



Hesi Siimets-Gross

Magister iuris,  
*Lecturer of Legal History,*  
*University of Tartu*

# Social and Economic Fundamental Rights in Estonian Constitutions Between World Wars I and II: A Vanguard or Rearguard of Europe?

The Constitution of 1937<sup>\*1</sup>, which followed the first Estonian Constitution (of 1920), is the basis for the present Constitution of Estonia. A series of fundamental rights was present in all of the country's constitutions. In human rights theory, fundamental rights are divided into three categories: fundamental rights of the first, second, and third generation. First-generation rights are those that contemporary Estonian lawyer E. Laaman defined as personal (or civil) rights, by which the state is not allowed to restrict the citizen in certain fields, such as the right to liberty and equality or freedom of property. The second-generation rights are social (and economic) rights, by which the citizen has the right to demand from the state a certain action. Examples are the right to work and to education.<sup>\*2</sup> This definition is recognised also in both contemporary and later European literature.<sup>\*3</sup>

Although the Constitutions of 1920 and 1937 are direct predecessors of the present Constitution, there has been relatively little research done with respect to them and what they contain, especially concerning fundamental rights. As during the interim between the two World Wars there was a relatively strong emphasis on

---

<sup>1</sup> Constitution of Republic of Estonia (Eesti Vabariigi põhiseadus; RT 1992, 26, 349; in Estonian), preamble.

<sup>2</sup> E. Laaman. Kodaniku põhiõigused ja kohused (Fundamental rights and duties of citizen). – Põhiseadus ja Rahvuskogu (Constitution and Constitutional Assembly). Tallinn 1937, p. 342 (in Estonian).

<sup>3</sup> Although social fundamental rights or social human rights were defined in the literature very differently at different times from the 1920s onward, there are some basics common to the definitions provided: there is a demand (often in the sense of a subjective right) for a certain positive performance from the state. See T. Marauhn. Das Grundrecht auf Zugang zu den Leistungen der sozialen Sicherheit: Anmerkungen zur Normkategorie der sozialen Grundrechte. – Erweitertes Grundrechtsverständnis – internationales Rechtssprechung und nationale Entwicklungen. Kehl am Rhein: Engel 2003, p. 253, with further references. For human rights in general, see P. Malanczuk. Akehurst's Modern Introduction to International Law, 7<sup>th</sup> revised edition. London, New York: Routledge 1997, p. 210.

social and economic fundamental rights (SEFR) in Europe<sup>\*4</sup>, also at constitutional level, this article is meant to fill this gap and throw light on social and economic human rights in the Constitutions of 1920 and 1937. The social and economic rights covered in this article are understood in a very broad sense, as all human rights are included that influence the social and economic sphere — the right to private property, the right to strike, and so on. As the principle of equality is a very important basis for the application of SEFR, gender equality will be discussed as well. On the other hand, some of the traditional rights of the second generation, such as the right to education and minority and cultural rights<sup>\*5</sup>, are omitted from the discussion.

As every legal system is influenced by others, the Estonian Constitutions have to be put in context in order for one to find out what has influenced them, and how.

## 1. Constitution of 1920

### 1.1. The drafting of the chapter on fundamental rights, and its models

Two pre-constitution documents in 1918<sup>\*6</sup> had already established some SEFR: the right to an adequate standard of living; the right to acquire land for agriculture and exploitation; the right to gain employment and labour protection; and the right to state support for those who are old, young, unable to work, and so on.

Finally, in the Constitution of 1920, these rights were specified and widened, while not being changed in principle. In the drafting of the Constitution, it was first discussed whether fundamental rights should be included in the constitutional text at all, as doing so was not common for that time, let alone before. For example, most constitutions in German states after 1848 did not make mention of the fundamental rights, for they were considered in legal theory to be self-evidently guaranteed. Still, it was found in the Weimar Constitution that, to tie the Constitution with the one from 1848, an extended series of fundamental rights should be established.<sup>\*7</sup>

In the case of the Estonian Constitution of 1920, there were also doubts as to whether the Constitution should have a human rights series at all, as it had in Latvia in 1922. But in Estonia there was demand on both counts, from the right wing and the left, so the fundamental rights were enshrined in the Constitution as legal guarantees.<sup>\*8</sup>

In the opinion of Laaman, the Estonian Constitution of 1920 was influenced by the French Declaration of the Rights of Man and of the Citizen, by extreme collectivism in Soviet Russia<sup>\*9</sup>, and by the Weimar Constitution.<sup>\*10</sup> The Weimar Constitution and the French declaration were held as the best examples at that time. The French work was an example for all constitutions developed after its adoption, and the Weimar Constitution was held up as a model of a modern and democratic constitution of the 20<sup>th</sup> century, and also as being one of the most advanced constitutions of its time.<sup>\*11</sup> So the best constitutions were chosen as models.

Although the human rights series of the French Declaration of the Rights of Man and of the Citizen<sup>\*12</sup> contained, in essence, the personal rights (such as the equality of the sexes and freedom of private prop-

<sup>4</sup> H. Dreier. *Die Zwischenkriegszeit. – Handbuch der Grundrechte in Deutschland und Europa. Bd. I. Entwicklung und Grundlagen.* D. Merten, H.-J. Papier (Hrsg.). Heidelberg: C.F. Müller 2004, p. 196. In this article, mainly the term ‘fundamental rights’ is used, but ‘human rights’ is not excluded.

