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Estonian Labour Law Reform: 
The Successful Implementation of the Idea of Flexicurity?

Merle MUDA

Over the past ten years, the EU has been seeking ways to increase the adaptability of employees and enterprises and the flexibility of labour markets. Since 2006, the keyword has been flexicurity, and the implementation of this concept is intended to achieve the desired changes in labour relations. Accordingly, Estonia has attempted to reform labour relations in the light of the idea of flexicurity and adopted the Employment Contracts Act in 2008. This law comprises several amendments, the aim of which is to make labour relations more secure and flexible. This article focuses on the reforms that have had the greatest impact on the functioning of labour relations: the form of employment contracts; entering into and termination of fixed-term employment contracts; the employer’s obligation to provide training; the employer’s right to reduce wages; and the termination of the employment contract at the initiative of the employer. The author analyses whether the implementation of the idea of flexicurity has been successful with regard to these issues.

1. INTRODUCTION

As in many other European countries, in Estonia at the end of the 1990s there was a strong perception of the need for labour law reform. However, whereas in other countries the interest in reform arose from developments in the labour market\(^1\) with a view to making labour relations more flexible, in Estonia the rethinking of labour legislation was connected with the reform of private law as a whole.

At the beginning of the 1990s, that is, immediately after the restoration of Estonia’s independence, the legal measures in force in Soviet Estonia were abolished and new Acts were passed. These Acts were drafted and adopted very quickly because the introduction of private property and the fast developing market economy required new legislation.\(^2\) The first Employment Contracts Act\(^3\) was passed in 1992. The concept of these Acts was

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\(^1\) Due to the increasing competition in the 1990s, the implementation of atypical forms of work became widespread.


not subject to in-depth analysis. Therefore, in the second half of the 1990s, the new reform of the legal system began with the intention first of all to strengthen the regularity of rules and, second, to harmonize Estonian law with EU Directives.4

Eight new laws regulating employment contracts were drafted in Estonia in the period from 1996 to 2005, but for various political reasons none of them was adopted.5 In November 2006, the European Commission published the Green Paper on Modernising Labour Law to Meet the Challenges of the 21st Century6 in order to emphasize the need to develop flexible labour relations and innovate labour law. The keyword in this Paper was flexicurity: through the implementation of this concept, it was intended to increase the adaptability of employees and enterprises and the flexibility of labour markets.7 In Estonia, the basis for the elaboration of new law was now clear, and in 2006 and 2007, the Employment Contracts Act was drafted.

Highlighting the need to put the idea of flexicurity into practice, it was easy to justify the adoption of the new draft. In December 2008, the Riigikogu (Estonian Parliament) passed the new Employment Contracts Act8 (Toölepingu seadus—TLS) that entered into force on 1 July 2009. The aim of this Act was to provide a legal basis for flexible labour relations and carry out an extensive reform of Estonian labour relations. Hence, in addition to Denmark and the Netherlands, Estonia was intended to be the third country in Europe where the concept of flexicurity was systematically implemented.

As the new Act was drafted quickly and without public discussion, there was not much research into the meaning and suitability of the idea of flexicurity for the Estonian system of labour relations.9 The aim of this article is to examine, first, the meaning of the concept of flexicurity in the context of the TLS and, second, whether the TLS provides the basis for flexible and secure labour relations in Estonia. In order to achieve this goal, a comparative analysis on the idea of flexicurity in the EU will be carried out. In addition to the TLS, the old Employment Contacts Act and provisions in some other European countries will be studied.

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4 M. Muda, ‘Eesti toœubete regulatsioon vajab uuendamist [Estonian Employment Regulations Need to Be Renewed]’, Riigikogu Toimetised 17 (2008): 148. However, as the process of adopting the labour law reform lengthened, the principles of the EU law were transposed into Estonian law by amendments to existing Acts.
9 This does not mean that research in this area was not being done at all, but these studies were not connected with the elaboration of the TLS. See, e.g., R. Eamets & T. Paas, ‘Flexicurity: Combining Labour Market Flexibility and Security in the Baltic States’, in Flexicurity and Beyond: Finding a New Agenda for the European Social Model, ed. H. Jørgensen & P.K. Madsen (Copenhagen: DJØF Publishing, 2007), 391–420.
2. THE IDEA OF FLEXICURITY IN THE CONTEXT OF ESTONIAN LABOUR LAW REFORM

2.1. MEANING OF FLEXICURITY IN EUROPE

The idea of flexicurity comprises two components: flexibility and security, which are not contradictory to one another but in many situations can be mutually supportive.\(^\text{10}\) There are several ways to characterize these concepts.\(^\text{11}\) Similarly, the concept of flexicurity has been exemplified in different ways by various authors. One of the most well-known concepts is the Danish ‘Golden Triangle’, in which the core of flexicurity consists of three components: a flexible, highly mobile workforce, a strong income support system, and active labour market and educational policies.\(^\text{12}\)

The meaning of flexicurity depends on social, economic, legal, and political factors in a given state.\(^\text{13}\) The European Council emphasizes that flexicurity approaches are not about one single labour market or working life model, nor about a single policy strategy: they should be tailored to the specific circumstances of each Member State. Flexicurity implies a balance between the rights and responsibilities of all concerned. Each Member State should develop its own flexicurity arrangements.\(^\text{14}\)

However, originating from the Danish ‘Golden Triangle’ the Council of the EU has elaborated the concept of flexicurity to be used in the context of EU social policy. According to the Council, flexicurity involves the deliberate combination of flexible and reliable contractual arrangements, comprehensive lifelong learning strategies, effective active labour market policies, and modern, adequate, and sustainable social protection systems.\(^\text{15}\)

Following this definition, the author of this article holds that the essence of flexicurity is to strike a balance between flexibility and security by using different methods. Thus, implementation of this concept is not possible only through labour law reform: all aspects of the labour market must be thought out.\(^\text{16}\) In addition, taking into account the differences in the social policies of the Member States, the EU is not able to lay down exact rules to guarantee the implementation of flexicurity: each Member State has to find its own way to combine flexibility and security.


\(^{11}\) See, e.g., ibid, 526 ff. Most of authors acknowledge the approach that there are four forms of flexibility (numerical flexibility, working-time flexibility, functional flexibility, and wage flexibility) and four forms of security (job security, employment security, income security, and combination security).


