairman Strupiņš indicated that Minister Bordāns had attempted to gain control of, and politicise, a new judicial training institution which is currently being developed.<sup>47</sup>

#### **4 The legislature's backlash against the same-sex partnership judgement**

The Latvian Constitutional Court has faced attacks from members of the executive and legislature in recent years. On 12 November 2020, the Latvian Constitutional Court delivered a landmark judgment which affirmed the rights of same-sex parents and demanded legal protection for same-sex couples.<sup>48</sup> The Court ruled that Section 155, paragraph 1 of the Labour Law which allows for 10 days paternity leave for a father (man) after the birth of his child was incompatible with Article 110 of the Latvian Constitution which provides that the state is required to protect the family.<sup>49</sup> The applicant, a woman in a same-sex relationship with the child's mother, claimed that the Labour Law's specification that only fathers are entitled to ten days leave was discriminatory towards her same-sex relationship and incompatible with the state's requirement to protect her family as required by Article 110 of the Constitution.<sup>50</sup>

The Constitutional Court ruled that the State has a positive obligation to protect all families, not just those established by traditional means such as marriage, a biological relationship, or a legally recognised child-parent relationship. A family is a social institution based on social reality and identifiable close personal ties based on understanding and respect.<sup>51</sup> Therefore, the Court acknowledges that in social reality close personal ties can also emerge as a result of actual cohabitation.<sup>52</sup> The first sentence of Article 110 of the Constitution sets out the State's positive obligation to protect and support every family, including also a de facto family which the Constitutional Court had previously established in its judgment of 5 December 2019.<sup>53</sup> The Court also reasoned that Latvia is an independent, democratic state that respects the rule of law and

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<sup>47</sup> *ibid.*

<sup>48</sup> Judgment of the Constitutional Court of the Republic of Latvia 12 November 2020 in case no 2019-33-01 2020 Latvia Journal <[https://www.satv.tiesa.gov.lv/en/cases/?-search\[number\]=2019-33-01](https://www.satv.tiesa.gov.lv/en/cases/?-search[number]=2019-33-01)> accessed 29 November 2022.

<sup>49</sup> *ibid* 36.

<sup>50</sup> *ibid* 2.

<sup>51</sup> *ibid* 12.1.

<sup>52</sup> *ibid.*

<sup>53</sup> Judgment of the Constitutional Court of the Republic of Latvia 5 December 2019 in case no 2019-01-01 2019 Latvia Journal <[https://www.satv.tiesa.gov.lv/en/cases/?-search\[number\]=2019-01-01](https://www.satv.tiesa.gov.lv/en/cases/?-search[number]=2019-01-01)> accessed 29 November 2022, para 12.2.2.

which strongly values human dignity.<sup>54</sup> The principle of human dignity does not allow the State to waive the fundamental rights of a particular person, or group of persons.<sup>55</sup> Stereotypes existing in society cannot serve as justification to diminish the fundamental rights of a specific person or group of persons in a democratic State governed by the rule of law.<sup>56</sup>

While the LGBTQ+ community and their supporters celebrated this judgment and the Constitutional Court's initiative in protecting the rights of same-sex couples, the judgment was seen by many in society and parliament as an attack on traditional family and Catholic values.<sup>57</sup> The judgment sent shockwaves through Latvian politics with many members of government and parliament not only criticising the judgment on its merits but also the Constitutional Court's authority and independence.<sup>58</sup>

Many members of the Saeima from a diverse group of parties and backgrounds voiced problematic opinions about the Constitutional Court and even called for its abolition.<sup>59</sup> Juris Rancāns from the New Conservative party (*Jaunā konservatīvā partija*, JKP), proclaiming that 'unfortunately, there is currently a myth in the public sphere about the Constitutional Court as an institution endowed with divine legitimacy, which stands above the political will of the people or the political will of the legislator, but in reality this is not the case'.<sup>60</sup> Aleksandrs Kiršteins (NA) called the Constitutional Court a 'decorative and expensive' institution which does not need to exist and its competence could be transferred to the Supreme Court.<sup>61</sup> In sum, the general consensus was that the Constitutional Court had become overly politicised and had overstepped its competence. Some members of parliament declared that the Court has no legitimate standing as it was not included in the original 1922 Sat-

<sup>54</sup> Judgment of the Constitutional Court of the Republic of Latvia in case no 2019-33-01 (n 48) para 12.2.

<sup>55</sup> *ibid.*

<sup>56</sup> *ibid.*

<sup>57</sup> Kalvis Engizers and Madara Meļņika, 'Defining the Modern Family: The Latvian Constitutional Court, the Definition of "Family", and Parliamentary Bitterness' (*Verfassungsblog*, 2 February 2021) <<https://verfassungsblog.de/defining-the-modern-family/>> accessed 29 November 2022; 'Supporters of 'traditional' Families Gather by Latvian Constitutional Court' (*LSM.LV*, 9 December 2020) <<https://eng.lsm.lv/article/society/society/supporters-of-traditional-families-gather-by-latvian-constitutional-court.a384696/>> accessed 29 November 2022.