<sup>5</sup> More research has been done on minority and cultural rights, so the need to treat them in this article was not so urgent. See: C. Hasselblatt. *Minderheitenpolitik in Estland: Rechtsentwicklung und Rechtswirklichkeit 1918–1996.* Bibliotheca Baltica 1996; C. Thiele. *Selbstbestimmungsrecht und Minderheitenschutz in Estland.* Berlin: Springer 1999; K. Aun. *Der völkerrechtliche Schutz nationaler Minderheiten in Estland 1917–1940.* Hamburg: Heitmann 1951; O. Angelus. *Die Kulturautonomie in Estland.* Flensburg 1951.

<sup>6</sup> The first was ‘Manifest kõigile Eestimaa rahvastele’ (Manifest for all peoples in Estonia) of 24 February 1918 by Maapäeva Vanematenõukogu (RT 1918, 1, 1; in Estonian), and the second ‘Eesti Vabariigi valitsemise ajutine kord’ (Temporary regime of government of Republic of Estonia) of 4 July 1919 (RT 1919, 44, 345; in Estonian).

<sup>7</sup> F. Hartung. *Die Entwicklung der Grundrechte seit 1776. – Die Entwicklung der Menschen- und Bürgerrechte von 1776 bis zur Gegenwart.* F. Hartung, G. Commichau. *Quellensammlung zur Kulturgeschichte. Bd. I. W. Treue (Hrsg.).* Göttingen: Muster-Schmidt Verlag 1985, pp. 28–29.

<sup>8</sup> E. Laaman. *Isik ja riik Eesti põhiseadustes (Person and state in Estonian Constitutions).* – *Õigus* 1937/3, pp. 102–103, 106 (in Estonian).

<sup>9</sup> The extreme collectivism in Soviet Russia influenced the Estonian Constitution in the opposite way, pushing it in the liberal direction.

<sup>10</sup> E. Laaman (Note 8), pp. 102–103, 106.

<sup>11</sup> H. Dreier (Note 4), p. 158.

<sup>12</sup> *Déclaration des droits de l’homme et du citoyen. – Staatsverfassungen. Eine Sammlung wichtiger Verfassungen der Vergangenheit und Gegenwart in Urtext und Übersetzung.* G. Franz (Hrsg.). München: Oldenbourg 1964, pp. 302–307. At the time when the French Declaration of the Rights of Man and of the Citizen was published, there was need for the freedom rights, and, as the social and economic human rights are also called ‘the rights of the second generation’, the need for them arose after the freedom rights were established.

erty<sup>\*13</sup>) and no social rights, as were provided in the Constitution of 1920 in Estonia, there can be seen some general influence. Into the Constitution of 1920 the liberal spirit of the French human rights declaration was incorporated. Above all, that containing the fundamental rights series was the first section to follow the introductory part in both the French document and the Estonian Constitution of 1920. Secondly, very characteristic of the general aim and essence of the Constitution of 1920 was the title of the chapter on human rights: 'About Fundamental Rights'. Although the main influence upon the Constitution of 1920 came, in my opinion, from the Weimar Constitution of 1919, there are some differences. In the Weimar Constitution and in the Estonian Constitution of 1937, the chapter was called 'About Fundamental Rights and Duties'. For the Weimar Constitution, the critical question is raised by J. Rückert: '[...] damit wird der Rechtsbefund janusköpfig. Wann gilt Recht, wann Pflicht, wird die Frage. Was vom Recht bleibt, wenn die Pflicht daneben tritt, wird entscheidend, vor allem in der Durchsetzung'.<sup>\*14</sup> This problem of duties was not present in the Constitution of 1920 but was to be present after adoption of the Constitution of 1937. Unfortunately, the time from the adoption of the Constitution of 1937 until the Second World War was too short to evaluate and characterise further developments in this context. In the case of the Weimar Constitution, the problem was evident for the latter generation, but the difficulties that could arise were not understood until the rise of the Nazi regime.

In comparison to the Constitution of 1937, that of 1920 has been held to be very liberal and to stress the individual and his rights or freedoms. Also, the individual had very few social rights under it, comparatively speaking.<sup>\*15</sup> This could be the influence of the French declaration, again.

In the Constitution of 1920<sup>\*16</sup>, the basic norm for social and economic rights was § 25, which stated that economic life in Estonia has to be in accordance with equity and that the aim of it is for persons to secure adequate housing through laws that concern the acquisition of land, a place to live, etc., and via laws that concern the right to assistance in the case of young or old age, incapacity for work, loss of a provider, need, and so forth.

Freedom of mobility and to change living place were set forth in § 17, § 19 established the freedom to choose one's profession and freedom of trade, and § 18 provided the freedom to strike and associate. The general equality of all men was established in § 6: no one should be discriminated against on the basis of gender in the public sphere. Section 12 contained the norm of compulsory primary education, and § 24 specified the freedom of private property.