\(^{15}\) ibid.

2.2. Interpretation of the idea of flexicurity in Estonia

The purpose of the new Act regulating labour relations in Estonia—the TLS—is to regulate relations between employers and employees, ensuring sufficient security relying on the values of the welfare state for employees, allowing undertakings to realize their constitutional right to the freedom for business, and promoting the competitiveness of the Estonian economy. It is important to find a reasonable way to enable employers to react quickly to market needs, as well as adequate protection for employees in the case of a decline in income and the rise in unemployment.17

Thus, the aim of the TLS is closely connected with the idea of flexicurity. In the framework of the TLS, the concept of flexicurity consists of four components: flexible labour law, contemporary social security systems, effective active labour market policies, and an effective system of lifelong learning.18 Hence, Estonia follows the idea of flexicurity approved in the EU. As mentioned above, the content of the concept of flexicurity in the EU is similar to the Danish approach. It should be emphasized that the Danish ‘Golden Triangle’ has a universal welfare state that is of the utmost importance for an understanding of the way the system works.19 Likewise, in Denmark, the regulation of labour relations is based on collective agreements.20

The Estonian system of social and industrial relations is completely different from the situation in Denmark. In Estonia, it is not possible to talk about a well-developed welfare state. In addition, due to the limited role of the social partners in shaping employment relations, the labour market is mainly regulated by legislation.21 Employees and employers usually have only the rights and obligations provided by law. Therefore, it is questionable whether the effective implementation of the idea of flexicurity is possible in Estonia.

Taking into account the main purpose of the Act, the TLS has several sub-aims: to harmonize labour law with the principles of private law,22 to increase the flexibility of labour relations, to enhance the security of employees, and to abolish formal provisions in

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18 Ibid., 2.
19 Supra n. 12, 12.
21 The low incidence of collective agreements in regulating employment relationships is largely due to the fact that only 7% of employees belong to trade unions. About the role of the employees’ representatives on shaping of employment relations, see M. Muda, ‘Estonia’, in The Laval and Viking Cases: Freedom of Services and Establishment v. Industrial Conflicts in the European Union, ed. R. Blanpain & A. M. Świątkowski, Bulletin of Comparative Labour Relations, No. 69 (Kluwer Law International, 2009), 38–42.
22 In 2001 and 2002, two basic Acts of civil and obligation law were adopted in Estonia: the General Part of the Civil Code Act (Tsiviilseadustiku ułdosa seadus [General Part of the Civil Code Act], passed on 27 Mar. 2002 — RT I 2002, 35, 216; 2009, 18, 108. The Act is available in English at <www.legaltext.ee/text/en/30082K2.htm>, 15 Jun. 2010) and the Law of Obligations Act (Võlaoigusseadus [Law of Obligations Act], passed on 26 Sep. 2001 — RT I 2001, 81, 487; 2009, 18, 108. The Act is available in English at <www.legaltext.ee/text/en/30085K2.htm>, 15 Jun. 2010). As the old TLS, passed in 1992, was not in line with these Acts, the regulation of employment relations was in contrast with the principles of private law. The new TLS eliminates this contradiction. Whereas the aim of this article is to analyse problems concerning the implementation of the idea of flexicurity in the new Act, the issues pertaining to the harmonization of the labour law with the rules of civil and obligation law are not examined here.
labour law and diminish the administrative burden. The author of this article is of the opinion that the last three of these goals are based on the idea of flexicurity. In particular, the aim of repealing formal provisions is to promote the flexibility of labour relations as the parties to the employment contract have more possibilities to conclude agreements.

2.3. IMPACT OF THE IDEA OF FLEXICURITY ON LABOUR RELATIONS REGULATION

A number of studies have underlined the fact that flexibility is not the monopoly of the employers, just as security is not the monopoly of employees. Many employers realize that they have an interest in stable employment relations and in retaining employees who are loyal and well qualified. For their part, many employees have an interest in more flexible ways of organizing work. As a result, the foundation is laid for an interaction between flexibility and security, highlighting the potential for win-win outcomes in situations that are traditionally conceived as characterized by conflicting interests.

The new Estonian TLS supports this opinion. The authors of the draft TLS observe that renewing the regulation of the employment contract entails the enlargement of the flexibility in employment relations. Beside flexibility, security has the same importance, not only for the employee but also for the employer.

The author of this article agrees with this position only in part. Considering the definition of flexicurity, it is clear that the implementation of this concept involves the alteration of flexibility and security for both parties to the employment contract. However, as the implementation of the concept of flexicurity means that traditional security in the job is exchanged for security in the market, the protection of the employee in the framework of labour relations should be diminished. Thus, following the four components of the idea of flexicurity, in comparison with the previous regulation, the TLS should reduce the employee’s security under the employment contract and attempt to increase the role of the state while guaranteeing social protection for workers and those between jobs.

It should be mentioned that as the old TLS was based on the Labour Code of Soviet Estonia, this Act did not take into account the individual character of employment relations. The regulation of labour relations was rigid and failed to give sufficient consideration to the interests of either employees or employers. There was not enough space for agreements.

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23 Supra n. 17, 2. Reduction of the administrative burden means, e.g., that the employer is not required to ask the consent from the Labour Inspectorate while elaborating the internal work procedure rules or terminating the employment contract with employees’ representatives and pregnant women, and so on. In addition, the employer has no obligation to maintain employment record books and employees’ personnel files because there is no need for these documents in practice.
24 For example, to balance work and family life.
25 Supra n. 10, 256.
26 The draft of the TLS was elaborated by the commission that consisted of the officials of the Ministry of Justice and the Ministry of Social Affairs only. The trade unions and employers’ organizations were involved after the publication of the first version of the draft. Members of research institutions were not included in the compilation of the TLS.
27 Supra n. 17, 2.
28 Supra n. 12, 7.
29 See para. 2.2.
30 Supra n. 4, 148–151.
Under the Explanatory Statement of the draft TLS, the implementation of the concept of flexicurity means that the regulation of labour relations should enable the parties to the employment contract to shape the relationship taking into account the needs and interests of the employer and employee as much as possible.\textsuperscript{31} To this end, the TLS diminishes the amount of legal rules that are obligatory for the parties to the employment contract and allows employees and employers to agree freely the content of the contract.\textsuperscript{32}

In a nutshell, the idea of flexicurity has the following impact on the regulation of labour relations: first, the intervention of the state in relations between the employee and employer decreases, that is, the freedom of contract is extended. Whereas the employer is traditionally the stronger party in the employment contract,\textsuperscript{33} the author of this article is of the opinion that the employer has more power to determine the content of agreements. Therefore, in practice the extension of flexibility is more favourable for employers. Second, the level of protection for employees does not change, or it increases.\textsuperscript{34} However, job security need not be guaranteed under the employment contract, that is, the employer is not the main actor who is liable for the employee’s protection: in several cases, the state takes responsibility for providing income support for persons who do not have work.