<sup>58</sup> Jānis Lasmanis, 'Deputies Question the Competence of the Constitutional Court. A New Judge Shall Not Be Elected' (*Neatkarīgā Rīta Avīze*, 22 December 2020) <[https://neatkariga-nra-lv.translate.google.com/politika/334033-deputati-apsauba-satversmes-tiesas-kompetenci-jaunu-tiesnesi-neievele?\\_x\\_tr\\_sl=lv&\\_x\\_tr\\_tl=en&\\_x\\_tr\\_hl=en-GB&\\_x\\_tr\\_pto=nui,elem](https://neatkariga-nra-lv.translate.google.com/politika/334033-deputati-apsauba-satversmes-tiesas-kompetenci-jaunu-tiesnesi-neievele?_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en-GB&_x_tr_pto=nui,elem)> accessed 29 November 2022.

<sup>59</sup> *ibid.*; Sanita Upleja, 'The Saeima Confirms Anita Rodiņš as a Judge of the Constitutional Court' (*Defli*, 3 November 2021) <[https://www.delfi-lv.translate.google.com/news/national/politics/saeima-apstiprina-anitu-rodinu-satversmes-tiesas-tiesnesa-ama-ta.d?id=53012637&\\_x\\_tr\\_sl=lv&\\_x\\_tr\\_tl=en&\\_x\\_tr\\_hl=en-GB&\\_x\\_tr\\_pto=nui,elem](https://www.delfi-lv.translate.google.com/news/national/politics/saeima-apstiprina-anitu-rodinu-satversmes-tiesas-tiesnesa-ama-ta.d?id=53012637&_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en-GB&_x_tr_pto=nui,elem)> accessed 29 November 2022.

<sup>60</sup> Lasmanis (n 58).

<sup>61</sup> *ibid.*

versme.<sup>62</sup> This alludes to the fact that the Latvian Constitutional Court was established in 1996, five years after the reestablishment of Latvian independence.<sup>63</sup> Therefore, the parliamentarians reasoned that the Court lacks legitimacy and is dispensable, as many neighbouring countries like Estonia, Sweden and Finland do not have a Constitutional Court.<sup>64</sup> Of course, this ignores the fact that the Supreme Court in those countries is also permitted to perform judicial review.

All of this culminated in a party of the governing coalition, NA, submitting a proposal to amend Article 110 of the Latvian Constitution on 7 November 2021.<sup>65</sup> The new text would have stated that a family can only be formed by marriage, blood kinship and adoption and must be based on a union between a man and a woman.<sup>66</sup> Although Prime Minister Krišjānis Kariņš stated that this was not the appropriate time to amend the Satversme (alluding to the emergency caused by the Covid-19 pandemic), on 14 January 2021, 47 members of parliament voted in favour of the amendment being put to Saeima committees for further deliberation.<sup>67</sup> However, this proposed amendment was abandoned in due course. Later, a referendum was proposed by conservative members of parliament to introduce a new definition of family which would strengthen the position of traditional family values. However, again, the initiative did not gather enough votes from the public for the question to be put to the people in a referendum.<sup>68</sup> In early 2022, the Minister of Justice initiated a draft civil partnership bill which would allow for the legal recognition of same-sex couples so that the requirements set out by the Constitutional Court in the same-sex partnership judgment would be satisfied. However, despite the bill passing through to the third reading in the Saeima, it failed due to conservative members of parliament such as NA, Farmers and Greens

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<sup>62</sup> *ibid.*

<sup>63</sup> Kristīne Krūma and Sandijs Statkus, 'The Constitution of Latvia: A Bridge Between Traditions and Modernity' in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) 951–952.

<sup>64</sup> Lasmanis (n 58).

<sup>65</sup> Draft Amendment to the Constitution of the Republic of Latvia, Saeima of the Republic of Latvia, 7 January 2021, no 3396.

<sup>66</sup> *ibid.*

<sup>67</sup> 'Kariņš: This Is Not the Time for Discussions on Amendments to the Satversme' (*Apollo.lv*, 11 January 2021) <[https://www-apollo-lv.translate.google.com/7153128/karins-sis-navistais-laiks-diskusijam-par-grozijumiem-satversme?\\_x\\_tr\\_sl=lv&\\_x\\_tr\\_tl=en&\\_x\\_tr\\_hl=en-GB&\\_x\\_tr\\_pto=nui,elem](https://www-apollo-lv.translate.google.com/7153128/karins-sis-navistais-laiks-diskusijam-par-grozijumiem-satversme?_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en-GB&_x_tr_pto=nui,elem)> accessed 29 November 2022; Jānis Kincis, 'Saeima Debates Definition of "Family" in the Constitution' (*LSM.LV*, 14 January 2021) <<https://eng.lsm.lv/article/politics/saeima/saeima-debates-definition-of-family-in-the-constitution.a388754/>> accessed 29 November 2022.

<sup>68</sup> 'Another Initiative Launched to Define "Family" in the Constitution of Latvia' (*LSM.LV*, 3 August 2022) <<https://eng.lsm.lv/article/society/society/another-initiative-launched-to-define-family-in-constitution-of-latvia.a467810/>> accessed 29 November 2022.

(Zaļo un Zemnieku savienība, ZZS), and Harmony boycotting the vote.<sup>69</sup> Thus, the Saeima has now passed the deadline set by the Constitutional Court by which it should have given legal recognition to same-sex couples. This presents a major concern for the standing of the Constitutional Court as it diminishes the perceived authority of the judiciary's decisions in the public eye. Furthermore, a constitutional court unable to carry out constitutional review is stripped of its purpose and is incompatible with the requirement of judicial independence demanded by liberal constitutional democracy.