As was mentioned before, this Constitution was very much influenced by the Weimar Constitution. Although the Constitution of 1920 set itself apart from the German tradition<sup>\*17</sup>, according to which the human rights series, inclusive of the social and economic human rights, was traditionally very thorough (the Weimar Constitution contained 56 sections)<sup>\*18</sup>, we find some of the social and economic fundamental rights in the same wording also in the Estonian Constitution of 1920.<sup>\*19</sup>

As in the Weimar Constitution, some of the norms had a declarative nature. Such was the case with § 25 of the Constitution of 1920 (the same applies to article 151 of the Weimar Constitution), which was in legal literature characterised as giving just the principal, overall aim that legislation was to strive toward.<sup>\*20</sup> Rückert is of the opinion that this article, which uses the wording found in the Weimar Constitution, contains an aim

<sup>13</sup> Andrezej Wasilewski is of the opinion that freedom of trade, although not *expressis verbis* mentioned in the Declaration of Human Rights, was at that time understood as a 'logical consequence of the overall freedom of the citizen'. A. Wasilewski. *Wirtschaftsfreiheit als Grundrecht. – Staat – Verfassung – Verwaltung. Festschrift anlässlich des 65. Geburtstages von Prof. DDr. DDr. H.c. Friedrich Koja. H. Schäffer et al (Hrsg.). Wien: Springer 1998, p. 467.*

<sup>14</sup> J. Rückert. *Weimars Verfassung zum Gedenken. – Rechtshistorisches Journal 1999 (18), p. 218.*

<sup>15</sup> See, e.g., H.-J. Uibopuu. *Üldised inimõigused Eesti 1920., 1937. ja 1992. aasta põhiseadustes (General human rights in Estonian Constitutions of 1920, 1937, and 1992). – Juridica 1997/2, pp. 236–237 (in Estonian).*

<sup>16</sup> *Eesti Vabariigi põhiseadus. – RT 1920, 113/114, 897 (in Estonian).*

<sup>17</sup> See J. Rückert: 'Diese deutsche Tradition [Vollverfassung mit ausführlichen Grundrechten – *the remark by the author*] hat zu tun mit der Betonung von Gemeinschaftsidealen, seien sie christlich oder sozial oder genossenschaftlich oder kollektivistisch geprägt oder eine Mischung davon' (Note 14), pp. 218–219.

<sup>18</sup> It did contain extra sections covering community life, the education system, and economic life. *Weimarer Verfassung 1919. – Staatsverfassungen. Eine Sammlung wichtiger Verfassungen der Vergangenheit und Gegenwart in Urtext und Übersetzung. G. Franz (Hrsg.). München: Oldenbourg 1964, pp. 212–222.* This extensive series of fundamental rights was later held as a weakness of the Weimar Constitution, with the claim that most of them were expressed in only programmatic sentences and were properly tasks for the legislator, not legal and binding norms. For more on this, see J. Rückert (Note 14), especially p. 220 et seqq. and H. Dreier (Note 4), especially p. 162 et seqq.

<sup>19</sup> For example, the right that economic life be in accordance with equity (§ 25 of the Estonian Constitution and the first sentence of article 151 of the Weimar Constitution).

<sup>20</sup> E. Janson. *Eesti Vabariigi riigiõigus (Constitutional law of Republic of Estonia). Tartu: Notitia 1935, p. 13 (in Estonian).* In 1923, E. Berendts noted that the laws that should be formulated in the form of concrete legal norms on the basis of the declarations of Chapter II were still works in progress and that the realisation of those very promising principles was still not completed. E. Berendts. *Die Verfassungsentwicklung Estlands. – Jahrbuch des öffentlichen Rechts. Piloty. Koellreutter (Hrsg.). 1923/24, Bd. XII. Tübingen: Mohr 1924, p. 196.*

against the aim, a rule against the rule, and a right against the duty. Who should draw the lines of demarcation is left open.<sup>\*21</sup> For the Estonian constitutions, the question of where the lines should be drawn was, at the time, still unanswered.

Indirectly, the Supreme Court too has found that § 25 has a declarative nature and that the courts cannot use this as the basis for a decision, as it ruled in one other case that ‘the court has to use the law (*ius*), principally staying within the bounds of equity (*aequitas*). If there is a contradiction between the law and equity, the legislator can change the law, and the court may not depart from the norms of law for purposes of satisfying the needs of equity’.<sup>\*22</sup> Thus, equity is the guideline for the court only when this is provided within the law. This does also mean that the Supreme Court of Estonia decided to assign itself a very positive role in interpreting laws.

Comparing the Constitution of 1920 with the Constitution of Finland, which was adopted at about the same time, in 1919, we can say that the Finnish work contained just very basic social and economic human rights, such as the protection of property and the worker (§ 6), freedom of movement (§ 7), equality in satisfying the cultural and economic needs of Finnish and Swedish citizens (§ 14), and from among the civil rights the equality of all citizens (§ 5).<sup>\*23</sup>

The Constitution of 1920 has been considered very liberal and individual, and this can be affirmed without much debate. As the models for this constitution the best examples of its time were chosen. Progressive for the time was the series of fundamental rights, and a little more attention was drawn to the social and economic side of the constitutional norms, as compared to what was set forth in, e.g., the Finnish constitution or French declaration.