The following paragraphs focus on changes in the regulation of labour relations in the light of the implementation of the concept of flexicurity. As the new TLS includes numerous changes in comparison with the previous regulation, the author focuses on the issues that have the greatest impact on the functioning of labour relations. Attention will be paid to the form of employment contract, entering into and termination of the fixed-term employment contract, the employer’s obligation to organize training for the employee, the employer’s right to reduce wages upon failure to provide work, and the termination of the employment contract at the initiative of the employer. Some rules on unemployment insurance will also be studied.

3. Changes in Labour Relation Regulation

3.1. Form of Employment Contracts

In the context of the idea of flexicurity, it is important to establish a simple mechanism for the conclusion of the employment contract. This means, first and foremost, that there are no significant formal requirements when the employer and employee wish to enter into the employment contract. The regulation on the form of the employment contract shows how flexible labour relations are.\textsuperscript{35}

\textsuperscript{31} Supra n. 17, 2.
\textsuperscript{32} Supra n. 13, 15.

\textsuperscript{33} Depending on the content of labour relation, sometimes the positions of employer and employee may be more or less equal. However, in order to implement the rules of labour law, the employer as a person who provides work must have greater power in the framework of the labour relation.

\textsuperscript{34} As mentioned in para. 2.2, one of the sub-aims of the TLS is to enhance the security of employees.

\textsuperscript{35} In theory, reference is made also to external numerical flexibility, i.e., the employers’ ability to adjust the number of employees to the current needs of production. In other words, it is the ease of hiring and firing employees, which manifests itself in the mobility of workers between employers. Supra n. 9, 393.
In the majority of the old Member States of the EU, the parties can usually make a valid employment contract without observing any formalities. Only agreements on some specific issues (e.g., probationary period, fixed-term employment contract, non-competition clause) require a written contract. Hence, entering into an employment contract is quite flexible.

Under the old Estonian TLS, the situation was different. The old Act stated that the employment contract had to be concluded in writing and employers had administrative liability for failure to formalize or for the unsatisfactory formalization of employment contracts (sections 28(1) and 28(3)). In keeping with this norm, employers and employees were used to entering into written contracts.

The regulation of the new TLS on the form of the employment contract is not clear. On the one hand, section 4(2) of the TLS establishes that an employment contract is entered into in writing. An employment contract is also deemed entered into if an employee commences work that, according to the circumstances, can be expected to be done only for remuneration. Failure to adhere to the formal requirement does not result in the invalidity of the employment contract (section 4(4)).

Hence, according to section 4, the formal requirements of the employment contract do not change, in comparison with the old regulation. Taking into account Estonian practice, the written form of employment contracts may be regarded as rational. The oral form of contracts simplifies the process of concluding employment contracts and makes labour relations more flexible, but in the case of a dispute, the employee has real difficulties in proving the content of an oral employment contract.

On the other hand, section 5 of the TLS sets forth the employer’s obligation to notify the employee about working conditions: subsection 1 lists the data that the written employment contract must contain, and subsection 2 establishes that the data of an employment contract should be communicated prudently, clearly, and unambiguously. The employer may demand that the employee confirm the communication of the data. If the employee has not been provided with the data before commencement of work, the employee may demand a copy at any time. The employer is obliged to communicate the

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37 However, the old TLS also accepted oral employment contracts. According to TLS s. 28(2), permitting an employee to commence work is equivalent to entering into an employment contract, regardless of whether the employment contract has been formalized. In such cases, the employment contract is formalized in writing with the terms that actually applied.

38 The author of this article does not understand why TLS emphasizes that work must be done for remuneration. This is not the main feature of an employment contract. The TLS should highlight the fact that work must be done under the supervision of another person.

39 Supra n. 36, 370.

40 For example, the name, personal identification code or registry code, place of residence or registered office of the employer and the employee; the description of duties; wages; working time; the place of performance of work; the duration of holidays; the rules of work organization approved by the employer; a reference to a collective agreement if a collective agreement is applicable to the employee, and so on.
data within two weeks of receiving such a request (subsection 3).\textsuperscript{41} Section 6 of the TLS provides for rules on the notification of employees of working conditions in special cases.\textsuperscript{42}

Thus, following sections 4–6 of the TLS, the employer has both an obligation to enter into the written employment contract and an obligation to inform the employee about the data of the employment contract in writing. It is not easy to understand how to implement these provisions at the same time. What is the concurrence of these provisions? Must employers formalize two written documents? For example, Sigur holds that according to the TLS, the employment contract must usually be concluded in writing, and section 5(1) provides for the obligatory content of the contract.\textsuperscript{43}

According to the guidelines of the Ministry of Social Affairs, section 5 of the TLS establishes above all the data for which no special agreement between the employer and employee is required: these are mostly so-called standard terms that are applied in every employment contract. However, some data (e.g., wages, working time, employee’s duties, and the place of performance of work) are essential conditions of the employment contract, and the parties to the contract usually negotiate these issues before the employee commences work. If not all the matters listed in section 5(1) of the TLS have been agreed, the employer must inform the employee about them in writing.\textsuperscript{44}

Hence, in the view of the authors of the TLS, an employer must, first, enter into the written employment contract where provision is made for the substantial conditions of the contract and, second, inform the employee about so-called standard terms in writing. The author of this article is of the opinion that the regulation of the TLS is not successful and not in line with the idea of flexicurity. Instead of the clear norm of the old TLS establishing that the employment contract must be concluded in writing,\textsuperscript{45} the new Act states that the employment contract may be written or oral, and some contract data may be a part of written employment contract and some may be in the written document in which the employer notifies the employee about working conditions.

