THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

JUDGMENT
On behalf of the Republic of Latvia;
Riga, 7 June 2019
Case No 2018-15-01

The Constitutional Court in the following composition: Chairperson of the Court Session Ineta Ziemele, Justices Sanita Osipova, Aldis Laviņš, Gunārs Kusiņš, Daiga Rezevska and Artūrs Kučs,

on the basis of the application of Jānis Kārkliņš

under Article 85 of the Constitution of the Republic of Latvia and Para 1 of Section 16, Para 11 of Section 17(1) and Section 28.[1] of the Constitutional Court Law,

on 9 May 2019, in the written procedure reviewed the case

"On Compliance of Section 27(5) and Section 30(4) of the Law on Higher Education Institutions with the First Sentence of Article 106 of the Constitution **of the Republic of Latvia"**.

The Establishing Part

1. On 2 November 1995, the *Saeima* of the Republic of Latvia adopted the Law on Higher Education Institutions, which entered into force on 1 December 1995.

1.1. Section 30(2) of the Law on Higher Education Institutions which regulated the procedure for the election of associate professors, stipulated that an associate professor shall be elected in an open competition for a term of six years in accordance with the provisions of Section 33 of this Law by the extended habilitation council in the relevant field, and on the basis of its decision, an employment contract with him or her shall be entered into by the rector.

By the Law of 23 November 2000 on Amendments to the Law on Higher Education Institutions which entered into force on 26 December 2000, the *Saeima* changed the wording of Section 30 of the Law on Higher Education Institutions. Following these amendments, Section 30(4) provides:

"An associate professor shall be elected in an open competition for a term of six years by the council of professors in the relevant field in accordance with the provisions of Section 33 of this Law. On the basis of the decision of the council of professors in the relevant field, an employment contract with an associate professor shall be entered into by the rector."

1.2. By the Law of 2 March 2006 on Amendments to the Law on Higher Education Institutions which entered into force on 6 April 2006, the *Saeima* supplemented Section 27 of the Law on Higher Education Institutions with Section 27(5) in the following wording:

"The employment contract restrictions specified in Section 45(1) of the Labour Law shall not apply to persons elected to academic positions. An employment contract with a person elected to an academic position (professor, associate professor, docent, lecturer, assistant) shall be entered into by the rector for the time term of election – six years."

2. The Applicant, **Jānis Kārkliņš** (hereinafter – the Applicant), holds that Section 27(5) and Section 30(4) of the Law on Higher Education Institutions do not comply with the first sentence of Article 106 of the Constitution of the Republic of Latvia (hereinafter – the Constitution).

2.1. The application indicates that according to the employment contract concluded, until 31 January 2018, the Applicant carried out the duties of an associate professor at the Department of Civil Law of the Faculty of Law of the University of Latvia. After the expiry of the employment contract, he wished to continue to work in this position and therefore entered the competition for the position of associate professor announced by the University of Latvia. By decision of the council of professors of 22 January 2018, the Applicant was re-elected for a term of six years to the position of associate professor in the field of law, sub-field of civil law. Pursuant to Section 27(5) and Section 30(4) of the Law on Higher Education Institutions, the Applicant and the University of Latvia entered into an employment contract for the fulfilment of professional duties of an associate professor for a term of six years.

2.2. Prior to the re-election of the Applicant to the position of an associate professor and entering into an employment contract, the council of professors evaluated the scientific and teaching qualification of the Applicant. Namely, two experts members of the council of professors examined the documents submitted by the Applicant and provided an opinion on his qualifications and their compliance with the requirements for the position of associate professor. According to the criteria included in the Cabinet Regulation No. 391 of 4 September 2001 "Procedure for the Evaluation of the Scientific and Teaching Qualifications of a Candidate for the Position of Professor and Associate Professor" (hereinafter – the Regulation No. 391), eligibility of the Applicant for the position was also evaluated individually by each member of the council of professors by making entries in an individual evaluation sheet. As part of the evaluation procedure, the Applicant also gave an open lecture which was evaluated by the experts, as well as his ability to conduct seminars. Pursuant to Paragraph 9 of Regulation No. 391, the joint decision of the council of professors on the qualifications of the Applicant was based on the individual evaluations of each member of the council recorded in the minutes. However, the Applicant was elected to the position of the associate professor by the council of professors by secret ballot.

Entering into a new contract, based on compliance with the qualification requirements and an affirmative vote of the council of professors, is required each time the previous contract expires. Such fixed-term employment, in circumstances where the Applicant is, in substance, engaged in fixed and permanent employment, infringes his right to work as defined by the first sentence of Article 106 of the Constitution. The Applicant, referring to the case-law of the Constitutional Court, holds that the first sentence of Article 106 of the Constitution protects the right of an employee to maintain an employment relationship for as long as he performs his work in accordance with the abilities and qualifications required for the position. The condition that the employer is granted the right to renew the contract of employment every six years creates a risk that the employer may include in the employment contract terms which are unfavourable to the employee. Moreover, if the person is not re-elected to the position, he would not receive severance pay, since, in line with Section 112 of the Labour Law, such pay is disbursed only if the employee has been employed for an indefinite period. Entering into an employment contract for an indefinite period restricts a person's ability to take maternity leave and parental leave.

2.3. The restriction of the fundamental right contained in Section 27(5) and Section 30(4) of the Law on Higher Education Institutions is established by law and may have a legitimate aim, i.e. protection of the rights of others. Namely, Section 27(5) and Section 30(4) of the Law on Higher Education Institutions ensure that the abilities, qualifications and suitability for the position of academic staff are regularly examined, as well as the scientific research carried out by academic staff and the quality of education provided to students are evaluated. These provisions are aimed at ensuring that students at State higher education institutions are educated by professional academic staff, who at the same time carry out high quality research and scientific activities. However, the restriction of the fundamental right contained in Section 27(5) and Section 30(4) of the Law on Higher Education Institutions is not appropriate for the purposes of achieving the legitimate aim. The legitimate aim can be achieved by other means which are less restrictive of the rights of persons. The benefit which society derives from restricting the Applicant's right to work does not outweigh the harm caused to his rights and legitimate interests. Thus the principle of proportionality has not been complied with.

Section 27(5) and Section 30(4) of the Law on Higher Education Institutions allow the qualifications and abilities of a professor or associate professor to be evaluated on an irregular basis, i.e. only once every six years, before the expiry of the election and employment contract of the person concerned. Moreover, even if the qualifications of a candidate for the position of professor or associate professor are recognised as excellent, this does not guarantee that this person will be elected to the position of professor or associate professor. Whether a professor or associate professor retains his or her position depends on the secret ballot of the professors of the field, as provided for in Section 33 of the Law on Higher Education Institutions, in which each professor of the field is guided by his or her own internal convictions and may make a decision based on circumstances that are not at all related to the qualifications or abilities of the candidate.

When clarifying the content of the national legislation and applying thereof, the legal acts of the European Union and their interpretation established by the case-law of the Court of Justice of the European Union must be taken into account. Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by UNICE, CEEP and the ETUC (hereinafter – the Directive) implements the ETUC-UNICE-CEEP framework agreement on fixed-term work (hereinafter – the Framework Agreement) annexed

thereto. It follows from that European Union legislation and the case-law of the Court of Justice of the European Union that the conclusion of a fixed-term employment contract is justified by 'objective reasons'. That is to say, it is possible to conclude a fixed-term contract of employment if the nature of the work and the circumstances in which it is carried out so permit and the conclusion of such a contract can be considered proportionate. In the present case, such objective circumstances do not exist. Similarly, persons elected to academic positions are not covered by the measures laid down in Clause 5 of the Framework Agreement, the purpose of which is to prevent the abuse arising from successive employment contracts or fixed-term employment relationships. Fixed-term employment contracts are concluded for the performance of short-term or temporary work. Fixed-term contracts should not be concluded with academic staff, since academic work almost always implies a long-term commitment to science.

The legislator, in adopting Section 27(5) and Section 30(4) of the Law on Higher Education Institutions, has not considered whether there were other means that were less restrictive of the rights and legitimate interests of a person. The legislator could have established a system whereby academic staff do not have to undergo a re-election procedure, but their compliance to their position is ensured by means of regular checks, or whereby academic staff are subject to control only in the event of complaints about their performance. A person who does not have the necessary abilities and qualifications for the position could have his or her employment terminated in accordance with the Labour Law.

3. The authority which issued the contested act, the *Saeima*, holds that Section 27(5) and Section 30(4) of the Law on Higher Education Institutions comply with the first sentence of Article 106 of the Constitution.

3.1. One of the contested provisions, i.e. Section 27(5) of the Law on Higher Education Institutions, applies not only to associate professors, but also to other academic positions: professor, docent, lecturer and assistant. The Applicant was elected to the position of associate professor for a term of six years and an employment contract was concluded with him for the performance of the duties of associate professor. Therefore, in the present case, the compatibility of Section 27(5) and Section 30(4) of the Law on Higher Education Institutions should be assessed only in relation to the academic position to which the Applicant was elected.

In Latvia, the position of associate professor is one of the regulated professions. It follows from the Law on Higher Education Institutions that an associate professor is, *inter alia*, also a teacher. It is a profession of particular social importance, and the qualifications, abilities and personality of the teacher are therefore essential for the achievement of the aims of education. As regards higher education, which is a prerequisite for many professions, the requirement for the most highly qualified academic staff is particularly important.

3.2. Section 27(5) and Section 30(4) of the Law on Higher Education Institutions essentially provide that a person is elected to the position of associate professor for a term of six years as a result of an open competition. The rector of a higher education institution enters into an employment contract with an associate professor for the same term. An associate professor would be elected by the council of professors from among the candidates for the position, after examination of the documents and discussions with the candidates for the position.

To qualify for the position of associate professor, a person must have received an appropriate evaluation of his or her scientific and teaching work. The procedure for that evaluation, namely as regards the scientific qualifications of the candidate, is governed in part by Regulation No. 391. According to this procedure, the scientific and teaching qualifications, as well as the organisational competence of a candidate to the position of associate professor are to be evaluated according to at least seven criteria (at least five criteria in the case of professional study programmes), with each assessor choosing one of five possible ratings - 'excellent', 'very good', 'good', 'satisfactory' or 'unsatisfactory'. The council of professors of the field, on the basis of the individual evaluations, adopts an overall evaluation of the scientific and professional qualifications of the professor. On the basis of this evaluation, the council of professors, after interviewing each candidate for the position of associate professor, decides by vote which candidate is best suited to the position.