## 1.2. Application of the fundamental rights provisions in the supreme courts

In the interim between the two world wars, the application of the fundamental rights provisions in the rulings of the courts, especially the supreme courts, was very different. In Finland, the opinion prevailed in constitutional literature and practice that no authority had the right to oversee the constitutionality of the formal law after it was ratified. Finnish law placed an emphasis on preventive control, and it was, moreover, executed through the nation’s parliament.<sup>\*24</sup> This applied not only for judicial control over the laws but also for the constitutional norms providing the fundamental rights. The latter had no direct effect: their application could not be controlled by the Supreme Court.

Opinions differ concerning the direct effect of the fundamental rights included in the Weimar Constitution in Germany. Some of them were, in general, held to be directly applicable, while other norms were only programmatic and considered to be the stuff of tasks for the legislator — this was the case with the social and economic rights, in particular, and the main basis for criticism of the fundamental rights chapter of the Weimar Constitution. So judicial control over the programmatic norms was not possible. The control of constitutionality by courts where other, directly applicable fundamental rights were concerned was possible in certain cases.<sup>\*25</sup>

In Estonia, the constitutionality of norms could be controlled by the Supreme Court. While the court could not abolish the law, it had an obligation to decide cases in such a way that the unconstitutional norm or law was rendered not there in practice.<sup>\*26</sup> The Supreme Court had the right to interpret the constitutional norms as well<sup>\*27</sup>, and the violation of fundamental rights could be claimed in the courts. Only a few of the decisions

<sup>21</sup> J. Rückert (Note 14), p. 225.

<sup>22</sup> Decision No. 5 of 19 April 1926. – 1926. aasta Riigikohtu otsused (Judgments of Supreme Court of 1926). Õiguse lisa. Tartu 1927, pp. 7–8 (in Estonian).

<sup>23</sup> Die Verfassung Finnlands (1919). Available at: <http://www.verfassungen.de/fin/finland19.htm>; Suomen Hallitusmuoto. 17.07.1919/94. – Suomen laki. II. Helsinki: Lakimiesliiton kustannus 1993, pp. A1, 1-2. This can be explained as an echo of the Finnish Civil War, as the war is called a war between rich and poor. The poor were defeated, so the social side was also left out from the Constitution and only the liberal personal rights stressed and included.

<sup>24</sup> This despite the fact that Suomen Hallitusmuoto § 92 provided that a public authority could not apply a regulation that went against parliamentary law or basic law. J. Husa. Guarding the Constitutionality of Law in the Nordic Countries: A Comparative Perspective. – The American Journal of Comparative Law Vol. 48, No. 3, summer 2000, pp. 364, 368.

<sup>25</sup> H. Dreier (Note 4), pp. 174–175, 180 with many references. See, for the different opinions on the direct effect, p. 174 et seqq. and, on judicial control, p. 180 et seqq.

<sup>26</sup> Õiguse üldõpetus dotsent Uluotsa loengute järele programmele vastavalt kokku seadnud Tartu Ülikooli juura üliõpilased (General theory of law, notes compiled by law students of University of Tartu according to lectures of senior lecturer Uluots). Tartu: Chr. Jürgensi paljundusbüroo 1923, p. 49 (in Estonian).

<sup>27</sup> See, e.g., the decision of the Supreme court of Estonia of 5 April 1921. – Riigikohus. Otsuste valikkogumik 1920–1940 (Supreme Court. Selected judgments 1920–1940). Compiled by T. Anepaio. Tartu: Elmatar 1999, p. 25 (in Estonian).



of the Supreme court of Estonia of this time have been published<sup>\*28</sup>, and others are very difficult to access, so only preliminary conclusions can be drawn. As the most important cases were chosen for publication<sup>\*29</sup>, we can, however, get some picture of these and see the tendency.

In general, among the most important cases that were published from 1921 until 1930, there were one to six cases every year concerning some of the fundamental rights. Most often, they dealt with minority and cultural rights or freedom of religion, but there were also two cases concerning the general equality principle, one concerning freedom of movement, and two dealing with the right to strike and associate contained in § 18. These cases will be discussed next.

The first case concerns a woman who applied for the post of candidate judge. The application was rejected on the ground that the Law of the Courts did not allow appointing women to the position of judge. In the opinion of the Supreme Court, the law provided only formal conditions for the naming of judges and, as these were not mentioned in the rejection of the application, the assumption that the ground was gender was not justified. 'Even if there were some doubts pointing to the contrary following the Constitution entering into force, and § 6 does provide equality of gender [...], the doubts are not validated,' stated the opinion. Women have the right to be appointed to the position of judge.<sup>\*30</sup> It should still be remarked that regardless of this decision from 1924, there were no female judges in Estonia in 1918-1940.<sup>\*31</sup> There was probably a problem in guaranteeing equality of gender in practice...