Taking into account the idea of the TLS, it would be more understandable if the TLS did not lay down any formal requirements concerning the conclusion of employment contracts, except for some specific terms. The employer should only have the obligation to inform employees about their working conditions in writing. Such a regulation would make labour relations more flexible. However, it seems that the parties to the employment

\textsuperscript{41} Section 5 of the TLS harmonizes Estonian labour law with Directive 91/533/EEC on an employer’s obligation to inform employees of the conditions applicable to the employment contract (OJ L 288, 18 Oct. 1991, 32–35). As Directive Art. 3.1 requires that information about the conditions of employment contract must be given to the employee no later than two months after the commencement of employment, the TLS is not completely in conformity with the Directive.

\textsuperscript{42} For example, if parties to the employment contract wish to agree on the fixed-term employment contract, teleworking, temporary agency work, the non-competition clause, etc.


\textsuperscript{44} E. Kaärens, S. Suder & T. Treier, Selgitused toölepingu seaduse juurde [Comments on the Employment Contracts Act] (Tallinn: Sotsiaalmuuseum, 2010), 7.

\textsuperscript{45} Although the requirement to enter into the written contract diminishes the flexibility of labour relations, the legislator had been given bright-line rules on how to behave.
contract would continue to enter into the written contracts in order to avoid labour disputes about the content of the employment contract.

3.2. FIXED-TERM EMPLOYMENT CONTRACTS

3.2.1. Entering into Fixed-Term Employment Contracts

Implementation of atypical forms of work is deemed one of the possibilities to increase the flexibility of labour relations and, thereby, put into practice the concept of flexicurity.

As regards non-standard work, the TLS establishes exhaustive rules on the fixed-term employment contract. The first reason for this is the need to align Estonian law with Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by the European Trade Union Confederation (ETUC), the Union of Industrial and Employers’ Confederations of Europe (UNICE), and the European Centre of Enterprises with Public Participation (CEEP). The second reason is that working under a fixed-term employment contract is the most well-known atypical form of employment in Estonia.

If open-ended contracts are the general rule, then fixed-term contracts must be considered to be the exception. This exception must therefore be interpreted in a restrictive way and must be justified on the basis of objective reasons. In several old Member States of the EU, there are no strict rules about reasons for entering into the fixed-term employment contract. Usually, the law establishes only a general principle that there must be a justified reason in order to conclude a contract for a definite period.

Unlike other countries, in Estonia, section 27(2) of the old TLS provided for the list of grounds (e.g., the completion of a specific task; the replacement of an employee who is temporarily absent; a temporary increase in work volume; the performance of seasonal work) enabling the parties to enter into a fixed-term employment contract.

The corresponding list was exhaustive: employers and employees were not allowed to conclude fixed-term contracts for any other reason. If a fixed-term employment contract was entered into for reasons not recognized by the law, the contract was deemed to

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46 For example, part-time work, fixed-term employment contracts, telework, temporary agency work, and so on. 47 See, e.g., D. McCann, ‘Regulating Flexible Work’, in Oxford Monographs on Labour Law (Oxford: Oxford University Press, 2008), 11–26. 48 The TLS also sets forth few provisions on teleworking, temporary agency work, and part-time work. As Estonian law has not been harmonized with Directive 2008/104/EC on temporary agency work (OJ L 327, 5 Dec. 2008, 9–14), the regulation of the TLS must be improved. 49 OJ L 175, 10 Jul. 1999, 43–48. In this article, the conformity of the TLS to Directive 1999/70/EC is not analysed. The Directive obliges the Member States to introduce measures in order to prevent abuse arising from the use of successive fixed-term employment contracts. The aim of the Directive is to protect employees by restricting the conclusion of fixed-term contracts. Such regulation gives priority to employee security instead of flexibility of labour relations. 50 Whereas there is no remarkable regulation on other forms of atypical work, they are not dealt with in this article. With regard to the implementation of new forms of labour relations, see supra n. 5, 133–137. With regard to the rules on non-standard work in the draft of the TLS, see supra n. 36, 376–377. 51 R. Blanplain, European Labour Law, 11th revised edn (Kluwer Law International, 2008), 431. 52 M. Muda, ‘Fixed-Term Employment Contract as a Basis for Creating Flexible Labour Relations’, in Studia z zakresu prawa pracy i polityki społecznej [Studies on Labour Law and Social Policy], Liber Amicorum Prof. A. M. Szczytkowski (Krakow: Musica Iagellonica sp. z o.o, 2009), 363.
open-ended. As the old TLS made it possible to enter into fixed-term employment contracts in rare cases only, this Act did not provide a legal basis for flexible labour relations.\textsuperscript{53}

The new TLS introduces essential changes concerning the conclusion of fixed-term employment contracts. Section 9(1) of the TLS establishes only the general rule for entering into a fixed-term employment contract: such a contract may be made for up to five years if it is justified by good reasons arising from the temporary fixed-term characteristics of the work, especially a temporary increase in work volume or the performance of seasonal work.\textsuperscript{54} In the case of a dispute, the employer is required to prove that there is a good reason for entering into the fixed-term employment contract.\textsuperscript{55}

Hence, the new TLS makes it simpler and gives employers more possibilities to conclude fixed-term employment contracts. As Estonian employers are used to exact statutory norms, it is hard to predict how they will interpret this rule,\textsuperscript{56} but limitations on the termination of fixed-term employment contracts on the initiative of the employer will probably avoid the conclusion of such contracts without justified reason.\textsuperscript{57}

3.2.2. \textit{Termination of Fixed-Term Employment Contracts at the Initiative of the Parties}

The fixed-term employment contract is usually concluded with the intention to continue with this contract to the end of term. Therefore, the termination of fixed-term employment contracts at the initiative of the employer or employee is often limited.

According to the law of several European countries, a fixed-term employment contract ordinarily expires when the work is done, and the parties to the employment contract may not terminate it on their own initiative, except when there is justified reason\textsuperscript{58} for the termination.\textsuperscript{59}

As regards the termination of the employment contract at the initiative of the employee, the new TLS makes the corresponding regulation more rigid. The old TLS did not restrict the termination of the fixed-term employment contract; moreover, in comparison with the open-ended employment contract, it was easier for the employee to terminate the fixed-term contract because, under section 80(1), the notice periods for termination of fixed-term contracts were shorter than for open-ended contracts.