The council of professors is composed of at least five professors in the relevant field. According to Section 35(1) of the Law on Higher Education Institutions, at least one third of the members of the council of professors of the field must be employed by another higher education institution. Neither the contested Section 27(5) and Section 30(4) of the Law on Higher Education Institutions, nor other external laws and regulations determine in what manner – open or secret – should the election of an associate professor take place. The fact

that the election is secret is determined by the guidelines developed by the Council of Higher Education.

3.3. The term for which a person is elected to the position of associate professor is limiting on the ability of this person to retain the position. However, this does not prevent the person from working in a field of his or her choice, such as law. Thus, the fundamental right of a person to retain the position of associate professor at a particular higher education institution, as provided for in the first sentence of Article 106 of the Constitution, is limited by Section 27(5) and Section 30(4) of the Law on Higher Education Institutions.

The restriction of the fundamental right contained in Section 27(5) and Section 30(4) of the Law on Higher Education Institutions is established by a duly adopted law and has a legitimate aim, i.e. protection of the rights of others and the welfare of society. In particular, the purpose of the restriction of fundamental rights is to ensure the renewal of academic staff, as well as the development of scientific research or artistic creation work pursuant to the modern standards. The functions of higher education institutions are the accumulation and transmission of knowledge to future generations (teaching) and the creation of new knowledge (research), *inter alia*, in order to contribute to the solution of social and economic problems. Associate professors not only contribute to ensuring the right of individuals to quality higher education, but also to training new academics, helping students to integrate into global academic processes and contributing to the development of their field, which underpins the welfare of society as a whole.

Periodic open competition to academic positions ensures the competition necessary to achieve these goals, preventing stagnation and providing the highest-achieving scientists and educators, including new academics, the opportunity to apply for the position of associate professor at a higher education institution. The procedure and conditions for the election of associate professors ensure that the most suitable candidate is selected. Since the decision of the council of professors must be taken by a majority of the votes cast, the vote may be open and at least one third of the members must be representatives of another higher education institution, the risk that the vote to approve a person as associate professor could be subjective is avoided as far as possible. The alternative means indicated by the Applicant are not such as would fully achieve the legitimate aims of the restriction of the fundamental right, moreover, to achieve them to the same quality as the periodic elections as currently provided for in the contested Section 27(5) and Section 30(4) of the Law on Higher Education Institutions. Periodic elections do

not exclude the obligation of the employer to monitor the performance of the duties of the associate professor and, in the event of serious violations, allow the possibility of terminating the contract earlier. However, the grounds for termination of an employment contract set out in Section 101 of the Labour Law cannot in themselves ensure that academic positions are filled by the most outstanding specialists and scholars in their field. The benefit to society of periodic open competition for academic positions outweighs the harm done to a individual.

3.4. Section 27(5) and Section 30(4) of the Law on Higher Education Institutions are not in conflict with the Framework Agreement. The legislator has also provided for the conclusion of fixed-term employment contracts for other persons holding positions of public importance, such as heads of public institutions, heads of law enforcement authorities and medical institutions. There are also professions for which the periodic reassessment of qualification or certification of a person is provided for. Moreover, in other EU countries, employment contracts for academic positions are also concluded for a fixed period. Employment contracts of indefinite duration are generally concluded at a later stage in an academic career. However, when comparing the practices of different countries, the sources of funding of higher education institutions, their stability, the status and demographic structure of academic staff, the number of students and other aspects of employment regulation must also be taken into account. The repeal of Section 27(5) and Section 30(4) of the Law on Higher Education Institutions could entail various risks which would undermine the achievement of the legitimate aim of the restriction of fundamental rights.

4. The Ministry of Education and Science, an invited person, holds that Section 27(5) and Section 30(4) of the Law on Higher Education Institutions comply with the first sentence of Article 106 of the Constitution.

4.1. The position of associate professor is considered to be a profession of public importance in that it is related to the need to ensure the right to education for every person enshrined in Article 112 of the Constitution. The legislator is entitled to impose strict requirements on persons wishing to work as an associate professor, relating not only to professional qualifications and abilities, but also to personality and previous experience. Similarly, in order to ensure the successful development of a knowledge-based State, the legislator must, for the sake of building a professional academic staff, also determine the method and procedure by which a person may be elected to an academic position.

4.2. The restriction of the fundamental rights arising from Section 27(5) and Section 30(4) of the Law on Higher Education Institutions is established by law. Moreover, this regulation has been in force for more than 20 years, which is evidence of legal certainty in this area.

Section 27(5) and Section 30(4) of the Law on Higher Education Institutions were adopted in order to protect the rights and interests of students. At the same time, these provisions contribute to the successful development of a knowledge-based State. Accordingly, the legitimate aim of the restriction of fundamental rights is the protection of the rights of others and the welfare of society. The existing procedure for the election of associate professors ensures that each time the council of professors of the field evaluate the abilities and qualifications of the candidate in accordance with the defined criteria. In this way, it is ensured that the duties of associate professor are performed by highly qualified and appropriate professionals. Section 27(5) and Section 30(4) of the Law on Higher Education Institutions do not prohibit the Applicant from repeatedly being a candidate for the position of associate professor, provided that the requirements laid down in Regulation No. 391 are met and that he is considered by the council of professors of the field to be the most suitable candidate. The first sentence of Article 106 of the Constitution does not provide for the right of a person to a specific position.

4.3. The decision whether an employment contract is entered into with an associate professor for a fixed election term, i.e. six years, is a matter for the legislator, and the statutory procedure for the election of associate professors and the conclusion of employment contracts therewith for a fixed term does not in itself mean unconstitutionality. The legislator has also provided for such fixed-term employment contracts in other areas of public importance. For example, fixed-term employment contracts have been concluded with heads of public agencies (state and local government agencies), heads of cultural and artistic institutions, heads of law enforcement authorities and medical institutions.

In the present case, the duration of the employment contract – six years – was established in order to attract the most suitable specialists to the higher education institution and to provide an opportunity to periodically evaluate their abilities, the work carried out and the results achieved. There are no other means which would be equally effective and the choice of which would be less restrictive of the fundamental rights of individuals. Moreover, the restriction of fundamental rights contained in Section 27(5) and Section 30(4) of the Law on Higher Education Institutions is also necessary in order to ensure the possibility for the younger

generation of specialists to apply for senior administrative and academic positions, the number of which is limited in higher education institutions. It should also be borne in mind that there is no mandatory retirement age for academic staff in Latvia.

5. The Ministry of Welfare, **an invited person,** points out that the Labour Law contains a general principle that employment contracts should be concluded for an indefinite period. However, in exceptional cases, in order to carry out short-term work, an employment contract may also be concluded for a fixed term of not less than five years. The provisions of the Labour Law ensure the achievement of the objectives set forth by the Framework Agreement. There is also a possibility to provide for exceptions to the provisions of the Labour Law if there are objective grounds for such exceptions and if they do not contradict the laws and regulations. In particular, a regulation may be established which, taking into account the specificities of the field, would provide for a different legal solution.

6. The Ombudsperson, an invited person, holds that Section 27(5) and Section 30(4) of the Law on Higher Education Institutions comply with Article 106 of the Constitution. However, the Ombudsperson points out that Latvia is one of only two European countries where employment contracts with academic staff are not concluded for an indefinite term. In many other countries, fixed-term employment contracts are only concluded at the early stages of an academic career. Thus, there may be other means that are less restrictive of the rights of a person.

Section 27(5) and Section 30(4) of the Law on Higher Education Institutions do restrict the right of a person to retain the position of associate professor at a particular higher education institution, as provided for in the first sentence of Article 106 of the Constitution. However, the Ombudsperson agrees with the response of *Saeima* that the restriction of the fundamental right is established by law, has a legitimate aim and is proportionate to the legitimate aim. The aim of Section 27(5) and Section 30(4) of the Law on Higher Education Institutions is not only to ensure qualified academic staff, but also to ensure their renewal. A periodic, open competition to the position of associate professor ensures the achievement of that aim by preventing stagnation and providing scholars and teachers of the highest standards to with the chance to obtain academic positions. More frequent evaluation of the qualifications of associate professors may be inappropriate and in some cases excessive. The benefit which society derives from Section 27(5) and

Section 30(4) of the Law on Higher Education Institutions outweighs the harm caused to the individual.

7. *Dr. iur.* Kitija Bite, an invited person, docent, Faculty of Law of the Riga Stradiņš University, agrees with the in the response of *Saeima* that Section 27(5) and Section 30(4) of the Law on Higher Education Institutions

The purpose of the Framework Agreement is to promote conclusion of employment contracts of indefinite duration, but fixed-term employment contracts are also respected. Such contracts are permissible if they meet the needs of the employer and the employee, if fixed-term contracts are a feature of employment and if fixed-term contracts can be of benefit to employers and employees.

In implementing the Framework Agreement, Latvia has made the conclusion of employment contracts of indefinite duration a fundamental principle. However, Section 44 of the Labour Law provides for cases in which an employment contract may be entered into for a specified period. Academic staff as defined by the Law on Higher Education Institutions are not included in the list provided in Section 44 of the Labour Law, nor in the Cabinet Regulation No. 353 of 6 August 2002 "Regulations Regarding Work in Activity Areas where an Employment Contract is Normally not Entered into for an Unspecified Period". However, Latvia is entitled to make use of the reservations on exceptional situations contained in the Framework Agreement. Professional and qualified academic staff in higher education institutions is an asset for society as a whole. The reservation in the Law on Higher Education Institutions, as a special legal provision, that the employment contract restrictions specified in Section 45(1) of the Labour Law do not apply to persons elected positions of associate professor or professor and a contract is entered into for a term of six years, comply with the aim of the Framework Agreement.

8. Sworn advocate *LL. M.* Jūlija Jerņeva, an invited person, holds that the Framework Agreement is based on the assumption that an employment contract of indefinite duration is the general form of employment relationship. However, a fixed-term employment contract may be used in exceptional cases. Moreover, the Framework Agreement does not prohibit entering into a fixed-term contract with an employee, but restricts the conclusion of such contracts if they are abused, worsening the legal position of the employee.