The basis for the second case was a requirement that, according to the law, the head of the community should be elected only from among the house owners. Here the Supreme Court decided that election from among only those owning a house would not be in accordance with § 6 which provided for general equality in the public sphere.<sup>\*32</sup>

The third case concerned freedom of movement, provided in § 17. Four men were applying for passports to go to Brazil and remain there. The Minister of Internal Affairs refused to grant them passports on the ground that although there was freedom of movement, it did not apply if there was a plan to go abroad and stay there, giving up all one's duties to the home state. The ruling declared that passports should not be given in the case of going abroad for a stay, because there were too many going to South America and the Estonian state had to bring them back because of their lack of money. The freedom of movement provided in § 17 is provided only for movement within Estonia and thus could not be applied in the case, read the ruling.<sup>\*33</sup>

Today, this argumentation appears amazing. In the Constitution of 1992, in force today, the material on freedom of movement is divided between two articles. Section 35 states: 'Everyone has the right to leave Estonia. This right may be restricted in the cases and pursuant to procedure provided by law to ensure the administration of court or pre-trial procedure, or to execute a court judgment'.<sup>\*34</sup> Under this section a person can bring an action before the courts if the passport is not delivered.<sup>\*35</sup>

According to the commentary accompanying the Constitution, such a situation as occurred in the above-mentioned case should at present be excluded.

The two cases concerning the right to associate and strike are very interesting, as the Supreme Court determined through them the limits of § 18. In the first case, the Minister for Internal Affairs who had the authority to register an association, refused to register the association of the railway workers. The reason was that the statutes of the association stated that the aim of the association included organising strikes, while the law prohibited railway workers from striking. The association of railway workers was of the opinion that the refusal of the minister was in violation of § 18, which mentioned everyone's right to strike and that the right could be restricted only in public interests. The court held that, as the appellants declared, the right to strike was not unrestricted and that in that case penal law prohibited striking, in the public interest, only to the railway workers.<sup>\*36</sup> What these public interests were in that this case the court did not determine.

In another case, the Minister for Internal Affairs refused to register an association of the workers of the town of Pärnu to which all workers could belong. The association too had as one of its aims organising strikes. In that case, the Supreme Court held that the minister could refuse to register the association only when the

<sup>28</sup> Riigikohus. Otsuste valikkogumik 1920–1940 (Note 27) and Riigikohtu otsused (Judgments of Supreme Court). Õiguse lisa.

<sup>29</sup> T. Anepaio. Eesti Vabariigi Riigikohus (Supreme Court of Republic of Estonia). – Riigikohus. Otsuste valikkogumik ... (Note 27), p. 16.

<sup>30</sup> The decision of the Supreme Court of Estonia of 1 September 1924. – Riigikohus. Otsuste valikkogumik ... (Note 27), pp. 41–44.

<sup>31</sup> T. Anepaio. Eesti Vabariigi kohtunikekorpus 1918–1940 (Judges in Republic of Estonia in 1918–1940). Tartu 1994 (Master's thesis; in Estonian).

<sup>32</sup> Decision No. 23 of 20 March 1923. – Riigikohtu otsused (Judgments of Supreme Court). Õiguse lisa. Tartu 1924, pp. 52–54.

<sup>33</sup> Decision of the 10<sup>th</sup> administrative department of 9 September 1926. – Riigikohus. Otsuste valikkogumik (Note 27), pp. 96–98.

<sup>34</sup> Eesti Vabariigi põhiseadus (Constitution of the Republic of Estonia). – RT 1992, 26, 349 (in Estonian).

<sup>35</sup> Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne (Constitution of the Republic of Estonia. Commented edition). Tallinn: Juura 2002, p. 284 (in Estonian).

<sup>36</sup> Decision No. 22 of 2 September 1926. – Riigikohtu otsused (Judgments of Supreme Court). Õiguse lisa. Tartu 1926, pp. 36–37.

statutes of the association were not in accordance with the law. As there was the freedom to strike and no law enacted after adoption of the Constitution prohibited **all** workers from striking, the decision of the minister was declared void. Even if it was prohibited for some members to strike, there could not be reason for prohibiting the registration of the association. If workers to whom the prohibition applied chose to strike, then they should have been held responsible, said the ruling.<sup>\*37</sup>

In these two cases, the Supreme Court proceeded from the constitutional right to strike and determined in which cases the right could be restricted, and when not.

The exercise of such control for securing fundamental rights was not self-evident at that time. The Constitution of 1920 was, with its series of fundamental rights and their general control, liberal and modern. On the other hand, the non-equality of gender in the private sphere and the restriction of freedom of movement to apply only within one's home country show a very conservative and narrow approach.

## 2. Constitutional reform of 1933

In 1933, the Constitution of 1920 was amended. There were no changes in the human rights chapter of the Constitution<sup>\*38</sup>, but the other amendments, together with the change of the political regime, were so important that many have spoken of the 'Constitution of 1933'. As Laaman writes: 'the authors of reform have changed their approach to constitutional matters from individualism to collectivism'.<sup>\*39</sup>

Using a right given him through the amendment of the Constitution, Prime Minister K. Päts, who fulfilled also the obligations of the head of state, declared on 12 March 1934 a state of national defence, which was prolonged many times<sup>\*40</sup> and did not end before World War II. The period was called the Silent Age, as the state was ruled without parliamentary action. The most important doctrine used by the government and opposition during this regime was solidarism. According to the doctrine, both the individuals and the state were subordinated to the welfare of society and the state could accept certain sacrifices on the part of the individual in the public interest. The executive power — that is, the government — was the most important institution. The other elements of the democratic political system slowly lost their importance, and the political opposition was marginalised.<sup>\*41</sup>