### **5 Backlash against the Constitutional Court regarding the merger of the Varakļāni and Rēzekne self-governing regions**

Another face-off between the legislature and the Constitutional Court came just a few months later in May 2021 after the Constitutional Court delivered its judgment on the merger of the Varakļāni and Rēzekne self-governing regions, threatening to start a constitutional crisis.<sup>70</sup> The merger of the two regions came about as a result of the adoption of a new law on 'Administrative Territories and Settlements' in June 2020 by the Saeima.<sup>71</sup> This law initiated the reform of Latvia's local government regions to tackle ongoing national concerns over declining demographics in rural Latvia and the related issue of these smaller rural regions being unable to cope financially with necessary public administration.<sup>72</sup> The reforms would redraw regional boundaries and merge some smaller self-governing regions with bigger ones to improve the overall delivery of public administration and, in turn, save the Latvian economy millions of euro by making the system more efficient.<sup>73</sup> However, this reform proved to be one of the most contentious political issues in recent years. Many wealthier self-governing regions were opposed to the reforms as their merger with poorer regions sparked concerns over the dilution of the quality of public services.<sup>74</sup> Another major concern was the planned creation of fewer but larger administrative units which would absorb the administrative tasks previously performed by public sector workers in smaller self-governing regions.<sup>75</sup> This would create job losses and mean that larger towns would attract more resources, devastating already faltering rural communi-

<sup>69</sup> 'Latvian Saeima Dodges Civil Union Law Adoption Again' (*LSM.LV*, 2 June 2022) <<https://eng.lsm.lv/article/society/society/latvian-saeima-dodges-civil-union-law-adoption-again.a459661/>> accessed 29 November 2022.

<sup>70</sup> Judgment of the Constitutional Court of the Republic of Latvia, 28 May 2021 in case no 2020-43-0106, 2021, *Latvia Journal* <[https://www.satv.tiesa.gov.lv/en/cases/?-search\[number\]=2019-33-01](https://www.satv.tiesa.gov.lv/en/cases/?-search[number]=2019-33-01)> accessed 29 November 2022.

<sup>71</sup> Law on Administrative Territories and Settlements (2020). 10/06/2020 *Latvian Journal*. No 119C.1 1.

<sup>72</sup> Daunis Auers, 'Continuity in Change? Latvia's Local Governments after Regional Reform and Local Government Elections' (Friedrich-Ebert-Stiftung 2021) 4.

<sup>73</sup> *ibid.*

<sup>74</sup> *ibid.*

<sup>75</sup> *ibid* 4–5.

ties.<sup>76</sup> Of course, individual politicians were also concerned about losing political influence over certain self-governing regions during the reshuffle which further aggravated the discourse around the reform.<sup>77</sup> Auers notes that a 'window of opportunity' emerged when the current governing coalition formed in January 2019, led by Prime Minister Krišjānis Kariņš (JV).<sup>78</sup> The coalition consists of five parties, all with differing ideologies, but crucially the ZZS, which held the prime minister position before the 2018 general election, was left in opposition.<sup>79</sup> This regional reform would have been very difficult if the ZZS were in power as they have been fierce advocates of small rural towns and villages.<sup>80</sup> Nevertheless, even in opposition, Viktors Valainis, a ZZS politician and member of the Saeima, submitted hundreds of amendments to the proposed law during parliamentary debates.<sup>81</sup> Scrutiny also came from the Latvian Association of Local and Regional Authorities as they lodged a complaint with the Congress of Local and Regional Authorities of the Council of Europe which resulted in a critical report being issued by the Congress.<sup>82</sup> The report published in late 2020 reasoned that the new reforms were evidence of 'deterioration in the overall situation of local democracy' and lacked proper consultation with local authorities and greatly reduced the financial autonomy of local authorities in Latvia.<sup>83</sup> A follow-up report by the Congress published after the adoption of the reforms by the Saeima lamented that the reform process was a 'missed opportunity for Latvia to adopt a territorial reform in full compliance with the European Charter of Local Self-Government which it has ratified'.<sup>84</sup>

On 28 May, Latvia's Constitutional Court ruled against the merger of Varakļāni with Rēzekne less than ten days before planned municipal elections.<sup>85</sup> The Court reasoned that the Saeima, which had merged the two self-governing regions on the third and final reading of the law, had ignored some crucial objectives of the reform.<sup>86</sup> Mergers should be based on efficiency rather than cultural history, and it further stated that the opinion of the counties' residents should be considered, which was relevant because 84% of Varakļāni residents preferred to be merged with

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<sup>76</sup> *ibid.*

<sup>77</sup> *ibid.* 4.

<sup>78</sup> *ibid.* 3–4.

<sup>79</sup> *ibid.*

<sup>80</sup> *ibid.*

<sup>81</sup> *ibid.* 4.

<sup>82</sup> 'Recommendation 447 (2020) Fact-Finding Report on Territorial Reform in Latvia, Congress of Local and Regional Authorities of the Council of Europe' 2.

<sup>83</sup> *ibid.*

<sup>84</sup> Congress of Local and Regional Authorities, *Communication by the Secretary General of the Congress at the 1397th Meeting of the Ministers' Deputies* (CG(2021)40-14, Council of Europe, 2021) 24.