The purpose of the Framework Agreement is to prevent abuse arising from the use of successive fixed-term employment contracts. In particular, Clause 5(1) of the Framework Agreement specifically seeks to prevent the possibility of abuse of the employer's power which may arise from the use of successive fixed-term employment contracts. The Member States are obliged to introduce one or more measures in their legal systems to prevent the risk of abuse of such contracts. One of those measures is the obligation to state objective reasons justifying the renewal of such contracts or employment relationships. According to the case-law of the Court of Justice of the European Union, objective reasons within the meaning of Clause 5(1)(a) of the Framework Agreement are the precise and concrete circumstances characterising a given activity, which are therefore capable, in that particular context, of justifying the use of successive fixed-term employment contracts. Those circumstances may result, in particular, from the specific nature of the tasks for the performance of which such contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from pursuit of a legitimate social-policy objective of a Member State. Accordingly, successive fixed-term employment contracts are justified if they meet a genuine need and are an appropriate and necessary means of achieving that objective.

The case-law of the Court of Justice of the European Union interprets Clause 5 of the Framework Agreement as meaning that a regulation similar to the contested Section 27(5) and Section 30(4) of the Law on Higher Education Institutions, which permits universities to renew successive fixed-term employment contracts concluded with academic staff, moreover, without placing any limit on the maximum duration of those contracts or the number of renewals, is not in contradiction thereto. However, it is for the national court of the Member State to determine whether the fixed-term contracts in question are justified by an objective reason within the meaning of Clause 5(1)(a) of the Framework Agreement. It is also for the national court to ascertain whether Section 27(5) and Section 30(4) of the Law on Higher Education Institutions are not being used to satisfy, in effect, the fixed and permanent need in relation to the hiring of academic staff, including associate professors.

9. *Dr. iur.* Christoph Johann Ulrich Schewe, an invited person, associated guest professor, Department of International and European Law, Faculty of Law, University of Latvia – provided an opinion on the compliance of

Section 27(5) and Section 30(4) of the Law on Higher Education Institutions with the European Union law.

Mr Schewe points out that the Treaty on the Functioning of the European Union obliges Latvia to transpose the Framework Agreement into national law. By adopting Section 45 of the Labour Law, which regulates the term of fixed-term employment contracts, Latvia has fulfilled that obligation.

Although the Framework Agreement gives the Member States a wide margin of discretion as to how and to what extent the Framework Agreement is to be transposed, Latvia has wrongly provided that the Framework Agreement does not apply to academic positions, that is to say, it has presumed that the positions of professors, associate professors and lecturers fall within the exceptions laid down in Clause 2 of the Framework Agreement which allow the non-application thereof. The present case does not involve special or exceptional circumstances justifying the conclusion of a fixed-term contract. Moreover, academic positions are not sectoral or seasonal. Latvia has therefore failed to transpose Clause 5 of the Framework Agreement, which obliges Member States to introduce one of the measures set out therein aimed at preventing the abuse of successive fixed-term employment contracts.

Latvia has incorrectly transposed the Framework Agreement, but it must be borne in mind that Clause 1 and Clause 5 of that European Union law leave the Member States a wide margin of discretion in transposing it into national law. The Court of Justice of the European Union has recognised that Clause 1 and Clause 5 of the Framework Agreement are not sufficiently clear and precise to have direct effect, that is to say, to confer a specific right on a person. Therefore, the Applicant cannot rely directly on Clause 5 of the Framework Agreement. However, the relevant European Union law should be used in ascertaining the content of the national legislation and in the application thereof. It is also possible to instruct the legislator to bring the national legal provisions into line with the Framework Agreement.

Where there has been abuse of successive fixed-term employment contracts, it should be possible to apply measures which ensure the employee with the necessary protection, thereby preventing a breach of European Union law.

The Concluding Part

10. The Applicant requests the Constitutional Court to assess compliance of several provisions of the Law on Higher Education Institutions with the first sentence of Article 106 of the Constitution. The legal grounds contained in the Application concerning the non-compliance of Section 27(5) and Section 30(4) of the Law on Higher Education Institutions with a legal provision with a higher legal force concern both the position of associate professor and the position of professor.

However, in its response, *Saeima* holds that in the present case, the compliance of Section 27(5) and Section 30(4) of the Law on Higher Education Institutions with the first sentence of Article 106 of the Constitution must be assessed only in so far as they apply to the position of associate professor, since the Applicant was elected to the position of associate professor for six years and an employment contract has been entered into with him for the performance of the duties of associate professor.

10.1. Section 30(4) of the Law on Higher Education Institutions lays down the procedure for a person to be elected as an associate professor. Namely, an associate professor is elected in an open competition for a term of six years by the council of professors in the relevant field in accordance with the provisions of Section 33 of this Law. On the basis of the decision of the council of professors in the relevant field, an employment contract with an associate professor shall be entered into by the rector. However, Section 27(5) of the Law on Higher Education Institutions provides that the employment contract restrictions specified in Section 45(1) of the Labour Law shall not apply to persons elected to academic positions and that an employment contract with a person elected to an academic position (docent, lecturer, assistant) shall be entered into by the rector for the term of election – six years.

Thus, one of the contested norms, namely Section 27(5) of the Law on Higher Education Institutions, applies to several persons elected to academic positions: professor, associate professor, docent, lecturer, assistant.

The Constitutional Court has repeatedly indicated that if the contested norm applies to a wide range of different situations, then it is necessary to specify to what extent it will assess this norm (*see Judgment of the Constitutional Court of 28 May 2009 in Case No 2008-47-01, paragraph 6, and Judgment of 19 December 2011 in Case No 2011-03-01, paragraph 13*).

In the present case, it is also necessary to clarify with respect to which persons the compliance of Section 27(5) of the Law on Higher Education Institutions with the Constitution is to be assessed.

According to Section 27(1) of the Law on Higher Education Institutions, the academic staff of a higher education institution consists of professors, associate professors, as well as docents, lecturers and assistants. Like associate professors, professors, docents, lecturers and assistants are elected for a term of six years (*see Section 28(2), Section 32(3), Section 36(1) and Section 37(1) of the Law on Higher Education Institutions*). However, the procedure for the election of associate professors and professors is different from that for the election of docents, lecturers and assistants. According to Section 33 of the Law on Higher Education Institutions, candidates for the position of a professor or an associate professor are elected by the council of professors in the relevant field. However, docents, lecturers and assistants are elected by the assembly of the faculty or the council of the institute (*see Section 32(3), Section 36(1) and Section 37(1) of the Law on Higher Education Institutions*). The Constitutional Court notes that the arguments of the Applicant regarding the non-compliance of Section 27(5) and Section 30(4) of the Law on Higher Education Institutions with the first sentence of Article 106 of the Constitution are related to the considerations on the procedure of election of candidates to the academic position by the council of professors in the relevant field.

The procedure for the election of a professor and an associate professor is analogous and is governed by Section 33 of the Law on Higher Education Institutions. Associate professors and professors are the highest-ranking group of academic staff in the Latvian higher education system. According to Section 28(1) of the Law on Higher Education Institutions, a professor is a specialist who is internationally recognised in his or her field and who conducts scientific research or artistic creation work pursuant to the modern standards and ensures high-quality studies in the relevant sub-field of research or art. A person who has a doctoral degree and has not less than three years of work experience in the position of associate professor or professor in a higher education institution may be elected to the position of professor. A doctoral degree is also a prerequisite for the position of associate professor (*see Section 30(1) of the Law on Higher Education Institutions*). Thus, when assessing the constitutionality of Section 27(5) of the Law on Higher Education Institutions with regard to associate professors, it is all the more necessary to examine it also with regard to professors.

Therefore the Constitutional Court will assess the compliance of Section 27(5) of the Law on Higher Education Institutions with the first sentence

of Article 106 of the Constitution insofar as it applies to associate professors and professors.

10.2. The second contested provision, namely, Section 30(4) of the Law on Higher Education Institutions, applies to associate professors only. It lays down the procedure by which and the term for which a person may be elected to that academic position. Section 28(2) of the Law on Higher Education Institutions, which regulates the procedure by which and the term for which a person may be elected to the position of professor, has not been contested by the Applicant before the Constitutional Court.

Therefore, the Constitutional Court must assess whether it is necessary and permissible in the present case to extend the limits of the claim and to assess the compliance of Section 28(2) of the Law on Higher Education Institutions with the first sentence of Article 106 of the Constitution as well.

The Constitutional Court has repeatedly concluded that in certain cases, the limits of a claim may be extended in cases already initiated. The Constitutional Court may extend the limits of a claim by first of all observing the concept of 'close connection'. In order to determine whether it is possible and necessary to extend the limits of the claim in a particular case, it must be ascertained, first of all, whether the provision in respect of which the claim is extended is so closely related to the provision contested in the case that the assessment thereof is possible within the same grounds or necessary for the determination or is necessary to arrive to a decision in the particular case, and, secondly, whether the extension of the limits of the claim is necessary to comply with the principles of the Constitutional Court procedure (*see, for example, Judgment of the Constitutional Court of 3 April 2008 in Case No 2007-23-01, paragraph 17 and Judgment of 29 December 2014 in Case No 2014-06-03, paragraph 17*).

In the context of the matter under consideration, Section 28(2) of the Law on Higher Education Institutions is closely related to the contested Section 27(5) of the Law on Higher Education Institutions, since only by examining both of these provisions can it be concluded whether the employment of professors for a fixed term complies with the first sentence of Article 106 of the Constitution. Moreover, the contested Section 30(4) of the Law on Higher Education Institutions, which regulates the procedure by which and the term for which a person may be elected to the position of associate professor, is analogous in substance to Section 28(2) of the Law on Higher Education Institutions, and therefore it is possible to assess it within the same reasoning.

Accordingly, in order to facilitate a comprehensive and impartial examination of the case, as well as procedural economy and the existence of a legal system in which unconstitutional provisions are eliminated as completely and comprehensively as possible, it is possible and necessary to extend the claim in the present case.

Therefore the Constitutional Court will also assess the compliance of Section 28(2) of the Law on Higher Education Institutions with the first sentence of Article 106.

10.3. Section 27(5), Section 28(2) and Section 30(4) of the Law on Higher Education Institutions are interrelated as part of the legal framework regulating the term for which a person may be employed as an associate professor or professor. It follows from these provisions that a person is elected to the position of associate professor or professor for a term of six years and that an employment contract is entered into by the rector for the same period.

Consequently, the Constitutional Court, when assessing compliance of Section 27(5) of the Law on Higher Education Institutions, insofar as it applies to associate professors and professors, Section 28(2) and Section 30(4) (hereinafter – the contested provisions) with the first sentence of Article 106 of the Constitution, will examine them as a single regulation.