Some changes concerning the Supreme Court may also indicate that the change of political regime influenced the decision-making of the courts, too. According to § 70 of the Constitution of 1920, the Supreme Court had the authority to appoint judges. With the amendments of 1933 and also in the Constitution of 1937, the authority for appointing judges belonged to the head of state and the Supreme Court had only an advisory role. K. Päts as the head of state prescribed on several occasions the persons to serve in that advisory capacity.<sup>\*42</sup>

The seat of the Supreme Court was the matter of many discussions in Estonia and turned out to be the symbol of the independence of the court system from the executive power. On the basis of the decree of the head of state of 8 June 1934, the Supreme Court was moved to Tallinn, to the capital city despite the opposition of the Supreme Court itself. Where public opinion was concerned, this meant clearly that the judicial power was subordinated to the executive power. Taking into account the events of 1934 and the arrest of some judges without prior permission from the Supreme Court (where the opinion of the Supreme Court was very calm and mild), we can say that the independence of the judicial power had been subverted earlier.<sup>\*43</sup>

This conclusion of T. Anepaio could be confirmed by the fact that after 1930 (and until 1939) among the published — and thus most important — Supreme Court cases there were no longer any cases where fundamental rights in general or social and economic rights in particular were interpreted, discussed, or given reference. We should bear in mind that until that time the Constitution was quite often the subject of legal analysis (including among the published cases). Even if we need more analysis of the unpublished Supreme

<sup>37</sup> Decision No. 31 of 28 September 1926. – Riigikohtu otsused. Õiguse lisa (Note 36), pp. 49–50.

<sup>38</sup> Eesti Vabariigi põhiseaduse muutmise seadus (Republic of Estonia Constitution Amendment Act). – RT 1933, 86, 628 (in Estonian).

<sup>39</sup> E. Laaman (Note 2), p. 344.

<sup>40</sup> J. Põld. Loenguid Eesti riigiõigusest (Lectures on constitutional law of Estonia). – Tartu: Sihtasutus Juridicum 2001, pp. 25–26 (in Estonian). The change of political regime in Estonia was moving in step with European developments. In 1933, Hitler came to power, and the regime had already turned authoritarian in Poland and Italy.

<sup>41</sup> T. Karjahärm. (V. Sirk). Vaim ja võim. Eesti haritlaskond 1917–1940 (Spirit and power. Estonian intellectuals 1917–1940). Tallinn: Argo 2001, pp. 285–286.

<sup>42</sup> T. Anepaio (Note 29), pp. 10–11.

<sup>43</sup> T. Anepaio (Note 29), p. 14.

Court cases in order to draw a firm conclusion on this point, just the fact that the SEFR are not present in the published argumentation of the court at that time shows us the direction in which the judicial power moved. Analysing this, one can conclude with ease that the chapter on fundamental rights was just ignored during the Silent Age. The argument of the courts was now directed more to the level of simple laws. All this affirms that a different approach had come to the fore, as has been claimed also by Laaman.

### 3. Constitution of 1937

In 1937, a new constitution was adopted. The history of the creation of this work is well documented and easy to follow. Many participants in the Constitutional Assembly have described the discussions and brought out the reasons behind including a certain norm, and the choice of language. All authors who have written about the Constitution of 1937 have praised it; there are no critical remarks.

J. Uluots, one of the main figures involved with the Estonian Constitutions, has characterised the Constitution of 1937 by saying that the then-new Constitution remained loyal to individualism and liberalism, as we could see from the second chapter (on fundamental rights). He continues by arguing that fundamental rights are not innate to a human being (i.e., inborn). They come from the society of the state. In that line of reasoning, they belong to the citizens on this basis and thus may be restricted in the interests of the society, and obligations and duties correspond to one's rights.<sup>\*44</sup> So the Constitution of 1937 attempted to develop the ideas of individualism and liberalism further, for more social solidarity within the state.<sup>\*45</sup> Uluots also stressed that the Constitution was based on the nature of the Estonian nation. In Estonians life, certain institutions had appeared, like a family and a home. Without a doubt, one characteristic of Estonians was a certain deference to the professions and, more generally, every single field of work.<sup>\*46</sup>

During the speeches at the Constitutional Assembly, most of the speakers expressed the opinion that one of the best ideas established in the Constitution was the increased presence of SEFR. This cannot be challenged. Another matter is how these constitutional principles were applied in reality and whether they were used at all. H.-J. Uibopuu has stated that 'the number of social rights did increase, at least formally'. He added that 'in this part of the Constitution, nothing turned to the disadvantage of the individual'.<sup>\*47</sup> Despite the increase in SEFR, not in the Constitution of 1920 nor in the Constitution of 1937 nor even in the Constitution of 1992 was the principle of *Sozialstaat* (the welfare state) introduced. This could be an indication that the social aspect was stressed less and the focus was placed on the collectivist side of things, where the individual has the obligations before the state and his fundamental rights are also restricted by duties before the state. If we turn the saying of Uluots in this way, it is not clear at all that the Constitution preserved its individualistic and liberal ideas.