<sup>85</sup> Judgment of the Constitutional Court of the Republic of Latvia in case no 2020-43-0106.

<sup>86</sup> *ibid.* 3.1.

Madona according to a poll.<sup>87</sup> Furthermore, Rēzekne County did not have the status or capacity to merge with Varakļāni County.<sup>88</sup> The last minute cancellation of the merger prompted the Central Election Committee to cancel the planned municipal elections in both Rēzekne and Madona counties as the Constitutional Court had suggested that Madona was a better choice than Rēzekne.<sup>89</sup>

The Constitutional Court's judgement sparked opposition from some Saeima factions, including the governing NA and JKP.<sup>90</sup> The Saeima threatened to ignore the judgment and to push on with a vote to merge Varakļāni with Rēzekne through another parliamentary vote, once again bringing the Constitutional Court's reputation and authority into question.<sup>91</sup> As Latvia sat on the verge of spiralling into a constitutional crisis, President Levits was forced to mediate and urged the Saeima to respect the decision of the Court and called upon representatives of the parties in coalition to meet and resolve the issue.<sup>92</sup> A temporary solution was decided which saw the Saeima vote to keep Varakļāni as a separate county.<sup>93</sup> However, as this county has a small population of 3,000 and does not have the capacity to support itself, the decision will need to be revisited at a later stage.<sup>94</sup>

President Levits was forced to remind the Saeima that 'Latvia is a country which adheres to the rule of law and that means that the Saeima must respect the decisions of the Constitutional Court. If the Saeima ignores the Court's rulings, it creates the risk of a constitutional crisis'.<sup>95</sup> Indeed, the legislature disrespecting the authority and decision of the Constitutional Court is a blatant attack on the rule of law.<sup>96</sup> Although a pause has been placed on the dispute over the merger of self-governing regions which avoided an outright coup against the Constitutional Court, this was the second major attack on the Constitutional Court's authority

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<sup>87</sup> *ibid*; Auers (n 72) 5.

<sup>88</sup> Judgment of the Constitutional Court of the Republic of Latvia in case no 2020-43-0106 para 3.1.

<sup>89</sup> *ibid*; Auers (n 72) 5.

<sup>90</sup> *ibid*.

<sup>91</sup> Office of the President, 'President of Latvia Expects Varakļāni Region Status Issue to Be Resolved According to Satversme' (*President of the Republic of Latvia*, 6 January 2021) <<https://www.president.lv/en/article/president-latvia-expects-varaklani-region-status-issue-be-resolved-according-satversme>> accessed 29 November 2022.

<sup>92</sup> Office of the President (n 91).

<sup>93</sup> 'Transcript of the Saeima, 1 June 2021. No 190/LP13, 14 June 2021, Latvian Journal No 113'.

<sup>94</sup> Auers (n 72) 5.

<sup>95</sup> Office of the President (n 91).

<sup>96</sup> Guntars Laganovskis, 'Ignoring the Judgment of the Constitutional Court Would Actually Change the Meaning of the State' (*LV Portal*, 2 June 2021) <[https://lvportals-lv.translate.google.com/norises/328922-satversmes-tiesas-sprieduma-ignoresana-faktiski-mainitu-valsts-jegu-2021?\\_x\\_tr\\_sl=lv&\\_x\\_tr\\_tl=en&\\_x\\_tr\\_hl=en&\\_x\\_tr\\_pto=nui,sc,elem](https://lvportals-lv.translate.google.com/norises/328922-satversmes-tiesas-sprieduma-ignoresana-faktiski-mainitu-valsts-jegu-2021?_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=nui,sc,elem)> accessed 29 November 2022.

and legitimacy waged by the legislature and executive within months. These attacks have severe consequences on the Constitutional Court's reputation which is particularly pertinent given that Latvia's citizens are already weary and untrusting of their justice system.

## 6 Politicisation of the Constitutional Court appointments procedure

Late 2020 and early 2021 saw another crisis between the Constitutional Court and the Saeima. The President of the Constitutional Court, Ineta Ziemele, left her position on 2 October 2020 as she was appointed as a judge of the Court of Justice of the European Union.<sup>97</sup> This created a vacancy in the Constitutional Court that the Saeima struggled to fill due to their fears that the Constitutional Court had become too politically active. According to Article 4 and 12 of the Constitutional Court Law, Constitutional Court judges are confirmed by the Saeima.<sup>98</sup> Three Constitutional Court judges are confirmed following a proposal by not fewer than ten members of the Saeima, two following a proposal by the Cabinet of Ministers, and two more following a proposal by the Supreme Court plenary session.<sup>99</sup> The Supreme Court plenary session selects candidates for the position of a Constitutional Court judge from among the judges of the Republic of Latvia.<sup>100</sup> However, the appointment of a new judge proved to be particularly difficult for the Saeima as the political backlash against the Constitutional Court's judgment on same-sex couples in early November was still a contentious issue.<sup>101</sup> Five candidates were nominated by different Saeima factions before the end of 2020 but none of the five nominees managed to acquire the necessary 51 votes in a parliamentary sitting on 21 December 2020.<sup>102</sup> The main reason for the indecision revolved around the ongoing narrative of the Saeima that questioned the very necessity of the Constitutional Court as an institution.<sup>103</sup> This was especially the case after the same-sex couples' decision which many viewed as evidence that the Constitutional Court had over-

<sup>97</sup> Constitutional Court of the Republic of Latvia, 'President of the Constitutional Court Ineta Ziemele Will Commence Performing the Duties of the Judge of CJEU on 6 October' <<https://www.satv.tiesa.gov.lv/en/press-release/president-of-the-constitutional-court-ineta-ziemele-will-commence-performing-the-duties-of-the-judge-of-cjeu-on-6-october/>> accessed 29 November 2022.