11. First sentence of Article 106 of the Constitution: "Everyone has the right to freely choose their employment and workplace according to their abilities and qualifications."

11.1. The Constitutional Court has repeatedly recognised that the first sentence of Article 106 of the Constitution does not directly guarantee the right to work, but the right to freely choose an employment and a workplace, including the right to maintain an existing employment and workplace. Thus, the right to freely choose employment includes such an essential element as the right to maintain an existing employment, which in turn includes the right to continue that employment in the future (*see Judgment of the Constitutional Court of 23 April 2003 in Case No 2002-20-0103, Concluding Part, paragraph 3 and Judgment of 21 December 2015 in Case No 2015-03-01, paragraph 14.2*).

The right to "freely choose" enshrined in the first sentence of Article 106 of the Constitution requires that an individual be provided with the possibility to choose, but does not require that everyone be provided with the possibility to work, moreover, to work exactly in the job that he or she wants (*see Judgment of the*

Constitutional Court of 4 June 2002 in Case No 2001-16-01, Concluding Part, paragraph 2). As the Constitutional Court points out, the right to freely choose employment and workplace, within the meaning of the first sentence of Article 106 of the Constitution, means, first, equal access to the labour market for all persons and, second, that the State may not impose restrictive criteria on persons other than certain requirements on ability and qualification which, if not met, would prevent an unqualified person from performing the duties of the position in question. The State is obliged to refrain from creating, directly or indirectly, conditions which would hinder a person from exercising his or her right to "freely choose" an employment (*see Judgment of the Constitutional Court of 21 December 2015 in Case No 2015-03-01, paragraph 14.1*)

The fundamental right enshrined in the first sentence of Article 106 of the Constitution protects a person against all State actions which restrict the freedom of a person to choose employment. However, this provision does not prevent the State from imposing requirements which a person must fulfil in order to be able to pursue this employment (*see Judgment of the Constitutional Court of 23 April 2003 in Case No 2002-20-0103, Concluding Part, paragraph 3 and Judgment of 21 December 2015 in Case No 2015-03-01, paragraph 14.2*). The legislator has the discretion to impose requirements in respect of a particular professional activity to the extent necessary in the public interest (*cf. see Judgment of the Constitutional Court of 18 February 2010 in Case No 2009-74-01, paragraph 14).* If the legislator has provided for such requirements, they must be assessed, *inter alia*, as restrictions of the fundamental right enshrined in the first sentence of Article 106 of the Constitution (*see Judgment of the Constitutional Court of 24 November 2017 in Case No 2017-07-01, paragraph 13.1*)

11.2. Following accession to the European Union, Latvia is obliged to fulfil its obligations arising from the Treaty on Accession to the European Union. In particular, with the ratification of the Treaty on Latvia's Accession to the European Union, European Union law has become an integral part of Latvian law. According to this Treaty, Latvia is also bound by the legislation which strengthens democracy adopted by the institutions of the European Union. The interpretation of these acts, as established by the case-law of the Court of Justice of the European Union, is binding in the application of national laws and regulations in order to avoid possible contradictions between Latvian and European Union law. Accordingly, the legislator, when adopting legal provisions, in particular such norms implementing the requirements of the European Union Directives in the national

legal system, must comply with the general principles of law and other provisions of the Constitution, as well as with the principles of European Union law (*see Judgment of the Constitutional Court of 17 January 2008 in Case No 2007-11-03, paragraph 24.2 and Judgment of 11 April 2018 in Case No 2017-12-01, paragraph 13*).

The criteria to be met by the national legislation on fixed-term employment contracts are also laid down in the Framework Agreement, as implemented by the Directive. The preamble to the Framework Agreement states that contracts of an indefinite duration are the general form of employment relationship. However, in certain sectors, specialities and areas of activity, fixed-term contracts are a feature of employment which can be useful for both employer and employee. One of the objectives of the Framework Agreement is to prevent abuse arising from the use of successive fixed-term employment contracts (see Clause 1 of the Framework Agreement). In particular, according to Clause 5 of the Framework Agreement, the laws and regulations of the Member State in which the conclusion of such employment contracts is permitted must lay down measures to prevent the risk of abuse of such contracts.

Accordingly, in assessing the compatibility of the contested provisions with the first sentence of Article 106 of the Constitution, account must also be taken of the relevant European Union legislation and the application thereof in practice.

11.3. In Latvia, the positions of associate professor and professor are regulated professions. Therefore, the laws and regulations including the Law on Higher Education Institutions, set out the professional qualification requirements for the commencement and performance of the professional duties of associate professors and professors.

According to Section 27(2), Section 28(4) and Section 30(5), the main tasks of associate professors and professors are to conduct scientific research work in a sub-field of science or the field of artistic creation, as well as to participate in educating students – the supervision of studies, supervision of research work for the acquisition of doctoral degrees and master's degrees, the training of the new generation of academics, artists and lecturers.

The Constitutional Court has recognised that, in order to clarify the content of certain provisions of the Constitution more fully and objectively, they must, *inter alia*, be specified in conjunction with other provisions of the Constitution. The application of the principle of unity of the Constitution is based on the assumption that the Constitution is a coherent whole and the norms contained

therein are to be interpreted systemically (*see Judgment of the Constitutional Court of 7 October 2010 in Case No 2010-01-01, paragraph 12 and Judgment of 29 June 2018 in Case No 2017-25-01, paragraph 17*).

It follows from the Law on Higher Education Institutions that the work of a professorship, i.e. associate professors and professors, is related to the formation of national and international science, as well as the training of the new generation of academics. Therefore, in the case under review, the Constitutional Court must also take into account the rights guaranteed by other provisions of the Constitution, including Article 113 of the Constitution, which establishes the obligation of the State to recognise the freedom of scientific, artistic and other creative activity. This means that the State, when imposing requirements in respect of the professional activities of associate professors and professors, is obliged to respect and protect, as well as to ensure, the right to scientific, artistic and other creative freedom of the persons concerned.

The right enshrined in Article 113 of the Constitution can be fully exercised only in conditions of academic freedom, which is an essential prerequisite for the sustainable development of society. Section 6 of the Law on Higher Education Institutions stipulates that freedom of studies, research work and artistic creation shall be ensured in higher education institutions. Following its accession to the European Union, Latvia is also bound by the Charter of Fundamental Rights of the European Union. Article 13 of this European Union law states that the arts and scientific research shall be free of constraint, i.e. the academic freedom of the researcher is respected.

The German Federal Constitutional Court has also held that scientific freedom includes, above all, scientific self-determination and the acquisition and transmission of knowledge. Anyone engaged in science, research or teaching has the right to be protected against any attempt by the State to influence the acquisition and transmission of knowledge. Since research and teaching must pursue truth as something "not fully conscious and never fully unconscious" (Wilhelm von Humboldt), science must be free from State interference and based on the personal and autonomous responsibility of the scientist (*see Judgment of the German Federal Constitutional Court of 29 May 1973 in Case 1 BvR 424/71 and 325/72, paragraph 128*).

Article 113 of the Constitution implies, *inter alia*, the obligation of the State to respect, protect and ensure the academic freedom of professorship. Article 1 of the Lima Declaration on Academic Freedom and the Autonomy of Higher

Education Institutions, adopted by the World University Service in September 1988, explains that 'academic freedom' means the freedom of members of the academic community, individually or collectively, in the pursuit, development and transmission of knowledge, through research, study, discussion, documentation, production, creation, teaching, lecturing and writing. The United Nations Educational, Scientific and Cultural Organisation (UNESCO) Recommendation concerning the Status of Higher-Education Teaching Personnel states that academic freedom includes the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies [*see: United Nations Educational, Scientific and Cultural Organisation, Recommendation concerning the Status of Higher-Education Teaching Personnel, 1997 (hereinafter – the UNESCO Recommendation)*]. Although the above-mentioned documents are not legally binding, the Constitutional Court recognises that they reveal essential elements of the content of the concept of academic freedom.

Academic tenure constitutes one of the major procedural safeguards of academic freedom (*see UNESCO Recommendation, paragraph 45*). Therefore, when assessing compliance of the contested provisions with the first sentence of Article 106 of the Constitution, the Constitutional Court will take into account that the positions of associate professor and professor, unlike other professions, are characterised by academic freedom.

11.4. It follows from the contested provisions that associate professors and professors are elected for a fixed term, i.e. for six years, rector of a higher education institution enters into an employment contract for the same term. Even if the person has the abilities and qualifications to perform the work in question, the employment contract is terminated at the end of that term. In order to be eligible for reappointment as an associate professor or professor, a person must have received an appropriate scientific and teaching evaluation and must have reapplied for the position of associate professor or professor. The council of professors in the field assess the suitability of the candidate for the position of associate professor or professor according to the criteria for the assessment of scientific and teaching qualifications laid down in Regulation No 391. In the event of re-election, the

employment contract with the associate professor or professor is also entered into for a fixed term of six years.

The Applicant has reapplied for the position of associate professor. The council of professors has recognised that his scientific and teaching qualifications are appropriate to carry out the duties of an associate professor. Pursuant to the contested Section 27(5) and Section 30(4) of the Law on Higher Education, the Applicant was elected to the position of associate professor for a term of six years and his employment contract was also entered into for that term (*see Volume 1, pages 29–39 of the case-file*).

Thus, the contested provisions restrict the right of the Applicant, enshrined in the first sentence of Article 106 of the Constitution, to maintain an employment characterised by academic freedom.

12. The right to freely choose employment enshrined in Article 106 of the Constitution may be restricted, but the Constitutional Court must assess whether the restriction is justified, i.e: 1) it is established by law; 2) it has a legitimate aim; 3) it is proportionate (*see, for example, Judgment of the Constitutional Court of 20 May 2003 in Case No 2002-21-01, Concluding Part, paragraph 2 and Judgment of 10 February 2017 in Case No 2016-06-01, paragraph 21*).

13. To evaluate whether a restriction of a fundamental right is established by law, it is necessary to examine the following:

1) whether the law is adopted in compliance with the procedures provided for in laws and regulations;

2) whether the law has been proclaimed and is publicly available in accordance with the requirements of laws and regulations;

3) whether the wording of the law is sufficiently clear to allow a person to understand the content of the rights and obligations arising therefrom and to foresee the consequences of the application thereof (*see, for example, Judgment of the Constitutional Court of 8 April 2015 in Case No 2014-34-01, paragraph 14 and Judgment of 21 December 2015 in Case No 2015-03-01, paragraph 23*).