The draft of the Constitution of 1937, presented by head of state K. Päts, was discussed in multiple commissions and in three stages at the Constitutional Assembly. In this article, the most interesting problems that arose will be brought out and also the final version of the norm will be supplied.

In contrast to the Constitution of 1920, which did not contain very many SEFR, to the final version of the Constitution of 1937 were added special articles about protection of family (§ 21) and economic life (§ 23), state's aid to facilitate finding of employment (§ 27), and state's aid for older people, as well as state aid in the event of inability to work or in cases of need (§ 28).

One of the most important and most discussed themes was the protection of the family and the education of young people. There were opinions that in the Constitution of 1920 were not stressed enough. Concern was expressed that the Constitution should stress, on one hand, the need for more children and, on the other, the obligations of the state and community concerning promotion of the family. Another idea was that children should be educated in the national spirit.<sup>\*48</sup>

<sup>44</sup> One of the contemporary German lawyers, C. Schmitt, wrote in 1932, analysing the Weimar Constitution: 'Grundpflichten, welche in ihrer Struktur Grundrechten entsprechen, sind im bürgerlichen Rechtsstaat undenkbar'. Inhalt und Bedeutung des zweiten Hauptteils der Reichsverfassung. – Handbuch des deutschen Staatsrechts. Vol. 2. G. Anschütz, R. Thoma (eds.). Tübingen 1932, p. 597. The theme of the Janus-head of such provisions is covered in this article under point 1.2, with references.

<sup>45</sup> J. Uluots. Eesti uue Põhiseaduse ideestikust (Foundations of the new Estonian Constitution). – Õigus 1937/7, p. 290 (in Estonian).

<sup>46</sup> J. Uluotsa kõne Rahvuskogu esimese koja põhiseaduse eelnõu üldaruandjana. Rahvuskogu esimese koja koosolekul 8. juunil 1937 (Speech of J. Uluots as general reporter of first chamber of Constitutional Assembly on draft Constitution. At the meeting of first chamber of Constitutional Assembly on 8 June 1937). – Põhiseadus ja Rahvuskogu (Constitution and Constitutional Assembly). Tallinn: Rahvuskogu üldkoosoleku juhatause väljaanne 1937, pp. 115–116 (in Estonian).

<sup>47</sup> H.-J. Uibopuu (Note 15), pp. 236–237.

<sup>48</sup> A. Mägi. Põhiseaduse koostamise käik Rahvuskogus (Drafting of Constitution in Constitutional Assembly). – Põhiseadus ja Rahvuskogu (Note 46), p. 178. Educational matters were regulated in §§ 22 and 23 of the Constitution of 1937, and both did contain the provisions of § 12 of the Constitution of 1920 although in a more profound manner.

The commissions also found that by nature it was not possible to have full equality between spouses and, to make things clearer, other basic characteristics of the family should be brought out. Also, the policy of protection of mother and child was defective.<sup>49</sup> The final version of § 21 provided<sup>50</sup>:

The family, being fundamental to the preservation and growth of the nation and as the basis of society, shall be protected by the state.

The laws regulating marriage are based on the principle of equality of husband and wife as far as it is in accordance with the common interest of the family, with the interest of the children and reciprocal support. The relations of property will be regulated by law, but the regulation cannot restrict the capability of one spouse to deal with property matters.

The protection of mothers and children shall be provided by law.

Families with many children are under special protection.

As the Weimar Constitution was still in force at that time, we can see that, in the drafting of the Constitution of 1937, the Weimar Constitution again was one of the models. The first sentence of the relevant sections (§ 21 of the Constitution of 1937 and article 119 of the Weimar Constitution) is almost the same, as is the whole article stressing the protection of families with many children and of mothers and children. The essential difference with the Weimar Constitution lies in the field of gender equality. The Weimar Constitution provides that '[Die Ehe] beruht auf Gleichberechtigung der beiden Geschlechter' (art. 119) — it establishes gender equality without any conditions. Here we can see that the prohibition of discrimination on the basis of gender in the public sphere in the Constitution of 1920, and in the same wording also in the Constitution of 1937, was not there by accident, but it was also in accordance with § 21, which provided equality within the family. We can see that even in the year 1937 and at the constitutional level, the idea of gender equality, especially within the family, was not quite entrenched. From this it follows clearly that there was no gender equality in the private sphere.

On the other hand, a provision of that nature was a step further in stressing the importance of family, as the Constitution of 1920 did not contain such an article, regardless of the Weimar Constitution being an available model for that also. Of course, the family as the basic and first building block of society, together with education in the national spirit and so on, was one of the main principles of national socialism. Here we can see that the drafters of the Constitution were aware of these ideas, and there seemed to be enough reason to apply these ideas also in practice.

Section 25 of the Constitution of 1920 was now divided into different articles. In the draft provided by Päts, § 24 stated: 'The organisation of economic life in Estonia is under the protection of the state.' As it lacked an 'equity principle'<sup>51</sup>, after discussions the final version of § 25 provided that the organisation of economic life in accordance with the principles of equity has to promote overall wealth, adequate housing, and the expression of creative powers. Section 25 established also freedom of trade, economic association, and profession.

Some sections have remained almost identical — e.g., § 6 of the Constitution of 1920 and § 9 of the Constitution of 1937 (on gender equality), § 17 of 1920 and § 13 of 1937 (on freedom of mobility), and § 17 of 1920 and § 18 of 1937 (on freedom of association).