Pursuant to the new TLS, an employee may not terminate a fixed-term employment contract\textsuperscript{60} without good reason (sections 85(2) and 91). The drafters of the TLS hold that in the case of a fixed-term employment contract, it is necessary to bear in mind the period or

\textsuperscript{53} Supra n. 36, 389.
\textsuperscript{54} In addition, under s. 9(2), a fixed-term employment contract may be made for the period of replacement of an employee who is temporarily absent. In that case, the duration of the employment relation is not limited.
\textsuperscript{55} Supra n. 17, 20.
\textsuperscript{56} Supra n. 36, 390.
\textsuperscript{57} See para. 3.2.2.
\textsuperscript{58} For example, a breach of contract by other party.
\textsuperscript{59} Supra n. 52, 360 and 371.
\textsuperscript{60} Except an employment contract made for the period of replacement of the employee.
circumstances that gave rise to the need for the additional labour force. Therefore, the termination of the fixed-term contract before the end of term is not in accordance with the aim of the contract.\(^{61}\)

Similarly, section 85(5) of the new Estonian TLS states that an employer may not terminate an employment contract under ordinary circumstances. Therefore, there must be good reason for the termination of the employment contract.\(^{62}\) In this respect, the new law does not modify the previous regulation (section 86 of the old TLS).\(^{63}\) However, section 100(3) of the new TLS provides that upon termination of a fixed-term employment contract for economic reasons, an employer must pay the employee compensation to an extent that corresponds to the wages that the employee would have been entitled to until the expiry of the contract term.\(^{64}\) No compensation is paid if the employment contract is terminated due to force majeure.

This rule is very strict for the employer. It means that an employer may not terminate the employment contract due to a decline in the work volume, reorganization of work, or other cessation of work, if he or she does not want to ‘buy out’ an employee. Therefore, the employer must seriously weigh whether and for how long\(^{65}\) to engage the employee on a fixed-term employment contract.\(^{66}\)

The author of this article is of the opinion that the regulation of the new TLS is not successful because it places excessive limitations on the conclusion of fixed-term employment contracts. In some cases, it is more favourable for the employer to enter into an open-ended employment contract instead of a fixed-term contract. The new TLS should not restrict the utilization of the fixed-term employment contracts in this manner.\(^{67}\)

As mentioned above,\(^{68}\) entering into fixed-term employment contracts is one of the ways to increase flexibility in labour relations. The new Estonian TLS is intended to be in line with the idea of flexicurity in simplifying the conclusion of fixed-term employment contracts. However, the Act makes the termination of such contracts more difficult. The author of this article holds that the regulation on the fixed-term employment contract should not give absolute priority to the security of the parties to the employment contract: it could be a good measure to increase flexibility. The new TLS does not use this opportunity.

\(^{61}\) Supra n. 17, 18–19.
\(^{62}\) An employer may terminate an employment contract on an extraordinary basis with good reason depending on an employee or for economic reasons (ss 88 and 89).
\(^{63}\) Supra n. 52, 371.
\(^{64}\) This rule does not apply if the contract terminates due to cessation of the activities of an employer or the declaration of the bankruptcy or termination of the bankruptcy proceedings of an employer without declaring bankruptcy, by reason of abatement of the bankruptcy proceedings.
\(^{65}\) Section 9(1) of the TLS establishes that a fixed-term employment contract may be made for up to five years.
\(^{67}\) Supra n. 52, 371. The regulation of the new Act would be more facile – the employer would have the possibility to terminate the employment contract for economic reasons if there is corresponding agreement between the parties.
\(^{68}\) See para. 3.2.1.
3.3. RIGHTS AND DUTIES OF EMPLOYEES AND EMPLOYERS

3.3.1. General Remarks

The regulation of the conclusion and termination of the employment contract is often associated with the implementation of the concept of flexicurity: the corresponding regulation shows how flexible or secure labour relations are. However, in this respect, the rules on the rights and duties of employees and employers for the duration of the employment contract should not be underestimated.

The regulation of the rights and duties of the parties to the employment contract subsumes various issues. The third chapter of the TLS provides lists of the main duties of employees and employers and describes some of them in detail (e.g., non-competition clauses, the duty of confidentiality, wages, working and rest time, annual leave, and so on).

Although the level of flexibility and security in labour relations depends on the regulation on working and rest time, in this article, these rules are not examined, because in comparison with the previous regulation the corresponding norms have not been amended to a significant extent, and they are essentially influenced by the EU law.

The new TLS modifies several norms regulating the rights and duties of the parties to the employment contract. Unlike the old TLS, the new Act provides for exhaustive rules dealing with non-competition clauses and the duty of confidentiality. However, as these obligations on the part of the employee are not included in every employment contract, they are not analysed in this article. In the next section, the focus is on two issues regarding the rights and duties of employees and employers: the employer’s obligation to provide training for the employee and the right to reduce wages upon failure to provide work, because they are new rules in Estonian labour law and linked to the idea of flexicurity.

3.3.2. Employer’s Obligation to Provide Training for the Employee

Labour market flexibility is related to the mobility of employees, as a high level of mobility of employees means more flexible labour markets. Therefore, the level of mobility of employees shows how the conception of the flexicurity is implemented.

It is possible to regulate various aspects of employee mobility. One of the main factors that helps increase mobility is the readiness of employees to change jobs. In order to ensure this, employees need appropriate training. In the EU in general and Estonia in particular, one of the key components of the idea of flexicurity is the need for an effective system of

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70 See, e.g., supra n. 10, 528 and supra n. 69, 592.
73 See, e.g., supra n. 69, 592.
lifelong learning. There are different ways to promote comprehensive lifelong learning strategies. Clearly, the state has an important role here in shaping the education system and training the unemployed, but lifelong learning may also be promoted in the framework of labour relations. This means that the employer provides training for the employee.