13.1. Although the contested provisions should be evaluated as a single regulation, the Constitutional Court must examine whether each of them has been adopted in due procedure, has been proclaimed and is publicly available in accordance with the requirements of laws and regulations, and has been formulated with sufficient clarity.

The contested Section 30(4) of the Law on Higher Education Institutions was expressed in its current wording by the law on Amendments to the Law on Higher Education Institutions, adopted by the *Saeima* on 23 November 2000 and published in the official gazette *Latvijas Vēstnesis*, No 448/449 (2359/2360), on 12 December 2000. However, an identical restriction of fundamental rights was already contained in Section 30(2) of the Law on Higher Education since 2 November 1995, when the Law on Higher Education was adopted by the *Saeima*. The term for which a person is elected to the position of professor, provided for in Section 28(2) of the Law on Higher Education Institutions, was also established by the Law on Higher Education Institutions adopted by the Saeima on 2 November 1995.

However, the restriction on the fundamental right contained in contested Section 27(5) of the Law on Higher Education Institutions was introduced by the Law on Amendments to the Law on Higher Education of 2 March 2006. That provision was adopted in accordance with the procedure laid down in Article 81 of the Constitution. On 23 August 2005, the Cabinet of Ministers adopted Regulation No 635 Amendments to the Law on Higher Education Institutions, which was submitted to the *Saeima* for approval on 26 August 2005. The draft law in question was examined by the *Saeima* in three readings. The Law was published in the official gazette *Latvijas Vēstnesis*, No 48 (3416), on 23 March 2006.

The parties to the proceedings and the invited persons all agree that the contested provisions have been adopted in accordance with the procedure laid down in the Constitution and the Rules of Procedure of the *Saeima*, have been proclaimed and made publicly available in accordance with the requirements of laws and regulations.

The wording of the restriction of the fundamental right contained in the contested provision is sufficiently clear. A person is able understand the content of that restriction and foresee the consequences of the application thereof.

13.2. At the same time, when ascertaining whether the law has been adopted in compliance with the procedure provided for in laws and regulations, account must be taken of the fact that, in accordance with the principle of good lawmaking, the legislator is obliged to assess the compliance of the provisions provided for in the draft law with legal provisions of higher legal force, including the legal norms of the European Union, and to harmonise the legal provisions provided for in the draft law with the provisions already in place in the legal system in accordance with the principle of rational legislator. The scope of the principle of good

lawmaking includes respect for European Union law that strengthens democracy, thus contributing to the adoption of a sustainable legal framework (*see Judgment of the Constitutional Court of 6 March 2019 in Case No 2018-11-01, paragraphs 18.4 and 18.4.1*).

In the present case, the contested Section 28(2) and Section 30(4) of the Law on Higher Education Institutions were adopted before Latvia's accession to the European Union. However, the contested Section 27(5) of the Law on Higher Education Institutions was adopted after Latvia's accession to the European Union on 2 March 2006. The annotation to the draft Cabinet Regulation in question indicates that it has no connection with European Union legislation. Also, the Constitutional Court has not obtained any confirmation from the tables of motions submitted to the draft law and the transcripts of the sittings of the *Saeima* that the legislator, in the process of adopting Section 27(5) of the Law on Higher Education Institutions, had assessed its compliance with the principles contained in the Framework Agreement (*see the annotation of the draft Cabinet Regulation No 635 Amendments to the Law on Higher Education Institutions submitted to the Saeima on 26 August 2005, tables of motions for the 2nd and 3rd reading of draft Law No 1324, transcripts of the sittings of the Saeima of 8 September 2005, 9 February 2006 and 2 March 2006*). Latvia has implemented the requirements of the Framework Agreement in the Labour Law by specifying in Section 44 thereof the cases in which fixed-term employment contracts may be concluded, as well as by setting limits to the total duration of such contracts (*see Section 45 of the Labour Law*). However, there is no material in the case-file to indicate that the legislator, by establishing a different regulation from the Labour Law by the contested provisions, has assessed their compliance with European Union law.

The Constitutional Court has acknowledged that not every violation of parliamentary procedure is a sufficient ground to consider that the adopted act does not have legal force. In order for an act to be declared invalid due to a violation of parliamentary procedure, there must be reasonable doubt that, had the procedure been followed, the *Saeima* would have adopted the same decision (*see Judgment of the Constitutional Court of 13 June 1998 in Case No 03-04(98), Concluding Part, paragraph 3*). In other words, only due to material procedural violation may a legal norm be considered unlawful.

In its Judgment of 6 March 2019 in Case No. 2018-11-01, the Constitutional Court recognised a violation of the principle of good lawmaking, since a number of procedural violations were established in the procedure of adoption of the

contested provision which, especially when taken in conjunction, were material. One of the violations was that the legislator had not assessed the compliance of the contested provisions with the norms of European Union law (*see Judgment of the Constitutional Court of 6 March 2019 in Case No 2018-11-01, paragraph 18.5*). In the present case, the Constitutional Court has not established any other violations in the procedure of adoption of the contested provisions. The Constitutional Court also takes into account the fact that two of the contested provisions were adopted before Latvia's accession to the European Union. Therefore, the mere fact that the legislator has not assessed the compliance of the contested norms with the principles contained in the Framework Agreement does not form a basis to declare them non-compliant with the principle of good lawmaking; and the Constitutional Court must establish whether the restriction of fundamental rights contained in the contested provisions has a legitimate aim and whether the principle of proportionality has been respected.

Consequently, the restriction of fundamental rights resulting from the contested provisions is established by law.

14. Any restriction of fundamental rights must be based on circumstances and arguments on why it is necessary, namely, the restriction is imposed for the sake of important interests – a legitimate aim (*see, for example, Judgment of the Constitutional Court of 22 December 2005 in Case No 2005-19-01, paragraph 9).* Article 116 of the Constitution stipulates that the rights set out in Article 106 of the Constitution may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, and public safety, welfare and morals."

Where restrictions of rights are established, the obligation to present and substantiate the legitimate aim of such restrictions in the Constitutional Court procedure lies, first and foremost, with the institution which issued the contested provision, in this present case – the *Saeima* (*see, for example, Judgment of the Constitutional Court of 1 November 2012 in Case No 2012-06-01, paragraph 12 and Judgment of the Constitutional Court of 11 December 2014 in Case No 2014-05-01, paragraph 18).*

The *Saeima* holds that contested provisions were adopted to ensure the renewal of academic staff, as well as to promote scientific research or artistic creation work pursuant to the modern standards. Associate professors not only contribute to implementation of the right of individuals to quality higher education,

but also to training new academics, helping students to integrate into global academic processes and contributing to the development of their field, which underpins the welfare of society as a whole. In other words, the legitimate aim of the restriction of fundamental rights is the protection of the rights of other people and the welfare of society.

14.1. The term for which a person is elected to a position of associate professor or professor and to which an employment contract is entered into with that person, as provided for in the contested provisions, is aimed at ensuring periodic renewal of academic staff, thereby promoting the development of scientific research and artistic creation. The aim of the open competition for the position of professor is to select the most suitable candidate, while also providing young academics the opportunity to apply for the position of associate professor or professor. Regulation No. 391 lays down the criteria for the scientific and teaching qualifications required for candidates for the positions of associate professor and professor. For example, scientific publications in journals included in the list of generally recognised peer-reviewed scientific journals approved by the Latvian Council of Science, as well as participation in international scientific conferences in Latvia and abroad are taken into account when assessing scientific qualifications. Moreover, professorship, in carrying out teaching, trains young academics and provides them with the opportunity to join the world academic processes (*see Section 5(5) of the Law on Higher Education Institutions*).

Higher education and science not only play an essential role in the development and formation of the individual and in personal welfare, but are also an integral prerequisite for the successful development of the State and society as a whole. Education has a vital role in the social development of the State and society, and education is recognized as one of the best financial investments a State can make [*see: Committee on economic, social and cultural rights, General Comment No. 13. Right to Education (Article 13 of the Covenant), para. 1*]. Higher education and science act as essential components of cultural, socio-economic and environmentally sustainable development of individuals, communities and society as a whole (*see: World Conference on Higher Education. Higher Education in the Twenty-first Century Vision and Action, UNESCO, Paris, 5 – 9 October, 1998*). Academic freedom is essential for the sustainable development of society. Right to education, teaching and research can only be fully enjoyed in an atmosphere of academic freedom (*see the preamble to the UNESCO Recommendation*).

The Sustainable Development Strategy of Latvia until 2030 emphasises that the quality, accessibility and content of education at all levels of education and age groups is a development possibility of Latvia and the precondition for increase in the value of human capital (*see: Sustainable Development Strategy of Latvia until 2030, 6 October 2010, paragraph 131*). Science, technology and innovation is focused on promotion of general well-being, quality of life and economic sustainability. (*see: Guidelines for Science, Technology Development, and Innovation 2014-2020, 28 December 2013, paragraph 6*). The level of welfare in a country is thus closely linked to its investment in education and science. The Constitutional Court has already recognised that an adequate level of education and science is an indispensable prerequisite for the successful development of every State (*see Judgment of the Constitutional Court of 20 May 2003 in Case No 2002-21-01, Concluding Part, paragraph 3.2*).

Thus, taking into account the aforementioned, it is recognised that the restriction of fundamental rights included in the contested provisions has a legitimate aim – protection of the public welfare.

14.2. Section 2 of the Education Law provides that the purpose of this Law is to ensure that every resident of Latvia has the opportunity to develop his or her mental and physical potential in order to become an independent and a fully developed individual, a member of the democratic State and society of Latvia.

Higher education is part of the education system. It is the level of education at which, after acquisition of secondary education, the personal development rooted in science or art, or both in science and art takes place in the selected academic or professional, or academic and professional field of studies, preparation for scientific and professional activity (*see Section 1(2) of the Education Law*). Associate professors and professors are also teachers. The profession of teacher is to be considered of public importance in that it is also related to the need to ensure the right to education for every person enshrined in Article 112 of the Constitution. Qualified academic staff, first and foremost the professorship, is essential for the implementation of higher education. The Constitutional Court has already recognised that the right to education for everyone enshrined in Article 112 of the Constitution essentially means the right to education that ensures the achievement of the objectives of the Education Law (*cf. see Judgment of the Constitutional Court of 24 November 2017 in Case No 2017-07-01, paragraphs 13.1 and 16.2*).

