



# Legal Science: Functions, Significance and Future in Legal Systems II

16–18 October, 2019 Riga

Collection of research papers in conjunction with  
the 7<sup>th</sup> International Scientific Conference of  
the Faculty of Law of the University of Latvia



**UNIVERSITY  
OF LATVIA**



**LATVIJAS  
UNIVERSITĀTE**

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This publication presents the second collection of research papers in conjunction with the 7<sup>th</sup> International Scientific Conference of the Faculty of Law of the University of Latvia “Legal Science: Functions, Significance and Future in Legal Systems”, 16–18 October, 2019, Riga, 424 pages.

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# Preface

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As the Chair of the Editorial Board of the Compendium II, which includes the papers presented at the 7<sup>th</sup> International Conference “Legal Science: Functions, significance and Future in Legal Systems”, I am particularly pleased and honoured to introduce the purpose and the contents of the current volume.

The international echo and success of this conference that once again – and even more so because of the University of Latvia Faculty of Law centenary celebration – welcomed scholars and researchers from several foreign jurisdictions, deserved a thorough publication of contributions, which will surely represent a pillar of modern legal science.

The present compendium offers a vast and stimulating view of the various conference sections with topics that range from the future and sustainable development of the modern states to the rule of law, from private international law and EU law to international and human rights, from the future challenges of criminal law to the theory of law and its support in raising the quality of legislation, and finally, to the current trends of private law.

The papers included in this volume are a result of rigorous analyses of the main questions and debates in the contemporary legal science. Topical issues and juridical problems have been tackled with intelligence and wisdom, especially when a regulation or court practice reflect EU developments, national tendencies and historical traditions.

Law interpretations and legal debates have been addressed by the authors within the framework of political assumptions and/or economic theories, which definitely represent the most valid legal research method.

The aim of the conference and its international dimension is perfectly represented by this collection containing papers that explore national legal evolution, often through comparative analysis. In some cases, the reader will see traces of harmonisation, in others – divergence, because law, and particularly its enforcement, remains the consequence of paths that make the history of each country unique. After all, that is the richness of Law: *Lex multiplex, ius unum*.

I am delighted to acknowledge the great merit of University of Latvia Faculty of Law, as it has endowed the EU and the world with another impressive token of the current international legal debate.

**Carlo Amatucci**

University of Naples Federico II

# SECTION 1

## CONSTITUTIONALITY AND SUSTAINABLE DEVELOPMENT OF THE STATE

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# PROTECTION OF PRINCIPLE OF THE RULE OF LAW IN RELATIONS BETWEEN THE EUROPEAN UNION AND THE REPUBLIC OF POLAND

## Summary

It is indisputable that the European Union is currently facing the greatest crisis since its creation. One of its causes is the issue related to the failure to follow the rule of law in some Member States, including Poland. This has resulted in a certain “awakening” in the protection mechanisms of the rule of law by the EU institutions, which is proven by their firm reaction to the Polish reforms regarding the judiciary. The fate of the EU as “the Union of principles” currently hangs in the balance, and each member state has to clearly determine its position in the organisation regarding this situation.

**Keywords:** rule of law, Court of Justice of the EU, justice administration system

## Introduction

The rule of law, being one of the fundamental principles that uphold the functioning of the European Union, is a complex subject, impossible to describe within the limits of a single academic article. The issues raised in this study will be limited to being indicative in nature, and they will only point out the main problems related to the rule of law in the sphere of relations between Poland and the European Union.

## 1. The concept and significance of the rule of law

The rule of law constitutes an element in the heritage of the EU Member States, and its universal function consists of the limitation of power by law, the protection of individuals against arbitrary power, and ensuring priority and dignity to the individual<sup>1</sup>. The essence of the rule is contained in Article 2 of the Treaty on European Union (TEU) and simultaneously constitutes one of the basic

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<sup>1</sup> Taborowski M. Mechanizmy ochrony praworządności państw członkowskich Unii Europejskiej. Studium przebudzenia systemu ponadnarodowego [Mechanisms to protect the rule of law of the European Union Member States. Study of the awakening of the supranational system]. Warsaw: Wolters Kluwer, 2019, p. 59;

constitutional principles of the EU<sup>2</sup> and the Member States, which, by joining the organisation, are obliged to respect and support this principle. In accordance with the so-called First Copenhagen Criterion, as specified in the Copenhagen Declaration of June 1993<sup>3</sup>, the accession of new states requires that

*[..] the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities [..]*<sup>4</sup>.

However, Article 2 of the TEU does not further specify the concept of the rule of law, consequently, for this rule to be applicable, it should be replete with content, which is the responsibility of the Court of Justice of the EU (CJEU).

The legal science considers the rule of law as an umbrella principle, which in its essence is a meta-principle, encompassing the tenets with specific normative significance in the EU legal system<sup>5</sup>. From the practical perspective, there are many sources providing elements forming the rule of law. One of the most important is definitely the Communication from the Commission on the Rule of Law of 2014 (“A new EU Framework to strengthen the Rule of Law”). It contains a set of six main principles of EU law, constituting, in the opinion of the Commission, the foundation of the rule of law within the meaning of Article 2 of the TEU: legality, legal certainty, the prohibition of arbitrariness in executive powers, independent and impartial courts, the separation of powers, and equality before the law. Essentially, all these principles either constitute the general principles of EU law or they have their source in the case law of the CJEU, or they are protected according to the Charter of Fundamental Rights.

## 2. Polish regulations concerning the rule of law

When Poland was at the stage of aspiring to the European Union membership, it had to accept the core values underlying the existence and functioning of the

<sup>2</sup> As follows: Communication from the Commission to the European Parliament and the Council. a new EU Framework to strengthen the Rule of Law, Strasbourg, 11/03/2014, COM(2014) 158 final, p. 2; see more on the subject of the Communication: Prostack R. Nienaruszalność unijnego systemu wartości jako żywotny interes Unii Europejskiej-krytyczna analiza mechanizmu egzekucji postanowień art. 2 Traktatu o Unii Europejskiej [Inviolability of the EU value system as a vital interest of the European Union – a critical analysis of the enforcement mechanism of Article 2 of the Treaty on European Union]. *Zeszyty Naukowe Uniwersytetu Ekonomicznego w Krakowie* [Cracow Review of Economics and Management]. No. 7, 2017, p. 92; Würtenberger T., Tkaczyński J. W, Nowe ramy Unii Europejskiej na rzecz umocnienia praworządności [A new European Union framework for strengthening the rule of law]. *Państwo i Prawo* [The State and the Law], No. 9, 2017.

<sup>3</sup> European Council, Conclusions of the Presidency, Copenhagen, 21–22/06/1993, DOC/93/3.

<sup>4</sup> Barcz J. Unia Europejska wobec niepraworządnego państwa członkowskiego [The European Union in relation to a Member State failing to abide the law]. *Państwo i Prawo* [The State and the Law], No. 1, 2019, pp. 4–5.

<sup>5</sup> Taborowski M. 2019, p. 61; the author quotes Pech L. The Rule of Law as a Constitutional Principle. *Jean Monnet Working Paper Series*, No. 4, 2009, p. 49 and 53, and Marshall G. The Rule of Law. Its Meaning, Scope and Problems. *Cahiers de philosophie politique et juridique*, No. 24, 1993, p. 43.

entire organisation. However, the rule of law clearly arises from the provisions of our constitution of 17 October 1997: “The organs of public authority shall function on the basis of, and within the limits of the law”. According to the understanding adopted in Polish constitutional law, this tenet is equated to the principle of the legality of the public-authority bodies, which basically means that they operate on the basis and within the limits of the law. The law, in turn, determines their tasks and competences, as well as the procedure for issuing decisions in the form and legal basis prescribed by the law and in compliance with the substantive regulations binding on a particular body<sup>6</sup>. Furthermore, it should be emphasised that the rule of law is a component of the state of the law and from a chronological perspective this is its source and it should be interpreted through such dimension<sup>7</sup>.

### 3. Poland and the European Union – a story of a difficult relationship

Regardless of the unanimous assurances by the Polish Constitutional Tribunal included in the judgement of 11 May 2005 on the Treaty on the accession by the Republic of Poland to the EU<sup>8</sup> concerning Poland’s membership of the union of law and the community of values such as democracy, and the rule of law, the issue of the rule of law at a certain time became a moot point between Poland and the EU. Since 13 January 2016, the European Commission has been conducting a structural dialogue with Poland on the matter of the rule of law in our country, issuing successive

<sup>6</sup> Sokolewicz W. Komentarz do art. 7 Konstytucji RP z 2 kwietnia 1997 r. [Commentary to Article 7 of the Constitution of the Republic of Poland of 2 April 1997]. In: *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Constitution of the Republic of Poland. Commentary], Vol. 5, Garlicki L. (ed.), Warsaw: Wydawnictwo Sejmowe 2007, p. 5; Skrzydło W., *Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. Komentarz* [Constitution of the Republic of Poland of 2 April 1997. Commentary]. Cracow, 1998, p. 15; Winczorek P. Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 IV 1997 r. [Commentary to Article 7 of the Constitution of the Republic of Poland of 2 April 1997]. Warsaw, 2000, p. 19; Morawska E. Klauzula państwa prawnego w Konstytucji RP na tle orzecznictwa Trybunału Konstytucyjnego [The rule of law clause in the Constitution of the Republic of Poland against the background of the Constitutional Tribunal’s jurisprudence]. Toruń, 2003, pp. 41–42; see also Tuleja P. Komentarz do art. 7 Konstytucji RP [Commentary to Article 7 of the Constitution of the Republic of Poland]. In: *Konstytucja RP, Komentarz* [Constitution of the Republic of Poland. Commentary]. Vol. 1, Safjan M., Bosek L. (eds.), Warsaw: CH Beck, 2016, p. 303; Judgement of the Polish Constitutional Tribunal Ts 216/04 of 9 May 2005, OTK ZU 2006, series B, No. 2, item 87.

<sup>7</sup> Sokolewicz W. 2007, p. 3; more on the subject of the concept of democratic principles of the state of law cf. i.a. Czarnek P. Zasada państwa prawa [Rule of law]. In: *Zasady Ustroju III Rzeczypospolitej Polskiej* [The Principles of the Third Republic of Poland]. Dudek D. (ed.), Warsaw: Wolters Kluwer, 2009, pp. 156–189; Tuleja P. Zastane pojęcie państwa prawnego [The concept of the rule of law as established]. In: *Wronkowska S. (ed.), Zasada demokratycznego państwa prawnego w Konstytucji RP* [The principle of a democratic state of law in the Constitution of the Republic of Poland], Warsaw, 2006.

<sup>8</sup> Judgement of the Polish Constitutional Tribunal K 18/04 of 11 May 2005, OTK-A 2005/5, item 49.

recommendations on this matter addressed to the Polish authorities<sup>9</sup>. Regarded as the culmination of these activities was, arguably, the proposal by the European Commission of 20 December 2017, adopted pursuant to Article 7(1) of the TEU, on identifying of a clear risk of a serious breach of the rule of law by Poland (the first proposal of such kind in the history of the EU). Simultaneously with the proposal (apart from the fourth recommendation), the Commission decided to take another step in the infringement proceedings against Poland (for a breach of the EU law and the adoption of the Act on the Common Court System), and to bring the matter before the Court of Justice of the European Union. These events initiated an ongoing political and academic debate in Poland and abroad, and relations between Brussels and Warsaw had never been this tense. The situation still retains its dynamics, and new issues related to the matters discussed in this article appear almost on a daily basis. At the beginning of October 2019, the CJEU received a new complaint from the European Commission (the third one in the sequence), according to which, the system of discipline for judges introduced by the provisions of Polish acts undermined the independence of the representatives of the Polish justice system, and did not ensure the necessary guarantees facilitating protection against control by the politicians. The Commission passed a motion for implementing scrutiny according to the expedited procedure, leading to the assumption that the decision of the CJEU on this matter would be issued within a few months. Very soon, on 5 November 2019, we will get to know the decision of the CJEU on the complaint by the European Commission regarding the provisions of the Act on the Common Court System (the complaint was lodged in March 2018). According to the CJEU Advocate General, Prof. Evgeni Tanchev, the provisions contested by the Commission are incompatible with EU law<sup>10</sup>.

#### **4. The position of the Court of Justice of the EU with regard to the Polish Supreme Court**

The case regarding the complaint by the European Commission on the matter of the violation by the Polish legislator of the fundamental tenets of the law of the EU, including the principle of judicial independence, lodged before the CJEU was recently decided. The CJEU announced its judgement in this case on 24 June 2019 (the judgement of the CJEU, Grand Chamber, in case C 619/18), with a prior decision to apply interim measures with regard to Poland in the form of an order to suspend the application of the provisions of the Law on the Supreme Court

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<sup>9</sup> See also the White Paper on the reforms of the Polish justice system presented by the Prime Minister of the Republic of Poland Mateusz Morawiecki at the meeting with the President of the European Commission Jean-Claude Juncker on 08/03/2018, which is treated as participation in the discussion on behalf of the Polish authorities (available at [www.premier.gov.pl](http://www.premier.gov.pl)).

<sup>10</sup> Opinion of Advocate General Evgeni Tanchev of 20 June 2019, ECLI:EU:C:2019:529; see also the earlier opinion of the same Advocate of 11 April 2019 on case C-619/18; both available on the website: [www.curia.europa.eu](http://www.curia.europa.eu).

on the retirement age for judges of the Supreme Court (thereby concurring with the request of the European Commission).

At this point, the significance of the interim measures mentioned above should be emphasised, as they provoked a clear reaction by the Polish authorities. The consequence was the restoration of the original legal status (*restitutio in integrum*) from before the adoption of the controversial provisions. At the same time, the Polish state, by the mere fact of the application of the decision, committed to refrain from any other activities aimed at impeding or negating the purposes of the interim measure.

The radicalism, the far-reaching consequences of this measure, and its distinctiveness (as it differs from the interim measures known to Polish law) gave rise to much political and academic discussion in our country<sup>11</sup>. The main problem, which appeared in relation to the discussed matter, was the question of whether the order issued by the CJEU created an independent legal basis for reinstatement of the judges of the Supreme Court to their previous posts. Finally, in order to apply the interim measures, the Polish authorities adopted an act amending the disputed provisions of the national law<sup>12</sup>. However, this fact did not stop the CJEU from adopting the judgement in this case.

The judgement of the CJEU concerned amendments to the Law on the Supreme Court adopted in 2018, which instituted, among other things, the lowering of the retirement age for judges of the Supreme Court and the Supreme Administrative Court from the age of 70 to 65 years. The CJEU emphasised that the disputed provisions of the Law on the Supreme Court breached the principle of the irremovability of judges, and judicial independence, thereby contravening the EU law. The Court also added that the guarantees regarding the independence and impartiality of judges require the authority in question to perform its duties in fully autonomous manner, protected from external pressure or interference.

## 5. The consequences of failure to observe the rule of law

Consequently, as it appears, at present the issue of the rule of law is the main factor governing relations between Poland and the EU. The essential question in this regard is what are the consequences for both parties.

Clearly, the crisis of the rule of law in any Member State has a negative impact on the entire EU, and exceptional measures would be required in the case

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<sup>11</sup> More on this subject: Kmiecik Z. Ochrona tymczasowa w sprawie skargi Komisji przeciwko Polsce dotyczącej przepisów ustawy obniżającej wiek przejścia w stan spoczynku sędziów SN. Glosa do postanowienia TSUE z 19.10. 2018 [Interim protection in the case of the Commission's complaint against Poland concerning the provisions of the act lowering the retirement age for the judges of the Supreme Court. Gloss to the CJEU decision of 19 October 2018]. C-619/18 R, *Państwo i Prawo* [The State and the Law], No. 1, 2019, p. 145.

<sup>12</sup> The Law of 21 November 2018 amending the Law on the Supreme Court (*Journal of Laws*, item 2507), which entered into force on 01 January 2019.

of a systemic crisis<sup>13</sup>. From this perspective, it should be noted that to a certain extent the EU has “activated” its system of supranational protection,<sup>14</sup> and the actions of the Polish authorities are largely responsible for that. As a result of its actions, the Republic of Poland is the only country having been covered by all the proceedings before the CJEU aimed at the protection of the rule of law<sup>15</sup>. These include the protection resulting from the procedure of Article 7 of the TEU, and the protection resulting from initiation of the preliminary ruling procedure pursuant to Article 267 of the TFEU (i.e., in practice, protection implemented by national courts).

Notably, the introduction of the procedure in accordance with Article 7 of the TEU was directly related to expanding of European integration with the states of Eastern-Central Europe, including the former states of the Soviet bloc<sup>16</sup>. Due to the fact that for a certain time among the Member States of the EU there have been systemic cases where the rule of law has been breached, the procedure under Article 7 of the TEU is increasingly frequently being perceived as a procedure with the repressive function (the initiation of sanction mechanism under Article 7(3) of the TEU) and isolating (aimed at protecting other EU states from the effects of the breach of values under Article 2 of the TEU)<sup>17</sup>.

The procedure regulated by Article 258 of the Treaty on the Functioning of the European Union (TFEU) enables the Commission (as the “guardian of the Treaties”) and the Member States (by Article 259 of the TFEU) to supervise the application of EU law by the countries, which belong to the EU<sup>18</sup>. The establishment of an infringement by the CJEU in the manner specified above results in an obligation imposed on a Member State to eliminate the infringement (Article 260 of the TFEU), and, if it fails to do so (i.e., fails to apply the order identifying the infringement), a penalty payment may be imposed (Article 260(2) of the TFEU), but this is not subject to the consent of the Member State. Although the indicated procedure was not constructed directly as a mechanism for the protection of the rule of law, the Commission has started to use it effectively in

<sup>13</sup> Safjan M. Rządy prawa a przyszłość Europy [The rule of law and the future and the future of Europe]. *Europejski Przegląd Sądowy* [European Judiciary Review], No. 8, 2019, p. 1.

<sup>14</sup> Using the definition of Taborowski M. presented in monograph cited above.

<sup>15</sup> On the subject of the effectiveness of the mechanisms of the rule of law, see: Grzeszczak M. Skuteczność unijnych procedur ochrony praworządności w stosunku do państw członkowskich [Effectiveness of EU procedures for protecting the rule of law in relation to Member States]. *Państwo i Prawo* [The State and the Law], No. 6, 2019, pp. 28–54.

<sup>16</sup> Kochenov D. Busting the Myths Nuclear: a commentary on Article 7 TEU, EUI Working Paper, Law 2017/10, pp. 4–5.

<sup>17</sup> Mik C. Komentarz do art. 7 TUE [Commentary on Article 7 TEU], In: *Traktat o Unii Europejskiej. Komentarz* [Treaty on European Union. Comment]. Mik C., Czaplński W. (eds.), Warsaw 2005, p. 95; on the subject of the of the essence and origins of procedure; see also Galster J., Lis-Staranowicz D. Doktryna Point of no return w prawie Unii Europejskiej. Ratione materiae wobec ratione temporis [The point of no return doctrine. Ratione materiae towards ratione temporis], *Państwo i Prawo* [The State and the Law], No. 7, 2017, p. 18 et seq. Barcz J. 2019, p. 11.

<sup>18</sup> Taborowski M. 2019, p. 215.



practice, which is proven by the aforementioned complaints regarding the Supreme Court, common courts and the disciplinary measures for the judges.

The last mechanism related to the preliminary ruling procedure (Article 267 TFEU) engages courts of EU Member States in protecting the essential rules of the supranational system, and it is a significant link in cooperation between them and the CJEU. It should be kept in mind that many essential principles on which the functioning of the EU is based have been developed precisely within the framework of this procedure, and the one, which is germane to the matters discussed here, is the rule of law<sup>19</sup>. At the moment, there are pending 14 requests for preliminary rulings submitted by Polish courts, which mainly ask whether certain elements of the judicial reforms of the ruling majority are lawful, such as the appointment of the new National Council of the Judiciary of Poland, the status of the newly-created Disciplinary Chamber of the Supreme Court, and a new model for disciplining judges<sup>20</sup>.

One should definitely add to the aforementioned procedures inclusion of Poland in the proceedings pursuant to the Communication of 11 March 2014, aiming to ensure “effective and coherent protection of the rule of law in all Member States”<sup>21</sup>. These proceedings are separate from those noted above, and in fact their function is preparatory for the procedure under Article 7 of the TEU (although their assumption is, in general, to avoid it)<sup>22</sup>.

Launching the aforementioned procedures obviously has a multidimensional impact on Poland, and this is not solely limited to the issue raised most often in public debate, i.e., financial sanctions from the EU. Legal science emphasises the existence of other severe consequences of a Member State’s failure to follow the rule of law, such as the isolation of the state, the limitation of funds from the EU budget, the exclusion of the influence of the state on the further systemic

<sup>19</sup> Cf. i.a. the judgement of the CJEU of 11 November 2005, C-144/04, *Werner Mangold v. Rüdger Helm*, ECLI:EU:C:2005:709; the judgement of 27 February 2018, C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117 and the commentary on the judgement, Bogdanowicz P., Jak Trybunał Sprawiedliwości “aktywował” art. 19 ust. 1 TUE w kontekście praworządności: uwagi na tle sprawy C-64/16 [How the Court of Justice “activated” Article 19(1) TEU in the context of the rule of law: comments against the background of case C-64/16]. *Associação Sindical dos Juizes Portugueses*. In: *Sądowe mechanizmy ochrony praworządności w Polsce w świetle najnowszego orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej* [Judicial mechanisms for the protection of the rule of law in Poland in the light of recent judicial decisions of the Court of Justice of the European Union], Barcz J., Łojek-Zawidzka A. (eds.), Warsaw, 2018.

<sup>20</sup> On 19 November, the judgement of the CJEU will be announced on the requests of the Supreme Court and the Supreme Administrative Court on the Disciplinary Chamber of the SC. Advocate General Evgeni Tanchev issued a very negative opinion regarding this chamber and the new National Council of the Judiciary, participating in the appointment of its judges; the opinion of the Advocate General on joined cases C-585/18, C-624/18 and C-625/18, the National Council of the Judiciary and others is available at [www.curia.europa.eu](http://www.curia.europa.eu).

<sup>21</sup> Communication, p. 3; The proceedings conducted by the Commission based on the Communication are referred to as “a mechanism” in the Communication itself, as well as by the CJEU, e.g. in the Order of 17 December 2018, C-619/18 R, *Commission v. Poland*, Clause 81.

<sup>22</sup> Taborowski M. 2019, p. 150.

development of the EU, exit (or even exclusion) from the Union<sup>23</sup>. One should also add the internal results of the conflicts arising between Poland and the EU, such as the noticeable political and social crisis, exacerbating the already considerable division among the citizens of our country. It seems that the winning of the recent parliamentary elections by the *Prawo i Sprawiedliwość* party, which is openly sceptical towards the previous concept of European integration, will not improve the situation.

## Conclusions

The scale of current challenges to the process of European integration by the EU Member States is immense and, depending on how these challenges will be addressed, the further direction of the development of this process and the position of particular States within it will be determined<sup>24</sup>. If the organisation is to remain “the Union of principles”<sup>25</sup> (“the Union of values”<sup>26</sup>), it seems that consistency and determined actions to reinforce the protection system of supreme values are the only possible direction. The author thinks that the question regarding states’ position in the organisation has to be answered individually by each country through the dimension of its own expectations towards European integration. It could be resolved either following the path of compromise and dialogue, or in the manner chosen by the UK. However, are we really going to respond to all the doubts currently being raised in political debate in Poland by going as far as leaving the organisation, despite having aspired to the membership for many years within the framework of democratic transformations, leaving behind us the experience of totalitarianism and exclusion?

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<sup>23</sup> Barcz J. 2019, pp. 11–20.

<sup>24</sup> Barcz J. Różnicujący się proces integracji europejskiej a Polska [The diversifying European integration process and Poland]. In: *Polska w Unii Europejskiej. Nowe wyzwania* [Poland in the European Union. New challenges]. Barcz J., Domaradzki S., Kuligowski R., Szewczyk M., Szklarczyk-Amati E. (eds.) The European Commission Representation Office in Poland: Warsaw, 2018, p. 30.

<sup>25</sup> Safjan M. 2019, No. 8, p. 6 et seq.; perceives the EU mainly as an economic union. Rulka M. Unijna kontrola praworządności-uwagi *de lege ferenda* [EU control of the rule of law – *de lege ferenda* remarks]. *Studia Europejskie* [Studies in European Affairs], No. 2, 2016, pp. 54–55.

<sup>26</sup> Von Bogdandy A. Tyrania wartości? Problemy i drogi europejskiej ochrony praworządności krajowej [Tyranny of values? Issues and methods in the protection of the rule of law in Europe]. *Europejski Przegląd Sądowy* [European Judiciary Review], No. 4, 2019, pp. 4–11.

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## **METHODS OF INCREASING VOTER TURNOUT IN THE CONTEXT OF ITS DECLINE AND LOW CIVIL CULTURE**

### **Summary**

The article presents selected issues related to realization of the Principle of the Sovereignty of the Nation, the institution of voting and voting turnout. The author tries to answer the question: how to increase voter turnout in the context of its decline and low civil culture? The article explores the methods of increasing voter turnout, such as compulsory voting, canvassing, creating well-informed voters, the value of online relationships in spurring people to vote.

**Keywords:** voter turnout, diminishing of attendance, voting, increasing voter turnout, elections

### **Introduction**

The article presents selected issues related to realization of the Principle of the Sovereignty of the Nation, the institution of voting and voting turnout. The article provides an answer to the question: how to increase voter turnout in the context of its decline and low civil culture? The current text presents methods of increasing voter turnout, such as compulsory voting, canvassing, creating well-informed voters, the value of online relationships in spurring people to vote.

The point of departure should be that the concept of democracy is governed by three principles: the principle of equality of all citizens before the law<sup>1</sup>; the principle of constitutional rights of the individual towards the state<sup>2</sup>; the principle that

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<sup>1</sup> Human Rights Committee determined that together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. CCPR General Comment dated 10 November 1989 No. 18. Available at: <https://www.refworld.org/docid/453883fa8.html> [last viewed January 14, 2020]. Also, the Polish Constitutional Tribunal determined the essence of the formal equality, which states that all public law entities distinguished equally by a given essential feature (relevant), shall be treated equally. The judgement of the Polish Constitutional Tribunal of 9 March 1988, Ref. No. U 7/87.

<sup>2</sup> The Human Rights Committee has stated that the citizen's right to take part in the conduct of public affairs includes constitutional processes. It has also recognized that the requirements of this right are met as long as important groups in society are represented and can participate. Human Rights Committee Communication of 30 January 1986 in case *Marshall v. Canada* (application No. 205/1986).

the nation is represented by an appropriate state authority<sup>3</sup>. Democracy is based on the principle of the participation of society (nation) in the creation of the state, expressed mainly in the form of legislative acts adopted by the parliament, that is, a body consisting of representatives expressing the political will of the majority of citizens. Therefore, the parliament elected by general election expresses the majority view and creates the will of the state. Democracy is to ensure the freedom and equality of all citizens by that, to the same extent, each of them participates in creating the will of the state.

## **1. Elections as a part of the representative system of democracy in a state and realization of the principle of the sovereignty of the nation**

Elections are a part of the system of democracy as the basic form of political governance in a state and realization of the principle of the sovereignty of the nation. By voting, representative bodies are composed, and representatives are entrusted with their mandate. The act of election is a process by which representative bodies are appointed. The act of voting and the principle of general election are related to the act of election. This is an expression of the principle of sovereignty of the nation. This is so, because in the system of representative democracy, the right to participate in composing the bodies of government is the main form by which citizens as a whole may influence public affairs<sup>4</sup>.

While the principle of general election has been formally accepted in democratic countries, we should stress that the actual participation of voters in the act of voting, or rather the lack of that participation, raises the question of whether voting is to be treated as a right or obligation.

It is worth noting here, that the decrease in voter turnout in many countries also in countries of well-established democracies, is very dangerous for the existence of the democratic system, because, in fact, it can mean delegitimization of the system. In the majority of democratic countries, active participation of citizens in the political life of their national communities is currently much needed. The above is related to increasing citizens' inaction and indifference to political affairs of the state, which, in turn, is reflected in a declining rate of electoral participation. The latter undoubtedly poses a threat to the system of democratic governance and the very idea of democracy, which in itself is not perfect, and the existence of which may be measured by the participation of citizens in political decision-making processes through participation in political elections. Democracy, and, in consequence,

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<sup>3</sup> For parliaments to be truly representative, elections must be free and fair. Citizens must have access to information about parliamentary proceedings, legislation, and policy, and be able to engage in continual dialogue with parliamentarians. Global Parliamentary Report: The Changing Nature of Parliamentary Representation, Denmark: UNDP/IPU, 2012, p. 9.

<sup>4</sup> See Robbins J. S. Introduction: Democracy and Elections. *Fletcher Forum of World Affairs*, Vol. 21, No. 1, 1997, pp. 1–14.

active civil participation in the political life of the state, is accepted in most of these countries. It should be emphasized that the reports on the level of voter turnout record global trend of decline in participation<sup>5</sup>.

## 2. Various institutions as a remedy for decreasing voter turnout

The decreasing voter turnout raises the question of how to remedy it. The representative system in its current form does not ensure good functioning of democracy. Many countries try to prevent the decrease in voter turnout. There are many methods for addressing this issue. It should be emphasized that the catalogue of guarantees of the principle of general election can be expanded but it is already very well developed (non-working day, opening hours of polling stations, voting circuits (permanent and separate), the possibility of voting in elections by citizens residing outside the country, register and list of voters, election protest, certificate of voting at the place of residence, or the use of alternative methods of voting, i.e., postal voting, electronic voting, proxy voting). However, the question arises whether the use of an increasing number of guarantees and the use of ever new information technologies will increase the participation of citizens in democratic processes? Furthermore, should the introduction of legal regulations that stipulate a mandatory participation in elections, i.e., normative regulation of compulsory voting be considered?

### 2.1. Compulsory voting

The institutional introduction of compulsory voting is undoubtedly the easiest and fastest way to increase voter turnout. It seems that the introduction of this institution to national legislation would provide the most significant benefits to emerging and underdeveloped democracies, where the widespread opinion that one's own vote has very little impact on the final result of election and public affairs is the basis for the electoral passivity of society. In this perspective, the legal obligation of voting would first develop in an individual a sense of "service" to the state, consisting in regular participation in elections of representatives appointed to exercise power, and then would teach a citizen a minimum civic commitment to the state, i.e., participation in the election of authorities.