<sup>98</sup> Law of the Constitutional Court (1996, Section 4(1)), 14 June 1996, Latvian Journal, no 103.

<sup>99</sup> *ibid.*

<sup>100</sup> *ibid.*

<sup>101</sup> Upleja (n 59).

<sup>102</sup> Kārlis Arājs, 'The Saeima Will Not Elect a New Judge of the Constitutional Court: Another Election Will Have to Be Held' (*Delfi*, 21 December 2020) <[https://www.delfi-lv.translate.google.com/news/national/politics/saeima-jaunu-satversmes-tiesas-tiesnesi-neizvel-bus-jariko-vel-vienas-velesanas.d?id=52777081&x\\_tr\\_sl=lv&x\\_tr\\_tl=en&x\\_tr\\_hl=en-GB&x\\_tr\\_pto=nui,elem](https://www.delfi-lv.translate.google.com/news/national/politics/saeima-jaunu-satversmes-tiesas-tiesnesi-neizvel-bus-jariko-vel-vienas-velesanas.d?id=52777081&x_tr_sl=lv&x_tr_tl=en&x_tr_hl=en-GB&x_tr_pto=nui,elem)> accessed 29 November 2022.

<sup>103</sup> Upleja (n 59).

stepped its competence.<sup>104</sup> Aldis Gobzems, an independent member of the Saeima, urged his fellow parliamentarians not to support Rodiņa because she approved of the Constitutional Court's judgment on same-sex couples.<sup>105</sup> He believed this was a violation of traditional family values found in the Latvian Constitution.<sup>106</sup> Aleksandrs Kiršteins (NA) called on the Saeima to postpone the appointment of any judge to the Constitutional Court as he believed the Court had violated its powers and created chaos by appropriating the role of the legislature.<sup>107</sup>

Finally, on 11 March 2021, more than five months after the Constitutional Court vacancy arose, Anita Rodiņa gathered 56 votes in the Saeima and was appointed to the Constitutional Court.<sup>108</sup> Rodiņa was nominated for this position at the beginning of February by coalition members Development/For! (Attīstībai/Par!, AP!), JV and was endorsed by the Judicial Council for the position.<sup>109</sup> However, despite this, there had been no consensus on her candidacy amongst coalition members the day before the vote.<sup>110</sup> Rodiņa was appointed only with the additional support of opposition members such as Harmony and ZZS.<sup>111</sup> The debate about Rodiņa's appointment lasted more than an hour, with the conversation dominated by the work of the Constitutional Court so far, the interference of the Court in politics, as well as the need for the Court overall.<sup>112</sup> Inese Voika (AP!) called out certain members of the Saeima for stalling the appointment of a new judge due to ideological differences, which she argued was inappropriate.<sup>113</sup>

There was also another important incident recently surrounding a judicial appointment to the Constitutional Court. On 9 December 2021, Irēna Kucina received adequate votes from the Saeima to become a Constitutional Court judge.<sup>114</sup> However, her candidacy was plagued by con-

<sup>104</sup> Arājs (n 102).

<sup>105</sup> Upleja (n 59).

<sup>106</sup> *ibid.*

<sup>107</sup> *ibid.*

<sup>108</sup> 'Latvian Parliament Approves New Judge for the Constitutional Court' (*Baltic News Network*, 11 March 2021) <<https://bnn-news.com/latvian-parliament-approves-new-judge-for-the-constitutional-court-222896>> accessed 29 November 2022.

<sup>109</sup> Upleja (n 59); Laura Selina Flower, 'ST as an Independent Arbitrator in the Legal System: The Judicial Council Supports Rodiņš as a Judge' (*Delfi*, 26 February 2021) <[https://www-delfi-lv.translate.google/news/national/politics/st-ka-neatkarigs-arbitrs-tiesiskaja-sistema-tieslietu-padome-atbalsta-rodinu-tiesnesa-amata.d?id=52973979&x\\_tr\\_sl=lv&x\\_tr\\_tl=en&x\\_tr\\_hl=en-GB&x\\_tr\\_pto=nui,elem](https://www-delfi-lv.translate.google/news/national/politics/st-ka-neatkarigs-arbitrs-tiesiskaja-sistema-tieslietu-padome-atbalsta-rodinu-tiesnesa-amata.d?id=52973979&x_tr_sl=lv&x_tr_tl=en&x_tr_hl=en-GB&x_tr_pto=nui,elem)> accessed 29 November 2022.

<sup>110</sup> Upleja (n 59).