Periodic renewal of academic staff could also contribute to development-oriented education of students. With the entry of new academics into professorship, higher education institutions are introducing new scientific knowledge and assessments which the students need.

Thus, the restriction of fundamental rights contained in the contested provisions is also aimed at protecting the rights of students by ensuring that persons who possess appropriate scientific and teaching qualifications and abilities participate in the process of education. Consequently, the legitimate aim of the restriction of fundamental rights contained in the contested provisions must also be recognised as the protection of the rights of other persons.

Therefore, the legitimate aims of the restriction of fundamental rights contained in the contested provisions are the protection of the welfare of society and the protection of the rights of other persons.

15. When assessing the proportionality of the restriction of fundamental rights, the Constitutional Court shall verify:

1) whether the selected means are suitable for the achievement of the legitimate aim, namely, whether the selected means can achieve the legitimate aim;

2) whether such action is necessary, namely, whether the legitimate aim cannot be achieved by means which are less restrictive of the rights of the individual;

3) whether the restriction is appropriate, namely, whether the benefit to society outweighs the harm caused to the rights of the individual.

If, on assessment of a legal provision, it is recognised that it fails to comply with at least one of those criteria, then it also fails to comply with the principle of proportionality and is unlawful (*see, for example, Judgment of the Constitutional Court of 16 May 2007 in Case No 2006-42-01, paragraph 11, and Judgment of 21 December 2015 in Case No 2015-03-01, paragraph 25*).

16. The means selected by the legislator are appropriate for achieving a legitimate aim, if the aim is achieved by the specific framework (*see, for example, Judgment of the Constitutional Court of 7 October 2010 in Case No 2010-01-01, paragraph 13*).

The restriction of fundamental rights contained in the contested provisions ensures that a person may hold the position of associate professor or professor only for a certain period of time. In order to reapply for the position of associate

professor or professor, a person must repeatedly participate in an open competition for the vacant position. In assessing the suitability of an applicant for the position of associate professor or professor, the scientific and teaching qualifications acquired in the last six years are taken into account, including organisational competence, which reflects experience and capacity in personnel management. The Law on Higher Education Institutions and Regulation No 391 contain precise and specific criteria for re-election as associate professor or professor.

The Applicant holds that the legitimate aim of the restriction of the fundamental right is not achieved, since the qualifications and abilities of an associate professor and professor are assessed only once every six years, before the expiry of the election and employment contract of the person. Thus, the contested provisions do not ensure a regular and efficient examination of the qualifications and abilities of associate professors and professors. Moreover, the current procedure for the election of associate professors and professors allows that, even if the qualifications of a candidate are recognised as adequate, he or she may not be re-elected, as the election is secret.

16.1. The procedure for the election of a professor and an associate professor is governed by Section 33 of the Law on Higher Education Institutions. In accordance with Section 33(1), an open competition is announced for vacant professor and associate professor positions. Candidates for the position of a professor or an associate professor are elected by the council of professors in the relevant field. It is composed of at least five higher education institution professors in the relevant field or sub-field. At least one third of the members of the council of professors must be employed by another higher education institution (*see Section 33(2) and Section 35(1) of the Law on Higher Education Institutions*).

When assessing whether the performance of a candidate for the position of associate professor or professor meets the criteria laid down in Regulation No 391, each member of the council of professors in the field, in accordance with Paragraph 8 of this Regulation, give one of the following ratings: 'excellent', 'very good', 'good', 'satisfactory' or 'unsatisfactory'. On the basis of these individual assessments, the council of professors in the field adopts an overall evaluation of the scientific and professional qualifications of the professor or associate professor. After reading the documents and discussions with all candidates for the position in question, the council makes a decision by vote (*see Section 33(2) of the Law on Higher Education Institutions*).

Neither the contested provisions, nor other provisions of the Law on Higher Education Institutions and Regulation No 391 expressly provide that the vote on the election of a person to the position of associate professor or professor must be held in secret. The fact that the election of a professorship is carried out by secret ballot of the Council of Professors of the field is laid down in the recommendation of the Council of Higher Education on the Procedure for the Election of Professors and Associate Professors and on the Criteria for Assessing the Qualifications of Candidates. In the light of this recommendation, the regulations on academic positions approved by the senates of higher education institutions provide that the election of associate professors and professors is held by secret ballot (*see, for example, paragraph 53 of the Regulations on Academic and Administrative Positions at the University of Latvia and paragraph 4.1 of the Regulations on the Procedure for Election of Professors and Associate Professors of Riga Technical University*).

The Constitutional Court considers that an open vote of the council of professors on the eligibility of a candidate for the position of associate professor or professor would promote transparency and openness in the decision-making process, as well as strengthen confidence in the selection of the most appropriate candidate. The contested provisions allow for such a voting procedure. The World Bank's report on academic careers in Latvia also states that, although the election procedure is generally recognised as a fair and acceptable way of selecting academic staff, it would be advisable in the future to consider solutions that would remove possible uncertainty in the selection process. Clearly defined and transparent criteria for the evaluation of research and other academic achievements are also essential. The criteria for selection to the advertised position should reflect the institutional profile and the tasks associated with the position. In addition, these criteria should provide predictable and realistic goals for young scholars, that is, these scholars should be well aware of what they are expected to achieve if they decide to continue with an academic career *(see the World Bank report 'Academic Careers in Latvia: Recommendations', 6 April 2018*).

16.2. The contested provisions create a situation where the scientific and pedagogical qualifications as well as organisational competence of a person are evaluated every six years, i.e. when a person wishes to re-apply for the position of associate professor or professor.

The *Saeima*, as well as the invited persons, the Ombudsman and the Ministry of Education and Science, point out that the chosen period of six years is

appropriate and justified, since, in accordance with Regulation No 391, criteria which require a longer period of time to be fulfilled are also assessed (*see Volume 2, pages 23-24, 47 and 78 of the case-file*).

In assessing the scientific and pedagogical qualifications candidate for the position of associate professor or professor in accordance with Regulation No 391, criteria such as scientific publications, participation in international scientific conferences, supervision of doctoral and master's theses, development of study programmes are taken into account. Scientific and research work is an ongoing and continuous process, the progress of which depends, *inter alia*, on the availability of infrastructure and resources, as well as on the qualifications of the professorship. Moreover, scientific progress is only possible within the framework of academic freedom, characterised by constant dialogue with colleagues in the field in Latvia and abroad. The Constitutional Court agrees that the means chosen by the legislator – assessment of the scientific and pedagogical qualifications, as well as organisational competence of a person every six years – could be appropriate, as it allows to verify the eligibility of a person for the position of professor or associate professor. More frequent assessment of the qualifications of associate professors and professors could undermine academic freedom.

Therefore, the measure selected by the legislator is suitable for achieving legitimate aim.

17. A restriction of a fundamental right is necessary where there are no other means which would be equally effective and the choice of which would be less restrictive of the fundamental rights of individuals.

However, a more lenient measure is not any other means, but only such a means by which the legitimate aim can be achieved at least in the same quality (*see, for example, Judgment of the Constitution Court of 7 October 2010 in Case No 2010-01-01, paragraph 14*).

17.1. The Applicant holds that the legitimate aim of the restriction of fundamental rights included in the contested provisions may be achieved by less restrictive means. According to the Applicant, a system could be established in such a way that academic staff would not be required to undergo a re-election procedure, but compliance with the position would be ensured by means of regular examinations. Consequently, once elected, a person would have the right to remain in office indefinitely, as long as his qualifications and abilities are adequate. The

criteria for verifying the qualifications and abilities of a person are already laid down in Regulation No 391.

In contrast, the *Saeima* submits that the legitimate aim of the restriction of fundamental rights cannot be achieved to the same extent by the means indicated by the Applicant. The possibility of selecting the most suitable candidate is provided by an open competition. In the absence of an open competition, the possibilities for middle academic staff to apply for a higher academic position would be reduced.

In its judgment of 20 May 2003 in Case No 2002-21-01, the Constitutional Court has held that the main criterion for persons to qualify for academic positions should not be their age, but their abilities and qualifications. By this judgment, the first sentence of Section 27(4) and the words "or for the period until the person reaches the age of 65" of Section 28(2) of the Higher Education Law and the first sentence of Section 29(5) of the Law on Scientific Activity, which restricted the right of a person to perform academic work after reaching the age of 65, were declared to be incompatible with Article 106 of the Constitution (*see Judgment of the Constitutional Court of 20 May 2003 in Case No 2002-21-01, Concluding Part, paragraph 3.3 and the Substantive Part*). Thus, in Latvia, the compulsory retirement age for academic staff is no longer established.

A report by researchers from the Eurydice network, established in 1980 by the European Commission and the Member States of the European Union to, *inter alia*, produce analytical reports on the education systems of European countries, indicates that in 2015 the proportion of academic staff over the age of 65 in Latvia was four times higher than the European Union average. Although the number of young persons with doctoral degree has increased significantly since 2003, the proportion of academic staff aged 35-49 in Latvia is among the lowest in the EU. This may reflect the difficulties associated with the generational change of academic staff (*see European Commission/EACEA/Eurydice, 2017. Modernisation of Higher Education in Europe: Academic Staff, 2017. Eurydice report. Luxembourg: Publications Office of the European Union, pp. 17 and the State Statistical Office factsheet 'Doctors of Science, 2015'*). The Council for Higher Education points out that the problem of 'ageing' of academic staff is most directly related to the problem of integrating young researchers into higher education institutions (*see: Council of Higher Education Review of the results of evaluation of higher education study programmes and proposals for further study programme, grouped in study directions, upgrading, improvement, development,*

consolidation, closure, efficient use of resources and financing from the national budget funds, Annex 2. Integration of young academics in higher education institutions. Council of Higher Education, Riga, 2013). Ministry of Education and Science, an invited person, in its description of the Latvian higher education system, also acknowledges that there is an 'ageing' of academic staff (*see Volume 2, page 70 of the case-file*). Thus, since the Judgment of the Constitutional Court of 20 May 2003 in Case No 2002-21-01, circumstances have changed which could be grounds for the legislator to review the regulation concerning the retirement age for academic staff.