Section 49 5) of the old TLS stated that an employer is required to provide vocational training at the expense of the company if the employer changes the requirements for vocational skills (including proficiency in the official language and foreign languages) necessary for performance of the work. As a result, the employer was under an obligation to provide training for the employee when the requirements for vocational skills were altered.

In the new TLS, the employer’s obligation to provide training is wider. Following the idea of flexicurity, section 28(2) 5) of the TLS sets forth that, for the development of the vocational knowledge and skills of employees, an employer is obliged to provide the employees with training based on the interests of the employer’s enterprise and bear the training expenses and pay average wages during training.

However, it should be emphasized that the above-mentioned rule is not a general obligation for employers to train employees: the employer must provide only the training that is necessary for the employer’s enterprise. However, there is no need for changes in working conditions or the requirements for vocational skills, in order to provide training. Employers should provide training in the case of innovations concerning the theoretical basis or techniques specific to the activity performed.

It should also be mentioned that during training, an employee is granted study leave. Under section 8(2) of the Adult Education Act employees must be granted study leave of up to thirty days per calendar year in order to take part in education and training. Average wages must be paid to employees for twenty calendar days for the period of study leave for formal education and vocational training.

Thus, Estonian law has the prerequisites for putting into practice the concept of lifelong learning in the framework of employment. However, the corresponding norm (section 28(2) 5) TLS) is quite abstract and admits of interpretation. It is not entirely clear when the employee can require training. It may be argued that the employer decides when and how to provide training for the employee because it depends on the financial status of

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74 See paras 2.1. and 2.2.
75 Various action programmes for retraining and lifelong learning have been prepared on the national level: the Development Plan for Estonian Adult Education 2009–2013 (<www.hm.ee/index.php?1511077>, 15 Jun. 2010), which was approved by the Government of the Republic in September 2009 with the aim of increasing the possibilities and readiness of the Estonian people to learn, will certainly make a contribution in the future.
76 Supra n. 44, 32.
78 According to s. 3(2) TaKS, formal education provides the opportunity to acquire basic education or general secondary education or secondary vocational education or higher education.
79 Pursuant to s. 3(3) TaKS, vocational training provides the opportunity to acquire and develop professional, occupational and/or vocational knowledge, skills and experience and the opportunity for retraining at the place of employment or at an educational institution.
the employer. However, at least the new TLS draws the attention of employers and employees to the importance of lifelong learning.

3.3.3. Employer’s Right to Reduce Wages upon Failure to Provide Work

3.3.3.1. General remarks

According to the general principles of contract law, a contract may be amended with the agreement of the parties or on another basis prescribed by the contract or law.80 Both the old and the new TLS provide that employment contracts may be amended only by agreement between the parties (section 59(5) of the old TLS and section 12 of the new TLS).

However, due to unforeseen circumstances, the need may arise to alter the employment contract without the consent of the other party. Reasons for such amendments may include the employee’s state of health, pregnancy, reorganization of production or work, production emergency, work stoppage, temporary decrease in work volume or orders, and so on. Like the old TLS, the new Act contains rules about the unilateral amendment of the employment contract, that is, at the initiative of the parties to the contract.81

In the context of flexicurity, it is significant that the employer has the possibility to alter the employment contract without the employee’s consent. In a climate of strong competition, market conditions may change very quickly, and therefore, the employer may not be able to provide work on agreed conditions. Thus, it is important for the regulation on the amendment of the terms and conditions of employment to be flexible.

In order to react to changes in the market, employers often perceive the need to amend wage conditions and working hours.82 Under the old TLS, there was no provision to change wage conditions without the employee’s consent.83 Both the old regulation (section 64 TLS) and section 47(4) of the new TLS allow the employer to make amendments to the organization of working time.84 In addition, the new Act establishes rules on the reduction of wages.

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80 This rule was also established by s. 13(1) of the Estonian Law of Obligations (supra n. 22).

81 In comparison with the old regulation, the new TLS does not stipulate so many chances to alter the employment contract by request of the parties. Nevertheless, as the regulation of the old TLS was unnecessarily detailed, the new Act is flexible enough and makes it possible to amend the contract. Either way, the employer and the employee conduct negotiations before changes are introduced.

82 In theory, reference is made to wage flexibility (enabling employers to alter wages in response to the changing labour market and competitive conditions) and internal numerical flexibility or working-time flexibility (i.e., the employers’ ability to modify the number and distribution of working hours with no change in the number of employees). Supra n. 9, 393–394.

83 However, according to s. 68 of the old TLS, upon a temporary decrease in work volume or orders, an employer has the right to establish part-time working time for an employee for up to three months per year. The implementation of part-time working time brought about the reduction of wages.

84 Pursuant to s. 47(4) of the new TLS, employers may unilaterally change the organization of working time, provided that the changes arise from the needs of the employer’s enterprise and are reasonable, considering mutual interests.
3.3.3.2. Conditions and procedure for amendment

Section 37(1) of the new TLS states that if an employer, due to unforeseen economic circumstances beyond his/her control, fails to provide an employee with work to the agreed extent, the employer may, for up to three months over a period of twelve months, reduce the wages to a reasonable extent, but not below the minimum wage, if payment of the agreed wages is found to be unreasonably burdensome for the employer.

It should be stressed that the employer may reduce wages only due to unforeseen economic circumstances beyond his/her control. The employer has no right to reduce the business risk by the arbitrary diminution of the amount of work. The prerequisite for the implementation of this provision is that the employer is not able to influence economic circumstances giving rise to the need for the reduction of wages. In addition, the payment of the agreed wages must be unreasonably burdensome for the employer, who cannot reduce wages if he or she has the financial means to pay remuneration.

The employer may reduce wages for up to three months over a twelve-month period. Under the norm, the employer is not obliged to diminish wages for three consecutive months. The amount of decreased wage must be reasonable, but not lower than the minimum wage. According to section 37(3) of the TLS, an employee has the right to refuse to perform work in proportion to the reduction in wages.

However, the reduction in wages is connected with several procedural requirements: before reducing wages, an employer must, first, offer an employee another job, if possible (section 37(2) TLS) and, second, notify the employees’ representative or, in their absence, notify employees and consult them (section 37(4) TLS).

The employee is not obliged to agree with the reduction in wages. Pursuant to section 37(5) of the TLS, an employee has the right to terminate the employment contract due to the reduction in wages, giving notice five working days in advance. Upon termination of the employment contract, an employee is paid compensation.