Currently, the institution of compulsory voting is used in 28 countries (Belgium, Cyprus, Greece, Luxembourg, Turkey, Argentina, Bolivia, Brazil, Chile, Dominican Republic, Ecuador, Guatemala, Honduras, Costa Rica, Mexico, Panama, Paraguay, Peru, El Salvador, Uruguay, Venezuela, Australia, Fiji, Laos, Nauru, Singapore,

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<sup>5</sup> Statistics available at: <https://www.idea.int/data-tools/question-view/521> [last viewed October 25, 2019].



Thailand, Egypt)<sup>6</sup>. The research demonstrated the fact that where the institution of compulsory voting was implemented in the legal system, it has managed to play its role and formed an effective means of increasing voter turnout; in other words, mobilizing eligible citizens to actively participate in elections. In countries with compulsory voting systems, the turnout is approximately by 20 % higher than in those without such regulation.

If considerable participation of voters in general and equal suffrage is a measure of democracy, then introduction of legal provisions the elections that cause the activation of civil society and increase its active participation in the election is absolutely democratic, and compulsory voting should be treated as an acceptable institution, perceived as a medial, preventive and democratic system-reforming instrument. It should be noted, however, that for all those who consider electoral participation as the right of an individual, and not his/her duty, compulsory voting will always be an undemocratic institution.

## 2.2. Canvassing

Activation of voters consists of measures aimed at mobilization of the electorate and a greater number of participants in elections (to increase voter turnout). This activation can take place with the help of institutional or propaganda factors. Institutional factors include all the legal mechanisms that directly or indirectly augment voter turnout<sup>7</sup>. An important role in the mobilization of voters is also played by properly prepared long-term propaganda campaign with a goal to stimulate voters' interest in the election and persuading them to participate in the act of voting. It mainly includes the following measures: information campaigns, in which voters are informed about the elections themselves, the voting method and the rules of the electoral process; promotional campaigns aimed at explaining the sense and effects of elections; civic campaigns; educational programs; organization of primaries; material incentives (lotteries, gifts)<sup>8</sup>.

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<sup>6</sup> For more on a compulsory voting, see: Giżyńska M., Polaczuk P. Compulsory voting: is possible in today's Poland? *Studia Politologiczne*, Vol. 32, 2014, pp. 301–313; Kato K. Evaluating Compulsory Voting: Australia in Comparative Perspective. Ann Arbor: ProQuest LLC, 2014, p. 210; Power T. J. Compulsory for Whom? Mandatory Voting and Electoral Participation in Brazil 1986–2006. *Journal of Politics in Latin America*, Vol. 1, 2009, pp. 97–122. Available at: <http://www.jpla.org/> [last viewed October 20, 2019]; Swenson K. M. Sticks, Carrots, Donkey Votes, and True Choice: A Rationale for Abolishing Compulsory Voting in Australia. *Minnesota Journal of International Law*, Vol. 16, 2007, pp. 529–552; Hill L. Compulsory Voting in Australia: A Basis for a Best Practice Regime. *Federal Law Review*, Vol. 32, No. 3, 2004, pp. 479–498; Matsler S. Compulsory Voting in America. *Southern California Law Review*, Vol. 76, No. 4, 2003, pp. 953–978.

<sup>7</sup> This includes: compulsory voting, availability and opening hours of polling stations, election date, the existence of alternative ways of voting, type of electoral system.

<sup>8</sup> See Andre A., Depauw S., Deschouwer K. Issue Uptake in the Shadow of Election. In: Between-Election Democracy: The Representative Relationship After Election Day, Esaiasson P., Narud H. M. (eds.), ECPR Press, 2013, pp. 53–75.

Therefore, improving the representativeness of the electorate and knowledge about strategies at stake may be a more important goal than dramatical increase of overall turnout. The most traditional way to get people out to vote is activation by volunteers or paid canvassers hitting the streets, talking to people on the streets, and going door to door to spread information about the elections<sup>9</sup>. Young and/or first-time voters may not be familiar with the voting procedure or the candidates. In that case, showing or sending them a sample ballot can help to explain the process. They can decide beforehand, whom they want to vote for and learn how the ballot works. Thus, it is important.

### 2.3. The value of online relationships in spurring people to vote

The development of modern technologies has undoubtedly contributed to the emergence of an information society, whose awareness of the exercising its electoral rights is gradually increasing. Nevertheless, the question should be asked, whether the introduction of ever newer forms of information technologies, which, on the one hand, facilitate the way of communication and information transfer, and on the other hand, constitute a tool in making political decisions, should be seen as a real measure, being the optimal antidote to numerous social dilemmas, in particular, the low voter turnout, which has been steadily decreasing for many years. At this point, it is worth emphasizing that modern information technologies undeniably affect the shape of democracy itself, and with it the tools that are used within it<sup>10</sup>.

The use of electronic voting certainly generates lower costs for the citizen, however, the average citizen in this way is less and less a member of the political community feeling responsible for the fate of his community, and increasingly becomes only interested in optimizing the individual benefits he/she can achieve. Social media has changed the way people communicate with each other. In previous years, traditional media played a significant role in creating awareness among people, but over period of time social media became an important marketing tool which not only makes people more aware of various matters but also helps to activate them. Politicians are becoming more and more active on social media<sup>11</sup>.

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<sup>9</sup> More in: Denver D., Hands G. *Modern Constituency Electioneering*. London: Franc Cass, 1997, pp. 117–122.

<sup>10</sup> More in: Porębski L. Więcej, szybciej, łatwiej. O radościach i smutkach związanych z elektroniczną demokracją. In: *Demokracja elektroniczna. Kontrowersje i dylematy* [More, faster, easier. About the joys and sorrows of electronic democracy. In: *Electronic democracy. Controversies and dilemmas*], Marczevska-Rytko M. (ed.), Lublin: Publishing house UMCS, 2013, pp. 13–31; Marczevska-Rytko M. Elektroniczny wymiar demokracji. Wybrane kwestie In: *Demokracja elektroniczna. Kontrowersje i dylematy* [The electronic dimension of democracy. Selected issues. In: *Electronic democracy. Controversies and dilemmas*], Marczevska-Rytko M. (ed.), Lublin: Publishing house UMCS, 2013, pp. 33–47.

<sup>11</sup> More in: A Biswas A., Ingle N., Roy M. Influence of Social Media on Voting Behavior. *Journal of Power, Politics & Governance*, Vol. 2, No. 2, 2014, pp. 127–155.

## 2.4. Creating well-informed voters

Creating well-informed voters, while some states have enacted automatic voter registration, as well as implemented policy changes allowing for early voting, absentee ballots, election day registration, and voting at home; a vast majority of voters are still not aware of the policy changes and how they can ease the voting process. A greater number of eligible voters probably participate in elections when the act of voting seems to be important, and when the electoral situation provides a sense that voting is associated with a personal impact on the results of the election, and therefore on the shape of government policies, and when the costs of participation in elections are not high. One may be encouraged to participate in elections if convinced about the value of the participation itself as an act of legitimizing the power, the possibility to really influence its shape, while treating the electoral participation as a civic duty in a democratic society<sup>12</sup>.

## Conclusions

From the above views, however, follows the next question: whether the mere increase in the number of people participating in the election is what it is really about. It should be remembered that lowering the standards of democracy may lead to its collapse or – even worse – to its illusory functioning. Is it not appropriate in this state of affairs to consider J. Schumpeter's opinion that the mere fact of holding elections should be considered sufficient to distinguish a given state as democratic<sup>13</sup>, and then the previously asked questions become irrelevant? On the other hand, should one ignore legal mechanisms contributing to the increase in eligible voters' participation and try to interfere in electoral mechanisms so that the participation of representatives is not a minority representation but a majority one? The attitude of the public towards their participation in political life is related to the level of confidence in the existing political system, existing parties, government institutions and politicians. Declining turnout rates as an expression of deteriorating support for a given political system poses a threat to democracy, because it can lead to the increasing popularity of anti-democratic movements. Decreasing turnout in every election results in a situation where society faces a need to change its lifestyle, reinterpret the role of government, become aware of its role in social and public life. The situation forces a change in behaviour, opinion and attitudes.

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<sup>12</sup> See Foley E. B. Voters as Fiduciaries. *University of Chicago Legal Forum*, 2015, pp. 153–192.

<sup>13</sup> Schumpeter J. A. *Kapitalizm, socjalizm, demokracja* [Capitalism, socialism, democracy]. Warszawa: Scientific Publishing House PWN, 1995, p. 312.

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## HUMAN RIGHTS AND NEW RACIAL MEASURES IN ITALY

### Summary

Like great trees, human rights are rooted in the distant past. Without looking further, the red line that, connecting them, passes through the stoic principles, the patristic teachings, the class privileges, the “*Costitutiones*”, the recognition of human value of the individual, the juridification of the concept of “person”, the personality attributes, the codifications, the Universal Declaration of Human Rights and finally, the most recent views about the compensation theme, that have extended the range from material damage to non-material one. However, too frequently the winding path of human rights has been impeded or cut short by repugnant legislative measures: for example, in Italy, with the introduction in Art. 1 of Civil Code of a limitation of the legal capacity in presence of certain conditions and then, with the anti-Semitic legislation (Royal Decree Law of 5 September 1938, No. 1390, 7 September 1938, No. 1381 and December 15, 1938, No. 1779, the Royal Decree Law of 17 November 1938, No. 1728). Therefore, about 70 years after repealing of those laws, in an international populist atmosphere, we are witnessing re-introduction of legislative and administrative measures with evident racist connotation, as they create the *discrimen* about the enjoyment of rights between one citizen and another or, worse, between races. No European citizen may remain silent in presence of these expressions of decadence, and everyone must fight to prevent the relapse to intellectual obscurantism.

**Keywords:** human rights, racial laws, concept of “person”, discrimination, discriminatory legislation (Decree Act. 4 October 2018 No. 113 and Decree Act 14 June 2019, No. 53)

### Introduction

Long gone are the days when the Holy Scriptures admonished:

*Do no wrong to a man from a strange country, and do not be hard on him; for you yourselves were living in a strange country, in the land of Egypt.*<sup>1</sup>

History shows itself failing to master repugnant episodes that are travelling on the shoulders of a certain populism. The very populism that, forgetting the constitutional precepts, creates limits, walls and, above all, distinguishes between

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<sup>1</sup> Exodus 22, 20. And, indeed, the Pentateuch is full of warnings about the behaviors to adopt towards foreigners. In the same Exodus, for example, in the paragraph dedicated to the Decalogue, we learn that on the seventh day “you will do no work, you, your son and your daughter, your slave and your maid, your cattle, the stranger who is inside at your doors”. And, again, in Leviticus it is stated that “You are to have the same law for the foreigner and the native-born.” (Lev., 24, 22). We may recall an even earlier principle, the *ξενία*, that is the dedication to the guest, shown in ancient Greek culture (*Iliad*, VI, 230; *Odyssey*, XVII, pp. 481–487).

“citizen” and “other”, therefore, between those, who have been generated (were born) in a place, by condition of birth (thus, of mere luck), and those who come from an “elsewhere”. And, even worse, the historical heritage is disfigured, whereby the concept of “citizen” is no longer used, being replaced by “community citizen” against a person designated as “extra-community”, to emphasize the difference between a person who is born and grows up in a certain locus: the latter, which is characterized by the total elision of the legal concept of “citizen” and the preposition of the extra term, obviously understood not as “superior”, but etymologically “coming from outside”, from another place, arising from different roots, recalling without a shadow of a doubt the dark concept of “race”.

Race: this term was coined in the zootechnical field in the XVI century in order to identify not a taxonomic<sup>2</sup> category, but a mere animal group artificially created and belonging to domestic<sup>3</sup> animals. The term “race” first of all harks back to the word *generatio*, then and perhaps more appropriately, to the ancient French *haraz* (i.e., horse breeding), extended in the late 1800s to the man for *ius positum*<sup>4</sup>, and finally used for political purposes, with the known prevarications attributable to the fascist and National Socialist ideologies that, using the concept of the “Aryan race” – as empty as it is erroneous, detracted from and even worse, forgot the humanist theories developed gradually over time until the XIX century.

Therefore, these are the theories we have to retrace here, because “the great trees need a long time to take root properly”<sup>5</sup>, and we must refer to these deep roots to eradicate even the slightest attempts at populism that lead to derailments, divisions, antitheses and, above all, to expulsions.

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<sup>2</sup> That is, a natural classification of living beings structured into smaller groups subordinated to larger groups.

<sup>3</sup> Cavalli Sforza L. L., Cavalli Sforza F., Piazza A. *Razza o pregiudizio? L'evoluzione dell'uomo fra natura e storia* [Race or prejudice? The evolution of man between nature and history]. Milano, 1996, passim.

<sup>4</sup> Rossi L. *Breve storia della lingua italiana per parole* [Brief history of the Italian language in words]. Loescher, v. razza, 2005.

<sup>5</sup> Grossi P. *Prima lezione di diritto* [First law lesson]. Laterza, 2007, p. 22.

## 1. The profound roots of human rights

The authorship of fundamental rights is not generally attributed to Roman law<sup>6</sup>. However, this approach cannot be shared because the lenses used by the jurist must have different graduations according to the different periods<sup>7</sup>.

Wishing, then, to limit the investigation to human dignity and freedoms, the imperial laws were relevant<sup>8</sup>.

First of all, in this sense, the work performance of the freedom in favour of the patron was forbidden, that they were *contra dignitatem eius* (Digesta Iustinians, 38, I, 38), or *digitate [...] debeant estimari* (Digesta Iustinians, 16 pr.; Paulo Sententiae, 40 ed.). In *homine libero* the *corporis aestimatio* was excluded (Digesta Iustiniani, 9, 9, I, 3). Still, the mark in front of *quo facies, quae non-similarity of the pulchritudinis coelesti est figurative, minimal maculatur* (Codex Theodosianus, 9, 40, 2). Moreover, the mark on the forehead was banned *quo facies, quae non ad similitudinem pulchritudinis coelesti est figurata, minime maculatur* (Codex Theodosianus, 9, 40, 2). Castration was considered an illicit practice not only against the slave and regardless of the adhesion of the mutilated person<sup>9</sup>; so too was prostitution. The amputation of a limb, which was previously applied as a punishment, was prohibited, as indeed the *servitus poene*. Finally, the institution of *infamia* was introduced, which was tainted by the one who, like the gladiators (Livio, in the book XXI, of the *Historia*, lists them *qui venalem sanguinem habent*), contradicted the *bona mores*<sup>10</sup>.

For its part, for freedom, the *lex Fabia de plagiaris* (of 209 BC) punished the person who had reduced a free man to the state of slavery with a death penalty; the comitial laws *de provocatione* (issued by 509 BC to 44 BC) also aimed to defend the *civis* from the unjust sentences of the magistrate. With the classical legislation, the *pater familias* was, then, prevented from denying freedom to children through the instrument of *venditio* (Codex Theodosianus, 4, 8, 6 pr.); the private prison

<sup>6</sup> Oestreich G. *Geschichteder Menschenrechte und Grundfreiheiten im Umriß* [History of human rights and fundamental freedoms]. 1968. Italian translation: *Storia dei diritti umani e delle libertà fondamentali*, a cura di Gozzi G., traduzione di Tommasi C., Roma-Bari, 2006. The doctrine of personality rights arrives at the same conclusion. On this point, see Resta G. *Autonomia privata e diritti della personalità* [Private autonomy and personality rights]. Jovene, 2005, p. 18; Alpa G., Ansaldo A. *Le persone fisiche*, Artt. 1-10. In: *Il Codice Civile Commentario* [Natural persons, Articles 1–10. In: *The Civil Code Commentary*], P. Schlesinger (ed.), Milano, 1996, who point out that “the category of personality rights – understood in the modern sense – was born in the early seventeenth century” (p. 155); Zeno-Zencovich V. v. *Personalità (diritti della)* [Personality (rights of)]. In: *Digesto, Sez. Civ., XIII*, Torino, pp. 430, 431. Timid hints are found in Windscheid B. *Diritto delle Pandette* [Right of the Pandects]. Prima trad. it. a cura di Fadda C. e Bensa P. E., Utet, 1902, 633 ss.

<sup>7</sup> The approach of Biondi B. *Il diritto cristiano romano* [The Roman Christian Law]. II, Milano, 1952, p. 342 is acceptable.

<sup>8</sup> Biondi B. 1952, [The Roman Christian Law], p. 342.

<sup>9</sup> *Nemo liberum servum veinvitum sinentem ve castrare debet, neque quis se sponte castrandum praebere debet* (l. 4, par. 2, D. *de sicaris*, XLVIII, 8).

<sup>10</sup> Guarino A. *Diritto privato Romano*. Jovene, 1992, p. 319 [Private Roman Law]; Mazzacane A. v. *Infamia (dir. rom.)*. In: *Enc. Dir., XXI*, 1971, p. 382 [Infamy (Roman Law)].

was forbidden (Codex Theodosianus, 9, II, I; Val. Theod. Arc. 383), nor was it possible to suffer a conviction if *in codice publico solleoni inscriptionis impleta sint* (Codex Theodosianus 9, 3, 4; Valentinian, 365). Finally, with Justinian, the *fautor libertatis*, there was a reduction in the number of cases of servitude due to the birth and imprisonment of war, as well as the abolition of *senatus consulta* by Claudian, reducing the woman married to a slave of others to the state of slave herself. These precepts suggest that the stoic *humanitas* and the patristic equality generated a precise regulation aimed at protecting the individual in many aspects, including dignity, protection of the name, physical integrity, honour and even of the home almost like a worthy antecedent of the right to privacy<sup>11</sup>.

These precepts, according to a doctrine<sup>12</sup>, were obscured in the barbaric age by the so-called Germanic right. Therefore, not even this approach appears, as far as concerned here, to be shareable. In particular, about eighty years later, the *Codex Iustinianus* was overshadowed by the edict of Rothari of 643,<sup>13</sup> in which the figure of the *guidrigildo* (“*wergild*”)<sup>14</sup> found its place. That is the representation of man in economic terms or, to be more precise, in monetary equivalent<sup>15</sup>. In addition to the individual assessments assigned by the successive laws<sup>16</sup>, two considerations appear relevant: the first is that the monetary evaluation of the individual stipulated in written form and no longer oral or customary precepts reduced private feuds, therefore, decreased the appeal to private justice; the second is that this economic representation, in fact already partly present in Roman law<sup>17</sup>, constituted the historical

<sup>11</sup> On the point, see Gaudemet J. Des droits de l’homme ’ont-ils été reconnus dans l’Empire roman? [Have human rights been recognized in the Roman Empire ?] in Labeo, 1987, p. 7.

<sup>12</sup> Calasso F. Medioevo del diritto [Middle ages of law]. I, Milano, 1954, p. 119.

<sup>13</sup> Rothari’s edict is the first Longobard legislative collection issued by King Rothari and composed of 388 articles, to which 153 chapters of the laws of Liutprando were subsequently added, 14 chapters of the laws of Ratchis and 22 chapters of the laws of Astolfo were later supplemented, setting up the code. *Edictum Longobardorum*. It was requisite only of the Italian population of Longobard origin (consequently, not binding to the Romans subject to Longobard rule), and it was divided into political crimes (1–14), crimes against people (15–144), crimes against things (145–152), hereditary and family law (153–226), royal rights and bonds (227–252), minor crimes (253–358) and procedure (359–388).

<sup>14</sup> From *wergild*, then *widrigilt* (*wer*: value; *gild*: money).

<sup>15</sup> For example, Chapter 140 of the Edict states that “if a free man [...] gives poison to another, if the one who takes it is not killed by that poison, the one who gave the poison pays a compensation equal to half the value of this person, according to how much he would be assessed if he had been killed”; meanwhile, Chapter 387 specifies: “if someone, by mistake, unintentionally, were to have killed a free man, he is to make up a compensation in the measure of his esteem, and there will be no place for a feud because there was no willfulness”. Chapters 11, 12 and 370 should also be read.

<sup>16</sup> From the documents of the time it is clear that an olive grove was sold for eight pieces of currency, a child for twelve and a horse for twenty-five; likewise, cutting a horse’s tail was the same price as a slave girl “with her child”!

<sup>17</sup> The *actio iniuriarum aestimatoria* was envisaged, therefore the sentence *in quantum aequum videbitur* for any offensive injury (Guarino A. 1992, p. 986 ss.). It is hardly necessary to recall that in the XII Tables the *os fractum* was rewarded with a pecuniary penalty fixed in 300 axes, if the fracture was inflicted on a free person and 150 on a slave; the *iniuria*, on the other hand, caused a penalty of only 25 axes.



antecedent for today's liquidation of personal damages, therefore, once again served the protection of human rights.

## 2. (Continued) Still on the profound roots of human rights

The *guidrigildo* dissipated starting from the 8<sup>th</sup> century AD, when this institute was supplemented by the requisition of the guilty party's assets<sup>18</sup>: the penalty for a private person began to evolve in public. The infiltration of Roman law into the Germanic one is slow, the result of a predictable mediation of the spiritual power that from Rome comes into direct contact with the invaders<sup>19</sup>. The mediated report involves the conversion of the Barbarians to Catholicism, so the slow insinuation into their customs of the natural law precepts with the return "to the Stoic-Augustinian doctrine of the law of nature"<sup>20</sup>. The perception of the individual as being endowed with reason and *dignitas for lex naturalis* appeared relevant also for the purposes of fundamental rights which, in fact, gradually became established, starting from the 1900s and up to 1200, receiving full legitimacy<sup>21</sup>.

Legitimization penetrated into common thinking with the expansion of the "press". Throughout the fifteenth century, the tendency was to publish "works of ancient fame and canonical use"<sup>22</sup>. The ability of the individual to innovate made it clear that everyone was given the right to consult the "truth" and, therefore, the controversy was opened to Catholic matrices. The breaking point was the need to place man at the centre of the universe, to move from a humanistic – medieval vision of the individual to the Renaissance, from a casuistic or predetermined approach to a distinctly rational approach<sup>23</sup>. Thus, the juridical settings also changed: the law is based on nature in general, but in particular on human nature, and therefore on the reason of the individual. Hugo Grotius had the courage to affirm that, as founded on rationality, "natural law would remain unchanged even if we admitted, which is

<sup>18</sup> The same, in the case of murder, would have been divided by the half to the deceased's heirs and, for the remaining part, should come from the funds of the State.

<sup>19</sup> Suffice it to say that Rothari's Edict was written in Latin.

<sup>20</sup> In this sense, Oestreich G. 1968 [History of human rights and fundamental freedoms], p. 23.

<sup>21</sup> Among them, three appear relevant. The first is the Constitution of Alfonso IX, whereby the rights of freedom are recognized in the Cortes del León in 1181: among the aforementioned rights "the intangibility of life, honor, home and property" stands out; the second is the Constitutions of the Sicilian Kingdoms of Frederick II presented and approved by the Parliament of Melfi in 1231, wherein the *puer apuliae* (Frederick II) abolished, among other things, the ordeal and the duel, granted obvious powers to women, sanctioned a timely regulation of right to health and the exercise of the medical profession. Finally, the *Magna Charta Libertarum* signed by John Lackland in 1215 and then reduced from 63 to 47 articles, promulgated the following year by Henry III.

<sup>22</sup> De Frede D. Ricerche per la storia della stampa e la diffusione delle idee riformate nell'Italia del Cinquecento [Research for the history of the press and the dissemination of reformed ideas in Italy of 16<sup>th</sup> century]. Napoli, 1985, p. 21. In particular, there was the reintroduction of the works of Cicero, Livio and Seneca.

<sup>23</sup> It is worth recalling that October 12, 1492 marks the date of the discovery of America.

not affirmable without a great scandal, that God did not exist, or that He did not care about human affairs”<sup>24</sup>.

It began a few years later, at the turn of the 16<sup>th</sup> and 17<sup>th</sup> centuries – the “philosophical liberalism” that culminated in Locke’s theories, according to which men naturally would find themselves “in a state of perfect freedom to regulate their actions and to dispose of their property and persons as they see fit, within the limits of the law and of nature, without asking permission or depending on the will of another.”<sup>25</sup> In this respect, there is a clear divergence between the innateness of rights and unavailability: man transfers does not transfer the innate rights to the State, but charges the State only with protection of these rights.

The Lockean theories, as well as those of Pufendorf and the other philosophers of law were directly received by the papers of the time. The Lockean theories, as well as those of Pufendorf and the other philosophers, were directly transposed into the maps of the time. In 1679, the *Habeas Corpus Act* was signed; in 1689, the *Bills of Rights* were approved; previously, in 1627, with the *Petition of Rights*, the House of Commons presented a real list of personal and property rights.<sup>26</sup> The Civil Code of Western Galicia was approved in 1797<sup>27</sup> and the United States Declaration of Independence was signed on July 4, 1776<sup>28</sup>.

<sup>24</sup> Grotius (Huig Van Groot), in 1625, with the publication of *De jure belli ac pacis*, built the theory of the new construction of law based on human reason alone and for this theory he “earned” the sentence of life imprisonment in the Calvinist Netherlands. About Grotius, see Alpa G. Ugo Grozio. *Qualche interrogativo di un profano [Ugo Grotius. Some questions of a profane]*. Bologna, 1998.

<sup>25</sup> Locke J. *An Essay Concerning the True Original, Extent, and End of Civil Government* (Italian translation – *Il Secondo Trattato sul Governo*, by Magri T.). Milano, 1998, p. 65.

<sup>26</sup> The triad of just rights and liberties by Sir Edward Coke, the first supporter of *Petition*: personal freedom, life and property, is well known.

<sup>27</sup> Paragraph 29 of Part I mentions “the right to the preservation of life, the right to procure things for wht is necessary, the right to ennoble one’s bodily and spiritual energies, the right to defend oneself and one’s possessions, the the right to assert one’s good name and, finally, the right to freely regulate and manage all that is available in its entirety”.

<sup>28</sup> Suffice it to recall the second paragraph of the Declaration:

*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.*

It is the era of the French revolution, therefore, of the “Declaration of the rights of man and of the citizen”<sup>29</sup> and above all of the less known, but very important, “Kantian philosophical devolution”.<sup>30</sup>

Kant attributes a new value to man, deriving it from the ethical idea of the subject. In “Metaphysical First Principles of the Doctrine of Right”, Kant points out that FREEDOM (independence from the constricting arbitrariness of another), as it can exist together with the freedom of each other according to a universal law, is this unique, original right, pertaining to every man by virtue of his humanity.<sup>31</sup>

For the philosopher, the concept of “humanity” is not, however, synonymous with mere belonging to the mankind, but instead a real “capacity” which, from a legal point of view, qualifies the subjective state of the individual. In the “Lessons of Ethics”<sup>32</sup>, Kant links the concept of humanity to those of human dignity and freedom, definitively sanctioning the principle of the unavailability of the subject: man, in particular, “can dispose of everything that belongs to his person, but not of it, and cannot use his freedom against himself”<sup>33</sup>. The close derivation of “humanity” from human dignity gives rise to the ethical perception of man, and constitutes the reason for the legal system to provide every useful tool to his protection: we hereby begin to glimpse the vague features of the “subjective right”.

The Kantian ethical idea begins to enter law: in the second book of the “Roman Law System”, Savigny states:

<sup>29</sup> Jellinek G. La dichiarazione dei diritti dell'uomo e del cittadino [Declaration of the Rights of Man and of the Citizen] (by Bongiovanni G.). Milano, 2002. The “Declaration” consisted of seventeen articles, whose principles all appear solemn. Among them, we recall the one referred to in Art. 1 (“Men are born and remain free and equal in rights. [...]”), in Art. 2 (“The goal of any political association is the conservation of the natural and imprescriptible rights of man. These rights are liberty, property, safety and resistance against oppression.”), in Art. 4 (“Liberty consists of doing anything which does not harm others: [...]”), and in Art. 11 (“The free communication of thoughts and of opinions is one of the most precious rights of man: any citizen thus may speak, write, print freely, except to respond to the abuse of this liberty, in the cases determined by the law”). These precepts were transposed into the “Universal Declaration of Human Rights” adopted by the United Nations on 10 December 1948. On the following Declarations, see Battaglia F. v. *Dichiarazioni dei diritti*. In: *Enc. Dir.*, XII. 1964, p. 409 [Declaration of Rights. In: *Enc. of Law*], which, in conclusion, emphasizes both the enlargement of rights from “a particular plan to a everwidening one”, and on the pre-establishment, by international organizations, of instruments “aimed at protecting rights” “the highest expression of a civilization that does not want to lose its meaning and its spiritual value” (p. 421).

<sup>30</sup> See Zatti P. Persona giuridica e soggettività. Per una definizione del concetto di persona nel rapporto con la titolarità delle situazioni soggettive [Legal Person and subjectivity. For a definition of the concept of person in relation to the ownership of subjective situations]. Cedam, 1975, p. 73.

<sup>31</sup> Kant I. *Metaphysische Anfangsgründer der Rechte* [Metaphysical First Principles of the Doctrine of Right], Italian translation, *Primi principi metafisici della dottrina del diritto*, a cura di Gonnelli F., Roma-Bari, 2005, p. 67 In the same paragraph on the innate right, the elements of the equality, of man as subject sui iuris and of man as individual iustus.

<sup>32</sup> Kant I. *Vorlesungüber Ethik* [Lectures on ethics]. Menzer P. (ed.), 1924, [Italian translation, *Lezioni di etica*, a cura di Guerra A., Roma-Bari, 2004].

<sup>33</sup> Kant I. 1924 [Lectures on ethics], p. 138.

*[...] every right exists because of the moral freedom inherent in each man. Therefore, the primitive concept of the person or subject of rights must coincide with the concept of man, and this primitive identity of the two concepts can be expressed by the following formula: every single man and only the individual man are capable of law<sup>34</sup>.*

These were, therefore, the slow changes that over time led to the birth of the “aptitude to have rights, which is, the legal capacity”<sup>35</sup>, a bond that will link man to positive law<sup>36</sup>.

These principles were, however, diluted in the subsequent codes. Among them, the *Codé civil* did not say much about the capacity and the rights of the person<sup>37</sup>. Consequently, except for the Austrian General Code of 1811<sup>38</sup>, the French derivation codes and, as far as we are concerned, the pre-unification codes and the Civil Code of 1865<sup>39</sup> will be oriented towards a purely proprietary approach: the need to protect industrial property prevailed with respect to the human person.

### 3. The third subparagraph of Article 1 of the Civil Code

The liberal principles, laboriously achieved, confusedly and tediously analysed, were completely overshadowed by the subsequent illiberal legislation. This is what happened, at least in Italy.