<sup>111</sup> 'Again, There Is No Consensus in the Coalition on the New ST Judge: Rodin's Election Will Need the Support of the Opposition' (*Delfi*, 3 October 2021) <[https://www-delfi-lv.translate.google/news/national/politics/koalicija-atkal-nav-vienpratibas-par-jauno-st-tiesnesi-rodinas-ivelesanai-vajadzies-opozicijas-atbalstu.d?id=53009891&x\\_tr\\_sl=lv&x\\_tr\\_tl=en&x\\_tr\\_hl=en-GB&x\\_tr\\_pto=nui,elem](https://www-delfi-lv.translate.google/news/national/politics/koalicija-atkal-nav-vienpratibas-par-jauno-st-tiesnesi-rodinas-ivelesanai-vajadzies-opozicijas-atbalstu.d?id=53009891&x_tr_sl=lv&x_tr_tl=en&x_tr_hl=en-GB&x_tr_pto=nui,elem)> accessed 29 November 2022.

<sup>112</sup> Upleja (n 59).

<sup>113</sup> *ibid.*

<sup>114</sup> 'Latvian Parliament Approves New Judge for the Constitutional Court' (n 108).

trovsky in the months prior to her selection for the post. Judge Kucina's previous role was to act as President Levits' legal advisor and there were several concerning reports before her nomination that President Levits had held phone calls with parliamentarians from AP! where he threatened to criticise the party if they failed to vote for Kucina, his preferred candidate, for the judicial post.<sup>115</sup> If these allegations were true, then this would constitute court packing which is a violation of judicial independence and the rule of law.

A further constitutional crisis materialised in Latvia in early 2021 when Sanita Osipova's candidacy to the Supreme Court failed to be approved in the Saeima with 40 MPs voting in her favour, 29 MPs against, and 16 MPs abstaining.<sup>116</sup> This was considered a shocking result as Sanita Osipova had previously served as President of the Constitutional Court and was considered a highly qualified and suitable candidate for the position of judge of the Supreme Court. What was troubling about the rejection of her candidacy by certain members of the Saeima was their reasoning. Many parliamentarians from the conservative wing of the Saeima, including ZZS and NA, cited the former Constitutional Court President's support of same-sex couples' rights and the corresponding jurisprudence of the Constitutional Court.<sup>117</sup> Emphasis was placed on the landmark decision of the Court of November 2020, which is addressed in section 4 of this paper, as a reason to reject Osipova's candidacy. It was feared she would lead the Supreme Court in deciding cases pertaining to recognition of same-sex partnerships that were coming up on the Supreme Court's list in a similar fashion.<sup>118</sup> The Saeima's controversial decision led the Supreme Court to issue a decision after a sitting of its plenary session where the court condemned the inappropriate politicisation of the appointment of a Supreme Court judge.<sup>119</sup> In this decision, the Supreme Court drew particular attention to the Saeima's violation of Article 83 of the Latvian Constitution which guarantees the independence of judges from political influence:

From this norm follows an absolute prohibition to punish a judge or otherwise create adverse consequences for him due to his judgments, unless one of the circumstances specified in the Law on

<sup>115</sup> Māris Klūga, 'Lavian President Denies Exerting Inappropriate Pressure on Politicians' (*LSM.LV*, 24 September 2021) <<https://eng.lsm.lv/article/politics/president/lavian-president-denies-exerting-inappropriate-pressure-on-politicians.a422742/>> accessed 29 November 2022.

<sup>116</sup> 'The Saeima Rejects the Candidates for the Post of Supreme Court Judge' (*Jurista Vārds*, 22 February 2022) <[https://juristavards-lv.translate.google.com/doc/280708-saeima-noraida-augstakas-tiesas-tiesnesa-amata-kandidati/?\\_x\\_tr\\_sl=lv&\\_x\\_tr\\_tl=en&\\_x\\_tr\\_hl=en&\\_x\\_tr\\_pto=sc](https://juristavards-lv.translate.google.com/doc/280708-saeima-noraida-augstakas-tiesas-tiesnesa-amata-kandidati/?_x_tr_sl=lv&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc)> accessed 29 November 2022.

<sup>117</sup> *ibid.*

<sup>118</sup> *ibid.*

<sup>119</sup> Decision No 2 of 18 February 2022 of the plenary of the Supreme Court 'On the Relationship between the Legislature and the Judiciary and the Independence of the Judge' <[https://www.at.gov.lv/files/uploads/files/2\\_Par\\_Augstako\\_tiesu/Plenums/plenuma%20lemums2%2018022022\\_EN.docx](https://www.at.gov.lv/files/uploads/files/2_Par_Augstako_tiesu/Plenums/plenuma%20lemums2%2018022022_EN.docx)> accessed 22 November 2022.

Disciplinary Responsibility of Judges, which may be the basis for the judge's liability, is proven. The decision of the Saeima, based on displeasure with the outcome of a specific case, to deny a Constitutional Court judge the possibility of a further career violates the said Constitutional norm.<sup>120</sup>

This controversy has put the judiciary in a very dangerous position, as now it has become clear that the careers of judges can be hindered due to their political stance on important issues. The placing of ideology considerations above a candidate judge's qualifications is likely to have direct and indirect effects on how judges adjudicate on sensitive political cases.<sup>121</sup> This disagreement between the legislature and the judiciary in such a public manner has major ramifications for the public's perception of the authority of the judiciary as well as the obvious violation of the well-established principle of judicial independence in Latvia.