Under the current framework, if, after a person is elected to a position, his or her eligibility for that position would be ensured only by means of regular examinations, the possibilities for middle-ranking academic staff to apply for vacant professorships would be further reduced. Periodic open competition for the position of associate professor and professor ensures the necessary competition, while also allowing middle-ranking academic staff to apply for higher academic positions. The Constitutional Court has already held that it is necessary to ensure that the younger generation of academics has the opportunity to apply for academic positions in order higher education and science to develop (*see Judgment of the Constitutional Court of 20 May 2003 in Case No 2002-21-01, Concluding Part, paragraph 3.3*). Moreover, the regular examinations referred to in the application, which, according to the Applicant, could be carried out at any time, would be contrary to academic freedom. Consequently, the indicated means cannot be recognised as one which would achieve the legitimate aim of the restriction contained in the contested provisions at least to the same quality.

17.2. Another more lenient measure, according to the Applicant, could be a system whereby the suitability of a person for a position is verified only in the event of complaints about his or her professional activity. The mere fact that a person has already been elected and is serving in an academic position is evidence that the person is suitable for the position and does not, in substance, require further evidence. If a person does not possess the abilities and qualifications necessary for the performance of the duties of the position in question, such a person could be dismissed in the cases provided for in the Labour Law.

The *Saeima*, on the other hand, holds that this measure does not achieve the legitimate aim of the restriction of fundamental rights. The absence of complaints about the activities of academic staff does not in itself provide evidence of the professional qualifications or the quality of the activities of the persons concerned,

nor does it ensure the necessary periodic monitoring of their scientific activities. The grounds for termination of the contract of employment contained in Section 101(1) of the Labour Law also fail to ensure that the position of associate professor is held by the most outstanding specialists and academics in their field.

Section 101(1) of the Labour Law grants an employer has the right to give a written notice of termination of an employment contract only on the basis of circumstances related to the conduct of the employee, his or her abilities, or of economic, organisational, technological measures or measures of a similar nature in the undertaking in the cases referred to in Paragraphs 1 to 11 of this Section of that Law, including where the employee lacks adequate occupational competence for performance of the contracted work. An employer has the obligation to notify the employee in writing of the circumstances that are the basis for the notice of termination (*see Section 102 of the Labour Law*).

Termination of employment in any of the cases referred to in Section 101(1) of the Labour Law is not equivalent to a periodic examination of the qualifications of a person in accordance with the criteria set out in Regulation No 391, which allows to verify both the scientific and teaching qualifications of a person. Therefore, the grounds for termination of the contract of employment contained in Section 101(1) of the Labour Law cannot in themselves always ensure that the duties of associate professor or professor are performed by a person who has the appropriate scientific and teaching qualifications. Complaints about the work of professorship do not always evidence that the persons concerned lack the abilities and qualifications required for the position in question. It must be concluded then, that the legitimate aim of the restriction laid down in the contested provisions would not be achieved if employment contracts with associate professors and professors were concluded for an indefinite period of time and the only way of ensuring that the relevant positions were occupied by persons with appropriate qualifications would be an examination following a complaint or termination of the employment contract.

Therefore there are no other, more lenient means by which the legitimate aim of the restriction of the fundamental right could be achieved at least to the same quality.

18. When assessing whether the restriction of fundamental rights included in the contested provisions complies with the legitimate aim, it must be ascertained whether the adverse consequences that the person incurs as a result of the

restriction of his/her fundamental rights are outweighed by the benefit that society as a whole derives from this restriction (*see Judgment of the Constitutional Court of 7 October 2010 in Case No 2010-01-01, paragraph 15 and Judgment of 16 June 2016 in Case No 2015-18-01, paragraph 18*).

In the given case, the task of the legislator is to proportionately balance the need to ensure the right of a person to maintain his or her current employment in the professorship, which is characterised by academic freedom, with the rights and interests consistent with the legitimate aims of the restriction of fundamental rights laid down in the contested provisions, including the need to ensure the uninterrupted development of higher education and science, which is a precondition for the sustainable development of society, as well as the right of students to higher education.

The contested provisions provide for a different regulation from the Labour Law and allow for the conclusion of successive fixed-term employment contracts with associate professors and professors. Therefore, in order to ascertain whether the legislator has properly balanced these different interests, the Constitutional Court must first ascertain whether, pursuant to Clause 5(1) of the Framework Agreement, protection against the possibility of abuse of successive fixed-term employment contracts is ensured.

19. Whether the restriction of the fundamental right resulting from the contested provisions is proportionate depends, *inter alia*, on the interpretation of Clause 5(1) of the Framework Agreement. It is therefore necessary, first of all, to ascertain what is the content contained in that provision of European Union law.

Article 267 of the Treaty on the Functioning of the European Union provides that the Court of Justice of the European Union has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties on which the European Union is founded and on the validity and interpretation of acts of the European Union. Where such a question is raised before any court of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice of the European Union to give a ruling thereon. Where any such question is raised in a case pending before a court of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal must bring the matter before the Court of Justice of the European Union. The decisions of the Constitutional Court are not subject to appeal, therefore, in cases where the outcome of the case depends on the

interpretation of European Union law, the Constitutional Court must ascertain whether the provisions of the relevant legislation are sufficiently clear and, if the relevant provisions are not sufficiently clear, whether the matter has been previously clarified by the Court of Justice of the European Union (*see, for example, Judgment of the Constitutional Court of 13 October 2015 in Case No 2014-36-01, paragraph 14*).

The purpose of Clause 5(1) of the Framework Agreement is to implement one of the objectives of the Framework Agreement, namely to place limits on successive recourse to fixed-term employment contracts or relationships in a manner which is likely to constitute a potential source of abuse to the disadvantage of workers, by laying down as a minimum a number of protective provisions designed to prevent the status of employees from being insecure (*see Judgment of the Court of Justice of the European Union of 4 July 2006 in Case C-212/04 Konstantinos Adeneler and Others, ECLI:EU:C:2006:443, paragraph 63, and Judgment of 7 March 2018 in Case C-494/16 Giuseppa Santoro, ECLI:EU:C:2018:166, paragraph 25*). Stable employment is viewed as a major element in the protection of workers. It is only in certain circumstances that fixed-term employment contracts can respond to the needs of both employers and workers (*see Judgment of the Court of Justice of the European Union of 14 September 2016 in Case C-16/15 María Elena Pérez López ECLI:EU:C:2016:679, paragraph 27*).

Therefore, where equivalent legal measures have not yet been introduced in the legal system Member States are obliged to introduce one or more of the measures provided for in Clause 5(1) of the Framework Agreement to prevent the abusive use of successive fixed-term employment contracts, namely, the obligation to lay down in legislation objective reasons justifying the renewal of such contracts, the maximum total duration of such contracts and the permissible number of renewals of such contracts. The Court of Justice of the European Union has held that Clause 5(1) of the Framework Agreement assigns to the Member States the general objective of preventing the abuse of successive fixed-term employment contracts, while leaving to them the choice as to how to achieve it (*see Judgment of the Court of Justice of the European Union of 7 March 2018 in Case C-494/16 Giuseppa Santoro, ECLI:EU:C:2018:166, paragraph 28*).

The Court of Justice of the European Union has also held that, in the context of the implementation of the Framework Agreement, Member States have the possibility to take account of the particular needs of the specific sectors and/or

categories of workers involved, provided that this is justified on objective grounds. Conclusion of fixed-term contracts based on objective reasons is a way to prevent abuse. In interpreting the concept of 'objective reasons' in Clause 5(1)(a) of the Framework Agreement, the Court of Justice of the European Union has held that these are the precise and concrete circumstances characterising a given activity, which are therefore capable, in that particular context, of justifying the use of successive fixed-term employment contracts. Those circumstances may relate, in particular, to the specific nature and characteristics of the tasks for the performance of which fixed-term contracts are concluded or, as the case may be, from pursuit of a legitimate social-policy objective of a Member State. However, national provisions or regulatory provisions which merely authorise recourse to successive fixed-term employment contracts in a general and abstract manner do not satisfy the requirements of the Framework Agreement. That is to say, such a provision, which is of a purely formal nature, does not permit objective and transparent criteria to be identified in order to verify whether the renewal of such contracts actually responds to a genuine need, is capable of achieving the objective pursued (*see Judgment of the Court of Justice of the European Union of 26 November 2014 in Joined Cases C-22/13, from C-61/13 to C-63/13 and C-418/13 Raffaella Mascolo and Others, ECLI:EU:C:2014:2401, paragraphs 70, 86 and 88*).

The Court of Justice of the European Union has already interpreted Clause 5(1) of the Framework Agreement in the context of national legislation of a Member State providing for the successive fixed-term contracts of employment of associate professors. The Court of Justice of the European Union held that Clause 5 of the Framework Agreement must be interpreted as not precluding national rules, which allow universities to renew successive fixed-term employment contracts concluded with associate lecturers, with no limitation as to the maximum duration and the number of renewals of those contracts, where such contracts are justified by an objective reason within the meaning of Clause 5(1)(a). However, the national court must ascertain that the renewal of the successive fixed-term employment contracts is actually intended to cover temporary needs and that rules such as those at issue in the main proceedings were not, in fact, used to meet fixed and permanent needs in terms of employment of teaching staff. The renewal of fixed-term employment contracts or relationships in order to cover needs which are, in fact, not temporary in nature but, on the contrary, fixed and permanent, is not justified under Clause 5(1)(a) of the Framework Agreement (*see Judgment of the Court of Justice of the European Union of 13 March 2014 in Case No C-190/13 Antonio*

Márquez Samohano ECLI:EU:C:2014:146, paragraphs 55 and 60). Although the facts of the present case are different, that judgment of the Court of Justice of the European Union reveals the principles to be observed by a Member State when regulating fixed-term employment contracts.

Therefore, the Constitutional Court concludes that the content of Clause 5(1) of the Framework Agreement has been clarified and that it is not obliged to refer the matter to the Court of Justice of the European Union for a preliminary ruling.

20. Since the content of Clause 5(1) of the Framework Agreement has been clarified, as already indicated in paragraph 18 of this Judgment, the Constitutional Court must ascertain whether the legislator has adequately balanced the interests of society and the professorship by providing protection to associate professors and professors against abuse arising from the use of successive fixed-term employment contracts.