In the Report to the King Emperor’s Majesty, the Minister of Justice Giuseppe Grandi made it clear that he had

*[...] found it convenient, in harmony with the Regime’s racial directives, to place in the third point of the first paragraph a provision referring to the special laws regarding the limitations on legal capacity deriving from the membership of certain races. The formula used in the text also contains a positive statement, as it establishes*

<sup>34</sup> Savigny Von F. *Sistema del diritto romano attuale* [Current Roman Law System]. Scialoja V. I., (ed.), Torino, 1886, II p. 2.

<sup>35</sup> Savigny Von F. 1886, II [Current Roman Law System], p. 1.

<sup>36</sup> Beyond these broad juridical categories, it must, on the other hand, ascribe to Savigny a clear ostracism to innate rights and, consequently, to rights of person.

<sup>37</sup> For the relationship between the *Codé Napoleon* and the current Italian Civil Code, see Busnelli F. D. *Il diritto delle persone* [The Right of person]. In: *Cinquant’anni del codice civile, Atti del Convegno di Milano* [Fifty years of the Civil Code, Proceedings of the Milan Conference], 4–6 giugno 1992, Milano, 1993, p. 109.

<sup>38</sup> In the sixteenth paragraph, it was stated that “every man has innate rights that are known by reason alone: therefore, he is to be considered a person”.

<sup>39</sup> The latter, in particular, stipulated that “any Italian enjoys civil rights” (Article 8) and that, therefore, their deprivation resulted either from the loss of citizenship (Articles 17–21) or from the so-called civil death (Articles 22–33). The principle of reciprocity was established for foreigners (Article 11).

*the principle that belonging to certain races can influence the sphere of the legal capacity of people*<sup>40</sup>.

It should not be forgotten that the third paragraph of the Art. 1 of the civil code stipulated that “the limitations to the legal capacity deriving from belonging to certain races are established by special laws”, that is – to enumerate them – by the legislative provisions of 1938, enacted “for the defence of the Italian race”, followed by those from 1939 to 1942. In addition to the Royal Decree Law of 5 September 1938, No. 1390, 7 September 1938, No. 1381 and December 15, 1938, No. 1779, the Royal Decree Law of 17 November 1938, No. 1728<sup>41</sup> was particularly odious. The nullity of the marriage concluded by the “Italian citizen of the Aryan race with a person belonging to another race” was stated, and it was specified in Art. 8, what criteria determined the belonging of a person to the Jewish race<sup>42</sup>. The *status* was to be “denounced and noted in the records of marital status and population” (Art. 9). Italian Jewish citizens could not serve in the military, exercise the office of guardian or curator except for minors or incapable of the same race, be owners or managers of companies declared attractive to national defence or companies with more than one hundred people, to own a land, a land with an estimate of more than five thousand lire or buildings with taxable income exceeding twenty thousand lire (Art. 10). Jewish parents could be deprived of parental responsibility (Art. 11). Jews could not have Aryan domestic helpers (Art. 12), nor could they be employed in the civil and military administrations of the State, in all state, provincial, municipal and controlled entities, in banks of national interest and in private insurance companies (Art. 13). The aforementioned Jews, when employed on the date of entry into force of the Royal Decree Law, were graciously “dispensed with” within three months of the same date (Art. 20). Italian citizenship of foreign Jews was automatically revoked (Art. 23) with the obligation to “leave the territory of the Kingdom, of Libya and of the Aegean possessions by 12 March 1939-XVII”: penalty expulsion (Art. 24).

<sup>40</sup> R.R. No. 18 in Pandolfelli G., Scarpello G., Stella Richter M., Dallari G. Codice Civile. Libro I, Illustrato con i lavori preparatori e con note di commento. Milano [Civil Code. Book I, Illustrated with the preparatory works and with commentary notes], 1940, p. 57 In the same Report to the King, in reference to implementation and transitory provision of Art. 106, it is stated that the denomination “Aryan race” “is not given with the purpose of defining anthropologically a determined race, but only for the criterion required by the law to clearly distinguish the Jewish race or the other extraneous races that have not merged into the race of the Italian people”.

<sup>41</sup> In the Official Journal of November 29, 1938, No. 264 containing “measures for the defense of the Italian race”.

<sup>42</sup> The criteria were, as follows: both parents of Jewish nationality, or one – a Jew and the other of foreign nationality, or from Jewish mother and unknown father, and finally, a person belonging to the Jewish religion.

What did the legal doctrine of the time of these legislative measures prescribe? Notorious pages written in 1939 by professor Francesco Degni<sup>43</sup> remain: racial politics, according to the directives of the Grand Council of Fascism, could no longer permit that belonging to a certain race remains irrelevant as a legal element in the determination of the sphere of legal capacity of the subjects. The equality of treatment between Aryans and non-Aryans can no longer be allowed in a social organization dominated by the principle of the defence of the pure race. The influence of this principle, therefore, has led to a series of legal incapacities, enunciated in a general terms. In the Article 1 of the Civil Code that refers to special laws.

The same considerations were observed by Carlo Gangi, who, again in 1948 (therefore, after the abrogation of the racial norms), sought the *ratio* of discrimination in the alleged usury of the Jews.<sup>44</sup> Messineo<sup>45</sup>, Pugliatti<sup>46</sup>, Barassi<sup>47</sup> appeared to reserve their criticism of the rules on the subject of discrimination. Finally, Pacchioni<sup>48</sup> was laconic. The civil lawyers of the time, perhaps because they were obliged to, mostly did not raise criticism, supinely embracing what, conversely, was already alien to the Albertine Statute<sup>49</sup> and to the Code of 1865<sup>50</sup>.

<sup>43</sup> Degni F. *Le persone fisiche e i diritti della personalità* [The physical persons and the rights of the personality]. Torino, 1939, p. 54. In-depth studies of limitations disposed by the fascist laws permits the author to consider the historical grounds, even the Justinian and medieval law. At the same time, there is recognition of the mitigating measures in the 16<sup>th</sup> and 17<sup>th</sup> centuries, and the equalization that followed the French Revolution and the Albertine Statute. Degni continued: “while in Roman imperial law and in intermediate law those incapacities were based mainly on the diversity of religion [...], in our new law they are the consequence of a rigorous and energetic racial policy, directed mainly at avoiding an excessive influence of the Jewish race in the moral and economic heritage of the Nation.” (p. 52).

<sup>44</sup> Gangi C. *Persone Fisiche e persone giuridiche* [Physical persons and legal persons]. 2<sup>nd</sup> ed., Milano, 1948, p. 11 ss. But see also Petrone C. *L'essenza dello Stato Fascista* [The essence of the Fascist State]. Roma, 1927, 66 ss. and Giurati G. v. *Fascismo* [Fascism]. In: *Nuovo Dig. It.*, V. Torino, 1938, p. 953. For a proper analysis, see Alpa G. *La cultura delle regole. Storia del diritto civile italiano* [The culture of rules. History of Italian civil law]. Roma-Bari, 2000, p. 270 ss.

<sup>45</sup> Messineo F. *Istituzioni di diritto civile* [Institutions of civil law]. Milano, 1942, developed an accurate list of criteria – not of a legal nature, but interpretative for identification of members of the Jewish race: this was due to the regulatory uncertainty of the Art. 8 Royal Legislative Decree 1728/1938 cit. (p. 89, ff).

<sup>46</sup> Pugliatti S. *Gli istituti di diritto civile* [Civil Law Institutes]. Vol. I, Milano, 1943, p. 131.

<sup>47</sup> Barassi L. *Istituzioni di diritto civile* [Institutions of civil law]. Milano, 1944, p. 40 ss.

<sup>48</sup> Pacchioni G. *Elementi di diritto civile* [Elements of civil law]. Milano, 1943, which only specified that “special laws limit the legal capacity of natural persons to belong to certain races” (p. 67).

<sup>49</sup> Articles 24–32 sanctioned “the equality of all regalist before the law” with enjoyment of civil and political rights, admission to civil and military positions, granting of personal freedom, domicile and press, right of ownership and assembly.

<sup>50</sup> Art. 1 attributed “to every citizen” the enjoyment of civil rights, unless he had criminal convictions; the same and without referring to the principle of reciprocity was legislated for the foreigner by Art. 3.

#### 4. Article 22 of the Constitution and principle of equality

The third paragraph of the Art. 1 of the Civil Code, as well as the measures on the subject of “defence of race” were repealed on January 20, 1944 by Royal Decree No. 25<sup>51</sup>. At the same time, the parliamentary *iter* began, indeed troubled, which led to the approval of the Art. 22 of the Constitution, which states that “no one can be deprived, for political reasons, of legal capacity, citizenship, name.” This process, which took place before the First Subcommittee, was attended by the drafters of the calibre of La Pira, Moro, Mancini and Meuccio Ruini who, in his Report as the President of the Commission for the Constitution, had to clarify, with regard to Art. 22 that “after witnessing the arbitri who, for political or racist reasons, stripped the entire ranks of citizens of the heritage of legal capacity, citizenship, and name, it was not possible to omit an explicit prohibition”.

Within the limits of the current paper, it is impossible to retrace the interesting setbacks, the constructive opinions, the individual parliamentary passages<sup>52</sup>; Here, the immediate link of legal capacity with the principle of equality should be emphasised. In particular, the same letter of the Art. 22 Cost., the Constituents’ use of the adjective “none”, as well as its initial provision before the Art. 3 of the Constitution and its definitive placement in Title I (civil report) of the First Part (Citizen’s Rights and Duties) of the Constitution, calls for the analysis of the concept of “legal capacity” in of the context of “equality” which, enshrined in Art. 3 of the Constitution, as a logical consequence, should cause an absolute incomprehensibility, therefore, not even for political reasons<sup>53</sup>, of the capacity itself: the simple human quality – “humanity” or “dignity” according to the Kantian ethical approach is a sufficient requirement for the capacity. The requirement of birth, an involuntary natural fact, determines only the precise temporal moment of its

<sup>51</sup> Royal Legislative Decree of 20 January 1944, No. 25 (Official Journal of 9 February 1944, No. 5, special series) containing “dispositions for the reintegration into the civil and political rights of Italian and foreign citizens already declared to be of Jewish race or considered of Jewish race”. See also the Legislative Decree of the Lieutenant, 14 September 1944, No. 287 (Official Journal of 9 November 1944, No. 79) containing “measures relating to the reform of civil legislation”. Art. 1 prescribed that Italian citizens of Jewish race were “reinstated in the full enjoyment of civil and political rights equal to those of all other citizens of whom they have equal duties” and that “all those provisions were repealed, which, for any act or relationship, require detection or mention of race”. Declared void were the provisions for revoking citizenship (Art. 2), the annotations of a racial nature in the registers of the civil status were noted as “non-existent” (Art. 3), the exonerated employees were readmitted to the service (Art. 4) and the candidates affected by racial laws – to the competitions (Art. 5), those who had passed exams in foreign schools (Art. 6), and finally, penal procedures for violations of the racial laws dismissed and the relevant convictions revoked (Art. 7).

<sup>52</sup> Parliamentary works can be viewed in Falzone V., Palermo F., Cosentino F. *La Costituzione della Repubblica italiana illustrata con i lavori preparatori* [The Constitution of the Italian Republic illustrated with the preparatory work]. Milano, 1976. Available at: [www.nascitacostituzione.it](http://www.nascitacostituzione.it) [last viewed May 10, 2019].

<sup>53</sup> In this context, see Stanzione P. *Capacità, I* diritto privato. In: *Enc. Giur.*, V, Roma, 1988, [Capacity, I] private law, in the *Legal Encyclopedia*, V] 4 and the references contained in Bianca C. M. *Diritto Civile, I*, la norma giuridica, i soggetti [Civil Law, I, the legal rule, the subjects]. Milano, 2002, p. 217 (nt. 6).

acquire: this already exists due to natural causes, as opposed to being recognized by the order, nor that it can be limited by the *ius positum*. It is not possible, then, to share the opinion of those who intend to treat the problem of legal capacity exclusively in terms of positive law<sup>54</sup>. There is no doubt that the major censorship to be moved to natural law is, as we know, the reference to constant, immutable, natural or supernatural principles: risk, the anachronism of the legal precept with respect to the practical need<sup>55</sup>. The negative consequences, however, linked to legal positivism, especially its modern version, are not negligible: procedural formalism tied to rules without historical culture<sup>56</sup> occasionally results in fortuitous goals, becomes capricious and transitory, and even more insidious, if the legal technique is placed in the hands of the populists.

Then and even with the benefit of the doubt, just naturalism should be preferred (perhaps Kelsenian<sup>57</sup>, therefore “structural”, “fundamental” with respect to positive law) and in this perspective it must be perceived within the meaning of “capacity”. It is good to consider “capacity” a *prius*, not a *posterius* of the order; not a product of law, not a *fictio iuris*, but the connection between man (not even, I would say, “person” according to Kelsen<sup>58</sup>, since “person” is an additional *fictio iuris*) and order. Hence, there is no recognition of the “capacity” on behalf of law, but instead – mere protection, inviolability of what already exists and which can neither be removed nor limited. The attribution also concerns the need to fix a *dies a quo*: a precise time limit within which to “connect” that subject to the right: the automatism of the attribution (coinciding with the vital birth) is not debatable. On the other hand, in addition to the aforementioned articles of the Constitution, Art. 1 of the Charter of Fundamental Rights of the European Union (“human dignity is inviolable. It must be respected and protected”: therefore, not recognized) seems to testify thereof, or the subsequent Art. 21<sup>59</sup>.

Consequently, one must share the theory, according to which “the subject [...] is also a *prius* of the juridical order<sup>60</sup>”, a presupposition for which “it comes to be and is

<sup>54</sup> Stanzione P. 1988 [Capacity, I) private law, in the Legal Encyclopedia, V], p. 4.

<sup>55</sup> Bobbio N. Giusnaturalismo e positivismo giuridico [Legal naturalism and legal positivism]. Milano, 1965.

<sup>56</sup> Irti N. Il salvagente della forma [The lifesaver of the form]. Roma-Bari, 2007, pp. 36–37. The lawyer masterfully emphasizes how “the rupture of the relationship between law and truth is the most painful issue in legal history. The law, separating itself from the truth, has been handed over to the relationship between the historical forces and the technical expertise of production. No one from above or from outside determines where to go anymore; and it therefore decides its own direction”.

<sup>57</sup> Kelsen H. Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik. Italian translation: Lineamenti di dottrina pura del diritto. [Outlines of pure doctrine of law] a cura di Treves R., Torino, 1952.

<sup>58</sup> *Ibid.*, p. 88.

<sup>59</sup> “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”

<sup>60</sup> Barbero D. Il sistema di diritto privato [The system of private law]. 2<sup>nd</sup> ed. a cura di Liserre e Floridia, 1993, p. 73.



the juridical order”<sup>61</sup> and to extend this theory also to legal capacity as a moment of connection between the subject and the order. Consequently, referring to the Art. 2 of the Constitution, it would be correct to state that “the inviolable rights of man are not already *assigned* by the law, but *recognized* as already existing”. It follows that legal capacity cannot be the result of “attribution by the order [...], because it is every individual’s own quality”<sup>62</sup>.

## 5. The new racial measures

On October 4, 2018, Decree Law No. 113<sup>63</sup> was approved and published in the Official Journal, legislating on the following matters: “Urgent provisions regarding international protection and immigration, public safety, as well as measures for the functionality of the Ministry of the Interior and the organization and operation of the National Agency for the administration and destination of seized and confiscated assets to organized crime”. There were many conflicting points with the civil rights’ system, humanitarian protection measures previously in force. Only few months after the decree came into force, it merited an intervention of the Court of Cassation. In particular, and wanting to dwell on the central data, the said provision abrogates the entire Art. 5, co. 6 d. lgs. No. 286/1998<sup>64</sup>, which allowed, in the framework of constitutional and international obligations, to issue residence permit on the basis of humanitarian reasons. As a replacement, the Decree No. 113 introduced new typologies of “permit”, first of all, for “special protection” for the duration of one year, to be granted by the territorial commissions in case of risk of persecution or torture; a residence permit in case of catastrophes was intended for calamities, to be issued, when a foreigner is not able return to his country due to an “exceptional, unanticipated catastrophe”, and the temporary leave “for medical treatment” in cases where the alien has contracted “a health condition of exceptional severity”; finally and almost as a pretty concession, the new residence permit provided “for acts of particular civil value”, which can be released on the advice of the Minister of the Interior.

The first problem to be examined is that the abrogated residence permit for humanitarian reasons has been introduced by the aforementioned Art. 5 in fulfilment of the civil right of asylum to the point that paragraph 4 of the said article expressly provides that “in examining the asylum application the territorial commissions evaluate for the measures referred to in Art. 5, paragraph 6, to the single consolidated

<sup>61</sup> Barbero D. 1993 [The system of private law], p. 73.

<sup>62</sup> Gazzoni F. *Manuale di diritto privato* [Manual of private law]. Napoli, 2000, p. 122. See also Bocchini F., Quadri E. *Diritto private* [Private law]. Torino, 2011, p. 208: “the legal capacity assumes [...] the essential profile and character of the condition of human person, of attribute that cannot be denied, for the necessary respect of the dignity of the man, whose inviolability is declared in the Art. 1 of Charter of Fundamental Rights of the European Union”.

<sup>63</sup> The Official Journal, General Series No. 231 of 4 October 2018. The aforementioned Legislative Decree was transformed with the law of 1 December 2018, No. 132.

<sup>64</sup> In the Official Gazette, General Series No. 191 of 18 August 1998, Ordinary Supplement No. 139.

text referred to in the legislative decree No. 286 of 1998, the consequences of a repatriation in light of the obligations deriving from the international conventions of which Italy is a signatory and, in particular, of Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, ratified pursuant to the law of 4 August 1955, No. 848<sup>65</sup>. Here, observe the principle that even international conventions, even if ratified, act as constitutional precepts, and there is a first problem of unconstitutionality of the aforementioned Decree Law No. 113, as it stands in obvious contradiction with the Art. 117 of the Constitution, which specifies that “the legislative power is exercised by the State and by the regions in accordance with the Constitution, as well as the constraints deriving from the community order and international obligations”. Moreover, this problem has become more acute than those procedures *in itinere*, that is, regarding those requests for permission that, formulated by foreigners before the new legislation came into force, have remained at the mercy of the waves. This is a point on which, as mentioned above, the Court of Cassation has already intervened with its judgment No. 4890 of 23 January 2019<sup>65</sup>. In particular, Ermellini, after pointing out that there is no transitional rule on the point, specifies that the current legislation “does not apply in relation to applications for recognition of a residence permit for humanitarian reasons proposed before entry into force (5/10/2018) of the new law, which will therefore be scrutinized on the basis of the existing legislation at the time of their presentation”. Most notably, however, is not so much the outcome of the decision, but the warning of obvious censure by the Court, which, in a passage of the sentence (page 18), states that the power to ascertain the requisites to grant new permits it has been “remodulated, in the light of significant restraints of humanitarian reasons”.

In any case, Decree No. 113 appears to be censurable in other points, all of which are worse than the previous prerogatives granted to foreigners on the basis of multiple international conventions. The validity period of the current permits does not exceed two years, but six months for the one issued as a consequence of catastrophe or one year in other cases. This will entail the following consequences: the foreigner with a six-month permit will no longer be able to access the social assistance benefits provided by the Art. 41 d. lgs. No. 286/1998 for the holders of permits valid for least one year; the foreigner with a permit valid for one year will no longer have access to public housing that the Art. 42 d. lgs. No. 286/1998 guarantees to all the holders of residence permits with a duration of at least two years; again, each of the new residence permits does not provide for its holder to register with the national health service, as was the case under the current Art. 34 d. lgs. No. 286/1998 for the permits already issued and granted due to humanitarian reasons, thereby relegating these foreigners only to access to urgent and essential outpatient or hospital medical care provided for by Art. 35 d. lgs. No. 286/1998.

These circumstances, in addition to obvious collision with the principle of Art. 3 of the Constitution, create distinctions not only between “citizen – community citizen” and “extracommunity person – foreigner”, but even between “foreigner before 2018” and “foreigner after 2018”, agreeing to grant certain minimum benefits

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<sup>65</sup> Unpublished.

only to the first and not to the second. This is not to mention the fact that even for foreigners before 2018 the benefits granted by the previous law will be reduced, should they intend to renew the permission already granted to them, when it expires. Here we should also note the administrative provisions, which have recently been passed and discredit the national chronicles. First of all, a reference to the “Regulation for access to subsidized social benefits” approved by the Municipality of Lodi with the resolution of the City Council No. 28/2017 – Art. 8, paragraph 5, establishes that “for the purposes of accepting the application aimed at accessing the measures and services governed by these Regulations, the income and the registered movable or immovable property governed by Art. 816 Civil Code, possibly owned abroad and not declared in Italy under the current tax law presently in force”. However, bearing in mind Art. 4, paragraph 5, of the same Regulation: “in context of submitting an application for access to the measures and services governed by this Regulation, “the citizens of non-EU states must produce – even in the absence of or registered immovable or movable property – the certification issued by the competent authority of the external State – accompanied by a translation in Italian legalized by the Italian consular authority that certifies its conformity – made in compliance with the provisions of Art. 3 of Presidential Decree No. 445/2000 and by Art. 2 of Presidential Decree No. 394/1999 and subsequent amendments in integrations over time in place.” Needless to say, this move has produced obvious discrimination among children, since for many non-EU parents it was impossible to obtain the relevant certification in the reference countries, which resulted in exclusion of children from the school canteen. And this, beyond the dutiful recourse of ordinary justice<sup>66</sup> unpleasantly resembles the measures which, belonging to the recent past, were thought to be forgotten. Similarly, the Ordinances No. 214 of 1 July 2015 and No. 27 of 25 June 2016 issued respectively by the Mayor of the Municipality of Alassio and the Mayor of the Municipality of Carcare who, as representatives of the local communities ex Art. 50, paragraph 5, TUEL, introduced the prohibition of entry into the territory of said municipalities to migrants without an adequate health certificate attesting to the absence of infectious and transmissible diseases. Both Ordinances were declared discriminatory, and therefore unlawful, by the Genoa Tribunal in the Order of 26 July 2017<sup>67</sup> which states, in addition to the objective impossibility on the part of all (and not only of the extra-community) of providing such a health certificate, especially the alleged factor of protection used by the mayors as the grounds for the administrative measures had been “represented both by race and ethnicity and by citizenship (different from the Italian one)”: these words remind of repugnant experiences that evidently have taught little.

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<sup>66</sup> Ordinary justice imposed an order to the Municipality of Lodi to modify the said Regulation, as manifestly discriminatory, in the part of allowing the self-certification to foreigners coming from non-EU states or the adoption of the certification open to EU citizens (see Order of the Court of Milano, December 13, 2018, rg. 20954/2018, unpublished).

<sup>67</sup> In Rep. 2017, Extra Merit, No. 2017.1956.4

Finally, the recent security decree bis<sup>68</sup> with Art. 1 is inserted in the “Single text of the provisions concerning the regulation of immigration and rules on the condition of foreigner”, Art. 1-ter under which “The Minister of the Interior [...] may restrict or prohibit the entry, transit or parking of ships in the territorial sea [...] to maintain order and public safety or when the conditions referred to in Article 19, paragraph 2, letter g), limited to violations of the law on the jurisprudence of the sea [...] made in Montego Bay”. It is necessary to underline that Art. 19, in marking the cases of transit as “prejudicial to the peace, good order and security of the coastal State”, indicates in the said letter g), the second paragraph, that the activity of “loading or unloading of materials, evaluates persons in violation of customs, fiscal, health or immigration laws and regulations in force in the coastal State”. Needless to say, this rule had to be contemplated with the subsequent Art. 98 of the same Montego Bay Convention, which enshrined (*rectius*: enshrines) the obligation to provide relief to the signatory States. In particular, the first paragraph stipulates that “Each State must require that the master of a ship that flies its flag, [...]: a) provides assistance to anyone found in the sea in dangerous conditions; b) proceeds as quickly as possible to the rescue of people in danger, if he is aware of their need for help, to the extent that this initiative can reasonably be expected from him;”<sup>69</sup>. These rules along with the Convention<sup>70</sup> remain in force in the Italian Republic. Thus, in a clear and incomprehensible regulatory contradiction, the State, on the one hand, requires to protect the right to life (through the rescue operations at sea), while, on the other hand, counteracts it, even placing those who violate the aforesaid prohibition under the administrative and penal sanctions according to the Art. 2 of the aforementioned security decree, bis. Additionally, the exception that already affects the first Safety decree about the evident breach of the Art. 117 of the Constitution which in its first paragraph establishes that “the legislative power is exercised by the State [...] regarding [...] the constraints arising from the Community legislation and international obligations”.

<sup>68</sup> Decree Act 14 June 2019, No. 53, defining “Urgent provisions concerning public order and security” (Official Journal, June 14, 2019, General Series No. 138).

<sup>69</sup> For the purposes of this discussion, the dictation referred to in the second paragraph of Art. 98 is also interesting: “Each coastal State promotes the establishment and permanent functioning of an adequate and effective search and rescue service to protect maritime and air security and, when circumstances require, collaborates to this end with adjacent States through regional agreements”.

<sup>70</sup> Ratified in Italy with the Law of 2 December 1994, No. 689 bearing “Ratification and execution of the United Nations Convention on the Law of the Sea, with annexes and final act, done at Montego Bay on 10 December 1982, as well as the agreement of application of Part XI of the Convention itself, with annexes, made to New York on July 29, 1994” (in the General Series No. 295 of 19.12.1994, Ordinary Supplement No. 164).

## Conclusions

Natalino Irti writes:

*[..] and then how can a lawyer, who does not wish to allow an antiseptic, futile waste of his own time, nor to painfully mourn the decline, look around and fail to start the dialogue in a manner of philosophers? It is not, of course, a question of adding a few quotations or bibliographic notes – all the extrinsic and ornamental things –, but rather a personal experience of concern regarding the questions, of glimpsing the philosophical background of our working tools<sup>71</sup>.*

If this is evident for the law in general, it is, as seen above, even more so for the human rights that loom as the last *philosophical* piece of a long, impervious path with no finish in sight. In this sense, there has been and still remains a constant “expansion” of the boundaries of fundamental rights driven by doctrine and jurisprudence, just think about the rights of the personality present in the notes to Windscheid, the translators Fadda and Bensa included, among the various hypotheses, the right to “Titles of nobility and related coats of arms<sup>72</sup>”, to “missive letters<sup>73</sup>”, to “portraits<sup>74</sup>”: the values forgotten or modified today during a constant evolution of the times<sup>75</sup>. The same thing is said for the “right to the voice<sup>76</sup>” or for the “right to the affairs<sup>77</sup>”. The path taken by the right to privacy, considered non-existent in the early 1970s<sup>78</sup>, then definitively transformed by evolution of telecommunications, is relevant. Finally, today we are talking about the right to “sexual identity<sup>79</sup>”, “self-determination<sup>80</sup>”, “information<sup>81</sup>”, “right to fame<sup>82</sup>” and surely in

<sup>71</sup> Irti N. *Nichilismo Giuridico* [Legal Nihilism]. Roma-Bari, 2005, VII.

<sup>72</sup> Windscheid B. 1902 [Right of the Pandects], p. 647. See also De Cupis A. *I diritti della personalità* [The rights of the personality]. In: *Trattato di dir. civ.* [Civil Law Treaty], Cicu A. and Messineo F. (eds.), IV, t. 2, Milano, 1961, p. 165.

<sup>73</sup> Windscheid B. 1902 [Right of the Pandects], p. 647; De Cupis A., 1961 [The rights of the personality]. In: *Civil Law Treaty*, p. 165.

<sup>74</sup> Windscheid B. 1902 [Right of the Pandects], p. 650.

<sup>75</sup> Windscheid B. 1902 [Right of the Pandects], p. 654.

<sup>76</sup> Degni F. *Trattato di diritto civile italiano, Le persone fisiche e i diritti della personalità* [Italian Civil Law Treaty, Natural persons and personality rights]. Vol. II, t. 1, Torino, 1939, which examines, however, the “right to the free performance of one’s business” p. 210 ss.

<sup>77</sup> Ligi F. *Contributo allo studio comparato dei diritti della personalità negli ordinamenti: tedesco, americano, francese e italiano* [Contribution to the comparative study of personality rights in the legal systems: German, American, French and Italian]. In: *AnNo. dir. comp e di studi leg.*, III, 1956 p. 196. But, lastly, v. Restà G. 2005, pp. 167–169.

<sup>78</sup> Ligi F. 1956 [Contribution to the comparative study of personality rights in the legal systems: German, American, French and Italian], p. 199.

<sup>79</sup> Civil Cassation, Section I, 29 October 1963 No. 2878, in *Civil Justice*, 1963, I, 2520 and App. Milan, 19 January 1971, in *Giur. It.*, I, sect. II, 1971, p. 1026.

<sup>80</sup> *Rescigno P. v. Personalità (diritti della)* [Rights of personality]. In: *Enc. Giur.*, XXIII, Roma, 1991, p. 6

<sup>81</sup> Pinna A. *Autodeterminazione e consenso: da regola per i trattamenti sanitari a principio generale* [Self-determination and consent: as a rule for general principle healthcare treatments. In: *contr. and business*]. In: *Contratto e imp.*, 2006, p. 589.

<sup>82</sup> *Loiodice A. v. Informazione (diritto alla)* [Information (Right of)]. In: *Enc. Dir.*, XXI, 1971, p. 472.

the future the right to live well, the right to happiness will have relevance. And we must not leave the path we have started upon, not simply by considering rights, but by viewing the instrument of their protection. The extension by the jurisprudence<sup>83</sup>, in the Italian legislation of the requirement referred to in Article 2059 of the Civil Code<sup>84</sup> and therefore revealing the reimbursement of non-pecuniary damages far beyond the limits established by the law, followed up on extensive and dated doctrinaire criticisms which emphasised the need to protect all constitutionally guaranteed rights with compensation for non-material damage<sup>85</sup>.