Where regulation of employment protection is concerned, it has been concluded that the state does not have to find employment for the unemployed. The drafters were also worried about the tendency for physical labour to be regarded as dishonourable and especially women going abroad to find work as chambermaids. At the same time, everyone should find employment himself.<sup>52</sup> So, the final section, § 27, stated that work is under state protection and that the state helped one to find work. Citizens were obliged to seek work themselves also and to take into account that 'work is the honour and duty of every citizen who is able to work'. Labour disputes were regulated by law. Section 28 stated that the family had to be responsible for the care of its dependent members and that the care was taken over by the state only if there were no family members. This article was meant to supersede § 25 of the Constitution of 1920 that did not place enough emphasis on the social obligations of the state.

Section 27 seems to strike out on its own, as at least at constitutional level the duty to work was not provided in other constitutions. For example, article 163 of the Weimar Constitution provided that 'to every German

<sup>49</sup> A. Mägi (Note 48), pp. 178, 215.

<sup>50</sup> See RT 1937, 71, 590. Compare to § 27 of the Constitution of 1992, which provides: 'The family, being fundamental to the preservation and growth of the nation and as the basis of society, shall be protected by the state. Spouses have equal rights. Parents have the right and the duty to raise and care for their children. The protection of parents and children shall be provided by law. The family has a duty to care for its needy members.' The provisions about gender equality have changed significantly, but the portion concerning the family has essentially remained the same.

<sup>51</sup> A. Mägi (Note 48), p. 180.

<sup>52</sup> E. Laaman (Note 2), p. 357.



should be given the possibility to achieve his maintenance through his work'. This duty to work was represented in § 28 of the Constitution of 1937, under which it was possible to take all who did not want to work, did not care for their family members, and did not perform other duties on account of being in need of help into forced guardianship.<sup>53</sup> The provision quite soon had practical consequences: the presidential decree of 7 July 1938 introduced camps for shirkers. The decree defined shirkers as persons who were able to work but did not want to do so and, secondly, persons who were able to work and did so but had problems with alcohol or drugs and wasted their salaries (§§ 2 and 3).<sup>54</sup> The decree was sent to Parliament for amendment. The Parliament discussed the need for such camps only superficially, with little focus on the need for such camps — some of the members of Parliament argued, even further, as to whether there should be more persons defined as shirkers, such as those who did not pay taxes properly.<sup>55</sup> As we can see, the title 'About the fundamental rights and duties' was not only declaration but reality. This is one more reason to speak with Rückert about the *Janusköpfigkeit* of these provisions. The right to work seems to be more duty than right. The duty to work is inherent for the autocratic state and for both socialism and national socialism.

Laaman's evaluation of fundamental rights as seen in the Constitution of 1937 is that we can see the proportionality: the individual rights are more restricted; social and corporal rights are more expanded. The individual rights have remained the same except that they are more restricted.<sup>56</sup> The opinion of A. Mägi is the same.<sup>57</sup> These evaluations clearly underestimate the possibilities the Constitution of 1937 provided for turning the freedoms into duties.

## 4. Conclusion

Answering the question posed in the title of the present paper, we have to distinguish between the Constitutions of 1920 and 1937. The Constitution of 1920 was in many ways very progressive and liberal. Not every constitution of that time contained SEFR. Not only that — control over their application was established, too. Still there was the problem of gender equality even at constitutional level in the private sphere. For the public sphere, the situation was better, but things were still not secured, as shown in the case of the woman applying to be a judge. In the European context, even this was quite progressive.

With the constitutional reform in 1933 began ideological change, which changed not the formulation of norm but their interpretation. The Constitution of 1937 was a logical continuation of this. It has been stressed that as regards the regulation concerning the head of state, with the Constitution of 1937 Estonia reverted from an authoritarian regime to a parliamentary one, but the change to democracy did not take place in the human rights arena. We can state in the case of SEFR that in the Constitution of 1937 more attention was paid to the rights, and that the rights changing to obligations did not widen the freedom but in fact did the opposite. As the constitutional fundamental rights were not applied in decisions of the Supreme court any longer, their importance in reality is questionable. In this development the Constitution of 1937 was following the authoritarian, national socialist, and collectivist ideas of the European State. The last doctrine was applied in a very particular manner as the duty to work and the corresponding right of the state to take shirkers into forced guardianship. This leaves the impression of a fervent prentice.

<sup>53</sup> See also A. Mägi. Inim- ja kodanikuõigused Eesti Põhiseadustes (Human and citizens' rights in Constitutions of Estonia). – Akadeemia 1995/1, p. 83 (in Estonian).

<sup>54</sup> RT 1938, 62, 614.

<sup>55</sup> Riigivolikogu stenograafilised aruanded. I. Koosseis. I ja II istungjärk. 1.–45. koosolek (Shorthand reports of State Council. I. Members. Sessions I and II. Sittings 1–45). Riigi Trükikoda 1938, pp. 226–241 (in Estonian).

<sup>56</sup> E. Laaman (Note 8), p. 117.

<sup>57</sup> A. Mägi (Note 53), p. 81.