With regard to employment contracts concluded with associate professors and professors, the legislator has not introduced into the legal system the measures laid down in Clause 5(1)(b) and (c) of the Framework Agreement. In particular, the legal provisions do not lay down the number of renewals of such contracts of employment which are permissible. Similarly, according to the contested Section 27(5) of the Law on Higher Education Institutions, associate professors and professors are not subject to Section 45(1) of the Labour Law, which provides that: "The term of an employment contract entered into for a specified period may not exceed five years (including extensions of the term) if another term has not been specified in another law for the employment contract. The entering into a new employment contract with the same employer shall also be regarded as extension of the term of the employment contract if during the period from the date of entering into the former employment contract until the entering into of a new employment contract the legal relationships have not been interrupted for more than 60 consecutive days." This also means that there is no maximum total duration of successive fixed-term contracts for associate professors and professors.

The Constitutional Court must therefore examine whether there are objective reasons justifying the conclusion of successive fixed-term employment contracts with associate professors and professors. The case-law of the Court of Justice of the European Union recognises that the use of fixed-term employment contracts founded on objective reasons is a way to prevent abuse (*see Judgment of the Court*

of Justice of the European Union of 26 November 2014 in Joined Cases C-22/13, from C-61/13 to C-63/13 and C-418/13 "Raffaella Mascolo and Others", ECLI:EU:C:2014:2401, paragraph 86). The existence of objective reasons in itself means that protection against the abuse arising from successive fixed-term employment contracts is ensured. If such successive employment contracts are not justified by objective reasons, the State is obliged to introduce one of the measures provided for in the Framework Agreement or an equivalent measure which would ensure the necessary protection.

In order to ascertain whether objective reasons exist, the Constitutional Court must ascertain whether:

1) there is a genuine need for the conclusion of successive fixed-term employment contracts and that measure is an appropriate and necessary means of achieving that objective.

2) the employment contracts with the professorship are concluded in order to satisfy a temporary need.

20.1. The Court of Justice of the European Union has held, in a case concerning successive fixed-term contracts of employment, that such contracts may be justified by the need to entrust specialists with recognised competence who exercise a professional activity otherwise than in a university with the performance of specific teaching tasks, so that those specialists can bring their knowledge and professional experience to the university. Such temporary contracts appear to be capable of achieving the objective pursued (*see Judgment of the Court of Justice of the European Union of 13 March 2014 in Case No C-190/13 Antonio Márquez Samohano ECLI:EU:C:2014:146, paragraphs 48 and 50*).

If the Constitutional Court has already held that the restriction of fundamental rights contained in the contested provisions has a legitimate aim, the restriction is appropriate and necessary to achieve that legitimate aim, it could indicate that there is indeed a real and genuine need to conclude successive fixed-term employment contracts with the professorship and that the measure is appropriate and necessary to achieve that aim.

20.2. However, in order to ascertain that there are objective reasons justifying the conclusion of successive fixed-term employment contracts, the Constitutional Court must also examine the purpose for which such contracts are concluded.

The Court of Justice of the European Union has held previously that the renewal of fixed-term employment contracts or relationships in order to cover needs which are, in fact, not temporary in nature but, on the contrary, fixed and

permanent, is not justified under Clause 5(1)(a) of the Framework Agreement. This would conflict directly with the premiss on which the Framework Agreement is founded, namely that contracts of indefinite duration are the general form of employment relationship, even though fixed-term employment contracts are a feature of employment in certain sectors or in respect of certain occupations and activities (*see Judgment of the Court of Justice of the European Union of 26 January 2012 in Case C-586/10 Bianca Kücük, ECLI:EU:C:2012:39, paragraphs 34 and 39*). Consequently, only the temporary needs of the employer can constitute an objective reason justifying the conclusion of successive fixed-term employment contracts.

The professorship has the task of carrying out academic and professional study programmes and of engaging in science, research and artistic creation. The Constitutional Court has already held that scientific and research work is an ongoing, continuous process and an integral part of the work of any higher education institution. The Constitutional Court has not found confirmation that all employment contracts with associate professors and professors are concluded in order to cope with temporary needs. Every higher education institution has a fixed and permanent need for professorship. This means that successive fixed-term employment contracts with associate professors and professors are in fact concluded in order to meet the fixed and permanent needs for the employment of professorship.

If successive fixed-term employment contracts are concluded in order to meet a fixed and permanent need in connection with the employment of an employee, the Member State is obliged to introduce one of the measures contained in Clause 5(1)(b) or (c) of the Framework Agreement or another equivalent or more favourable measure to protect employees against the abuse arising from the use of a succession of fixed-term employment contracts. Since successive fixed-term employment contracts with the professorship are concluded to meet a fixed and permanent need, the legislator is obliged to provide the necessary protection to the employees. The Court of Justice of the European Union has held that, although the Framework Agreement does not lay down a general obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration, the State must nevertheless introduce measures to protect workers against the insecurity linked to successive fixed-term contracts (*see Judgment of the Court of Justice of the European Union of 4 July 2006 in Case C-212/04 Konstantinos Adeneler and Others,*

ECLI:EU:C:2006:443, paragraph 63, and Judgment of 26 November 2014 in Joined Cases C-22/13, from C-61/13 to C-63/13 and C-418/13 Raffaella Mascolo and Others, ECLI:EU:C:2014:2401, paragraph 80).

20.3. According to the contested provisions, a person may hold the position of associate professor or professor only for a fixed period, that is to say, for six years. Such a restriction of a fundamental right could be regarded as proportionate to the legitimate aim if the legislation provided for a mechanism to ensure that the employee is protected against abuse arising from a succession of fixed-term employment contracts, for example by setting a maximum total duration or number of renewals of successive fixed-term employment contracts and providing that, after a certain period, a fixed-term employment contract may be converted into an employment contract of indefinite duration. Multiple successive fixed-term employment contracts entail employment insecurity, i.e. they may lead to insecurity as to the future employment of the person concerned. The Law on Higher Education Institutions does not provide for any measures to address this insecurity, although it could, for example, provide for the possibility that, if certain conditions are met, a fixed-term employment contract will be converted into an employment contract of indefinite duration. In the light of the foregoing, the legislator cannot be said to have adequately balanced the interests of society as a whole and those of an associate professor or professor.

Thus, the restriction does not comply with the principle of proportionality and, consequently, the contested provisions, in so far as they do not provide protection against the abuse arising from use of successive fixed-term employment contracts, do not comply with the first sentence of Article 106 of the Constitution.

21. In accordance with Section 32(3) of the Constitutional Court Law, a legal norm that the Constitutional Court has declared as not conforming to the norm of a higher legal force shall be regarded as not in effect from the day of publication of the Constitutional Court judgment, unless the Constitutional Court has determined otherwise. The aforementioned provision of the Constitutional Court Law grants the Constitutional Court a wide margin of discretion to decide from which moment a provision declared as not conforming to the norm of a higher legal force ceases to have effect.

Therefore, the Constitutional Court must consider from which moment do the contested provisions, in so fas as they do not ensure protection against abuse

arising from the use of successive fixed-term employment contracts, must be declared as not in effect.

21.1. The Constitutional Court takes into account that the restriction of fundamental rights contained in the contested provisions promotes the uninterrupted development of higher education and science, which is a precondition for the sustainable development of society, as well as ensuring the right of students to higher education, which is in the interest of the whole society. Therefore, the contested provisions, in so fas as they do not ensure protection against abuse arising from the use of successive fixed-term employment contracts, must be recognised as not in effect not from the moment of their adoption or any other moment in the past, but from the date of publication of the Judgment of the Constitutional Court.

The Constitutional Court notes that the legislator, taking into account the specific national circumstances affecting the employment of the professorship, must ensure that the contested provisions are compliant with the first sentence of Article 106 of the Constitution by introducing into the legal system measures which would ensure protection against abuse arising from the use of successive fixed-term employment contracts. The Constitutional Court cannot replace the discretion of the legislator with its opinion on how exactly the necessary protection should be ensured (*cf. see Judgment of the Constitutional Court of 19 December 2011 in Case No 2011-03-01, paragraph 20, and Judgment of 2 May 2012 in Case No 2011-17-03, paragraph 16*). However, the Constitutional Court, exercising the power conferred upon it by Section 32(3) of the Constitutional Court Law, must also ensure, within the limits of its possibilities, that the situation which may arise from the moment when the contested provision is declared not in effect until the moment when the legislator adopts a new legal regulation in its place does not lead to an infringement of the fundamental rights guaranteed to persons by the Constitution, nor does it cause significant harm to the interests of the State or society (*see Judgment of the Constitutional Court of 16 December 2005 in Case No 2005-12-0103, paragraph 25, and Judgment of 31 January 2013 in Case No 2012-09-01, paragraph 16.1*). In the present case, it is necessary to protect the fundamental rights of the persons who will be subject to successive fixed-term employment contracts for performing the duties of an associate professor or professor until the legislator adopts a legal regulation that is compliant with the Constitution and which will ensure protection against the risk of abuse arising from the use of such contracts. The Constitutional Court draws

attention to the fact that, until the adoption of a new legal regulation, the right of the persons concerned to maintain their current employment must be assessed by directly applying the first sentence of Article 106 of the Constitution and the conclusions contained herein.

21.2. The present case was initiated on the basis of a constitutional complaint. The task of the Constitutional Court is to prevent, as far as possible, the infringement of the fundamental rights of a person (*see, for example, Judgment of the Constitutional Court of 16 December 2005 in Case No 2005-12-0103, paragraph 25*).

By applying the contested Section 27(5) and Section 30(4) of the Law on Higher Education Institutions, the Applicant was re-elected to the position of associate professor for six years and on 24 January 2018, an employment contract was entered into with him for six years (*see Volume 1, pages 29-39 of the case-file*). If the Constitutional Court decides that the contested provisions should be recognised as not in effect in respect of the Applicant from the moment of the infringement of his fundamental rights, then the employment contract concluded with him for a fixed term would be transformed into an employment contract for an indefinite term. However, it is for the legislator to decide on the conditions under which such conversion may be carried out. It is for the legislator to determine how the rights of the employee are best protected, and therefore the contested norms cannot be declared not in effect from the moment when the infringement of the fundamental rights of the Applicant occurred.

The Substantive Part

On the basis of Sections 30-32 of the Constitutional Court Law, the Constitutional Court

decided:

declare Section 27(5) of the Law on Higher Education Institutions, with regard to associate professors and professors, Section 28(2) and Section 30(4), in so far as they do not provide protection against the abuse arising from the use of successive fixed-term employment contracts, as non-compliant with the first sentence of Article 106 of the Constitution of the Republic of Latvia.

The Judgment is final and not subject to appeal.

The Judgment shall enter into force as of the date of its publication.

Chairperson of the Court session I. Ziemele