The author of this article is of the opinion that, in the light of the concept of flexicurity, the Estonian legislator has increased flexibility of labour relations by establishing the rule that gives the employer the right to reduce the employee’s wage unilaterally. The corresponding rule is well considered: the employer does not have unlimited opportunities to reduce wages. The alteration of wages must be legitimate and the protection of employees is guaranteed by the procedure for amendment.

85 The minimum wage is established by the Government of the Republic. At present, the amount of minimum wage is EEK 4350 (EUR 280).
86 Supra n. 44, 39.
87 Ibid. n. 40.
88 The employer decides the wage that is reasonable. Supra n. 43, 86.
89 TLS s. 37(4) adds that the employer must provide notice of the reduction of wages no less than fourteen calendar days in advance. The employees’ representative or employees must give their opinion within seven calendar days of receiving the employer’s notice.
90 Under TLS s. 100(1), an employer must pay the employee compensation equivalent to one month’s average wages of the employee. In addition, an employee has the right to receive an insurance benefit from the Unemployment Insurance Fund (TLS s. 100(2)). About the amount of insurance benefit, see para. 3.4.4.
3.4. Termination of Employment Contracts at the Initiative of the Employer

3.4.1. General Remarks

In the framework of flexicurity, it is important to establish transparent rules on the termination of the employment contract. Above all, this concerns the termination of the employment contract at the initiative of the employer. The regulation of the termination of employment contract at the request of the employer shows how flexible labour relations are. The old TLS regulated the grounds and procedure for termination of employment contracts in great detail. That kind of rigid regulation on termination was not purposeful. The new TLS focuses on balancing the interests of the parties to employment contracts and attempts to make the rules more flexible.

However, in the case of the termination of the employment contract at the initiative of the employer, the security of the employees must not be underestimated. The termination of the employment contract usually means a loss of income for the employee. This is why the law should provide adequate protection for the employee. Thus, the legislator must weigh the needs of employers and employees carefully before adopting regulations on the termination of the employment contract at the request of the employer.

3.4.2. Grounds for Termination

In the legal systems in several countries, it is possible to distinguish two different situations in which the question of termination of employment arises, depending on the nature of reasons stated for the termination. The international organizations also support such an approach. For example, according to the International Labour Organization (ILO) C158, an employment contract must not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking, establishment, or service (Article 4).

As regards the previous Estonian regulations, section 86 of the old TLS provided ten specific grounds for terminating contracts. For each of the grounds for dismissal, the employer had an obligation to prove that there was a reason provided by law for the

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91 In theory, it is a matter of external numerical flexibility, i.e., the employers’ ability to adjust the number of employees to the current needs of production. In other words, it is the ease of hiring and firing employees, which manifests itself in the mobility of workers between employers. Supra n. 9, 393.


95 For example, liquidation of the enterprise, agency, or other organization; declaration of bankruptcy of the employer, lay-off of employees; unsuitability of an employee for his or her office or the work to be performed; unsatisfactory results of a probationary period; the long-term incapacity for work of an employee; breach of duties by an employee, etc.
dismissal; otherwise, the dismissal was unlawful. The regulation of the law was so detailed that employers often did not exactly understand which ground was applicable or whether a dismissal was indeed lawful in a given case.96

The new TLS makes significant changes concerning the rules on the termination of employment contract on the initiative of the employer. Instead of exact grounds, the TLS provides general reasons and guidelines for termination. Similar to other counties’ regulation,97 pursuant to sections 88 and 89 of the TLS, the employer can terminate the employment contract for economic reasons or reasons pertaining to the employee’s conduct or capacities/personal attributes. However, every termination of the employment contract must be justified by good reason as a result of which the employment relationship cannot be expected to continue.98

The author of this article holds that, in the light of the concept of flexicurity, the regulation of the TLS is successful. The new Act increases flexibility of labour relations to a great extent. Although Estonian employers are used to exact statutory norms, the TLS is detailed enough to guarantee a fair and flexible interpretation of rules.99 However, it is also clear that the new regulation increases the role of courts in the implementation of law.

3.4.3. Term of Advance Notice

As in the case of the termination of employment contract, the employee may lose his or her income, both national and international instruments establish the employer’s obligation to give notice of termination in order to enable the employee to look for a new job. For example, under Article 11 ILO C158, an employee whose employment is to be terminated is entitled to a reasonable period of notice or compensation in lieu thereof, except in the case of serious misconduct.100

In national legal systems, the legislation usually stipulates the minimum period of notice that the employer must observe and that is based on the principle that the duration of the period of notice depends on the length of the employee’s employment with the employer.101

Under the old TLS, the employer’s duties were extensive in the case of the lay-off of employees when the period of notice (two, three, or four months) depended on the length of service of the employee with the employer (respectively, less than five years, five to ten years, more than ten years; section 87(1) 3)). The employer was required to give the employee at least two months’ prior notice before dismissal in the case of the liquidation of

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96 Supra n. 92, 20.
97 See, e.g., supra n. 36, 373.
98 Supra n. 17, 65.
99 Supra n. 36, 373.
100 That is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period. However, Art. 4.4 of the European Social Charter does not bind the employer’s duty to give notice to the reason of termination. European Social Charter (1961), Council of Europe, <http://conventions.coe.int/Treaty/en/Treaties/Html/035.htm>, 15 Jun. 2010.
101 Supra n. 36, 374.
a legal person (section 87(1) 1)). In the case of the unsuitability of the employee, the corresponding term was one month and, in the case of long-term incapacity for work, two weeks (sections 87(1) 4) and 5).102 Hence, in the old TLS the ground for termination determined the length of the notice period.