## **7 The cost of political attacks on judicial independence and the EU's (lack of) response**

The past few years have seen an increasingly tense and adversarial relationship between the judiciary and the other powers of State. These challenges can be summarised as a strategic attack by some members of the Saeima and the government designed to put pressure on the judiciary for political gain. The attacks on the Constitutional Court due to the Saeima's disagreement with the Constitutional Court's reasoning in recent judgments is based on their political and ideological disagreements but it is unacceptable for parliamentarians to attack the legitimacy and standing of an independent court for these reasons.<sup>122</sup> A leading cause for such a political backlash can be attributed to the central role of populist politics in Latvia.<sup>123</sup> Populism, in this context, is understood as a disregard for the essential institutions of checks and balances, such as courts, by the legislature or executive.<sup>124</sup> This type of political discourse has been a major issue in both Poland and Hungary and so, identifying and understanding such issues are key to preventing the undermining of judicial independence and the rule of law.

This raises the important question of how to prevent attacks on the judiciary in Member States post-accession? This is particularly pertinent given the experience of the EU so far in attempting to halt the tide of populist assaults on judicial independence in countries like Poland and

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<sup>120</sup> *ibid.*

<sup>121</sup> 'The Saeima Rejects the Candidates for the Post of Supreme Court Judge' (n 116).

<sup>122</sup> Council of Europe, 'Judges: Independence, Efficiency and Responsibilities' (2010) Recommendation CM/Rec(2010)12 paras 17–18.

<sup>123</sup> Daunis Auers, 'Populism and Political Party Institutionalisation in the Three Baltic States of Estonia, Latvia and Lithuania' (2018) 11(3) *Fudan Journal of the Humanities and Social Sciences* 341, 349–350.

<sup>124</sup> Bojan Bugarcic, 'Populism, Liberal Democracy, and the Rule of Law in Central and Eastern Europe' (2008) 41(2) *Communist and Post-Communist Studies* 191.

Hungary. One of the ways the EU Commission has attempted to prevent similar fates in other Member States is by introducing an annual rule of law monitoring system called the Annual Rule of Law Reports in 2020.<sup>125</sup> Additionally, the Rule of Law Conditionality Mechanism under Regulation 2020/2092 was introduced in 2021 and has the power to withhold EU monetary support from Member States.<sup>126</sup> The Conditionality Mechanism has already been used against Hungary and is expected to have significant persuasive effects in combating rule of law abuses.<sup>127</sup> I have argued elsewhere that the Rule of Law Reports could be linked to the Conditionality Mechanism as they would help keep track of evolving rule of law concerns within Member States and could later be used for sanctioning purposes.<sup>128</sup> However, it is important to consider the lack of efficacy of the Rule of Law Reports as they stand now. So far, the reports on Latvia have failed to identify effectively many of the concerns highlighted in this paper which diminishes the purpose of the reporting system and turns a blind eye to problematic developments within Latvia.

Latvia received a reasonably favourable rule of law evaluations in the 2020, 2021 and 2022 reports. In particular, the sections on judicial independence were concise, identifying corruption within the judiciary and controversies surrounding the politicisation of judicial appointments as a cause for concern.<sup>129</sup> However, the reports failed to appreciate the scale of damage to judicial independence after the multiple instances of politicising courts, attempts at court packing, and the general tarnishing of the reputation of the judiciary. The reports on Latvia's rule of law status offer only a shallow account of the true situation on the ground. The 2021 report on Latvia failed to highlight the extent of the attacks on judicial independence during the past few years. As noted above, the Constitutional Court suffered severe backlash from legislators over its November 2020 decision which affirmed the right to parental leave for same-sex couples as well as for the decision against the merger of Varakļāni with Rēzekne less than ten days before the planned municipal elections. These decisions were followed by a constitutional crisis in which members of the Saeima attempted to ignore Constitutional Court decisions and even called for the abolition of the Court altogether.<sup>130</sup> What is further concerning is that despite the 2022 report raising the issue of the politici-

<sup>125</sup> Beatrice Monciunskaitė, 'To Live and to Learn: The EU Commission's Failure to Recognise Rule of Law Deficiencies in Lithuania' (2022) 14(1) *Hague Journal on the Rule of Law* 49, 56–63.

<sup>126</sup> Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, Article 2 (a).

<sup>127</sup> Kati Cseres and Michael Borgers, 'Competition and Conditionality: The Missing Piece of the Puzzle in the Case of Hungary?' (*Verfassungsblog*, 2 June 2022) <<https://verfassungsblog.de/competition-and-conditionality/>> accessed 29 November 2022.

<sup>128</sup> Monciunskaitė (n 125) 49.

<sup>129</sup> Commission, 'Commission staff working document – 2020 Rule of Law Report Country Chapter on the Rule of Law Situation in Latvia' SWD (2020) 313 final.

<sup>130</sup> Office of the President (n 91).

sation of the appointment of a Supreme Court president in early 2022, the two prior reports failed to mention a similar situation that arose regarding the appointment of a Constitutional Court judge in late 2020 and early 2021.<sup>131</sup> Once again, the rule of law reports failed to acknowledge how deeply rooted such issues are and instead painted them as isolated incidents. These are serious oversights on the EU Commission's part if the purpose of these annual reports are considered.