Consequently, a certain philosophical fund, beyond the declarations of principle, cannot suffer exemptions, nor conceive limitations attributable to any process of *commodification* or, even worse, of *damnatio memoriae*. The specific weight or, better, the ethical fullness contained in the juridical or naturalistic concepts of “man”, “person”, “ability” and whatever else, cannot, in short, be borrowed or bartered with anything: worth, the freedom of everyone. The continuation upon this path is, then, the responsibility of everyone, including the first jurists through their philosophical instruments; just as the arrest is attributable to those who eschew the subject or to those who, aware of certain injuries, justify them on the basis of contingent problems or to those who, worse yet, even if perceiving them, refrain from contradicting or opposing impervious and dark attempts to return to the past. And then, in a favourable sense, it is necessary to see all the legislative<sup>86</sup> and

<sup>83</sup> Marchegiani L. Il diritto sulla propria notorietà [The right over one's reputation]. In: *Riv. dir. civ.*, Vol. 1, 2001, p. 191; Scognamiglio C. Il diritto all'utilizzazione economica del nome e dell'immagine delle persone celebri [The right to economic use of the name and image of famous people]. In: *Dir. Inf.*, 1988, p. 1.

<sup>84</sup> First, see the judgment of 23 April 2003 of the United Sections of the Court of Auditors (in *Resp. Civ. Prev.*, 2003, 1130), followed by the famous judgments of the Court of Cassation Nos. 7281, 7282 and 7283 of 12 May 2003 (with note Ziviz P. E poi non rimane nessuno [And then there was no one left]). In: *Danno e resp.*, 2003 p. 713) and Nos. 8827 and 8828 of May 31, 2003 (with note Busnelli F. D. Chiaroscuri d'estate. La Corte di cassazione e il danno alla persona [Light shutters in summer. The Court of Cassation and personal injury]. In: *Danno e resp.*, 2003 p. 816). To consolidate the changed orientation, the Constitutional Court intervened with sentence No. 233 of 11 July 2003 (with note by Ziviz P. Il nuovo volto dell'art. 2059 c.c. [The new face of Art. 2059 c.c.]. In: *Resp. civ. prev.*, 2003, p. 1036) and the subsequent sentence of the Court of Cassation No. 12124 of 19 August 2003 (with note Ziviz P. Brevi riflessioni in materia di ingiustizia del danno non patrimoniale [Brief reflections on the injustice of non-pecuniary damage]. In: *Resp. Civ. Prev.*, 2003, p. 1329). Finally, it should be noted that this orientation was also shared by the Cassation Court: on this point, cf. Ziviz P. Danno non patrimoniale: uno e trino [Non-pecuniary damage: one and three]. In: *Resp. Civ. Prev.*, 2004, p. 100.

<sup>85</sup> Laconically stating that “Non-material patrimonial damage must only be compensated in cases determined by law”. Talk about “a significant limit and often a foreclosure”, Rescigno P. 1990, p. 8. On the issue, see more extensive considerations by Ferri G. B. Oggetto del diritto della personalità e danno non patrimoniale. In: *Riv. dir. comm.*, 1984 [Subject of personality rights and non-pecuniary damage. In: *Comm. Law Mag.*], p. 154 ss. and di Majo A. Profili dei diritti della personalità [Profiles of personality rights]. In: *Riv. trim. dir. proc. civ.*, Vol. I, 1962, 94 ss.

<sup>86</sup> Among these, it is worth mentioning the Decree Law of 26 April 1993 No. 122 on “Urgent measures on racial, ethnic and religious discrimination” (in the Official Journal General Series No. 97 of 27 April 1993) and the Articles 43 and 443 of the Legislative Decree of 25 July 1998 No. 286 containing “Consolidated text of the provisions concerning immigration regulations and rules on the status of foreigners” (in Official Journal No. 191 of 18 August 1998, Ordinary Supplement No. 139).

jurisprudential<sup>87</sup> interventions that have followed each other over the years and are taking place to condemn any manifestly discriminatory and racist behaviour.

Hence, what is the remedy for the path to continue? In Bertrand Russell's "banquet speech" held in 1961 at the Nobel Retirement Ceremony, the philosopher voiced a conclusion that could be widely shared: "I would say that if my analysis is correct, what is needed for the world to be happy is mainly "intelligence". And this, all in all, is an optimistic conclusion, because intelligence is something that can be cultivated with proven educational methods"<sup>88</sup>.

A starting point, undoubtedly complex, yet, I hope, to be pursued.

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<sup>87</sup> Jurisprudence, both of merit and legitimacy, has several times intervened on the issue of discrimination and, in particular, in the hate speech and hate crimes sectors. Finally, see Court of Appeal sect. I – Brescia, 01/18/2019, No. 96. In: *Foro it.* 2019, 3, I, 1029; *Cass. peNo.*, section V, March 23, 2018, No. 32028. In: *Guide to law*, 2018, pp. 33, 88; Court of Bologna, 7 March 2018. In: *Foro it.*, 2018, 7–8, I, 2526. In civil matters, with particular reference to the right to report, see Court of Milano, Ord. June 13, 2019; Trib. Palmi, Ord. May 21, 2019; Court of Turin, Ord. May 28, 2019: all unpublished. The first Ordinance sentenced, for libel in the press, the journalistic newspaper 'Liberio Quotidiano' to the compensation of damages in favour of a Cooperative mentioned in the article entitled "List of pimps that enriched themselves with the trafficking of black people"; the second Ordinance accepted the appeal of a Community citizen of Romanian nationality, holder of an "ENI card" with exemption code X01, ascertaining the right to access both to the specific exemption codes due to its peculiar pathologies, both to the free administration of health care providers and to the free administration of specific technological aid, all services re-entered in the LEA; finally, the third ordinance declared discriminatory the conduct of the Municipality of Turin for having denied the maternity allowance pursuant to Art. 74 Legislative Decree 151/2001 to non-EU town mothers holding permits for family reasons. Further measures on the subject of discrimination are available at [https://www.asgi.it/banca-dati/?fwp\\_aree=giurisprudenza](https://www.asgi.it/banca-dati/?fwp_aree=giurisprudenza) [last viewed May 10, 2019].

<sup>88</sup> Padoan D. *Per amore del mondo. Discorsi politici dei premi Nobel per la letteratura* [For the love of the world. Political speeches of the Nobel Prize winners for literature]. Milan, 2018, pp. 77 and 95.

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## CONCEPT OF FREEDOM OF EVALUATION IN LATVIAN ADMINISTRATIVE LAW

### Summary

The article presents a research on the understanding and use of the concept of freedom of evaluation in the Latvian administrative court judgments. It outlines the main elements of this concept, explains the limits of judicial review of decisions based on freedom of evaluation and summarises the areas in which the freedom of evaluation has been acknowledged by the courts.

**Keywords:** freedom of evaluation, separation of powers, judicial review

### Introduction

One of the realms of the executive power in which administrative courts do not interfere in substance is the so-called freedom of evaluation (German – *der Baurteilungsspielraum*, Latvian – *novērtējuma brīvība*). The concept of freedom of evaluation in the Latvian legal system has been transplanted from the German legal system. The first article in which this concept has been explained was written by a leading Latvian lawyer Egils Levits in 2003, in which he mentioned the concept of freedom of evaluation as an exception to the principle that the courts are entitled to review all facts and questions of law. He explains that “the control in substance is not possible, when the evaluation given by the authority refers to unique, unrepeatable situation. Such instances occur in cases when an authority grants evaluation of a person in a unique situation (exams, assessment of compliance). In such instances, within certain boundaries there exist the freedom of evaluation which the court cannot control in substance.”<sup>1</sup>

In German Administrative Law, the concept of freedom of evaluation has been developed since the 1950s. Generally, it refers to a situation, where a legal provision contains a general clause, which has to be interpreted and applied by a body whose expertise and specific knowledge is crucial in evaluating the facts of the case and subsuming them to the contents of the legal provision. According to the German case law, the freedom of evaluation exists in the following areas:

- 1) decisions on exams of various kinds (evaluation in state exams etc.);
- 2) other decisions similar to exams, particularly in schools (admission to next class etc.);

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<sup>1</sup> Levits E. Ģenerālklausulas un iestādes (tiesas) rīcības brīvība (II) [General provisions and discretion of an institution (court) II]. *Likums un Tiesības* [Law and Rights], No. 7(47), July 2003, p. 203

- 3) evaluation of civil servants;
- 4) decisions adopted by various boards, if expert knowledge for representation of various interests is at the core of the decision (for instance, decision to grant access to stock exchange market from the Stock Exchange Commission);
- 5) decisions related to prognosis and risk assessment in areas like environmental law and economic law;
- 6) decisions where at the core of decision are predetermined goals and issues in the area of administrative and economic policies.<sup>2</sup>

The concept of freedom of evaluation in the case law of Latvian administrative courts has been used at least since 2009. However, no research has been made in the Latvian administrative law regarding the contents of this concept and the consistency of its use in the court judgments. The only recent explanation of this concept is included in the textbook of Administrative law: “In contrast to the discretionary power, the court usually can review the application of provision containing so-called indefinite legal terms. However, there are areas lacking a complete review of application of indefinite legal terms. Such cases include freedom of evaluation and not the discretionary power. Freedom of evaluation exists only if the application of the legal term demands specific knowledge in a certain area. The court usually reviews only whether an obvious error on significant procedural breaches has been committed.”<sup>3</sup> Therefore, the purpose of this article is to outline the main elements of the concept of freedom of evaluation and identify problems of its application.

The data obtained for this research were collected from the search engine of government portal manas.tiesas.lv, where more than 300 judgments were found containing the phrase *novērtējuma brīvība* (freedom of evaluation). A general look at these judgments indicates that the concept has been used more frequently in the recent years. During the research, all the judgments in which the court has used the concept of freedom of evaluation in order to limit the scope of its review were analysed.

## 1. Decisions regarding disability status and payments from the medical risk fund

Most judgments using the concept of freedom of evaluation have been adopted regarding decisions of the State Medical Commission for the Assessment of Health Condition and Working Ability (hereinafter – the State Commission). The doctors of the State Commission are entitled to adopted decisions on disability. The Disability

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<sup>2</sup> Maurer H. Allgemeines Verwaltungsrecht. 17. Auflage, Verlag C.H. Beck, München, 2009, pp. 150–151; similar outlook: Peine F. J. Vācijas vispārīgās administratīvās tiesības [General administrative law of Germany]. 4<sup>th</sup> revised edition. Vācijas Administratīvā procesa likums [Administrative Procedure Law of Germany]. Rīga: Tiesu namu aģentūra, 2002, pp. 68–69.

<sup>3</sup> Briede J., Danovskis E., Kovaļevska A. Administratīvās tiesības [Administrative Law]. Mācību grāmata. Rīga: Tiesu namu aģentūra, 2016, p. 34.

Law<sup>4</sup> defines three groups of disability,<sup>5</sup> and the main criteria for disability is the loss of ability to work determined in percent. In the case law, the claimants ask to determine that they correspond to a more severe disability group or object to conclusion of a doctor if it states that the claimant does not correspond to the criteria for disability.

The courts do not interfere with the medical observations and evaluations of the person's ability to work issued by doctors of the State Commission. The arguments used by courts to limit their competence are mainly based on the professional expertise necessary to adopt the decision and therefore a natural obstacle to overrule the conclusions made by a professional body. For instance, the court has ruled that "only doctors of the State Commission are entitled to determine whether the claimant has such confinements of functioning that can be a basis for granting disability, likewise, only these doctors are entitled to discern, how severe the confinements are and what is the loss of ability to work in percent. The court [...] according to its competence can only review whether the conclusions made by doctors are not in obvious contradiction to the medical documentation and evidence in the case."<sup>6</sup> The court has also stated that "evaluation of diagnosis, symptoms of ailment and condition of health is the competence of doctors and not of the courts."<sup>7</sup> "Evaluation of confinements of functioning mainly is based on the professional experience of doctors of the State Commission which has accrued by comparing and assessing various similar cases. The court has no grounds to question this evaluation, since from the materials of the case and the application does not stem, that the evaluation of the experts is based on insufficient or not objective information."<sup>8</sup>

In general, a court judgment in these cases mainly is composed from citations of legal provisions regulating evaluation and criteria of disability and contents of the medical documentation. This is the court's approach to reviewing whether the decision corresponds with procedural rules and whether it is not arbitrary. This is all that is required from the court in reviewing the legality of decisions passed by the State Commission. Although a claimant can submit evidence that he has an

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<sup>4</sup> Disability Law. Available at: <https://likumi.lv/ta/en/en/id/211494-disability-law> [last viewed October 5, 2019].

<sup>5</sup> a) Group I disability, if the loss of ability to work is in the amount of 80–100 percent, – very severe disability,  
b) Group II disability, if the loss of ability to work is in the amount of 60–79 percent, – severe disability,  
c) Group III disability, if the loss of ability to work is in the amount of 25–59 percent, – moderately expressed disability.

<sup>6</sup> Judgment of Administrative Regional Court of 16 May 2019 in case No. A420204018, point 12. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/382965.pdf> [last viewed October 5, 2019].

<sup>7</sup> Judgment of Administrative Regional Court of 4 April 2016 in case No. A420328814, point 16. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/257777.pdf> [last viewed October 5, 2019].

<sup>8</sup> Judgment of Administrative District Court of 7 May 2019 in case No. A420316518, point 12. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/382280.pdf.pdf> [last viewed October 5, 2019].

ailment, or ask for an expertise, the expertise can only prove facts instead of giving a legal evaluation of facts. Since the evaluation of facts in these cases demand specific knowledge and professional expertise, a judge has no authority to make medical statements and voice opinions of his own.

A similar approach is used in a rather recent category of cases concerning payments from the medical risk fund. The Law on the Rights of Patients<sup>9</sup> provide that a patient is entitled to compensation for any harm (including moral harm) caused to his or her life or health, which has been caused by the medical practitioner working in the medical treatment institution through his or her acts or failure to act or caused by the conditions during medical treatment. Regulation of the Cabinet of Ministers provide that the Health Inspection determine the amount of harm in percent, taking into account various criteria (for instance, foreseeable course of disease, circumstances and environment in the hospital, quality of life and prognosis of life expectancy). It is evident that the legal regulation provides the Health Inspection with a considerable freedom of evaluation, because the total amount of harm is determined according to a variety of criteria, most of which require particular professional experience and knowledge. It is not surprising that in these cases the courts have also used the concept of freedom of evaluation in order to limit their scope of review.<sup>10</sup>

## 2. Decisions regarding exams and assessment evaluations

A classic example of freedom of evaluation both in Germany and Latvia is the evaluation in exams. In Germany, the exam law (*Prüfungsrecht*) exists as a particular branch of administrative law with several textbooks written on the subject.<sup>11</sup> In Latvia, the case law regarding exams is just developing, but seems to be rather consistent. The courts have made judgments regarding examinations in universities, the Road Safety Directorate (exam for obtaining a driving licence), Data Protection Authority (exam of a data protection specialist), Insolvency Control Service (qualification exam of an administrator), Notary Council (qualification exam of a sworn notary), Association of Sworn Auditors (qualification exam of a sworn auditor). In all these cases, the courts have consistently ruled that they are not entitled to review the evaluation of exam. For instance, in a case regarding the exam for obtaining a driving license, the court has ruled that “the knowledge and skills to drive a vehicle is evaluated by an inspector in an exam. Therefore, the legal provision

<sup>9</sup> Law on the Rights of Patients. Available at: <https://likumi.lv/ta/en/en/id/203008-law-on-the-rights-of-patients> [last viewed October 5, 2019].

<sup>10</sup> For instance, Judgment of Administrative District Court of 17 April 2019 in case No. A420275718. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/380805.pdf> [last viewed October 5, 2019]; Judgment of Administrative District Court of 5 March 2019 in case No. A420152218. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/377022.pdf> [last viewed October 5, 2019].

<sup>11</sup> For instance, Niehues N., Fischer E., Jeremias C. *Prüfungsrecht*. 7. Auflage, Verlag C. H. Beck, 2018; Zimmerling W., Brehm R. *Prüfungsrecht: Verfahren – Vermeidbare Fehler – Rechtsschutz*. Heymanns Verlag GmbH, 2007.

grants inspector the freedom of evaluation. Judicial review of such an evaluation is limited. In case of freedom of evaluation, the court cannot review the conclusions of an authority in substance, but can merely review whether the authority has not committed an obvious error.”<sup>12</sup> “When reviewing complaints about evaluations of exams, the competence of the courts is to review whether in the examination of procedure the principle of procedural fairness and prohibition of arbitrariness have been observed, as well as the principle of equality, that is, whether all persons had equal opportunities, equal circumstances, and whether the knowledge of all persons was evaluated in accordance with the same criteria. Therefore, the court cannot review the evaluation in substance.”<sup>13</sup>

However, sometimes courts base their reasoning regarding freedom of evaluation on the premise that “an exam due to its unique situation cannot be repeated in court in order to review knowledge: it would be a new exam and not the review of knowledge demonstrated in the exam.”<sup>14</sup> This reasoning is outdated. Indeed, in oral exams and other exams that demand demonstration of practical skills (driving of a vehicle, etc.) the reason why the exam cannot be reviewed in substance is mainly practical – the exam cannot be reviewed just because the exam itself (demonstration of skills and knowledge) cannot be repeated and therefore there is no evidence of the demonstration. However, if the exam consists of written or otherwise recorded answers, the exam does not have to be repeated in order to review the knowledge. Hence, the reason behind the freedom of evaluation in exams is the fact that a particular knowledge and expertise is needed in order to determine whether the knowledge, skills and competencies of a person correspond to a certain level. Academic freedom in universities also is a consideration. The Supreme Court has stated that when the procedural rules of evaluation have been breached (insufficient motivation of evaluation and possible non-objectivity), the illegal situation can be remedied by repeatedly reviewing the written work.<sup>15</sup>

The courts have also acknowledged the freedom of evaluation in assessment processes in competition proceedings, insofar as the assessment is based on professional competence of the decision maker. For instance, an associate professor applied for a re-election. Despite the fact that he was the only contestant, the council of professors voted not to elect the contestant. The contestant submitted an

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<sup>12</sup> Judgment of Administrative Regional Court of 7 August 2018 in case No. A420356716, point 9. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/360434.pdf> [last viewed October 5, 2019].

<sup>13</sup> Judgment of Administrative District Court of 27 November 2012 in case No. A420645711, point 8. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/123183.pdf> [last viewed October 5, 2019].

<sup>14</sup> Levits E. Ģenerālklauzulas un iestādes (tiesas) rīcības brīvība (II) [General provisions and discretion of an institution (court) II]. *Likums un Tiesības* [Law and Rights]. No. 7(47), July 2003, p. 203. See, for instance Judgment of Administrative District Court of 17 October 2017 in case No. A420163017, point 10. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/332244.pdf> [last viewed October 5, 2019].

<sup>15</sup> Judgment of the Department of Administrative Cases of the Supreme Court of 02 March 2012 in case No. A42915709, point 12. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/120687.pdf> [last viewed October 5, 2019].



application to the court. The court, *inter alia*, stated that “taking in consideration the autonomy of the university and the freedom of evaluation granted to the council of professors in deciding on the suitability of the contestant, the court acknowledges that the members of the council of professors are entitled to evaluate other criteria as well, unless they are arbitrary. The decision of the council of professors can be based on a vision of the council regarding reaching tasks and goals of the respective branch or subbranch of science, the previous and planned contribution of the contestant in reaching these goals, the attitude of the contestant towards his duties, in particular, if a person has been elected previously, personal observations and experiences in cooperation with the contestant. Therefore, taking into consideration the specifics of the election process, the post of the associate professor is not acquired by merely objective professional qualification criteria. [...] The court has no doubt regarding legality of the contested decision, for evaluation criteria have not been chosen arbitrarily, they are closely related with skills and tasks of an associate professor, and there are no obvious errors of evaluation.”<sup>16</sup>

Similar cases include assessment made by various commissions in contests for distribution of public funding for various projects. For instance, in a case where a contestant had been denied the funding for a scientific project, because foreign experts had given to the contestant insufficient number of points to receive the funding, the court ruled that it “cannot review the assessment given by the foreign experts in substance, because the experts have the freedom of evaluation. The freedom of evaluation is based on the professional experience and knowledge of the expert. In case of the freedom of evaluation, the court only reviews whether an obvious error or significant procedural breach has been committed.”<sup>17</sup> A similar reasoning has been given in other cases regarding assessment of commissions in competitions for funding.<sup>18</sup> It is important to emphasize that courts do not review only those assessments which are based mainly on professional knowledge and where the criteria stipulated by legal provisions *per se* demand subjective insight and evaluation of the assessor. For instance, a criterion that a scientific project can contribute to further development of the science is of a purely subjective character and depends solely upon the judgment of an assessor. However, another criterion in the same competition – previous experience of project manager in other similar projects – can be objectively evaluated and therefore is fully reviewable by a court.

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<sup>16</sup> Judgment of Administrative District Court of 23 April 2019 in case No. A420308013, points 12 and 15. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/381062.pdf> [last viewed October 5, 2019].

<sup>17</sup> Judgment of Administrative Regional Court of 21 June 2016 in case No. A420231314, point 11. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/271003.pdf> [last viewed October 5, 2019].

<sup>18</sup> See, for instance Judgment of Administrative Regional Court of 4 June 2019 in case No. A420165318, point 16. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/384508.pdf> [last viewed October 5, 2019]; Judgment of Administrative District Court of 9 May 2018 in case No. A420226217, point 8. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/352631.pdf> [last viewed October 5, 2019].

### 3. Assessment made by supervisory bodies

The freedom of evaluation has been acknowledged by the courts in cases where an institution applies provisions which grant a power to interpret facts in such a manner that several interpretations are legitimate and well-grounded. Electronic Communications Law<sup>19</sup> compels the Public Utilities Commission to ensure that “electronic communications merchants in mutual settlement of payments for the provision of the number portability service apply tariffs approximated to costs and the direct charges of the end-user if there are such shall not be an obstacle to the use of number portability service. The Regulator shall take the relevant decision for achievement of this objective.” The Supreme Court has ruled that words “apply tariffs approximated to costs” and “obstacle to the use of number portability service” confers to the Commission the freedom of evaluation. The Supreme Court based its conclusions mainly on the fact that the provisions are very abstract and that the Court of the European Justice has also acknowledged “margin of appreciation” for the Commission.<sup>20</sup> It appears that the provision contains only a general principle which even in one case cannot lead to a single mandatory result. Phrase “tariffs approximated to costs” include economic evaluation of various facts and therefore gives the Commission a significant freedom to decide on methods to be implemented and facts to be taken into account.

Another example of freedom of evaluation conferred upon a supervisory institution is the case where the Safety Police had published the annual report which stated that a particular person posed a threat to national security. The Supreme Court ruled that the Safety Police had a freedom of evaluation in assessing the risks which pose a threat to national security.<sup>21</sup>

In both cases, the legal provisions contain such general terms which cannot lead to a single legitimate outcome and which in essence entrust authorities with making assessments of facts not according to purely objective criteria, but by taking into account values, economic considerations and forecasts. Since such considerations can provide various outcomes, they are legal unless based on obviously erroneous judgments or made in breach of procedural requirements.

### 4. Uncertainties and problems for future research

Although the courts have been rather cautious in limiting the scrutiny of their review, it appears that there is one category of case law where use of the freedom

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<sup>19</sup> Electronic Communications Law. Available at: <https://likumi.lv/ta/en/en/id/96611-electronic-communications-law> [last viewed October 13, 2019].

<sup>20</sup> Judgment of the Department of Administrative Cases of the Supreme Court of 11 January 2013 in case No. A42680309, point 8. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/123416.pdf> [last viewed October 13, 2019].

<sup>21</sup> Judgment of the Department of Administrative Cases of the Supreme Court of 31 May 2019 in case No. A420220916, point 10. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/384111.pdf> [last viewed October 13, 2019].

of evaluation concept seems to be misleading. Law “On Gambling and Lotteries”<sup>22</sup> provides that the municipal council “shall decide on the permit to operate gambling on a case by case basis, if the operation of gambling on the particular premises does not create substantial impairment to the interests of the State and the residents of the respective administrative area.” In 2012, the Supreme Court ruled that words “substantial impairment to the interests of the State and the residents of the respective administrative area” confer to the council the freedom of evaluation.<sup>23</sup> However, since then the courts have identified several criteria used by municipal council as insufficient to deny a gambling permit. For instance, administrative courts have ruled that such argument as “significant intensity of pedestrians” in the respective area does not form sufficient grounds for denying a permit, unless the chances that a gambling house is visited by persons who did not originally want to enter it increases. Such considerations as nearby apartment houses or general negative attitude of residents towards gambling are not sufficient to maintain that a “substantial impairment” has been caused.<sup>24</sup> The courts have also satisfied claims to issue gambling permits, therefore judging that there is no “substantial impairment”. Consequently, in this category of cases, the court does scrutinize the arguments of the municipal council and quite rightly fills the content of the indefinite legal terms with its own merits. Hence, this is not a situation, where a special knowledge or professional experience would be mandatory in order to reach a decision. The conclusion that in this situation there is no need to talk about the freedom of evaluation corresponds to the German case law, where such indefinite legal terms as “important reasons” or “basis of public common interest” have not been acknowledged as conferring upon the authority the freedom of evaluation and thus limiting the scope of judicial review.<sup>25</sup>

If a legal provision confers upon an authority the freedom of evaluation, the courts still are entitled to make a thorough examination of all aspects of the case in order to check, whether the decision is not arbitrary (obviously, erroneous). If a court finds that the decision is arbitrary, the only remedy it can usually grant is declaring the decision illegal and repealing it. However, if a claimant has asked for a more favourable decision (for instance, a higher disability group), the court is generally not entitled to rule that the claimant should receive a higher disability group. In those cases, the court can merely oblige the authority to pass the decision once again. In general, such a solution prolongs the overall length of administrative proceeding and sometimes might prove ineffective.

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<sup>22</sup> On Gambling and Lotteries. Available at: <https://likumi.lv/ta/en/en/id/122941-on-gambling-and-lotteries> [last viewed October 13, 2019].

<sup>23</sup> Judgment of the Administrative Department of the Supreme Court of 14 December 2012 in case No. A42554407, point 8. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/123260.pdf> [last viewed October 13, 2019].

<sup>24</sup> See, for instance, Judgment of the Administrative District Court of 1 August 2019 in case No. A420295618, point 9. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/388203.pdf> [last viewed October 13, 2019].

<sup>25</sup> Maurer H. Allgemeines Verwaltungsrecht. 17. Auflage, Verlag C. H. Beck, München, 2009, p. 149.

Another aspect worthy of consideration is to what extent and in which areas the legislator can wilfully use legal provisions conferring upon the authorities the freedom of evaluation and thus limiting the scrutiny of the judicial review.

## Conclusions

1. The freedom of evaluation is a concept used by administrative courts to limit the amount of scrutiny they use when reviewing the legality of administrative actions. The freedom of evaluation refers to a concept or phrase in a legal provision which, in order to apply it: 1) demands from the decision-maker specific knowledge, professional experience or personal insight in evaluating facts, making forecasts or assessing risks, and 2) allows various legitimate evaluations.
2. Administrative courts have acknowledged the freedom of evaluation in decisions regarding disability status, payments from the medical risk fund, examinations, assessment evaluations in competitions and several decisions made by regulatory or security authorities.
3. The concept of freedom of evaluation does not mean that a decision can be arbitrary. Even when the freedom of evaluation is acknowledged, the court is entitled to review all aspects of the decision in order to make sure that the decision is based only on considerations stemming from the legal provision.

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## CONCEPT OF FULLY ELABORATED DRAFT LAW IN THE CONTEXT OF IMPLEMENTING VOTER'S LEGISLATIVE INITIATIVES

### Summary

Latvia is among the few countries in the world where voters have a right of legislative initiatives or a right to submit draft laws in the Parliament. According to Article 78 of the Constitution of the Republic of Latvia, the electors, in number comprising not less than one tenth of the electorate, have the right to submit a fully elaborated draft of an amendment to the Constitution or a law. However, in order to come as far as submission of a draft law to the *Saeima*, the voters have to fulfil certain preconditions stipulated in the Law "On National Referendum, Legislative Initiative and European Citizens' Initiative", i.e. set up a group responsible for the draft law and submit to it a fully elaborated draft law or draft amendments to the Constitution to be registered at the Central Election Commission. Given that over time the Central Election Commission has turned down several initiatives of signature collection due to detected shortcomings, the article will discuss the practice established by this institution and analyse conclusions from the case law that apply to content of a fully elaborated draft law.

**Keywords:** totality of citizens, voters' legislative initiative, initiative group, fully elaborated draft law, national referendum, collection of signatures, the Central Election Commission

### Introduction

According to Article 2 (henceforth – Constitution), sovereign power in Latvia belongs to the Latvian people and citizens of the Republic of Latvia having a right to vote exercise this power on behalf of the totality of citizens. Article 64 of the Constitution stipulates that there are two legislative subjects in Latvia – Parliament (the *Saeima*) and the people. Article 78 of the Constitution defines the procedure according to which the voters exercise the right to legislative initiative given to the people: "Electors, in number comprising not less than one tenth of the electorate, have the right to submit a fully elaborated draft of an amendment to the Constitution or of a law to the President, who shall present it to the *Saeima*. If the *Saeima* does not adopt it without change as to its content, it shall then be submitted to national referendum." Totality of citizens of Latvia was granted these rights on 7 November 1922, when the Constitution was promulgated and said article has not been amended ever since. Procedure of implementation of voters' legislative initiative has always been regulated in greater detail by the law. Currently it is regulated by the Law "On National Referendum, Legislative Initiative and European

Citizens' Initiative"<sup>1</sup> adopted in 1994 (hereinafter – Law), although it has had several significant amendments during the course of its existence.

When the Constitution was elaborated, the Constitutional Assembly initially considered granting voters the initiative rights only concerning amendments of the Constitution, i.e., the version of that time submitted for review envisaged that no less than one fifth of the electorate would be entitled to submit to the President fully elaborated draft amendments to the Constitution [..]<sup>2</sup>, however, eventually the members of the Constitutional Assembly decided to attribute this right both to laws and amendments to the Constitution. Rights of totality of citizens arising out of Article 78 of the Constitution is an instrument practically used in life. In order to reduce a likelihood of poor quality draft law being submitted, the *Saeima* adopted amendments to the Law on 8 November 2012, stipulating stricter procedural steps for initiating draft laws by the voters, including introduction of a requirement to specify an initiative group responsible for the draft law (initiative group can be a political party or an association of such, or an association established and registered according to the procedure laid down in Associations and Foundations Law and consisting of at least 10 voters)<sup>3</sup> and clearly defining competence of the Central Election Commission (henceforth – CEC) in reviewing and registering draft laws for further collection of signatures. Questions about rights of the voters to initiate draft laws have been repeatedly discussed also in the Constitutional Court and the Supreme Court, especially analysing content of the precondition put forth for voters' legislative initiatives that the draft law must be "fully elaborated" and regarding scope of powers of the CEC during the registration process.