The new TLS does not differentiate notice periods according to the reasons for termination. Section 97(2) of the TLS establishes that an employer must give an employee advance notice of termination if the employment relationship with the employer has lasted less than one year – fifteen calendar days; one to five years – thirty calendar days; five to ten years – sixty calendar days; ten or more years – ninety calendar days.103 Employers need not follow these rules when the reasons for termination are connected with the employee’s conduct or capacities/personal attributes.104

The author of this article holds that, in comparison with the old TLS, the new regulation does not change the level of the protection of employees. On the one hand, the TLS increases the employees’ security because, usually, the employer is obliged to give advance notice irrespective of the ground for termination. On the other hand, the new Act increases flexibility of labour relations because lengths of notice periods are shorter. In order to compensate for this disadvantage, the TLS provides for the additional obligation for the employer. Pursuant to section 99 of the TLS, an employer must grant an employee time off to find a new job to a reasonable extent within the period of advance notice. However, as in the case of termination of the employment contract for reasons depending on the employee, the obligation to give advance notice is subject to interpretation, and the new regulation will probably give rise to more disputes.

3.4.4. Compensation

Upon termination of the employment contract at the initiative of the employer, it is important to guarantee the employee sufficient income, especially when he/she does not immediately find a new job. In line with the rules of other countries105 and Article 12 of the ILO C158, in order to protect the employee’s income, a severance allowance and/or benefits from unemployment insurance must be paid to the employee by the employer or by the special funds. As the employer’s fiscal obligations prevent the termination of the

102 If the employer did not observe the notice period prescribed in the old TLS, he or she was required to pay compensation to the employee in the amount of the employee’s average daily wages for each working day short of the advance notice of termination (s. 87(2)).

103 These are minimum periods. If an employer gives advance notice of termination later than provided by law or a collective agreement, the employee has the right to receive compensation to the extent to which he or she would have had the right to obtain upon following the term of advance notice (s. 100(5) TLS).

104 Section 97(3) of the TLS states that when an employer terminates an employment contract for reasons dependent on employee, he or she may terminate the contract without adhering to the term of advance notice if, considering any and all circumstances and mutual interests, it cannot be reasonably demanded that the performance of the contract be continued until the expiry of the agreed term or term of advance notice. The author of this article is of the opinion that, in addition to the aforesaid rule, the observance of notice period is not reasonable when employer terminates the contract upon declaration of the bankruptcy or termination of the bankruptcy proceedings of an employer without declaring bankruptcy, due to abatement of the bankruptcy proceedings.

105 Supra n. 36, 374.
employment contract and, therefore, make labour relations less flexible, the balance of the employer’s and state responsibilities when dismissal results in unemployment must be well considered.

According to section 90(1) 2) of the old TLS, an employer was required to pay compensation equivalent to one month’s average wages when the ground for the termination was the unsuitability of the employee. In the case of the lay-off of employees or the liquidation of a legal person, the amount of compensation (two, three, or four months’ average wages) paid to employees depended on the length of service of the employee in the company (respectively, less than five years, five to ten years, more than ten years; section 90(1) 1) TLS). Under the previous regulation, the state had no obligation to pay any separation benefits.

The new TLS modifies the regulation concerning the employee’s income protection. In comparison with the old rules, the TLS diminishes the employer’s responsibility and enlarges the responsibility of the state when the dismissed employee becomes unemployed. Under section 100(1) of the TLS, in the case of lay-off of employees, the employer is required to pay compensation equivalent to the average monthly wage to the employee. The employer is not required to pay compensation when the employment contract ends for other reasons.

In addition to the compensation paid by the employer, section 100(2) of the TLS establishes that upon the termination of an employment contract due to a lay-off, an employee has the right to receive insurance benefit. The TLS sets forth a new type of benefit: insurance benefit upon lay-off, which is paid under the conditions and pursuant to the procedure provided for in the Unemployment Insurance Act106 (Töötuskindlustuse seadus–TKindlS). According to section 147 of the TKindlS, the amount of the benefit upon lay-off depends on the length of service of the employee in the company: an employee who has been employed by the employer for a period of five to ten or over ten years is entitled, respectively, to one or two months’ benefit.

However, in contrast with the previous regulation, the total amount of compensation107 is smaller. The new Act lays down that the amount of compensation can be diminished due to the increase of the amount of the benefit to be paid in the case of unemployment.108 In fact, whereas section 9(4) 1) of the TKindlS establishes that the amount of the unemployment insurance benefit per calendar day is 50% of the remuneration per calendar day for the period of one to 100 calendar days, section 178 10) of the TLS increases the amount to 70%. In addition, under section 9(4) 2) of the TKindlS, the amount of unemployment insurance benefit per calendar day is 40% of the remuneration per calendar day for the period of 101 to 360 calendar days, whereas the TLS increases the corresponding percentage to 50%.


107. That is the compensation paid by the employer plus the benefit upon lay-off. The total amount of the compensation has been reduced by one month’s salary.

108. Supra n. 17, 76–77.
The enforcement of section 178 10) of the TLS that strengthens the employee’s protection in the case of unemployment has been postponed because the new Act was drafted during the economic growth (2006–2007) but when the TLS entered into force the Estonian economy was in deep crisis and it was not possible to guarantee employees all the planned entitlements.

The author of this article is of the opinion that the reduction of the employees’ rights and employers’ duties in the manner provided in the TLS is reasonable. By enlarging the state responsibility, the TLS introduces greater flexibility in the termination of employment by the employer. However, the implementation of the idea of flexicurity is not successful because the essential provisions concerning employee security are not in force.

4. Concluding Remarks

The idea of flexicurity that is the basis of the new TLS originates from the corresponding concept approved in the EU. Under the interpretation of the EU, the essence of this concept is to strike a balance between flexibility and security. The new Estonian law also attempts to give equal weight to these two components of flexicurity in the labour market.

Depending on the matter at issue, the TLS diminishes or extends the employers’ obligations and the employees’ rights. In addition, the new Act gives the parties to the employment contract more possibilities to conclude agreements concerning different aspects of the labour relation. In general, the legal regulation of labour relations is more flexible, but the security of employees, especially in the event of unemployment, has not increased. However, as the TLS has been in force for only one year, there is no significant case law concerning the new Act. The rules of the TLS are quite abstract, and therefore, the Estonian courts will have considerable power to shape the corresponding practice.

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109 The enforcement has been postponed until 1 Jan. 2013.
110 The TLS entered into force on 1 Jul. 2009.
111 Supra n. 36, 375 and supra n. 66, 249.
112 Especially the Supreme Court. Although the decisions of the Supreme Court as the highest instance are not binding on courts of lower instance, the latter still follow the Supreme Court’s views in making their judgments.
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