Given the significant issues described in this paper, the Rule of Law Reports evidently fail to live up to their purpose by ignoring threats to judicial independence in Latvia. Unfortunately, this silence on the threats to judicial independence in a Member State is not surprising given the Commission's track record on this issue. In many ways, we can see the Commission repeating the same mistakes, only this time by ignoring systemic threats to the rule of law in the very reports designed to flag them. Although the reports mention an array of issues affecting judicial independence, they fail to connect the dots and put these events into context. That is, the described events can be attributed to deliberate attacks by other branches of the State towards the judiciary which are severe and should be noted as such. If the subsequent rule of law reports are not strengthened by the introduction of suitable and achievable recommendations, and, above all, thorough consideration of all threats to the rule of law, then there is a risk that small rule of law concerns may develop into significant breaches.

## 8 Conclusion

This paper has examined the most concerning threats to judicial independence in Latvia. The Latvian political party system shows significant evidence of volatility and instability. The political party landscape in Latvia was poorly regulated in the early years of the country's re-independence which created optimal conditions for the development of a volatile political party system.<sup>132</sup> The general election in 2018 was declared a victory of populist parties, marking the prominence of anti-establishment and illiberal forces in Latvia.<sup>133</sup> While the most recent general election in October 2022 also produced significant wins for new and old populist forces and established centrist parties, it still remains to be seen what type of government coalition will materialise from this election. Nevertheless, it is clear from the issues highlighted in this paper that judicial independence is under threat in Latvia and further research and diligent

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<sup>131</sup> Arājs (n 102).

<sup>132</sup> Auers (n 123) 345–349.

<sup>133</sup> Andrew Higgins, 'Populist Wave Hits Latvia, Lifting Pro-Russia Party in Election' *New York Times* (New York, 7 October 2018) <<https://www.nytimes.com/2018/10/07/world/europe/latvia-election-russia.html>> accessed 29 November 2022; Daunis Auers and Andres Kasekamp, 'Comparing Radical-Right Populism in Estonia and Latvia' in Ruth Wodak, Majid KhosraviNik and Brigitte Mral (eds), *Right-Wing Populism in Europe: Politics and Discourse* (1st edn, Bloomsbury Publishing 2013).

observation of the institutional dialogue of the branches of the State are imperative. The Latvian judiciary is currently suffering a crisis of independence; structural issues which effect Latvian judicial independence stem from the executive's excessive powers over court budgets.<sup>134</sup> Besides this, the Minister of Justice has been attempting to attack the Chairman of the Judicial Council in retaliation for the Chairman's politically inconvenient opinions of the current judicial system in Latvia.<sup>135</sup> There is also a resounding lack of trust and respect for the authority of courts by many prominent political factions. The Constitutional Court has been criticised and attacked by parliamentarians over decisions in the recent parental leave case<sup>136</sup> and the Varakļāni and Rēzekne self-governing regions case.<sup>137</sup> These attacks were not comments disagreeing with the Court's reasoning or legal approach, but rather a fundamental attack on the legitimacy of the Constitutional Court's standing. Parliamentarians refused to perform their duties and nominate a replacement judge to the Constitutional Court for this very reason.<sup>138</sup> Although pro-EU and pro-rule of law parties have played a major role in Latvian governance with New Unity and AP! supporting the Constitutional Court during its crisis, and condemning the attacks on judicial freedom by other parliamentarians, the fact remains that anti-establishment forces carry significant weight in Latvian politics. The evidence in this paper indicates that the foundations of Latvia's democratic institutions are being put into question by populist parliamentarians. The apparent backlash against the authority of the judiciary combined with the prominent role of populism leaves the country vulnerable to populist power-grabs. Although Latvia's rule of law is not suffering to the extent seen in Poland and Hungary, this does not mean scholars and civil society should become complacent. After all, Hungary was once classified as a consolidated democracy and was only recently downgraded. This shows that no democracy is ever fully 'complete' and the threat of regression is always on the horizon if we are not vigilant.<sup>139</sup>

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<sup>134</sup> Law on Judicial Power (Article 50.2(3) of 1993), 1 January 1993, Reporter of the Supreme Council and Government of the Republic of Latvia <<https://likumi.lv/ta/en/en/id/62847-on-judicial-power>> accessed 29 November 2022.

<sup>135</sup> Dreiblat and Rozenbergs (n 44).

<sup>136</sup> Judgment of the Constitutional Court of the Republic of Latvia 12 November 2020 in case no 2019-33-01, 2020, Latvia Journal <[https://www.satv.tiesa.gov.lv/en/cases/?-search\[number\]=2019-33-01](https://www.satv.tiesa.gov.lv/en/cases/?-search[number]=2019-33-01)> accessed 29 November 2022.

<sup>137</sup> Judgment of the Constitutional Court of the Republic of Latvia in case no 2020-43-0106.

<sup>138</sup> Upleja (n 59).

<sup>139</sup> Jacques Rupnik and Jan Zielonka, 'Introduction: The State of Democracy 20 Years On: Domestic and External Factors' (2013) 27 *East European Politics and Societies: and Cultures* 3, 21; Bojan Bugarič, 'A Crisis of Constitutional Democracy in Post-Communist Europe: "Lands in-between" Democracy and Authoritarianism' (2015) 13(1) *International Journal of Constitutional Law* 219, 221 <<https://doi.org/10.1093/icon/mov010>> accessed 29 November 2022.



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