## 1. A concept of fully elaborated draft law

According to Article 78 of the Constitution, the voters are entitled to initiate both draft amendments to the Constitution and draft laws. Besides, the procedure of submission and criteria to be met do not differ for draft amendments to the *Constitution* and draft laws, therefore, for the purpose of this article a term *draft law* will imply also draft amendments to the Constitution. The voters can initiate amendments to any existing law and completely new law.

According to Article 23(3) of the Law, the first steps of implementation of voters' legislative initiative begin at the moment when the initiative group submits to CEC a submission of the draft law or draft amendments to the Constitution, in support of which the collection of signatures is planned. The initiative group must prepare a draft law or draft amendments to the Constitution fully elaborated in terms

<sup>1</sup> Law "On National Referendum, Legislative Initiative and European Citizens' Initiative". Available at: <https://likumi.lv/ta/en/en/id/58065-on-national-referendum-legislative-initiative-and-european-citizens-initiative> [last viewed October 25, 2019].

<sup>2</sup> Transcript of the 20<sup>th</sup> sitting of the IV Session of the Constitutional Assembly 09.11.1921. Available at: *Latvijas Satversmes Sapulces stenogrammu izvilkums (1920–1922)*. Rīga: Tiesu namu aģentūra, 2006, p. 467.

<sup>3</sup> See Article 23 of the Law.



of form and content, in support of which collection of signatures is planned. Once an initiative group has lodged a submission on draft law or draft amendments to the Constitution to CEC, it must examine the submitted documentation and adopt one of three decisions within 45 days: 1) to register the draft law; 2) to set a term for correcting any faults in the submission and the draft law or draft amendment to the Constitution (for example, in cases, when the title of the law must be specified, the text of the draft law must be corrected in accordance with requirements of the Latvian literary language and orthography, or terminology used in the draft law must be specified); (3) to reject registration of the draft law.<sup>4</sup>

If the draft law submitted by the initiative group is registered, the CEC announces 12 months of collection of signatures on certain draft law. If the support mentioned in Article 78 of the Constitution is achieved during the period in question, i.e. it has been signed by 1/10 of Latvian electorate, the draft law is submitted to the State President according to Article 78 of the Constitution and he submits it for consideration in the *Saeima*.

According to Article 23(5) of the Law, The Central Election Commission shall refuse registration of the draft law or draft amendments to the Constitution only in 2 cases: firstly, if the initiative group does not conform to the requirements of the Law (preconditions put forth to initiative groups was described above), or, secondly, if the draft law or draft amendments to the Constitution is not fully elaborated *in terms of form or content* (emphasis by the author).

When deciding on registration of the draft law submitted by the initiative group, CEC may request information, explanations and opinions from public and municipal authorities necessary for deciding on this issue, as well as to invite experts. Rights implied in this law are exercised in practice, for example, when asking teaching staff of law faculties of Latvian universities to provide opinions about a certain draft.

In actual life, initiative groups have often faced problems with meeting the criterion of *fully elaborated* draft law, and therefore CEC has rejected registration of the submitted draft laws. Information in possession of CEC reveals that from 2012 until now 12 initiatives have been registered<sup>5</sup>, whereas registration of 9 draft laws or draft amendments to the Constitution were rejected<sup>6</sup>.

The Law states that a decision on rejecting registration of draft law or draft amendments to the Constitution adopted by CEC can be appealed in the Administrative Case Department of the Supreme Court. Several initiators have exercised this right and consequently it has led to the case law in Latvia giving certain criteria that a draft law should fulfil to qualify as *fully elaborated*.

<sup>4</sup> See Article 23(4) of the Law.

<sup>5</sup> See Initiatives registered for collection of signatures are available at: <https://www.cvk.lv/lv/iniciativas/veletaju-iniciativas/registretas-iniciativas> and <https://www.cvk.lv/lv/iniciativas/veletaju-iniciativas/iniciativas-par-kuram-parakstu-vaksana-noslegusies> [last viewed October 28, 2019].

<sup>6</sup> Initiatives with rejected registration available at: <https://www.cvk.lv/lv/iniciativas/veletaju-iniciativas/iniciativas-kuram-registracija-atteikta>. [last viewed October 28, 2019].

### 1.1. Scope of concept “fully elaborated draft law in terms of form”

A criterion that a draft law must be fully elaborated in terms of form requires compliance with conditions of legal technique. Requirements for the form of the draft law are primarily found in the Cabinet Regulation “Regulation on elaboration of draft regulatory enactments”<sup>7</sup>, as well as different guides to elaboration of regulatory enactments.<sup>8</sup> Authoritative legal scientist from the 1920s, Prof. Kārlis Dišlers, at his time pointed out that in order to deem a draft law to be fully elaborated in terms of form, the draft law must clearly show “what existing laws or articles of laws are cancelled or amended, and logically comprehensible content of amendments and possible new articles”.<sup>9</sup> A draft law must contain legal provisions – it cannot be formulated as a declarative statement or a conceptual proposal.<sup>10</sup>

The Supreme Court in its judgement of year 2014 has pointed out that according to provisions of the Rules of Procedure of the *Saeima* also draft law or draft amendments to the Constitution submitted by the totality of citizens must be executed as draft law. At the same time, it must be taken into account that formal requirements must be constructed in a way to exclude drafts that are not suitable due to formal shortcomings (for example, draft is not executed as draft law, draft has unclear content, text has logic mistakes etc.).<sup>11</sup>

The draft law must also contain transitional provisions or provisions on effectiveness of the law, if required so by the nature of amendments.<sup>12</sup> As shown by the practice of CEC, meeting of formal criterion usually has not been a difficulty for the initiative groups, but initiative registrations were mainly rejected due to shortcomings in the draft law's content, making it not fully elaborated.

### 1.2. Scope of concept “fully elaborated draft law in terms of content”

Any law must comply with the legal system in terms of content. It means that by using law application methodology and especially interpretation methodology,

<sup>7</sup> The Cabinet Regulation of 03.02.2009 No. 108. Regulation on Drafting Regulatory Enactments. *Latvijas Vēstnesis*, 17.02.2009. No. 26 (4012).

<sup>8</sup> Normatīvo aktu projektu izstrādes rokasgrāmata. [Handbook for Drafting Regulatory Enactments] Rīga: Valsts kanceleja. 2016. Available at: <https://tai.mk.gov.lv/book/1/chapter/23> [last viewed September 25, 2019].

<sup>9</sup> Dišlers K. Vai Centrālajai vēlēšanu komisijai ir tiesība pārbaudīt iesniegtos likumprojektus [Does the Central Election Commission Have the Right to Verify the Submitted Draft Laws]. *Jurists*, No. 5, 135., 136. sl., 1928.

<sup>10</sup> Letter by the Department of Constitutional and Administrative Law of the Faculty of Law, University of Latvia to CEC No. 2020-V10-36. *Jurista Vārds*, No. 40 (739), 02.10.2012, p. 21.

<sup>11</sup> Judgement of the Supreme Court of 28 March 2014 in case No. SA-3/2014, para. 9. Available at: [www.at.gov.lv](http://www.at.gov.lv) [last viewed October 12, 2019].

<sup>12</sup> Pastars E. Referendumu nedienas. Diena. 03.08.2002. Quoted from: Saeimas Juridiskā biroja vēstule No. 12/13-3-n/36-11/12 Centrālajai vēlēšanu komisijai. *Jurista Vārds*, No. 40 (739), 02.10.2012, p. 18.

the law must be suitable and must not contradict legal provisions that are superior or have a higher priority in power hierarchy.<sup>13</sup>

During recent years, the case law in Latvia has become constant regarding the content of a draft law to qualify as fully elaborated<sup>14</sup>. As the Constitutional Court stated in its decision of 19 December 2012 on termination of proceedings in the so-called language referendum case<sup>15</sup>, a draft law cannot be deemed to be fully elaborated in terms of content, if: 1) it intends to decide issues beyond the scope of the law; 2) in case of acceptance it would contradict provisions, principles and values implied in the Constitution; 3) in case of acceptance it would contradict international liabilities of Latvia. The Supreme Court also constantly complies with these evaluation criteria for a “fully elaborated” draft law, when examining cases on appeal of CEC decisions, referring to said decision of the Constitutional Court. The Venice Commission of the Council of Europe has also pointed out that a draft law submitted for a referendum must comply with the legal provisions of the supreme law authority, international law and principles of the European Parliament (democracy, human rights and law governed state).<sup>16</sup>

In its practice, CEC has repeatedly rejected registration of draft laws that contradicted the Constitution or international contracts binding to Latvia. For example, registration of a draft law envisaging to introduce individual material liability of the *Saeima* deputies, ministers and state secretaries, i.e. stating that these officials are “individually materially liable for loss resulting from decisions taken, signed or endorsed by such officials” was rejected and collection of signatures was not started on the basis of contradiction to the Constitution.<sup>17</sup> In this particular situation, it was concluded that this draft law would contradict the principle of unaccountability of the *Saeima* deputies stipulated in Article 28 of the Constitution, namely, “Members of the *Saeima* may not be called to account by any judicial, administrative or disciplinary process in connection with their voting or their views as expressed during the execution of their duties. [...]” The said draft law was interesting also because it envisaged holding these officials liable, however, the next article stated that “Procedure of imposing the material liability shall be elaborated

<sup>13</sup> Judgement of the Supreme Court of 28 March 2014 in case No. SA-3/2014, para. 10, see also Letter No. 12/13/-3-n/36-11/12 of the Saeima Legal Office to the Central Election Commission. *Jurista Vārds*, No. 40 (739), 02.10.2012, p. 18.

<sup>14</sup> Judgement of the Supreme Court of 18 December 2013 in case No. 2013-06-01 and judgement of 28 March 2014 in case No. SA-3/2014. Available at: [www.at.gov.lv](http://www.at.gov.lv) [last viewed September 25, 2019].

<sup>15</sup> Decision of the Constitutional Court of 19 December 2012 in case No. 2012-03-01 on termination of proceedings. Available at: <https://likumi.lv/doc.php?id=253569> [last viewed September 25, 2019].

<sup>16</sup> Code of Good Practice on Referendums, CDL-AD(2007)008rev, Venice, 16-17 March 2007, point III.3. Available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDLAD%282007%29008-e> [last viewed September 25, 2019].

<sup>17</sup> Decision by CEC of 19.05.2015 No. 4 and Decision of 02.04.2015. No. 3 “On the Draft Law Submitted by the Association “Atvērtās pārvaldības partnerība Latvijā” On the Personal Liability of Members of the Saeima, Ministers and Secretaries of the State”. Available at: <https://www.cvk.lv/pub/public/31136.html>; <https://www.cvk.lv/pub/public/31107.html>; <https://www.cvk.lv/pub/public/31134.html> [last viewed September 25, 2019].

by the Cabinet of Ministers in a separate draft law to be submitted to the *Saeima* within six months". Regarding a version of this article, CEC referred to conclusions of the Constitutional Court and pointed out that such article would contradict the principle of legal certainty. The following requirement arises from the principle of legal certainty: "a legal provision defining restrictions of fundamental rights of a person must be clear and as accurate as possible.[...] Issuer of the legal provision must take care of formulation of the legal provision to make it as unambiguous as to allow correct interpretation and application, while a person could be aware of the legal consequences of its application".<sup>18</sup> Namely, this article of the draft law is actually a thesis or a goal, but it does not define a mechanism for achieving it; therefore, the draft law was considered as declarative and unclear, because if the voters signed the draft law they would not have any clarity about its legal consequences and what would be the practical mechanism of imposition of material liability.

Similarly, registration of a draft law intending to define a new case for referendum at the level of law (instead of Constitution) was rejected and no collection of signatures was started. Noteworthy, proposals promoted by various initiative groups have been submitted to CEC with a shared idea – at the time when lats was the national currency of Latvia – these initiative groups wanted to introduce a new case for referendum at the level of law, i.e., to prescribe that official currency change can be decided only in referendum. One of the initiatives that was submitted in January 2013, envisaged amendments to the Law On the Bank of Latvia, defining lats as the sole means of payment in Latvia – until the referendum decides otherwise.<sup>19</sup> Some initiatives tried to determine referendum arrangement formalities in a new law "On participation of nation in change of legal means of payment in the Republic of Latvia"<sup>20</sup>. In all these cases, CEC turned down registration of these draft laws, providing a reasonable conclusion that introduction of a new case for referendum is an issue of amendments to the Constitution for which the *Saeima* or totality of citizens of Latvia must decide as a constitutional legislator. CEC referred to Article 64 of the Constitution<sup>21</sup> and pointed out: "Since the Constitution clearly lays down the cases of participation of the totality of citizens as public authority,

<sup>18</sup> See, for example, Judgement of the Constitutional Court of 28 June 2013 in case No. 2012-26-03, para. 14. Available at: [http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2012/12/2012-26-03\\_Spriedums\\_ENG.pdf#search=2012-26-03](http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2012/12/2012-26-03_Spriedums_ENG.pdf#search=2012-26-03) [last viewed September 11, 2019].

<sup>19</sup> Decision by CEC of 18.03.2013 No. 14 On draft law "Amendments to the Law On the Bank of Latvia" submitted by the initiative group. Available at: [https://www.cvk.lv/pub/upload\\_file/14\\_pilnais.pdf](https://www.cvk.lv/pub/upload_file/14_pilnais.pdf) [last viewed September 11, 2019].

<sup>20</sup> Decision by CEC of 31.01.2013. No. 5 On draft law "On nation's participation in decision making concerning a term of introduction of euro currency" submitted by the initiative group. Available at: [https://www.cvk.lv/pub/upload\\_file/PV%202013/31012013\\_CVK\\_lemums\\_Nr\\_5\\_izverts.pdf](https://www.cvk.lv/pub/upload_file/PV%202013/31012013_CVK_lemums_Nr_5_izverts.pdf) [last viewed September 11, 2019]; Decision No. 35 of 18.09.2013 On draft law "On nation's participation in change of legal means of payment in the Republic of Latvia" submitted by association "Latviešu Biedriba". Available at: [https://www.cvk.lv/pub/upload\\_file/35\\_pilnais.pdf](https://www.cvk.lv/pub/upload_file/35_pilnais.pdf) [last viewed September 11, 2019]. See p. 11.

<sup>21</sup> Article 64 of the Constitution stipulates: "The *Saeima*, and also the people, have the right to legislate, in accordance with the procedures, and to the extent, provided for by this Constitution." Namely, it follows from this article that rights of the people as the legislator are restricted and their scope is defined by the Constitution.

the law or other regulatory enactment cannot include other cases for referendum. A new referendum case, not previously defined in the Constitution, can be introduced only via amending the Constitution, and the *Saeima* or the totality of citizens of Latvia as constitutional legislator must collectively decide on that”.<sup>22</sup> It must be mentioned that in the decision of CEC discussed above, an emphasis was placed on several aspects that show further potential contradictions also with the international liabilities assumed by Latvia.

It has been admitted in the case law that a fully elaborated draft law in terms of content is a draft law that does not contradict the international liabilities assumed by the state. Initiative that aimed at amending Article 4 of the Constitution by supplementing it with a sentence “National currency of Latvia is lats” lodged by the voters was turned down by CEC in 2013 as non-compliant with international liabilities of the state.<sup>23</sup> CEC concluded that an issue on means of payment in Latvia is related to accession of Latvia to the European Union and participation in the Economic and Monetary Union. Article 119 of Treaty on the Functioning of the European Union list actions to be taken by the European Union and its Member States within the framework of Economic and Monetary Union. One of activities to be taken by the member state is also an introduction of a single currency. It means that a question about means of payment in Latvia (keeping lats or introducing euro) applies to conditions of being a part of the European Union and introduction of euro is a liability undertaken with the international treaty.<sup>24</sup> When examining the case where the said decision of CEC was contested, the Supreme Court in its judgement of year 2014 stated: “Term ‘fully elaborated’ found in Article 78 of the Constitution must be understood as implying also a legislative initiative of such totality of citizens that respects international liabilities of Latvia in a way that it provides measures of preventing contradictions with international liabilities of Latvia before entering in force of the law or amendments to the Constitution under the initiative or concurrently with it. The draft law that would oppose the international liabilities of Latvia in case of acceptance is not to be considered as ‘fully elaborated’”.<sup>25</sup>

Any draft law or draft amendments to the Constitution submitted must also have appropriate quality – it may not have internal contradictions of other ambiguities. Besides, the entire text of a draft law must meet the criterion “fully elaborated”, and even if the draft law does not qualify as fully elaborated in some part, that shortcoming cannot be prevented and it must be admitted that the draft law generally does not satisfy the requirements of Article 78 of the Constitution and that shortcoming cannot be eliminated, for example, by excluding the unsuitable

<sup>22</sup> Available at: [https://www.cvk.lv/pub/upload\\_file/14\\_pilnais.pdf](https://www.cvk.lv/pub/upload_file/14_pilnais.pdf) [last viewed September 11, 2019], paras 15, 16.

<sup>23</sup> Decision by CEC of 14.05.2013. No. 17. On the draft law “Amendment to the Constitution of the Republic of Latvia” submitted by the association “Par latu, pret eiro”. Available at: [https://www.cvk.lv/pub/upload\\_file/17\\_pilnais.pdf](https://www.cvk.lv/pub/upload_file/17_pilnais.pdf) [last viewed September 11, 2019].

<sup>24</sup> Ibid.

<sup>25</sup> Judgement of the Supreme Court of the Republic of Latvia of 28 March 2014 in case No. SA-3/2014. Available at: [www.at.gov.lv](http://www.at.gov.lv) [last viewed September 12, 2019].

part from text of the draft law.<sup>26</sup> The draft law must be fully elaborated at the moment of submission to CEC, and the submitter cannot claim that it could be improved after registration or that improvements could be left to the *Saeima*.<sup>27</sup>

A precondition that the draft law must be fully elaborated is especially important, because in compliance with Article 78 of the Constitution, if *Saeima* failed to support the submitted draft law or adopted it with amendments in content, this incomplete draft law would be presented for referendum and could end with potential acceptance of “spoilage”. Notwithstanding the fact that text of a draft law submitted by the initiative group cannot be amended after its registration, one must ensure that a draft that contradicts the basic values of democratic and legal state would not be presented for referendum. According to Article 78 of the Constitution, the same version of the draft law must be presented for referendum that was initiated by 1/10 of electorate, and as the Constitutional Court has concluded: “[..] if poor quality or anti-constitutional draft laws were presented for referendum on a regular basis, the very idea of legislative initiative of voters would be levelled out and over the course of time the civic activity of voters could decrease.”<sup>28</sup>

## 2. Restrictions of content of voters' initiatives

The understanding that voters' initiatives cannot pertain to issues that fall within the competence of other bodies of state power has been consolidated in legal science, for example, if the Constitution states that amnesty in Latvia is given by the *Saeima*, the voters could not initiate a draft law on amnesty just like the voters could not adopt the Rules of Procedure of the *Saeima* (because, according to Article 21 of the Constitution, it is an exclusive prerogative of the *Saeima*) etc. Professor K. Dišlers in his time specified that a totality of citizens may initiate adoption of only abstract and general legal norms, but not administrative or jurisdictional acts.<sup>29</sup>

Pre-war legal science already discussed topics whether the voters were entitled to initiate issues on cases mentioned in Article 73 of the Constitution, like the cases that cannot be passed to referendum (i.e. budget and laws on borrowings, taxes, customs, railway tariffs, military service, declaration and starting of war, conclude peace, announcement of extraordinary situation and its termination, mobilisation and demobilisation as well as contracts with other foreign countries). For example,

<sup>26</sup> See Decision by CEC of 19.05.2015 No.4, para. 8; Letter by the Saeima Legal Bureau No. 12/13-3-n/36-11/12 to the Central Election Commission. *Jurista Vārds*, No. 40 (739), 02.10.2012, p. 17.

<sup>27</sup> Article 12 of Decision No. 4 of 19.05.2015 by CEC; see also Article 17 of Decision No. 13 of 02.04.2015 by CEC.

<sup>28</sup> Judgement of the Constitutional Court of the Republic of Latvia of 18 December 2013 in case No. 2013-06-01, para. 13.2. Available at: [http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2013-06-01\\_Spriedums.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2013-06-01_Spriedums.pdf) [last viewed August 28, 2019].

<sup>29</sup> Dišlers K. Nekonstitucionāls ierosinājums [An Unconstitutional Proposal]. *Jaunākās Ziņas*, 17.06.1927. Quoted from: Saeimas Juridiskā biroja vēstule, No.12/13-3-n/36-11/12 Centrālajai vēlēšanu komisijai [Letter by the Saeima Legal Bureau No. 12/13-3-n/36-11/12 to the Central Election Commission]. *Jurista Vārds*, No. 40 (739), 02.10.2012, p. 18.

professor K. Dišlers in his work published in the 1930s pointed out that the restrictions mentioned in Article 73 of the Constitution pertain only to referendums but not to initiation of laws. At the same time, the professor indicated that it would be hard to imagine an actual life situation, where the voters submitted proposals regarding budget or contracts with foreign countries, but if voters would like to initiate a draft law, for example, on introduction of some new tax or cancellation of an existing one, K. Dišlers believed that people could not be denied of such right.<sup>30</sup> The professor specified that in these cases a draft law submitted by the voters could become a law only if the *Saeima* adopted it. Namely, in K. Dišlers' opinion, consequences mentioned in the second sentence of Article 78 of the Constitution – if the *Saeima* did not accept the draft law lodged by the voters without amendments in terms of content, it could not be passed for referendum – would not be applicable to such cases.

The said issue has brought about polemics in contemporary law science. For example, *Dr. iur.* I. Nikuļceva has also stated in her doctoral thesis that she supports the aforementioned conclusions of professor K. Dišlers<sup>31</sup>, and she believes these restrictions in case of doubt should be interpreted more narrowly. Meanwhile, the experts of constitutional law J. Pleps and E. Pastars have pointed out that the restrictions listed in Article 73 of the Constitution should also be applicable to voters' initiatives.<sup>32</sup> In the judgement of 2014 the Constitutional Court, in examining a case, in which the primary issue to be reviewed did not pertain directly to restrictions upon voters' initiative, noted, *inter alia*, that “voters' rights to legislative initiative are not applicable to draft laws, which, pursuant to Article 73 of the *Satversme*, cannot be submitted for a national referendum”<sup>33</sup>. It must be added, that currently, in 2019, a draft law “Amendment to the Law On Real Estate Tax” submitted by an initiative group has been registered by CEC for collection of signatures, and it envisages amendments to the law that a natural person's only housing is not subject to real estate tax if the property meets the criteria listed in the draft law.<sup>34</sup>

To consider draft amendments to the Constitution as fully elaborated, their content must not contradict those provisions of the Constitution that the draft amendments do not offer to amend: either the core of the Constitution or the basic provision laid down in proclamation act of the State of Latvia that Latvia

<sup>30</sup> Dišlers K. *Ievads Latvijas valststiesību zinātnē* [Introduction to the Science of Latvian State Law]. Rīga: A. Gulbis, 1930, p. 117.

<sup>31</sup> Nikuļceva I. *Tautas nobalsošana un vēlētāju likumdošanas iniciatīva. Promocijas darbs* [National Referendum and Voters' Legislative Initiative. Thesis]. Rīga: Latvijas Universitāte, 2012, pp. 94–95.

<sup>32</sup> Pleps J., Pastars E. *Vai tauta var Saeimā iesniegt budžeta projektu* [May the People Submit to the Saeima a Draft Budget]. *Jurista Vārds*, No.18 (251), 10.09.2002 and No. 19(252), 24.09.2002.

<sup>33</sup> Judgement of the Constitutional Court of the Republic of Latvia of 12 February 2014 in case No. 2013-05-01, para. 14.4. Available at: [http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2013-05-01\\_Spriedums.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2013-05-01_Spriedums.pdf) [last viewed September 19, 2019].

<sup>34</sup> Available at: [https://www.cvk.lv/uploads/files/Iniciativas/NIN\\_likumprojekta%20teksts.pdf](https://www.cvk.lv/uploads/files/Iniciativas/NIN_likumprojekta%20teksts.pdf) [last viewed September 19, 2019].

is independent and democratic republic.<sup>35</sup> At the end of 2011, when, according to regulation of that time, a draft amendment to the Constitution signed by 1/10 of electorate and envisaging to strengthen status of the Russian language as the second official language<sup>36</sup> was submitted to the *Saeima*, public and layers' community lit up with discussions on whether the voters can initiate any kind of amendments to the Constitution. In 2012, the Constitutional Law Commission set up under auspices of the State President's office, published its opinion "On constitutional foundations of the State of Latvia and the inviolable core of the Constitution", which included the conclusion that voters did not have an unrestricted right to initiate any constitutional amendments. Respectively, the Commission pointed out that the Constitution holds values that cannot be amended, and one of such is also the official state language, given that Latvia is a national State and the Latvian language means the identity of this State.<sup>37</sup> Also, the decision of December 2012 by the Constitutional Court on termination of proceedings in case No. 2012-03-01 has brought forward the notion of values enshrined in the Constitution, obliging every legislation's subject to stick to the principle – to act not only according to provisions and principles of the Constitution, but also in keeping with the values, pointing out that "not only a legislator implementing legislation rights independently – the *Saeima* – but also a legislator exercising legislation rights in certain cases – the nation – must comply with provisions of legal power and respect constitutional values embedded therein."<sup>38</sup> As pointed out by the Constitutional Court Judge G. Kusiņš, referendum can amend the Constitution, if such amendment does not exclude any element of Constitutional core or does not contradict any element of Constitutional core. "It is possible to add to the core of the *Satversme* through a national referendum; however, a totally different core of the *Satversme* may be established only by adopting a new *Satversme*"<sup>39</sup>

CEC's right to assess whether the draft law has been fully elaborated clearly follows from regulation of the current law; however, CEC is not entitled to evaluate usefulness of the draft law or to evaluate its acceptability or perform political

<sup>35</sup> 78. pants. Latvijas Republikas Satversmes komentāri. [Article 78. The Commentaries of the Constitution of the Republic of Latvia]. V nodaļa. Likumdošana. Autoru kolektīvs prof. R. Baloža zinātniskā redakcijā, Rīga: Latvijas Vēstnesis, 2019, p. 286.

<sup>36</sup> Bērziņš iesniedz Saeimā likumprojektu par divvalodību [Bērziņš Submits to the Saeima a Draft Law on Two Official Languages]. Leta. 20.12.2011. Available at: [http://www.tvnet.lv/zinas/latvija/404238-berzins\\_iesniedz\\_saeima\\_likumprojektu\\_par\\_divvalodibu](http://www.tvnet.lv/zinas/latvija/404238-berzins_iesniedz_saeima_likumprojektu_par_divvalodibu) [last viewed September 19, 2019].

<sup>37</sup> Latvijas valsts kodolu meklējot [Searching for the Core of the State of Latvia]. *Jurista Vārds*, No. 6 (705), 07.02.2012; Opinion by the Commission of Constitutional Law from 17.09.2012 on the Constitutional Foundations of the State of Latvia and Inviolable Core of the *Satversme*. Available at: [http://www.president.lv/images/modules/items/PDF/17092012\\_Viedoklis\\_2.pdf](http://www.president.lv/images/modules/items/PDF/17092012_Viedoklis_2.pdf) [last viewed August 17, 2019].

<sup>38</sup> Decision of the Constitutional Court of the Republic of Latvia of 19 December 2012 on Terminating Legal Proceedings in case No. 2012-03-01. *Latvijas Vēstnesis*, No. 200 (4803), 20.12.2012, para. 18.3.

<sup>39</sup> Platāce L. Vēlētāju tiesības ierosināt referendumus pārmaiņu priekšā [Voters' Right to Initiate Referendums in the Wake of Changes]. 25.07.2012. Available at: <http://m.lvportals.lv/visi/likumi-prakse?id=250193?show=coment> [last viewed August 17, 2019].



assessment that can be done solely by the legislator – the *Saeima* or the people.<sup>40</sup> CEC must perform only legal assessment of the draft law. As pointed out by the Constitutional Court, CEC must register every draft law submitted by the voters, except where it *obviously* (emphasized by author) has not been fully elaborated in terms of content.<sup>41</sup> If CEC establishes that a draft law is not fully elaborated, it adopts a decision on refusing to register the draft law. As the Supreme Court has found, the decision by which CEC refuses registration and transfer of a draft law submitted by voters for collection of signatures is not to be recognised as being an administrative act, because it is adopted within the framework of legislative procedure.<sup>42</sup>

Article 23<sup>1</sup> of the Law states that the initiative group can appeal the decision to reject registration of a draft law or draft amendments to the Constitution adopted by the CEC to the Department of Administrative Cases of the Supreme Court, where it examines the case as the court of first instance, and it means that the case is examined as to its merits.<sup>43</sup> Thus, in proceedings the Supreme Court must evaluate whether the draft law submitted by the voters is fully elaborated.<sup>44</sup>

In practice, CEC decisions to reject registration of draft laws have been appealed several times, including requests to the Supreme Court to oblige CEC to approve legislative proposals for collection of signatures, and the court has also been requested to enforce moral compensation.<sup>45</sup> Interestingly, the Supreme Court has exercised rights arising out of the Law On Constitutional Court<sup>46</sup> and addressed the Constitutional Court with an application requesting to evaluate compliance of Article 23(5)(2) and Article 23<sup>1</sup>(1) of the Law with Article 1 of the Constitution. The Supreme Court was concerned if the legal provision qualifying CEC to evaluate voters' initiatives in terms of content and qualifying the Supreme Court to examine complaints about such decisions does not contradict the principle of separation of powers.<sup>47</sup> The Constitutional Court in its judgement passed in 2013 concluded that there was no contradiction between the contested law and

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<sup>40</sup> Judgement of the Constitutional Court of the Republic of Latvia of 18 December 2013 in case No. 2013-06-01, para. 14.3. Available at: [http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2013-06-01\\_Spriedums.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2013-06-01_Spriedums.pdf) [last viewed November 2, 2019].

<sup>41</sup> *Ibid.*, paras 14.3 and 15.4

<sup>42</sup> Decision of the Senate of the Supreme Court of the Republic of Latvia of 20 February 2013 in case No. A420577912 SA-1/2013, para. 9.

<sup>43</sup> Administrative Procedure Law. Article 105(1). Available at: <https://likumi.lv/ta/en/en/id/55567-administrative-procedure-law> [last viewed November 2, 2019].

<sup>44</sup> Judgement of the Constitutional Court of the Republic of Latvia of 18 December 2013 in case No. 2013-06-01. Available at: [http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2013-06-01\\_Spriedums.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2013-06-01_Spriedums.pdf), Article 15.4 [last viewed November 2, 2019].

<sup>45</sup> Decision by the Supreme Court of the Republic of Latvia of 11 February 2013 in case No. A420577912 SA- 1/2013. Available at: <at.gov.lv/files/files/1-sa-2013.doc> [last viewed November 02, 2019].

<sup>46</sup> The Constitutional Court Law. Available at: <https://likumi.lv/ta/en/en/id/63354-constitutional-court-law> [last viewed November 2, 2019].

<sup>47</sup> See Decision of the Senate of the Supreme Court of the Republic of Latvia of 20 February 2013 in case No. A420577912 SA-1/2013, para. 9. Available at: <at.gov.lv/files/files/> [last viewed November 2, 2019]. With this decision the Supreme Court decided to amend the content of its decision of 11.02.2013 on submission of the application to the Constitutional Court.

Constitution – the Supreme Court must find out whether the draft law submitted by the voters was really and obviously fully elaborated in terms of content and whether CEC in its decision had legally justified non-compliance of the draft law with the relevant legal provision.<sup>48</sup> The Constitutional Court also pointed out that it had an exclusive competence to admit legal provisions to be non-compliant with the legal provisions of the supreme legal powers and declare them invalid, however, also the administrative court, within the framework of each case, had to make sure that the applicable legal provision complied with legal provisions of the supreme legal powers. Thus, the Constitutional Court decided that this regulation conformed to Article 1 of the Constitution.<sup>49</sup>

## Conclusions

1. The term *fully elaborated draft law or amendments to the Constitution* used in Article 78 of the Constitution includes criteria of both *form* and *content* of the draft law. In practice, the initiative groups often had problems to fulfil a criterion of fully elaborated draft law and, therefore, CEC had refused their registration for further collection of signatures.
2. A criterion that a draft law must be fully elaborated in terms of *form* requires compliance with conditions of legal technique. Proper form of a draft law is defined in the Cabinet Regulation No. 108 “Regulation on executing of draft legislative acts”. Additionally, the draft law or draft amendments to the Constitution submitted by the totality of citizens must be executed as draft law, i.e., it must contain legal provisions and it cannot be executed as declarative statement or conceptual proposal.
3. Regarding evaluation of the *form* of a draft law, one must take into consideration a conclusion from the case law that formal requirements must be strict enough to exclude drafts that cannot be applied due to formal shortcomings. Introducing criteria that are too hard to attain could make this right of totality of citizens an especially hard-to-implement procedure.
4. As shown by the practice, i.e. decisions of CEC, meeting of formal criterion usually has not been a difficulty for the initiative groups, but initiative registration was mainly rejected, because the draft laws had not been fully elaborated in terms of content.
5. Case law in Latvia has established certain features that a draft law must have to be identified as fully elaborated *in terms of content*. The draft law cannot be

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<sup>48</sup> Judgement of the Constitutional Court of the Republic of Latvia of 18 December 2013 in case No. 2013-06-01, paras 15.3 and 15.4. Available at: [http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2013-06-01\\_Spriedums.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2013-06-01_Spriedums.pdf) [last viewed November 2, 2019].

<sup>49</sup> *Ibid.*, para. 15.1.

considered as fully elaborated in terms of content, if: 1) it intends to decide issues beyond the scope of the law; 2) in case of acceptance it would contradict provisions, principles and values implied in the Constitution; 3) in case of acceptance it would contradict international liabilities of Latvia.

6. In particular, to consider draft amendments to the Constitution to be fully elaborated, their content must not contradict either those provisions of the Constitution that the draft amendments do not offer to amend, or the core of the Constitution.
7. A draft law must be fully elaborated at the moment of submission to CEC, and the submitter cannot use a pretence that it could be improved after registration or that improvements could be left to the discretion of the Parliament.
8. The condition that the draft law must be fully elaborated is especially important, because in compliance with Article 78 of the Constitution, if 1/10 of the electorate failed to support the submitted draft law or adopted it with amendments, this incomplete draft law would be presented for referendum and ended with potential acceptance of “spoilage”. Notwithstanding the fact that text of the draft law submitted by the initiative group cannot be amended after its registration, it must be ensured that the draft law or amendment to the Constitution contradicting the basic values of democratic and legal state would not be presented for referendum.

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## THE RELATION BETWEEN POLITICAL RIGHTS AND SOCIAL RIGHTS: SOME REMARKS CONCERNING THE POLISH CONSTITUTIONAL AND POLITICAL PRACTICE

### Summary

The purpose of the current paper is to address two questions. Firstly, whether and how political rights and freedoms affect the extent and content of social rights. Secondly, whether and how social rights impact an active enjoyment of political rights by citizens. It has been established that social rights are an expression of public morality and demonstrate the state's sensitivity to the needs of the disadvantaged, and that political rights are a *sine qua non* condition for exercising sovereign power by the nation. Political rights are intended to vindicate natural social rights from the state and to defend constitutional social rights at a level higher than the minimum. In turn, the absence of social rights or their inadequacy prompts citizens to exercise political rights and freedoms that serve to express dissatisfaction with the policies adopted by the state. It has also been established that unemployment and, consequently, poverty (insufficient protection of natural social rights) affects citizens' electoral activity and the voter turnout rate, and hence, the exercise of the right to vote, fundamental to democracy.

**Keywords:** social rights, political rights, social minimum, constitutional court, right to vote, turnout

### Introduction

My article has neither a dogmatic nor an axiological dimension<sup>1</sup>. It is a description of a relationship between political and social rights in Poland, based on constitutional observation and political practice in recent years. The objective here is to address two questions. Firstly, whether and how political rights and freedoms

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<sup>1</sup> See Sokolewicz. W., Wotyczek K. Wolności i prawa polityczne. In: Konstytucja Rzeczypospolitej Polskiej. Komentarz. Garlicki L., Zubik M. (eds.), Warszawa: Wydawnictwo Sejmowe, 2016, pp. 308–324; Granat M. Dylematy konstytucyjnej zasady wolności człowieka. In: Mini-komentarz dla Maksiprofesorów. Księga jubileuszowa profesora Leszka Garlickiego, ed. Zubik M. Warszawa: Wydawnictwo Sejmowe, 2017, pp. 246–261; Zubik M. Wolność a prawo (pięć hipotez o stosowaniu pojęć konstytucyjnych dotyczących praw człowieka). *Państwo i Prawo*, No. 9, 2015, pp. 3–9; Sokalska E. Human Rights from Historical and Philosophical Perspective (the Outline). In *L'udské Práva Včera a Dnes. Původa Význam L'udských Práva Ich Ochrana v Právnej Terminológii a Praxi* (Zborník je súhrnom príspevkov z III. ročníka medzinárodnej vedeckej konferencie "Banskobystrická škola právnych dejín", konanej v dňoch 15.–16. marca 2017 na pôde Právnickej fakulty Univerzity Mateja Bela v Banskej Bystrici), Skaloš M., Turošík M. (eds.), Banská Bystrica: Belianum, 2017, pp. 394–406.

impact the extent and content of social rights. Secondly, whether and how social rights impact an active enjoyment of political rights by citizens.

## 1. Preliminary assumptions

The starting point for further analysis is the four preliminary assumptions that outline the background of an analysis of constitutional and political practice. They refer to the provisions of the Constitution of 2 April 1997, as well as the constitutional practice forged by the case law of the Constitutional Tribunal<sup>2</sup>.

Firstly, the Constitution of 2 April 1997 guarantees citizens a comprehensive catalogue of political rights and freedoms, which have been continuously reinforced since 1989, thus since the Polish nation's regained the ability of self-determination. The catalogue of those rights and freedoms includes: a) the freedom of association, b) the freedom of association in trade unions, c) the right to participate in a referendum and the right to vote, d) the freedom of peaceful assembly, e) the right to submit petitions, f) the freedom of speech. Political rights and freedoms define the attitude of citizens towards the state and its institutions, since they render it possible, among other things, to elect representatives to the Sejm and Senate, local government bodies, to formulate opinions and present them to public administration authorities, control and criticize public authorities, to submit draft laws to Parliament, to take decisions on important matters by referendum. They are of vital importance, since they are necessary to exercise the sovereign power by the Nation (pursuant to Article 4 of the Constitution, the supreme power is vested in the Nation. The Nation is construed, according to the preamble to the Constitution, as all citizens.)

Secondly, on the one hand, the Constitution of 1997 does not qualify Poland as a social welfare state such as Germany, Romania or Slovenia. However, Poland is a state applying the principle of social justice<sup>3</sup>. It should also be pointed out that the Constitution of 1997 was founded on the ruins of a socialist state, which protected its citizens against poverty, albeit only in theory. The fathers of the Polish Constitution, born and raised in the previous political system, felt a strong attachment to the social rights featured in the Socialist Constitution of 22 July 1952.<sup>4</sup> Therefore, they introduced these into the text of the Constitution. The catalogue of social rights is very extensive and includes, for example, a) the right to safe and hygienic conditions of work, b) the right to statutorily specified days free from work

<sup>2</sup> The Constitution of the Republic of Poland of 2<sup>nd</sup> April, 1997, as published in *Dziennik Set*, No. 78, item 483. English text of Constitution. Available at: <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> [last viewed October 10, 2019].

<sup>3</sup> "The distribution of justice, sometimes referred to as social justice, concerns the powers of individuals in relation to a group of which individuals are part. In order for people to bring something to the community, they must also receive something from it." see Maryniarczyk A. O właściwą miarę sprawiedliwego działania. In: *Sprawiedliwość – idea rzeczywistość*, Jaroszyński P., Krąpiec A. (eds.), Lublin: Fundacja "Lubelska Szkoła Filozofii Chrześcijańskiej", 2009, p. 355.

<sup>4</sup> Granat M. Konstytucja RP na tle osiągnięć konstytucjonalizmu polskiego. *Przegląd Sejmowy*, No. 4, 2007, pp. 14–19.

c) the right to social security, d) the right to health care services, financed from public funds, e) the right of families, finding themselves in difficult material and social circumstances – particularly those with many children or a single parent – to special assistance from public authorities, f) education financed from public funds<sup>5</sup>. I believe that social rights and, more broadly, social benefits, determine the state's attitude towards citizens who find themselves in a difficult life situation. They are the expression of public morality<sup>6</sup> and an expression of the state's sensitivity to the needs of the poor, sick, old and lonely people<sup>7</sup>.

Thirdly, the abovementioned social rights sound optimistic and may create a sense of social security in Poland. This supposition, however, was not confirmed by statistical data, since in 1997 the rate of unemployment in Poland reached 13 % and increased up to 20 % in 2004. In turn, the rate of extreme poverty equalled 5.4 % and increased steadily to reach 12.5 % in 2005. Most Poles who found themselves in a difficult financial situation caused by the transformation of the economy, longed for a job, decent remuneration and housing. If we translate those longings into legal language, Poles demanded the right to work, the right to decent remuneration and the right to shelter, not guaranteed by the Constitution. Although those rights were not and are not subject to constitutional protection, they are not devoid of significance, as they are attached to the so-called human dignity<sup>8</sup>. Such a state of affairs is the reason why I refer to the right to work, the right to decent remuneration and the right to housing as natural social rights.

To conclude the question of social regulations in the Constitution of 1997, it should be pointed out that in addition to social rights, the legislator introduced the so-called social policy principles, which also require the authorities of the state

<sup>5</sup> The Constitution of the Republic of Poland of 2<sup>nd</sup> April, 1997, as published in *Dziennik Ustaw*, No. 78, item 483. English text of Constitution [online] <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>. More in Garlicki L. Wolności i prawa ekonomiczne, socjalne i kulturalne. In: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Garlicki L., Zubik M. (eds.), Warszawa: Wydawnictwo Sejmowe, 2016, pp. 563–569; Bułajewski S., Dąbrowski M. Wolności i prawa ekonomiczne, socjalne i kulturalne. In: *Wolności i prawa człowieka w Konstytucji Rzeczypospolitej Polskiej*, Chmaj M. (ed.), Warszawa: Wolters Kluwers, 2008, pp. 151–198.

<sup>6</sup> “The Encyclical *Rerum novarum* of Leo XIII (Latin for new things or arrival of a new era) is one of the most important documents on political and social issues. Prior to its publication, the Pope issued about five other encyclicals on political, social and economic problems. The author thus established the basis for the development of Catholic social teaching as a science. The main problems addressed by the encyclical are the workers' issue, but also poverty and poor social status of the population due to the capitalism. Leo XIII calls for the state intervention in the economy, particularly in protecting the helpless and those in need” – Jáger R. *Social and legal interaction*. Banská Bystrica: Belianum, 2016, p. 86.

<sup>7</sup> Kalisz A. Prawa socjalne w systemie prawnym oraz znaczenie w społeczeństwie. *Filozofia Publiczna i Edukacja Demokratyczna*, No. 1, 2014, pp. 77–102; Danowska-Prokop E. Narodziny prawa socjalnego. *Nierówności Społeczne Wzrost Gospodarczy*, No. 51, 2017, p. 134.

<sup>8</sup> Bosek L. Komentarz do Art. 30 Konstytucji Rzeczypospolitej Polskiej. In: *Konstytucja RP Tom 1 Komentarz do Art. 1–86*, Safjan M., Bosek L. (eds.), Warszawa: C.H. Beck, 2016; Granat M. Godność człowieka z Art. 30 Konstytucji RP jako wartość i jako norma prawna. *Państwo i Prawo*, No. 8, 2014, pp. 3–22.



to adopt a policy reducing unemployment<sup>9</sup> and an appropriate housing policy<sup>10</sup>. However, they are not a source of subjective rights<sup>11</sup>. Moreover, the Constitution guarantees the right to minimum wages, although “there is no constitutional requirement for the amount of remuneration to correspond to the amount and quality of work”<sup>12</sup>.

Fourthly, the Constitutional Tribunal (hereinafter: CT) protects the Constitution and protects the Constitutional rights and freedoms, including social rights. However, the ability of asserting social rights before the CT is quite severely limited. The court adopts a conservative attitude since: (a) social rights and programmatic provisions may only be asserted before the CT to a minimum extent, as it is the responsibility of the state to ensure a minimum (social) standard of living and thus to satisfy fundamental existential needs (cf. CT judgments of 8 June 2010, file ref. No. SK 37/09; 25 February 2014, file ref. No. SK 18/13); (b) the legislator determines (acting in the framework of values and constitutional principles) “an existential threshold corresponding to the minimum level of human consumption needs under given socio-economic conditions” (see: CT judgment of 12 April 2011, file ref. No. SK 62/08); (c) it is impossible to derive the right to a specific social benefit of a specific amount from the constitutional regulation of social rights; (d) when assessing cases with the social component, the CT deems it necessary to preserve the budgetary balance, which also stems from the Constitution, since the exercise of social rights generates considerable costs, and, moreover, such costs are continuously increasing; (e) the Constitutional Tribunal does not intervene if social rights are ensured at the minimum level; (f) natural social rights are not subject to CT’s protection because they are not protected by the Constitution, although the Court has held that eviction onto the streets is inadmissible in the light of the human dignity principle<sup>13</sup>.

## 2. How political rights and freedoms affect social rights

The above arrangements allow to formulate two questions. Firstly, are there any legal instruments that let citizens vindicate natural social rights from the state? Secondly, are there any legal instruments that permit the citizens to vindicate constitutional social rights above the minimum level?

<sup>9</sup> “Public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a home by each citizen” (Art. 75.1 Constitution).

<sup>10</sup> “Public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a home by each citizen” (Art. 75.1 Constitution).

<sup>11</sup> Bernaczyk M. Konstytucyjne obowiązki państwa do podejmowania działań w zakresie zaspokajania potrzeb mieszkaniowych jednostki. In: *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, Jabłoński M. (ed.), Wrocław, 2014, pp. 755–772.

<sup>12</sup> Kuczma P. Prawa pracownicze. In: *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, Jabłoński M. (ed.), Wrocław, 2014, p. 565.

<sup>13</sup> Constitutional Tribunal judgment of 18 October 2017, file ref. No. K 27/15.

Such instruments are political rights and freedoms that play an important role in asserting social rights. In my opinion, the freedom of assembly, the right to strike, the right to petition, the freedom of speech are used to articulate social demands. They are tools for exercising pressure on the government, parliament, political parties and other institutions responsible for social policy<sup>14</sup>.

The aforementioned supposition is confirmed by systemic practice. Social movements were and are active all over the world (e.g. the yellow vests protest in France; the movement of the outraged in the USA), and Poland is not an exception. Polish teachers announced a strike in April 2019, and it was the largest social protest in the history of Polish education. They demanded an increase of salaries (PLN 1 000) as well as improved working conditions. That movement was initially widely supported by society. However, children having to remain at home and parents forced to organize the corresponding care divided the public opinion<sup>15</sup>. In the face of declining public support and loss of remuneration for the non-working time, which resulted in many teachers being left with no means of subsistence, the trade unions suspended the strike. Eventually, the strikers received a slight increase of salaries. In turn, police officers who do not have the right to strike received a high increase (PLN 1 000). A difficult social situation forced them to a different form of protest, namely, a few days before the national holiday, 30 000 police officers fell ill with flu, which directly threatened public order and the internal security of the state<sup>16</sup>. The illness spread quite quickly, and the ill police officers received extensive social support (74 % of the population have a favourable opinion of police officers in Poland). These circumstances exerted pressure on the government, which met the demands of police officers<sup>17</sup>. Another type of protest was used by people with disabilities, who also do not exercise their right to strike, since most of them are not employed. In order to exert pressure on the government and the parliament, as well as to draw attention to their difficult social situation, they organized a permanent assembly in the parliament building, occupying it for 40 days. Strong public support and justified demands for social rights had an impact on the position of the government, which initially adopted a rigid approach only to finally accept some of the demands of people with disabilities<sup>18</sup>. Ultimately, the parliament passed

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<sup>14</sup> In the doctrine of the law it is argued that neither the breadth nor the depth of the constitutional regulation of social rights proves the “social” nature of the state. They are states without a constitutional regulation of social rights, embodying the protection of citizens in a difficult life situation. See Jagielski M. Constitutional regulation of social and economic matter (theoretical aspects). *Gdansk Law Studies*, Vol. XXXI, 2014, pp. 589–602.

<sup>15</sup> Tomaszewicz Z. Teachers will not be happy. There is a new poll – Poles say what they think about their protest. Available at: <https://natemat.pl/270193,czy-polacy-popieraja-strajk-nauczycieli-jest-nowy-sondaz-kantar> [last viewed October 13, 2019].

<sup>16</sup> Matlacz A. Police officers ended the protest. They fought earlier pensions and full overtime. Available at: <https://www.prawo.pl/kadry/koniec-protestu-policjantow-ze-zwolnieniami-chorobowymi,326560.html> [last viewed October 12, 2019].

<sup>17</sup> Parents of disabled children occupy the Sejm. *Gazeta Prawna*. Pl. Available at: <https://www.gazetaprawna.pl/artykuly/785566,rodzice-niepelnosprawnych-dzieci-okupuja-sejm.html> [last viewed October 12, 2019].

<sup>18</sup> *Ibid.*

the Solidarity Fund Act, imposing a solidarity tax on the highest-earning Poles. Thereby, the government found resources to finance social benefits for the disabled.

The three different social movements outlined above lead to the following conclusions. First of all, political rights are intended to pursue natural social rights and constitutional social rights from the state at a level above the minimum. Moreover, some political rights are effective if they are exercised collectively. Besides, the power of some political rights depends on the power of the social group demanding social benefits. Finally, the power of political rights also depends on the power of public support. The more citizens support social demands, the greater the chance of success.

### 3. How social rights affect political rights and freedoms

The relation of political rights and freedoms to social rights was outlined above. The question arises as to whether social rights can affect political rights and freedoms and the intensity with which they are exercised by citizens.

Firstly, an inadequate social policy of the state triggers the citizens' need to contest the actions of the government. To this end, they exercise political rights and freedoms, advancing demands, criticizing public authorities, organizing protests and strikes. By means of political rights and freedoms, citizens express their objection to the government and the social policy it follows.

Secondly, social rights or social benefits are "used" by political parties in the election game. Social policy and social promises are an important element of electoral campaigns. They are also among the decisive factors for an electoral success. In addition, promises of social benefits also provide incentives for citizens to participate in elections. Thus, for example, in the parliamentary elections of 2015 the two major political parties made promises of a social nature. Among other things, the voters were tempted by cheap housing for the young, lower retirement age for women (60), cheap student loans, a one-time allowance for young workers in the amount of PLN 4 000, a monthly allowance for the second and subsequent child in a family – PLN 500. As a result, the elections were won by a party whose political agenda was based on extensive social support for families with children and for the elderly, while voter turnout increased slightly from 48.92 % in 2011 to 50.92 % in 2015<sup>19</sup>. Yet, the European Parliament elections held in May 2019 are an interesting example. It was the first time that political parties made quite extensive promises of social benefits in the EP elections. They were in no way related to the presence of Poland in the EU. Parties tempted voters with pledges like an additional annual bonus retirement pension, a reduction in taxes for the young, a monthly allowance of PLN 500 per child. Promises of social benefits seem to have been decisive for the electoral success of the Eurosceptic party, although as many as 91 % of Polish citizens are Euroenthusiasts. In addition, a record increase in voter turnout to the EP was

<sup>19</sup> Report on elections to the Sejm of the Republic of Poland and the Senate of the Republic of Poland held on 25 October 2015. Available at: [https://parlament2015.pkw.gov.pl/pliki/1447076581\\_SPROAWOZDANIE.pdf](https://parlament2015.pkw.gov.pl/pliki/1447076581_SPROAWOZDANIE.pdf) [last viewed October 12, 2019].

reported in Poland, from 23.83 % in 2014 to 45.58 % in 2019.<sup>20</sup> The increase in voter turnout accompanied the elections to the national parliament on 13 October 2019. For the first time since 1989 (the first free elections in Poland), the turnout of voters exceeded 60 %. It must also be pointed out that the social factor was heavily featured in the election campaign. The promises included elimination of income tax, raising the minimum remuneration to PLN 4 000, exempting young business operators from social security contributions, PLN 5 medications or abolishing income tax on pensions. In total, the voter turnout reached 61.74 %, and the elections were once again won by the party offering Poles an extensive system of social benefits.

Thirdly, it is possible to notice a link between the level of natural social rights and active participation of citizens in elections.

**a) Parliamentary elections in 2005:**

- the lowest turnout (40.57 %);
- one of the highest unemployment rates (17.6 %);
- the voter turnout in the district with the highest unemployment (Warmia-Masuria, 27 % unemployment) – 44 %;
- the voter turnout in the district with the lowest unemployment (Mazowieckie, 13.8 % unemployment) – 54 %.

**b) Parliamentary elections in 2019:**

- the highest turnout (61.74 %)<sup>21</sup>;
- the lowest unemployment rate (5.1 %, according to International Monetary Fund – 3.5 %);
- the voter turnout in the district with the highest unemployment (Warmia-Masuria, 8.6 % unemployment) – 53.61 %;
- the voter turnout in the district with the lowest unemployment (Greater Poland, 2.8 % unemployment) – 62.95 %.

The above figures indicate that the rate of unemployment directly impacts the voter turnout. 62.70 % of eligible voters participated in the first free elections held on 4 June 1989, whereby the rate of unemployment reached 0.3 % in early 1990, while at the end of 1990 there was a significant increase in the number of the unemployed (approximately 5 %). In the elections to the national parliament held on 13 October 2019, the highest voter turnout in over 30 years and concurrently the lowest rate of registered unemployment was recorded.

<sup>20</sup> Information of the National Electoral Commission. Available at: <https://pe2019.pkw.gov.pl/pe2019/pl/frekwencja/pl> [last viewed October 12, 2019].

<sup>21</sup> Announcement of the National Electoral Commission of 14 October 2019 on the results of the elections to the Sejm of the Republic of Poland on 13 October 2019. Available at: [https://pkw.gov.pl/pliki/1571084597\\_obwieszczenie\\_sejm.pdf](https://pkw.gov.pl/pliki/1571084597_obwieszczenie_sejm.pdf) [last viewed October 20, 2019].

## Conclusions

In conclusion, it must be noted that, firstly, political rights are the cornerstone of democracy and the attitude of the state to those in need determines the standing of democracy. Social rights express public morality and are a demonstration of the state's sensitivity. Secondly, political rights are a *sine qua non* condition for the exercise of sovereign power by the nation. It also serves as a tool to vindicate natural social rights from the state and to assert constitutional social rights at a level above the minimum. Thirdly, the absence of social rights or their inadequacy activates citizens to exercise their political rights and freedoms, which serve to express their dissatisfaction with the state's policies. Fourthly, the rate of unemployment and, consequently, poverty (insufficient protection of natural social rights) affects the electoral activity of citizens and the rate of voter turnout, and hence the exercise of the right to vote, which is fundamental in democracy.

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## ESTABLISHING THE UNIVERSITY OF LATVIA

### Summary

During the Soviet occupation, it was emphasised that the University of Latvia had been founded by the head of the Latvian Socialist Soviet Republic P. Stučka on 8 February 1919. Research has uncovered that the following dates in the establishing of the University of Latvia should be recognised as important from the legal perspective: the decision of the People's Council of Latvia of 15 July 1919 on establishing the Latvian Higher School, and the order of 3 August of the Provisional Government of Latvia "On taking over Riga Polytechnical Institute". These decisions and not the decree of Stučka paved the legal grounds for the opening of the University of Latvia on 28 September 1919.

**Keywords:** national higher school, the University of Latvia, the Latvian State University

### Introduction

During the Soviet occupation, it was emphasised that the University of Latvia had been founded by the head of the Latvian Socialist Soviet Republic Pēteris Stučka (1865–1932), and 8 February 1919<sup>1</sup> was indicated as the date of its foundation. It was further explained that, later on, "in the bourgeois Latvia", the University of Latvia had been formed on the basis of the higher school founded by Stučka.<sup>2</sup> This Soviet myth, according to which the University of Latvia was the very same Latvian Higher School founded by Stučka, remained unrevised even at the time of the *Atmoda* [the Awakening]. Ilgonis Bite wrote the following on 4 February 1989 to honour the 70<sup>th</sup> anniversary of the University of Latvia:

*[..] the Bolshevik men in power paid most serious attention to the establishment and formation of a higher school, and, already about a month after their entry in Riga, issued a decree (dated 8 February 1919, signed by Pēteris Stučka) on the Higher School of the Soviet Latvia [...] The first chord in the emergence of the Latvian State University was thus struck. In its turn, the opening of the Latvian Higher School took place on 28 September 1919, with the participation of the President of the People's Council Jānis Čakste.*<sup>3</sup>

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<sup>1</sup> 1919. gada 8. februāra Latvijas Sociālistiskās valdības dekrēts "Par Latvijas augstskolas dibināšanu" [The Decision of the Latvian Socialist Government "On the Establishment of the Latvian Higher School"]. In: *Ciņa*, No. 26, 08.02.1919, p. 1.

<sup>2</sup> Pētera Stučkas Latvijas Valsts universitāte 40 gadus (1919–1959) [Pēteris Stučka's Latvian State University in 40 years (1919–1959)]. Jurgens J. (ed.), Rīga: Latvijas valsts izdevniecība, 1959, pp. 3, 4.

<sup>3</sup> Bite I. P. "Celdamās augstāki". Stučkas Latvijas Valsts Universitātei 70 ["Rising higher". Stučka's Latvian State University Turns 70]. In: *Literatūra un Māksla*, No. 5, 04.02.1989, p. 2.

In this concept, the establishment of the University was divided into two parts, with Pēteris Stučka laying the legal foundation, and Jānis Čakste (1859–1927) accomplishing the actual opening. This is rather illogical from both the historic and the legal perspective. Stučka and Čakste represented two different and mutually negating states. Thirty years have passed since the *Atmoda* period, and the legal twists and turns in establishing the University of Latvia should have been figured out by now. However, what we find in Wikipedia is exactly the same text from the 1989 publication as cited above.<sup>4</sup> This seems to lack importance, as we are aware that Wikipedia is not a reliable source, but in the Constitution of the University of Latvia we have the same explanation of University's establishment.<sup>5</sup>

A number of books about the University of Latvia has been published to date. Every anniversary of the University sees a solemn launch of a new book. This tradition, which was started in the interwar period of the 20<sup>th</sup> century, more precisely, in 1929, when the 10<sup>th</sup> anniversary of the UL was celebrated, continued during the years of the Soviet power, as well as after the restoration of independence of the Republic of Latvia.<sup>6</sup> The books seem to be concerned with one and the same higher education institution, yet there are substantial differences not only between the names for the institution and its public tasks, but also between the facts about the establishment of the university and the continuity of institutions, namely, whether the University of Latvia established by the Republic of Latvia is the successor of the Latvian Higher School founded by Pēteris Stučka's government of the Latvian Soviet Socialist Republic, or, as it was written in the Soviet literature, the two universities are one and the same. This question is further complicated by the fact that the University of Latvia was also first established as the Latvian Higher School,<sup>7</sup> and both of the aforementioned names were used interchangeably for several years after the establishment of the institution (until 1923).<sup>8</sup>

<sup>4</sup> Latvijas Universitāte [University of Latvia]. In: Wikipedia. Available at: [https://lv.wikipedia.org/wiki/Latvijas\\_Universit%C4%81te](https://lv.wikipedia.org/wiki/Latvijas_Universit%C4%81te) [last viewed July 11, 2019].

<sup>5</sup> Latvijas Universitātes Satversme pieņemta LU Satversmes sapulces sēdē 29.03.96. un grozījumi, kas pieņemti LU Satversmes sapulces sēdē 16.12.96., LU Satversmes sapulces sēdē 10.05.2001., LU Satversmes sapulcē 22.02.2006. [The Constitution of the University of Latvia was adopted at a meeting of the Constituent Assembly of the University of Latvia on March 29, 1996, and amendments adopted at a meeting of the Constituent Assembly of the University of Latvia December 16, 1996, at a meeting of the Constituent Assembly of the University of Latvia May 10, 2001, at the Constituent Assembly of the University of Latvia February 22, 2006]. Available at: <https://likumi.lv/doc.php?id=46864> [last viewed September 26, 2019].

<sup>6</sup> Latvijas Universitāte 1919.–1929. [University of Latvia. 1919–1929]. Rīga: Latvijas Universitātes izdevums, 1929, Latvijas Universitāte 20 gados 1919–1939. [University of Latvia in 20 years. 1919–1939. Part I]. Rīga: Latvijas Universitāte, I daļa, 1939, Latvijas Universitāte 20 gados 1919–1939. [University of Latvia in 20 years. 1919–1939. Part II] Rīga: Latvijas Universitāte, II daļa, 1939, Pēteris Stučkas Latvijas Valsts universitāte 40 gados (1919–1959). Jurgens J. (ed.), Rīga: Latvijas valsts izdevniecība, 1959, etc.

<sup>7</sup> The Commission for Organising the Latvian Higher School was created on 1 September 1919, LVVA 7427. f. 6. apr. 325. lieta, p. 80. The press, too, wrote about the establishment of the Latvian Higher School, e.g.: Latvijas Augstskola. In: *Sociāldemokrāts*, No. 75, 29.09.1919, p. 1.

<sup>8</sup> LVVA 7427. f. 6.apr. 37<sup>a</sup> lieta 79, p. 80.



This year is the centenary of the University of Latvia, and in this research the author will analyse regulations, shorthand reports of the sittings of the People's Council of Latvia, the surviving documents of the Council for Organising the University of Latvia, as well as other archive and press materials, to study the process of establishing the University of Latvia.

## 1. The three governments in Latvia 1918/1919 and their universities

In 1918/1919, three statehoods were established in what is now the territory of Latvia. Some other statehood ideas were also considered at the time, floating around with no attempt being made to implement them – for example, a state of the Balts, i.e. Latvians and Lithuanians.<sup>9</sup> Tumultuous as the end-of-war time was, it did not prevent every power that felt a halfway safe governor of the territory of Latvia from expeditiously addressing the top-priority tasks, the first of which was to establish an own higher school.

“In the waning years of World War I (1917–1918), the thought about the times of the “Livonian Order’s omnipotence” came alive again with a new vigour. This conviction was bolstered by the presence in the Baltic of Kaiser’s Germany’s occupation military force, by the collapse of the Russian Empire and the Bolsheviks coming to power in Russia.”<sup>10</sup> The German Kaiser acknowledged the sovereignty of Vidzeme, Estonia, Riga and Saaremaa on 22 September 1918.<sup>11</sup> This news reached the addressees only on 17 October, and the members of the independent commission of the United Land Council, based on the German communication of 22 September, decided to start activities for the formation of the Baltic Duchy, inviting the Duchy of Kurzeme to participate.<sup>12</sup> Concurrently with the formation of the state, work was being done to create an appropriate higher school. Thus, in October 1918 the German occupation power renewed RPI as the Baltic Technical Higher School (German: *Baltische Technische Hochschule*), adjusting it to the German Empire’s requirements for higher education institutions. This process could be complicated, because RPI, in the same way as plants and factories, had been evacuated during World War I deeper into the empire away from the front line, and all the RPI resources – either material or human – were no longer available in Riga. The stipulated language of instruction at the Baltic Technical Higher School was German. The statutes of the higher school

<sup>9</sup> Lazdiņš J. Konstitucionalisma pirmsākumi un nerealizētie valstiskumi Latvijā [The beginning of constitutionalism and unrealized statehoods in Latvia]. In: *Jurista Vārds*. No 23 (774), 11.06.2013. Available at: <https://juristavards.lv/doc/257350-konstitucionalisma-pirmsakumi-un-nerealizetie-valstiskumi-latvija/> [last viewed July 10, 2019].

<sup>10</sup> Ibid.

<sup>11</sup> Wilhelm I. Graf von Hertling. Anerkennung der Unabhängigkeit von Livland, Estland, Riga und Oesel durch das Deutsche Reich. In: *Rigische Zeitung*, No. 243, 19.10.1918, p. 1.

<sup>12</sup> Lazdiņš J., 2013.

were approved by the German Military Administration on 15 October 1918.<sup>13</sup> On 18 October 1918, the periodical *Rigische Nachrichten* informed that Kaiser Wilhelm I had sent a telegram with greetings to the newly established Baltic Technical Higher School.<sup>14</sup>

The thought about their own independent state had grown in the national self-consciousness of Latvians. Therefore, simultaneously with the attempts to renew Livonia, that is, in the autumn of 1918, Latvian national political forces were trying to gain Germany's support for Latvian independence, so that Germany "would not throw obstacles in the way of the Latvian people to the immediate start of building an independent state."<sup>15</sup> On 18 November 1918, Latvian national political forces, formed into the People's Council of Latvia, proclaimed the Republic of Latvia.<sup>16</sup>

Professor Jānis Lazdiņš writes: "On the very same day that the People's Council proclaimed the Republic of Latvia, "other Latvian people" – Bolsheviks – decided at the 17<sup>th</sup> Conference of the Latvian Social-Democracy that "Latvia is a connected commune, a constituent of the Russian Socialist Federative Soviet Republic, [and that] the Latvian issue is only resolvable in the interests of the proletariat along with the consolidation in Latvia of the power of the proletariat, which is only possible through international socialist revolution."<sup>17</sup> On 17 December 1918, the Latvian Soviet Socialist Republic was proclaimed.<sup>18</sup> On 3 January 1919, the Bolshevik forces entered Riga and took over almost the entire territory of Latvia in a short time. Thus, shortly after the proclamation of the Republic of Latvia, the Latvian Socialist Soviet Republic was proclaimed to be ruled by Pēteris Stučka's government.<sup>19</sup> Stučka's government, too, appreciated the national importance of education. Therefore, one of its first steps was to reform the education system in accordance with the Marxist views: education must not be influenced by any religion and must be available to everyone on completely equal terms. Thus, it was established that education in all schools was free, and religious education in schools was prohibited. All Latvian schoolteachers had to be elected by the councils of workers' and landless peasants'

<sup>13</sup> Zigmunde A. Baltijas Tehniskā augstskola [Baltic Technical University]. In: *Zinātņu vēsture un muzejniecība. LU raksti*, Vol. 639, Rīga: LU, 2001, p. 36.

<sup>14</sup> Kaisertelegramm an die Baltische Technische Hochschule. In: *Rigische Zeitung*, No. 242, 18.10.1918, p. 1.

<sup>15</sup> LVVA 6033, f. 1. apr. 35, pp. 1, 57.

<sup>16</sup> 1918. gada 18. novembra Latvijas Tautas Padomes uzsaukums: Latvijas pilsoņiem! [The address by the People's Council of Latvia on 18 November 1918: to the nationals of Latvia!]. In: *Latvijas valsts tiesību avoti. Valsts dibināšana – neatkarības atjaunošana. Dokumenti un komentāri*. Rīga: Tiesu namu aģentūra, 2015, p. 54.

<sup>17</sup> Lazdiņš J., 2013.

<sup>18</sup> Pētera Stučkas Latvijas Valsts universitāte 40 gadus (1919–1959), 1959, p. 7.

<sup>19</sup> Bleiere D., Butulis I., Feldmanis I., Stranga A., Zunda A. *Latvijas vēsture 20. gadsimts* [History of Latvia 20<sup>th</sup> Century]. Otrais papildinātais izdevums. Rīga: Jumava, 2005, p. 113.

deputies.<sup>20</sup> The reform introduced the Latvian language in the system of education in addition to Russian as the language of instruction.<sup>21</sup>

On 8 February 1919, RPI was closed down by a decree signed by Pēteris Stučka: “its professors, assistants, service staff and other employees shall be considered (as of today) dismissed.”<sup>22</sup> In its stead, the Latvian Higher School was established and transferred to the jurisdiction of the Commissariat of Education<sup>23</sup> headed by Jānis Bērziņš (1881–1938).<sup>24</sup> In a 1959 book about the University of Latvia, the need for a new higher school was explained, as follows: “Even though Riga Polytechnical Institute was located in the territory of Latvia, it could not be viewed as a Latvian national higher school. All training in it before 1896 was carried out in German, and after 1896 – in Russian. [...] And, what is especially important, the Institute did not satisfy, or plan to satisfy, Latvia’s need for specialists in medicine, humanities and other branches of science and arts; it was mainly preparing engineers.”<sup>25</sup> Consequently, the LSSR also understood the necessity for higher education in Latvian allowing to prepare specialists needed by the state. Hence, in this respect, there is no particular contradiction with the concept that every state needs its own university. There was, however, a substantial departure from the requirements for classical higher education – before everything else, in the candidate admission requirements set out in the Commissariat of Education Regulation of 8 February 1919 on the Latvian Higher School. Not only did it contain the gender equality principle and age restrictions, namely, it granted the right to study from the age of 16, but it also included the provision that students should be admitted “without certificates of previous education, and no admission exams are held.”<sup>26</sup> Thus, an age prerequisite and not the literacy requirement was set for studying at the Higher School. While only gymnasium graduates are normally admitted to classical university, Stučka’s government did not set such requirements for admission to the Latvian Higher School. Nor were any education or work experience criteria set for selecting the Higher School teachers.<sup>27</sup> In other words, although a higher school was founded, it cannot be firmly concluded from the requirements for teachers and candidates that it was a full-scale university, that is, a higher education institution where an individual under the tutelage of professors continues education after graduating from secondary school. Rather, it was either a peculiar communist alternative to a classical bourgeois university, ensuring a possibility to study for all those willing, or a model

<sup>20</sup> Pēteris Stučkas Latvijas Valsts universitāte 40 gados (1919–1959), 1959, p. 8.

<sup>21</sup> 1919. gada 8. februāra LSPR Izglītības komisariāta noteikumi par Latvijas Augstskolu [February 8, 1919 Regulations of the LSSR Education Commission on the Latvian Higher School]. In: *Cīņa*, No. 26, 08.02.1919, p. 1.

<sup>22</sup> 1919. gada 8. februāra Latvijas Sociālistiskās valdības dekrēts “Par Latvijas augstskolas dibināšanu” [The Decision of the Latvian Socialist Government “On the Establishment of the Latvian Higher School”]. In: *Cīņa*, No. 26, 08.02.1919, p. 1.

<sup>23</sup> *Ibid.*

<sup>24</sup> Latvijas enciklopēdija [Latvian Encyclopaedia]. 1<sup>st</sup> volume. Rīga: Valērija Belokoņa izdevniecība. 2002. pp. 632, 633.

<sup>25</sup> Pēteris Stučkas Latvijas Valsts universitāte 40 gados (1919–1959), 1959, p. 9.

<sup>26</sup> 1919. gada 8. februāra LSPR Izglītības komisariāta noteikumi par Latvijas Augstskolu.

<sup>27</sup> *Ibid.*

of people's university, that is, an institution for further training of adults, similar to those established in, e.g., the Weimar Republic.<sup>28</sup> It was provided that the students would be obtaining not only a diploma of full education, but also certificates of attending particular study courses.<sup>29</sup> Different levels of knowledge among students inevitably caused problems in the process of studies. Although the Latvian Higher School only worked for a few months, it encountered considerable difficulties.<sup>30</sup>

There were three governments in Latvia in the spring of 1919: Kārlis Ulmanis' (1877–1942) government, which was supported by the allies, particularly Great Britain; Andrievs Niedra's (1871–1942) government, which was supported by Rüdiger von der Goltz (*Gustav Adolf Joachim Rüdiger Graf von der Goltz*; 1865–1946) and the German Balts and had the sympathies of Germany; Stučka's government, supported by Soviet Russia. On 22 May 1919, troops loyal to Ulmanis and Niedra jointly liberated Riga from the Bolsheviks.<sup>31</sup> Almost immediately, changes in higher education took place. Studies at the Soviet Latvian Higher School continued until 21 May 1919.<sup>32</sup> After the taking of Riga, operation of the Baltic Technical Higher School was renewed, and, after the Ceasefire of Strazdumuiža was signed in July 1919, the Baltic Technical Higher School was closed down.<sup>33</sup>

## 2. The origin of the idea of a national university and establishment of the University of Latvia

The Latvian people managed to preserve the Republic of Latvia, whose foundation on 18 November 1918 was followed by establishment of the Higher School of Latvia. Under the extreme circumstances in the Republic of Latvia, this Higher School was not legally founded as a traditional university, namely, by a special monarch's decision, or a law of parliament, or a government decree, that is, fancy founding documents like the ones that are the pride of universities established before the 20<sup>th</sup> century<sup>34</sup> and also later, in a more peaceful time.

<sup>28</sup> Dohmen G. Volkshochschulen. In: Handbuch Erwachsenenbildung.Weiterbildung. Hrsg. Rudolf Tippelt. Springer-Verlag, 2013, pp. 408, 409.

<sup>29</sup> 1919. gada 8. februāra LSPR Izglītības komisariāta noteikumi par Latvijas Augstskolu.

<sup>30</sup> Pēteris Stučka Latvijas Valsts universitāte 40 gados (1919–1959), 1959, p. 17.

<sup>31</sup> Bleiere D., Butulis I., Feldmanis I., Stranga A., Zunda A., 2005, p. 117.

<sup>32</sup> Pēteris Stučka Latvijas Valsts universitāte 40 gados (1919–1959), 1959, p. 18.

<sup>33</sup> Zigmunde A., 2001, pp. 36–40.

<sup>34</sup> A number of legal historians devoted their academic work to studying the foundation documents of universities, e.g.: Bünz E, Graber T. Die Gründungsdokumente der Universität Leipzig (1409): Edition, Übersetzung, Kommentar, Volume 3. Dresden: Publisher Thelem, 2010, Uman L. Die Gründungsurkunden der Prager Universität – Der Sinn der doppelten Bekräftigung des Gründungsaktes. GRIN Verlag, 2011, Conrads N. Die tolerierte Universität: 300 Jahre Universität Breslau 1702 bis 2002; Katalogbuch zur Ausstellung "Die tolerierte Universität". Franz Steiner Verlag, 2004, p. 25.

The need for education in Latvia was first voiced at the Teachers' Congress in 1905.<sup>35</sup> In May 1917, the Latvian higher school stakeholders commission, chaired by Miķelis Valters (1874–1968), was established under the Provisional Land Council of Vidzeme. In June 1917 in Dorpat, the Latvian Teachers' Congress set up a Higher School subpanel, which, in turn, created a special Latvian Higher School Committee.<sup>36</sup> On 11 July 1919, the Higher School panels of the Latvian Education Association decided on the necessity to establish a national higher school. An appeal regarding establishment of the Latvian Higher School was presented to the then Minister for Education Kārlis Kaspars (1865–1962).<sup>37</sup> In the interwar period press, 11 July is mentioned as a significant date in the beginning of processes for establishing the University of Latvia.<sup>38</sup> Furthermore, after World War II, the Latvian exile press refuted the thought that the idea of the need to establish the UL should be associated with the name of Pēteris Stučka.<sup>39</sup>

During the session of the People's Council of Latvia on 15 July 1919, Kārlis Ulmanis spoke about the urgent work to be done by the government in the Republic of Latvia. He said: "As concerns the Latvian Higher School, the works on organising it must be started immediately. The Higher School will start operating on new foundations. The existing Technical Higher School must be taken over by the government. Work on the opening of the University of Latvia must begin. We hope to do it as early as this autumn."<sup>40</sup> The People's Council of Latvia was deciding on establishing the Latvian Higher School by voting on the whole action programme proposed by the Cabinet of Ministers. The deputies voted by standing up: 61 votes were for, while 22 – against the government's action programme.<sup>41</sup> Thus, the legislator's decision to establish the UL should be dated back to 15 July 1919. Moreover, the legislator, on the *expressis verbis* proposal of the head of government, decided to establish a new higher school rather than restore one of the higher schools previously existing in the territory of Latvia.

Next followed the government's action and the organising of the higher school. On 16 July 1919, the People's Council adopted the law on the Cabinet of Ministers' right to issue provisional orders between the sessions of the People's Council in

<sup>35</sup> Viča A. Latvijas skolotāju kongress [The Latvian Teachers Congress]. In: *Izglītības Ministrijas Mēnešraksts*, No. 2, 01.02.1921, pp. 130, 131.

<sup>36</sup> Ozola V. Latvijas Universitātei 55 gadi [The University of Latvia is 55 years old]. In: *Latvijas Amerikā*, No. 39, 28.09.1974, p. 9.

<sup>37</sup> Šodien Latvijas universitātes idejiska dzimšanas diena [Today is the ideological birthday of the University of Latvia]. In: *Rīts*, No. 189, 11.07.1939, p. 17.

<sup>38</sup> *Ibid.*

<sup>39</sup> Ozola V., 1974, p. 9.

<sup>40</sup> Ulmanis K. Runa Latvijas Tautas Padomes trešās sesijas otrā sēdē. 1919. gada 15. jūlijā [Speech at the second session of the Third Session of the People's Council of Latvia. July 15, 1919]. In: *Latvijas Tautas Padomes sēdes*, No. 3, 13.07.1919, p. 108.

<sup>41</sup> Latvijas Tautas Padomes trešās sesijas 1919. gada 15. jūlija otrās sēdes stenogramma [Verbatim report of the second session of the Third session of the People's Council of Latvia, July 15, 1919]. In: *Latvijas Tautas Padomes sēdes*, No. 3, 13.07.1919, p. 121.

the presence of a pressing need.<sup>42</sup> The next legal step in establishing the Latvian Higher School was the Government order of 3 August 1919 “On taking over Riga Polytechnical Institute”.<sup>43</sup> This order was recognised as “grounds for the legal existence and further formation of the UL” also in the publication by the Chairman of the UL Organising Council Ernests Felsbergs (1866–1928) and the secretary of the Organising Council Kārlis Oskars Kundziņš (1883–1967) “Explanatory Notes on the Draft Constitution of the University of Latvia”.<sup>44</sup>

The order provided for the establishment of a special commission for practical implementation of the order, namely, for 1) taking over the RPI property, 2) discussing the transformation of the RPI departments with the aim to bring them in line with the needs of the newly established Latvian Higher School.<sup>45</sup> Following the order, the establishing of the Latvian Higher School was commenced. The Government had set the task of opening the Latvian Higher School as early as autumn 1919. Therefore, the respective commissions were established straight away. The first to start its work was the Commission for Reorganising Riga Polytechnical Institute (hereinafter – the Reorganising Commission). Its first sitting took place on 8 August 1919. Concurrently, the Latvian Higher School Deans’ Council, Facilities Commission, as well as sub-commissions for founding individual faculties, were established and started working.<sup>46</sup> In August 1919, a common assembly of former RPI students elected the Students Bureau, which further on participated in the work on establishing the Latvian Higher School.<sup>47</sup> The Reorganising Commission was tasked not only with taking over the Institute’s premises, teaching staff, and students, but also with planning the laying of the foundation of the new Latvian Higher School on the basis of the resources taken over. Already in the first sitting, the commission took decisions not only on what should be taken over from RPI, namely, “first of all, to retain all of the six previously existing faculties: 1) agronomy, 2) engineering, 3) chemistry, 4) trade, 5) architecture, 6) mechanics”, but also on what else had to be done for the purposes of the new Higher School, for example, “transforming what was previously the faculty of trade into an economics and law faculty offering a 4-year course”.<sup>48</sup> Also, during the very first sitting, the commission decided on who would have rights to enter the newly established Latvian Higher School. Professor Pauls Valdēns (1863–1957) explained that appropriately prepared students, that is, secondary school graduates, are the cornerstone of the Higher School’s success.

<sup>42</sup> Latvijas Tautas Padomes 1919. gada 16. jūlija Likums par Ministru kabineta tiesību izdot pagaidu rīkojumus [Law of the People’s Council of Latvia of July 16, 1919 on the right of the Cabinet of Ministers to issue temporary orders]. In: Latvijas Pagaidu Valdības Likumu un Rīkojumu Krājums, No. 7, 10.08.1919, p. 90.1.

<sup>43</sup> 1919. gada 3. augusta Latvijas Pagaidu Valdības rīkojums rīkojums Par Rīgas Politehniskā Institūta pārņemšanu [Order of 3 August 1919 on the taking over of the Riga’s Polytechnic Institute]. In: Latvijas Pagaidu Valdības Likumu un Rīkojumu Krājums, No. 7, 10.08.1919, p. 96.

<sup>44</sup> LVVA 7427. f. 6. apr. 325. lieta, p. 80.

<sup>45</sup> 1919. gada 3. augusta rīkojums Par Rīgas Politehniskā Institūta pārņemšanu.

<sup>46</sup> LVVA 7427. f. 6. apr. 325. lieta, p. 80.

<sup>47</sup> LVVA 7427. f. 6. apr. 37. a lieta, p. 350.

<sup>48</sup> LVVA 1632 f. 2 apr. 603. lieta, p. 1.

Valdens also emphasised the “equal position of young men and young women”.<sup>49</sup> In the same sitting, the commission also mapped out the brand new faculties to be established, for whose formation it would be necessary to attract new resources, for example, the faculties of medicine and veterinary science.<sup>50</sup> The main guidelines developed by the Reorganising Commission for the new Higher School were, as follows:

- “1) The Latvian Higher School has to be the highest education institution in the state, resolving all the most important theoretical and practical issues, conducting the relevant academic studies, preparing academic and practical workers useful to the state.
- 2) While holding the international academia in high respect, in all studies we must seek to consider our specific Latvian circumstances and requirements.
- 3) Latvian has to be the language of instruction, yet Russian and German are admissible as an exception when renowned foreign professors, or former honorary professors at Riga Polytechnical Institute, are invited to collaborate on a standing or guest basis.
- 4) Only those Riga Polytechnical Institute honorary professors can be invited as teachers who have not shown hatred and contempt for the State of Latvia, and among younger teachers’ preference should be given to Latvian speakers and those familiar with the Latvian environment.”<sup>51</sup>

On 4 September 1919, the Commission for Reorganising RPI was transformed into the Commission for Organising the Latvian Higher School (hereinafter – the Organising Commission).<sup>52</sup> After the question of taking over RPI had been removed, on 2 September 1919, from the People’s Council’s agenda for lack of time,<sup>53</sup> the People’s Council of Latvia in the 11<sup>th</sup> sitting of its fourth session on 5 September decided on the draft law to amend the Government order of 3 August “On taking over Riga Polytechnical Institute.” Reporting on the draft was the member of the People’s Council Kārlis Dēķens (1866–1942), who explained that the amendments were necessary because, even though the order had provided for the establishment of one commission and invested it with a rather narrow competence, councils and subcommissions had already been created in actual life, participating not only in the takeover of RPI, but also in the establishing of the Latvian Higher School. The proposed amendments were intended to clearly stipulate that “the polytechnical

<sup>49</sup> LVVA 1632 f. 2 apr. 603. lieta, p. 1.

<sup>50</sup> Ibid.

<sup>51</sup> Lejiņš P. Latvijas Augstskola [University of Latvia]. Izglītības Ministrijas Mēnešraksts. No. 1. 01.01.1920, p. 75.

<sup>52</sup> LVVA 7427. f. 6. apr. 325. lieta, p. 80.

<sup>53</sup> 1919. gada 2. septembra Latvijas Tautas Padomes ceturtais sesijas desmitās sēdes stenogrammas [The shorthand record of the tenth sitting on 2 September 1919 of the fourth session of the People’s Council of Latvia]. No. 4, 08.11.1918, p. 164.

institute is to be transformed into a new Latvian Higher School”.<sup>54</sup> However, in the debates, the deputies highlighted the internal contradictions in the draft amendments and stressed their low quality. Ādolfs Klīve (1888–1974) pointed out that “the Higher School is now at the stage of being organised, and it will have been more fully formed by the next session, so it will be possible to decide if necessary”.<sup>55</sup> On the whole, the deputies considered the measures for organising the Latvian Higher School to be appropriate and did not see the need to meddle in them unnecessarily with an additional regulation. The draft law was taken off the agenda.<sup>56</sup>

On 16 September 1919, the Organising Commission chaired by Professor Valdēns met at the premises of the Ministry of Education to decide on the election of the presidium, selection of teaching staff, student admission, and other issues, including also the opening event of the Latvian Higher School. As follows from the minutes, the Executive Committee for the Higher School opening event was not prepared to report, as the matter was carried over to the next meeting, that is, to 19 September.<sup>57</sup> On 15 September, the official admission of students into the Latvian Higher School started.<sup>58</sup> During the meeting on 19 September, the Organising Committee stated that 190 Latvians, 1 Lithuanian, 8 Russians, 7 Germans, 139 Hebrews, or, in total, 345 people wishing to study had applied.<sup>59</sup> After long disputes during the Executive Committee meetings about the time and date of the Latvian Higher School opening event, the possible deliverers of formal speeches, the venue and the guests to be invited, it was decided that the event would be held on 28 September, first at the premises of the Higher School, then at the National Opera. On 28 September 1919, the first stage of work on organising the Latvian Higher School was concluded, and on 29 September the teaching started. Nearly 2000 students commenced their studies at nine faculties: Architecture, Engineering, Law and Economics, Chemistry, Agriculture, Mathematics and Natural Sciences, Mechanics, Medicine, Linguistics and Philosophy.<sup>60</sup>

The following dates in the establishing of the University of Latvia should be recognised as important from the legal perspective: the decision of the People’s Council of Latvia of 15 July 1919 on establishing the Latvian Higher School, and the order [with the force of a law] of 3 August of the Provisional Government of Latvia “On taking over Riga Polytechnical Institute”; also important are the debates

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<sup>54</sup> The shorthand record of the eleventh sitting on 5 September 1919 of the fourth session of the People’s Council of Latvia, proposal of amendments to the order of 3 August 1919 “On taking over Riga Polytechnical Institute”. *Latvijas Tautas padomes sēdes stenogrammas*, No. 4, 08.11.1918, p. 313.

<sup>55</sup> Klīve, an utterance in debates on amendments to the order of 3 August 1919 “On taking over Riga Polytechnical Institute”, the eleventh sitting on 5 September of the fourth session of the People’s Council of Latvia. *Latvijas Tautas padomes sēdes stenogrammas*, No. 4, 08.11.1918, p. 313.

<sup>56</sup> Klīve, an utterance in debates on amendments to the order of 3 August 1919 “On taking over Riga Polytechnical Institute”, the eleventh sitting on 5 September of the fourth session of the People’s Council of Latvia. *Latvijas Tautas padomes sēdes stenogrammas*, No. 4, 08.11.1918, p. 314.

<sup>57</sup> LVVA 1632. f. 2. apr. 603. lieta, p. 23.

<sup>58</sup> Laube E. Paziņojums [The announcement]. In: *Valdības Vēstnesis*, No. 33, 07.09.1919, p. 3.

<sup>59</sup> LVVA 1632. f. 2. apr. 603. lieta, p. 25.

<sup>60</sup> Lejiņš P., 1920, p. 75.



held by the People's Council of Latvia on 5 September to discuss the draft amendments to the government order of 3 August, which allow for the conclusion that the legislator recognised appropriateness of the processes taking place for the UL to be established. These decisions paved the legal grounds for opening of the University of Latvia on 28 September 1919.

## Conclusions

1. In 1918/1919, three statehoods were established in what is now the territory of Latvia, and each of the states founded its own higher school using the Riga Polytechnical Institute's resources that had remained in the territory of Latvia after the evacuation.
  - 1.1. In October 1918, the German occupation power renewed RPI as the Baltic Technical Higher School.
  - 1.2. On 8 February 1919, the Soviet Latvian Higher School was founded by a decree signed by Pēteris Stučka.
  - 1.3. On 15 July 1919, the People's Council of Latvia decided to establish the Latvian Higher School.
2. The analysis of the Latvian Higher School founded by Pēteris Stučka reveals that, pursuant to the Commissariat of Education Regulation of 8 February 1919, equal access to higher education was ensured for all those willing to study, including those who had not received a secondary education. This contradicts the requirements for higher education and raises doubts as to whether a higher school in the traditional sense of the word had been established. The author concludes that what Pēteris Stučka founded was not a classical university but either a Marxist-compatible alternative to the classical "bourgeois university" or a people's higher school where lectures were held in Latvian and Russian.
3. On 15 July 1919, the People's Council of Latvia decided to establish a new Latvian higher school rather than renew one of the higher schools previously existing in the territory of Latvia. For this purpose, on 3 August 1919 the Government issued the order "On taking over Riga Polytechnical Institute", which was followed by activities for the takeover of RPI and the establishing of the Latvian Higher School.
4. The process of establishing the Latvian Higher School concluded on 28 September 1919 with a formal opening event marking the establishment of the first higher education institution – university – in which the language of instruction was Latvian. The Latvian Higher School met the criteria set for universities, as it was stipulated that the School would only admit candidates who have a gymnasium education, and also the teaching staff were required to be appropriately qualified.

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## **IDEALISM IS INCLINED TO REDUCE COMPLIANCE WITH LAW**

### **Summary**

Idealism is inclined to create overly strict laws, rules, or standards. However, these excessively severe restrictions can be harmful to humankind. Therefore, laws that are too severe reduce compliance with the law. Low compliance with law causes serious accidents. In this study, I investigate Japanese leadership, which tends to avoid difficult discussions about correct standards based on scientific theory or data – Japanese leaders are easily influenced by public opinion or authority.

**Keywords:** idealism, compliance, panic phenomena, minus-bubble, excessively severe standard, Japanese leadership

### **Introduction**

I hereby introduce three examples of overly severe laws or rules produced by idealism that are influenced by public opinion, without scientific data or theory. Firstly, I investigate a law concerned with radioactive level for refuge. Secondly, I look at the incident of the falsification of data by a Japanese production company. Thirdly, I examine the excessive obligation for university students by the Japanese government.

I conclude that Japanese management and leadership must change to control public opinion or its social atmosphere. Occasionally, Japanese management is admired by Occidental researchers. However, Japanese leaders do not resist the overall social atmosphere despite their professional knowledge and skill.

### **1. Panic after the Fukushima nuclear accident**

The International Nuclear and Radiological Event Scale (INES) ranks the severity of damage of nuclear accidents from 1 to 7. The accident at the Fukushima Daiichi Nuclear Plant in 2011 was categorized as level 7, as was the Chernobyl accident. The Japanese government at that time, led by Prime Minister Naoto Kan, was concerned with raising the INES level to a category 7.<sup>1</sup>

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<sup>1</sup> Jennex M. *Using Social and Information Technologies for Disaster and Crisis Management*. IGI Global, 2013.

However, some nuclear specialists criticized the decision made by Kan's government. Mark Tran introduces a criticism from Murray Jennex, associate professor at San Diego State University<sup>2</sup>.

In my opinion, raising [Fukushima] to the level of Chernobyl is excessive. It is nowhere near that level. Chernobyl was terrible – it blew up, and with no containment they were confounded, whereas [Fukushima] containment held, the only thing that did not was the fuel pool that caught fire.

Tran analysed the difference between the nuclear accidents of Fukushima and Chernobyl, comparing these nuclear crises through official data. For example, in the case of Chernobyl, the reactor itself exploded while it was still active. However, in the case of Fukushima, the cause of the accident was not the reactor itself but occurred because the plant's cooling system was impaired by a tsunami.<sup>3</sup>

Tran also pointed out the level of radioactive material released in each accident. Whereas the radioactive material released by Fukushima's plant reactors was estimated at more than 10 PBq (petabecquerel) by the Japanese nuclear safety commission, the radioactive material released by the Chernobyl incident was estimated at 5 200 PBq.<sup>4</sup>

Moreover, in the case of Chernobyl, Tran noted that 50 emergency rescue workers died from acute radiation syndrome and related illnesses. Furthermore, 4 000 children and adolescents contracted thyroid cancer.<sup>5</sup>

In the case of Fukushima, however, no radiation-linked deaths have been reported and only 21 plant workers have been affected by minor radiation sickness.<sup>6</sup>

James Mahaffey has investigated various atomic accidents since the 1950s.<sup>7</sup> He also investigated the accident of Fukushima and Chernobyl in detail. He attributed the cause of the Fukushima accident to the 49-foot high tsunami that struck 50 minutes after a magnitude 7.2 earthquake (from the Great East Japan Earthquake),

<sup>2</sup> Tran M. "Nuclear crises: How do Fukushima and Chernobyl compare?" *The Guardian*, April 12, 2011. He investigated the difference between the accident in Chernobyl and that in Fukushima. He pointed several important points of difference between them, notwithstanding the same category 7 of the INES level.

Other articles describe the difference between Chernobyl and Fukushima is included, as follows. Mahaffey J. *Atomic Accidents*. Pegasus Books, 2014; Brocato C. S. *How A Nuclear Event In America Will Probably Go Down: What Was Learned From Three Mile Island, Chernobyl, and Fukushima*. Dr. "B's" Radiation Series Book 6, 2018. Filburn T., and Bullard, S. *Three Mile Island, Chernobyl, and Fukushima*. Springer International Publishing, Switzerland, 2016. Claussen A, Rosen A. *Nuclear Disasters: Fukushima and Chernobyl*. Dixi Books Publishing, 2019.

<sup>3</sup> Tran M. "Nuclear crises: How do Fukushima and Chernobyl compare?" *The Guardian*, April 12, 2011.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Mahaffey J. *Atomic Accidents*. Pegasus Books, New York, 2014. He also pointed out the important difference between the two nuclear accidents that happened in Chernobyl and Fukushima, just like as Tran, as I mentioned above. We can find that Japanese government and public opinion were led by overestimating the highest category 7 of the INES level to the panic reaction in nuclear management.

which inundated the entire plant, while the cause of the Chernobyl accident was the nuclear reactor itself.

In 2011, just after the accident of the Fukushima nuclear plant, the government of Naoto Kan was apparently in a panic.<sup>8</sup> They explained that the tsunami was of an exceptional scale and happened roughly once every hundred years.<sup>9</sup> Despite this explanation, they decided to stop nearly all the nuclear plants in Japan, as if another exceptionally large wave was coming the next day. Their explanation of the accident, and certainly their political decision, lacked any scientific grounds.<sup>10</sup>

After the Fukushima accident, most Japanese people became afraid of nuclear power, and supported or agreed with the anti-nuclear movement. They created an anti-nuclear atmosphere, which Japanese leaders could not handle sufficiently well. I believe that this inclination of public opinion is the result of panic.<sup>11</sup>

This panic caused three main circumstances: uncertainty, involvement of a large number of amateurs, and the absence of reasonable investigation based on scientific knowledge.

Firstly, the uncertainty concerning nuclear energy and radioactivity among the general population and lack of knowledge or information stimulates uneasiness, anxiety, and fear. This emotional state in a large population causes panic.

Secondly, the involvement of a large number of amateurs. Including politicians, a large number of amateur commentators in the media – TV, radio, and newspapers – tried to explain the dangers of nuclear energy or the seriousness of the accident at the Fukushima Nuclear Power Plant having neither specialized knowledge nor honest investigation. Almost all of them denounced nuclear technology from an emotional standpoint.

In fact, after the Fukushima accident, many people bought Geiger counters, and measured the degree of the radioactivity around their homes.<sup>12</sup> This craze proved that the anti-nuclear atmosphere had turned into a panic.

Furthermore, the Japanese government tried to search for active fault lines that are one million years old by digging the ground at each nuclear plant, spending several billions in yen,<sup>13</sup> aside from the fact that the cause of the Fukushima accident had nothing to do with cracks in the ground but with being inundated by a tsunami.

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<sup>8</sup> The Independent Investigation Fukushima Nuclear Accident. The Fukushima Daiichi Nuclear Power Station Disaster: Investigating the Myth and Reality. Routledge, 2014.

<sup>9</sup> Ibid.

<sup>10</sup> The Independent Investigation Fukushima Nuclear Accident. The Fukushima Daiichi Nuclear Power Station Disaster: Investigating the Myth and Reality. Routledge, 2014.

<sup>11</sup> 産経新聞 Sankei Newspaper, 31 March 2013, 1 July 2013.

<sup>12</sup> 日本経済新聞 [Nihon Keizai]. Newspaper 8 May 2011. A column reported that demand for Geiger counters rose rapidly. After the Fukushima nuclear accident, a digital Geiger counter priced 98 000 yen increased in demand 300 times.

<sup>13</sup> 原子力規制委員会 [2013 June] 「敷地内及び周辺の地質・地質構造調査に係る審査ガイド」[Guidance of Nuclear Regulation Authority. Guidance for geological investigation of nuclear plants and around them]. June, 2013.

Such ridiculously formal activities by the government also proved the existence of panic and the lack of rational thinking.

## 2. Japanese government set excessively severe standard in panic

We see an atmosphere of unreasonable and emotional avoidance of nuclear technology in Japan after the Fukushima accident. According to Japanese cultural characteristics, such an atmosphere is inclined to dominate people. Therefore, the mass media usually tries to control the atmosphere.

Japanese leaders seldom debate any theme countering the prevailing opinion. For example, before the Fukushima accident, the leaders of Japanese electric companies rarely discussed the security of nuclear technology with anti-nuclear advocates.<sup>14</sup> The leaders easily declared a 100 % safety assessment to the public to avoid severe scientific debate.<sup>15</sup> They managed to let the counterforce pass without controversy. This is characteristic of Japanese leadership.

However, their casual 100 % safety declaration caused them to refrain from further improvement. Following the Fukushima accident, the same phenomenon reoccurs. Even today, Japanese leaders, including statesmen, the government, and corporate executives, avoid tough debates with anti-nuclear forces on the future policy of nuclear energy in Japan, just as before the Fukushima accident. Consequently, this Japanese traditional leadership style in coordinating a conflict resolution has serious limits.

Furthermore, another serious problem is that some Japanese leaders are inclined to submit to some dominant public opinions or atmosphere. However, many of these dominant opinions or atmosphere are easily created by the mass media. In the days of the Democratic Party government of Noda, after Kan, the Minister of Health, Labour and Welfare, Yoko Komiyama in October 2011 decided that the safe level of caesium radioactivity in food was less than 1mSv<sup>16</sup>, even though the international standard safety level is 5mSv.<sup>17</sup>

Likewise, the Minister of the Environment Goshi Hosono, who was a member of Noda's cabinet, was responsible for the governmental decision to set radioactivity levels for the evacuation zone.<sup>18</sup> He influenced the decision to set the acceptable radioactivity level for returning to the evacuation zone at 1mSv, even though

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<sup>14</sup> Nakase T. 『日本電気事業経営史』第9章 [Business History of Japanese Electrical Industry. Chapter 9 日本評論社], 2005.

<sup>15</sup> Ibid.

<sup>16</sup> 日本経済新聞 [Newspaper, Nihon Keizai Shinbun], October 28, 2011.

<sup>17</sup> Terada, H. I. Yamaguchi, et al. Regulation values and current situation of radioactive materials in food 『保健医療科学』[Medical Health Science], Vol. 67, No. 1, 2018, pp. 21–33.

<sup>18</sup> 内閣官房[Cabinet Secretariat's report]「低線量被ばくのリスク管理に関するワーキンググループ報告書」[Working Group's report for a risk management of low level radiation], December, 2011.

the international standard was 20mSv.<sup>19</sup> In this decision-making process, local governments in Fukushima also held responsibility for the excessively severe standard, because they conformed to the 1mSv standard for the exhaustive cleaning of radio-activity to the national government.<sup>20</sup> The leaders of the local governments in Fukushima also kowtowed to the dominant social opinion or atmosphere.<sup>21</sup>

In sum, these decisions were obviously a surrender to idealism of security. This excessively severe 1mSv standard for removing the evacuation zone designation is now hurting the refugees, towns, and villages in Fukushima. In 2012, more than 160 000 persons took refuge from Fukushima.<sup>22</sup> In 2018, some towns and villages in Fukushima were removed from the evacuation zone.<sup>23</sup> However, a total of 3 701 persons who had taken refuge from Fukushima were dead by September 30, 2018 due to various stressors or the lack of medical services in the refuges, a phenomenon called “deaths related to the Great East Japan Earthquake.”<sup>24</sup> Furthermore, many towns and villages forcibly emptied of inhabitants for an extended period of time have practically become ruins.<sup>25</sup>

Although the Liberal Democratic Party came to power after the Democratic Party at the end of 2012, no Minister of the Environment has ever tried to restore the level of refuge to 20mSv from 1mSv. As they also bow to the idealism, such as maximum safety precedence, dominant social opinion, or anti-nuclear atmosphere, they hesitate to explain, discuss, or debate with the public using science-based knowledge and facts.

### 3. The incident of data falsification by Japanese production company

Traditionally, Japanese leadership has the characteristic of coordinating diversity of opinions. This style of leadership, however, is mainly concerned with the emotional conditions of its members. Certainly, this has the merit of keeping emotional harmony in an organization. However, this type of leadership also has the problem of avoiding disputation with others to find the truth or to realize some

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<sup>19</sup> 内閣官房[Cabinet Secretariat's report]「低線量被ばくのリスク管理に関するワーキンググループ報告書」[Working Group's report for a risk management of low level radiation], December, 2011.

<sup>20</sup> Ibid.

<sup>21</sup> 福島県[Fukushima government's report]. 「東日本大震災の記録と復興への歩み」[History of the great east Japan earthquake and reconstruction], 2013.

<sup>22</sup> 福島民友新聞[Newspaper Fukushima Minyu Shinbun], September 8, 2017.

<sup>23</sup> Ibid. March 12, 2018.

<sup>24</sup> 復興庁[Reconstruction Agency's Report]. 「東日本大震災における震災関連死の死者数」[Number of the great east Japan earthquake-related deaths], September 30, 2018.

<sup>25</sup> Aoki, M. 『地図から消される街-「3.11後の言っではいけない真実」-』講談社新書 [Disappearing towns. The taboo truth after 3.11], 2018. The author reported the cases of the damage suffered by refugees, and several towns and villages were falling into ruins after the long refuge caused by the overly strict removing standard 1mSv.



important objectives. In particular, Japanese leaders are inclined to be submissive to or flatter some dominant opinions to avoid difficult discussions, as I have mentioned. This is a serious fault of Japanese leadership.

In the future, Japanese leaders in any organization must be sufficiently brave to enter into a debate with anyone about any topic in an attempt to establish the truth in the best interest of public welfare. In any discussion or disputation, scientific bases or facts are important. Japanese leaders must utilize science-based data or knowledge to persuade opponents without resorting to emotion.

Recently, many incidents of data falsification by Japanese production companies have been reported. For example, Kobe Steel is a famous and large company that had falsified data on its steel material for more than 40 years.<sup>26</sup> They adopted a special standard that they themselves set for a test of the material products.<sup>27</sup> This standard is called *tokusai*, an abbreviation of *tokubetsu saiyo*, which means “special adoption”.

Of course, this *tokusai* standard is lower than the regular standard. However, many client enterprises acknowledge the *tokusai* standard, and accepted the products that passed the *tokusai* standard.<sup>28</sup> What should we learn from this incident? A spirit of compliance to appear to be legitimate is important, evidently. However, I would like to raise two points. First of all, no accidents have ever been caused by this lower *tokusai* standard. Secondly, the client enterprises agreed with the *tokusai* standard.

To summarize, the most important problem is whether the regular standard was excessively severe. If the regular standard was set too high to produce quality products at suitable costs and within an appropriate period of time, the regular standard cannot be a legitimate standard. We must remember that an excessively severe level for removing the evacuation zone ban is harming both the refugees and the area around Fukushima.

These excessive or idealised standards are often created by overly dominant opinions or atmospheres lacking scientific discussion. They assert that Japanese people usually use this stated principle and true intention appropriately. I think the core problem of these types of incidents is the lack of scientific discussion by Japanese leaders. In other words, the lack of bravery of Japanese leaders, preventing them from entering tough disputations against powerful opponents is the core problem.

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<sup>26</sup> 毎日新聞 [Newspaper Mainichi Shinbun], 17 October, 2017.

<sup>27</sup> Ibid.

<sup>28</sup> Aluminum & Copper Business: Moka Plant, Kobelco Material Copper Tube, LTD, etc. actually reported, “With respect to internal standards that are overly strict, we will review shipping decisions based on internal standards and undertake correction action by unifying shipping decisions based on customer standards.” “Report on investigation into the cases of the Kobe Steel Group’s improper conducts and on measures to prevent recurrence.” Kobe Steel Ltd., 2017.

#### 4. Excessive obligations for university students

I would like to introduce another case of a Japanese university that was concerned with creating an excessively severe standard as an example of the Japanese decision-making process.

In 2018, the Ministry of Education, Culture, Sports, Science and Technology Japan (MEXT) decided that every student must prepare notes for two hours, and spend two hours in review for every subject they take. The university's office formally demanded that every professor must record this obligation for students in their syllabus.<sup>29</sup>

As a student impacted by this rule, I argued with a clerk who demanded compliance. I insisted that four hours of preparation and review for each subject that a student took was impossible. No professor should publish such an unrealistic obligation for students in the syllabus. However, the clerk insisted that this policy was decided by official committees in our university, guided by MEXT.<sup>30</sup>

Then, I explained to the clerk what it meant. Most students take about 12 classes a semester. If they must study for four hours for each class, they must study for 48 hours a week in total. It means that every student must study for about seven hours a day, seven days a week. Yet, after attending classes at the university, students may go home, eat dinner, and shower before they start their studies at 8 p.m., and they must not stop studying until 3 a.m. They must keep this schedule every day. Consequently, this precludes any students' activities, part-time work, and social activity.

I informed the dean of our faculty that this unreasonable policy had to be reconsidered. He accepted my proposition immediately. However, it will take a long time to abolish this institutionalized policy. Furthermore, most of the professors accepted the requirement by the university as the authorities intended. Therefore, the obligation for students will continue to be published on official syllabuses for a long time. I think that this type of decision is closely related to the falsification problems of Japanese enterprises.

Through the analysis mentioned above, we can summarize the Japanese leadership style and decision-making approach, as follows. Firstly, Japanese leaders usually do not like debating with people over issues. They would like to coordinate conflicting opinions rather than prevail against opposing opinion or persuade an adversary.

Secondly, leaders are inclined to be submissive to a dominant atmosphere or an authority. Then they wait patiently for objections to subside. This tolerance is useful to avoid a severe conflict, at least for a while; in fact, many radical objections in Japan decline or disappear during this tolerant, submissive period.

<sup>29</sup> Professors' meeting at Kanagawa University, November 2018.

<sup>30</sup> We can find an idealistic policy of the Japanese Ministry of Education, Culture, Sports, Science and Technology on a White Paper of the Ministry and in internet data. Available at: [https://elaws.e-gov.go.jp/search/elawsSearch/elaws\\_search/lsg0500/detail?lawId=331M50000080028](https://elaws.e-gov.go.jp/search/elawsSearch/elaws_search/lsg0500/detail?lawId=331M50000080028) [last viewed April 5, 2020].

Thirdly, Japanese leaders are inclined to be concerned with emotional conditions rather than rational or scientific affairs. Of course, this tendency of Japanese leadership is related to the characteristics of Japanese society. Japanese society holds the opinion that the critical element of leadership is humanity rather than ability.

## **5. How must the Japanese leadership style be changed to overcome the excessive demands based on idealism?**

According to the characteristics of Japanese leadership style, although they have a merit for avoiding severe conflicts between opponents and realizing appropriate agreements in adequate time after long negotiations, their downside is the tendency to be swayed by idealism, populism, or emotionalism with comparative ease.

We must remember the causes of panic phenomena as described in the previous section. Fundamentally, panic is mainly caused by irrational and emotional enthusiasm in the public under the conditions of uncertainty. The illogical, excessive hope and expectations of the majority causes the euphoria of a plus-bubble, while a minus-bubble is caused by the majority's irrational excessive anxiety and fear. Both are panic phenomena.

I see Japanese public opinion as a factor in the phenomenon of the minus-bubble after the Fukushima accident. Actually, this minus-bubble phenomenon has expanded to some foreign countries. For example, the German government decided to stop nuclear energy development after the Fukushima accident.

I do not know if the Japanese leadership is effective enough to solve this type of problem as a kind of panic phenomenon, as Japanese leadership is weak in the face of emotional public opinion, and the panic phenomenon is formed by public emotion.

Let us review the problems of creating excessively severe standards for radioactivity by the Democratic Party, the numerous incidents of data falsification by Japanese production companies caused by creating excessively high standards, and establishment of excessively stringent study obligations for students at Japanese universities.

Why do Japanese leaders create such unrealistic standards? The excessive standard is usually the result of pandering by Japanese leaders to some dominant influence, such as public opinion or authority. Particularly in the case of a dominant influence based on idealism, Japanese leaders are apt to easily accept any demand posed by the dominant influence.

"As the human security is the most important factor, a severe standard for radio-activity is the best approach," "Since higher quality products are the most important factor for customers, a higher quality standard is the best approach," "As training students is the mission of each university and each professor, a higher study standard is the best approach."<sup>31</sup> Because these types of substantiation are based on

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<sup>31</sup> These advocacies are the examples reflecting idealism in each field.

idealism, any responsible person of any organization feels a difficulty in disputing or opposing them.

Other types of advocacy, such as peace, democracy, equality, and so on, also have an irresistible power for the majority. In general, Japanese leadership is weak in disputing such kinds of advocacy based on idealism. Of course, Japanese leaders in any organization sometimes must resist or fight against unreasonable claims. However, even in that case, they usually adopt the Japanese style of leadership, avoiding much dispute.

In the case of nuclear policy, the Japanese style of leadership has several fatally weak points. First of all, this approach takes a long time to persuade an opposing influence. As I mentioned in section 2 above, a large number of refugees have been sacrificed during the attempt to reach a consensus on restoring the safe radioactivity level in evacuation zones to 20mSv instead of 1mSv.

Secondly, the opposing influence will never be persuaded by a long and patient negotiation, because of their political conviction against nuclear development in Japan.

Thirdly, an emotional approach to solving the problem of the nuclear accident will produce a contrary effect. For example, if the government emotionally talked about the large number of sacrificed refugees or the devastated villages in Fukushima where refugees could not return as a means of promoting the restoration of the radioactivity level in evacuation zones to 20mSv from 1mSv, that appeal would be utilized by opposing actors to promote anti-nuclear development.

To overcome the idealism, Japanese leadership must become more aggressive in basing its policies on scientific logic against an illogical, emotional atmosphere. As I mentioned above, the panic phenomenon of minus-bubble is constructed by unreasonable fears, uncertainties, and anxieties in the majority population. Therefore, leaders of any organization must communicate precise information and explain logical theory, assisted by specialists.

## Conclusions

In this article, I proposed the idea that scientific data, knowledge, and feasibility are important to create laws in our society. However, idealism is inclined to serve as a basis for establishing overly strict laws and rules. I introduced three cases, in which excessively strict standards harm actual human life and reduce compliance with the law.

The first case is the overly severe radioactivity standard. The Japanese government set an excessively severe standard of 1mSv as an acceptable radioactivity level for returning to an evacuation zone in a panicked reaction after the Fukushima nuclear accident in 2011, even though the international standard was 20mSv. This decision was a surrender to the idealism of perfect security. However, this excessively severe standard caused the deaths of 2 250 people due to the lack of medical services or because of various other stressors during the extended period of refuge.

The second case is the falsification of data by Kobe Steel in Japan. Shop workers created their own standard called *tokusai* because of the excessively severe formal standard. This *tokusai* standard had been adopted for 40 years, not only by the shop workers but also by client companies. While there are currently no reports of accidents due to the *tokusai* standard, this reduction in compliance with the rule may cause serious accidents in future. Therefore, adequate regular standards are necessary to maintain compliance.

The third example is the excessively severe obligation for university students established by Japanese government in 2018. The new rule, which imposes upon students an obligation to study – preparing for class and reviewing their lecture notes for about seven hours every day, is never feasible. This rule may reduce students' compliance with other rules at the university.

Furthermore, I mentioned that a characteristic of Japanese leadership is inclined to be submissive to the dominant atmosphere or to idealism. However, to comply with the law, when we enact laws, rules, or standards, we must consider scientific data, knowledge, and feasibility instead of an emotional atmosphere and idealism. In any case, we should have the courage to debate with positions adopted in spirit of unrealistic idealism to safeguard compliance with laws.

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## **SUSTAINABILITY AS THE STATE PRINCIPLE, DIVERSITY OF ITS APPLICATION IN PRACTICE**

### **Summary**

In the article, the author analyses the principle of subsidiarity, which can be described as part of a broad social strategy. Without denying that this principle originated in or was created under the influence of environmental law, currently sustainability has been given a broader scope and it demands long-term thinking in different areas.

The author points out that the principle of sustainability is not solely a political or governmental principle. It is included in normative acts *expressis verbis* in specific areas, turning into a principle of a certain field. Moreover, the principle of sustainability has become a constitutional principle. In the Preamble of the *Satversme* (constitution), the concept of sustainable development and responsibility towards future generations are included.

The author proves that Latvia belongs to the countries which recognize global environmental constitutionalism with sustainability as one of its elements. Furthermore, analyses confirm that the principle of sustainability is applied both by the Constitutional Court and the courts belonging to the court system in different areas.

By analysing the concept “sustainability constitutionalism”, the author discloses the content of sustainable legal regulation.

**Keywords:** sustainability, Constitution [*Satversme*], Constitutional Court, constitutionalism, legislation

### **Introduction**

Currently, nobody doubts that one of the major future challenges for mankind will be the issues related to ecosystems and environment, protection and safeguarding of it. Awareness of the environment’s importance has led to development of several principles, which, over time, have surpassed the environmental law and have become paramount principles of national development. Sustainability is one of these principles.

Sustainability is a new term in legal science. However, sustainability is one of those principles that have undergone extensive development, in particular, recently: it has both international and national dimension; it is used by the legislator, as well as politicians; sustainability is extensively applied in the case law in various areas. This is why the principle of sustainability has become an overall guiding principle for human development and achieving sustainability has become the central issue



of our time.<sup>1</sup> Today, it is indeed impossible to treat sustainability as an isolated “environmental goal” – it is a part of a broad social strategy.<sup>2</sup>

This article aims to present the meaning of the sustainability principle in Latvia in both policy and law documents, to reveal the application of this principle in diverse areas, proving that the phenomenon, which is globally known as sustainability constitutionalism, can also be discussed in the context of Latvia.

## 1. The roots and content of sustainability. Some general remarks

Usually, the roots or the origin of the term or legal concept of sustainability are related to 1987 when the World Commission on Environment and Development (known as Brundtland Commission<sup>3</sup>) published the statement “Our common future”. However, sustainability is a concept with much deeper roots. Sources reveal that the idea of sustainable development was expressed already in 1713 when Hanns Carl von Carlowitz edited the first book on forest sciences<sup>4</sup> pointing to the need for caution, a balance between timber growth and lumbering. At that time, however, a precise definition of the sustainability principle was not provided. However, this conclusion comprised the idea of sustainability. It has been also noted that sustainability had been known sooner – in countries of medieval western Europe in agriculture – land cultivation, and also in forestry.<sup>5</sup> A push towards awareness of this concept was given also in 1798 by Tomas Malthus in his “Essay on the Principle of Population”. His thesis was that population increases geometrically, while food increases arithmetically.<sup>6</sup> However, 1987 is the time when this concept gains recognition within the international community. It is known that it was the Brundtland Commission’s report that served as the push towards more detailed discussions of the problems that later evolved in 1992 in Rio de Janeiro Earth Summit.<sup>7</sup> Following that, “Agenda 21”<sup>8</sup> was issued as a guide for countries

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<sup>1</sup> John A. Vucetich and Michael P. Nelson. Sustainability: Virtuous or Vulgar? *BioScience*, Vol. 60, No. 7, July/August 2010, p. 539.

<sup>2</sup> Farber, D. A. Law, Sustainability, and the Pursuit of Happiness. UC Berkeley: Berkeley Program in Law and Economics. Available at: <https://escholarship.org/uc/item/6289107q> [last viewed October 4, 2019].

<sup>3</sup> Commission Chair was Gro Harlem Brundtland, the former Minister of Norway.

<sup>4</sup> Keiner M. History, Definition(s) and Models of “Sustainable Development”. Available at: <https://www.research-collection.ethz.ch/bitstream/handle/20.500.11850/53025/1/eth-27943-01.pdf> [last viewed October 4, 2019].

<sup>5</sup> Warde P. *Modern Intellectual History*, No. 8, Issue 1, 2011, pp. 153–163.

<sup>6</sup> Malthus T. R. *Essay on the Principle of Population*. Electric Book Company, 2000. ProQuest Ebook Central. Available at: <https://ebookcentral.proquest.com/lib/lulv/detail.action?docID=3008464> [last viewed July 7, 2019].

<sup>7</sup> Portney K. *Sustainability*. Cambridge: The MIT Press, 2015, p. 32.

<sup>8</sup> United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992 AGENDA 21. Available at: <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> [last viewed July 20, 2019].

with respect to the economic development on the 21<sup>st</sup> century. The Sustainable Development Goals of the United Nations were defined in 2015, to be achieved by 2030.<sup>9</sup>

Various explanations of sustainability can be found in sources of law. For example, it has been mentioned that “sustainable development means ensuring dignified living conditions with regard to human rights by creating and maintaining the widest possible range of options for freely defining life plans.”<sup>10</sup> Likewise, it has been noted that the core meaning of sustainability has been the preservation of natural systems supporting human life.<sup>11</sup> The so-called Brundtland Commission’s principle of sustainability was defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>12</sup> This is the most frequently used definition of sustainability worldwide as well as in Latvia. This understanding of sustainability is used also by the Constitutional Court of the Republic of Latvia in its case law.<sup>13</sup> Sustainability has been explained also in the normative regulation. Section 1 of the Environmental Protection Law points out that the principle of sustainable development should be regarded as the integrated and balanced development of public welfare, the environment and economy, which meets the present social and economic needs of inhabitants and ensures the compliance with environmental requirements, not endangering the possibility to meet the needs of the future generations, as well as ensures the preservation of biologic diversity.<sup>14</sup>

<sup>9</sup> Sustainable Development Goals. Available at: <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> [last viewed July 7, 2019].

<sup>10</sup> Keiner M. History, Definition(s) and Models of “Sustainable Development”. Available at: <https://www.research-collection.ethz.ch/bitstream/handle/20.500.11850/53025/1/eth-27943-01.pdf> [last viewed July 7, 2019].

<sup>11</sup> Bosselmann K. Global Environmental Constitutionalism: Mapping the Terrain. *Widener Law Review*, Vol. 21, No. 2, pp. 180–181. Available at: <http://datubazes.lanet.lv:2095/login.aspx?direct=true&db=a9h&AN=110507334&site=ehost-live> [last viewed July 16, 2019].

<sup>12</sup> Report of the World Commission on Environment and Development: Our Common Future Available at: <https://www.are.admin.ch/are/en/home/sustainable-development/international-cooperation/2030agenda/un-milestones-in-sustainable-development/1987-brundtland-report.html> [last viewed July 7, 2019].

<sup>13</sup> See, for example, Judgement of the Constitutional Court of the Republic of Latvia of 24 February 2011 in case No. 2010-48-03, para. 6.1. Available at: [http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2010/07/2010-48-03\\_Spriedums\\_ENG.pdf#search=2010-48-03](http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2010/07/2010-48-03_Spriedums_ENG.pdf#search=2010-48-03) [last viewed July 16, 2019]; Judgement of the Constitutional Court of the Republic of Latvia of 17 January 2008 in case No. 2007-11-03, para 15. Available at: [http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/05/2007-11-03\\_Spriedums\\_ENG.pdf#search=2007-11-03](http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/05/2007-11-03_Spriedums_ENG.pdf#search=2007-11-03) [last viewed October 10, 2019].

<sup>14</sup> Environmental Protection Law. Available at: [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Environmental\\_Protection\\_Law.doc](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Environmental_Protection_Law.doc) [last viewed July 16, 2019].

Usually, three dimensions or three pillars of sustainability are discerned: environmental<sup>15</sup>, economic<sup>16</sup>, and social<sup>17</sup>. In other sources, the social dimension is replaced by equity.<sup>18</sup> The idea of sustainability is that all the three elements should go hand in hand.

Sustainability is not a principle applicable solely in public law. It reaches beyond, as it is applicable also in private law – in business. For example, sustainability indicators are sought and identified in the private sector.<sup>19</sup> The terms “sustainability of business activities<sup>20</sup>” or “sustainable activities of the personnel” are known, used in Section 8 the Enterprise Income Tax Law.<sup>21</sup> Sustainability criteria are applied in the area of biofuels and bioliquids.<sup>22</sup>

Thus, it can be said that sustainability has broad dimensions and is being applied in diverse areas. Without denying that this principle originated in or was created under the influence of environmental law, currently sustainability has been given a broader scope. Likewise, the essence of sustainability is found in two key elements: the need to satisfy the humanity’s present needs, at the same time caring for the future generations in various fields. To put it differently – the sustainability principle demands long-term thinking.

## 2. Sustainability as an element of development in Latvia: political and legal aspects

It has been noted in research that the actual efforts and politics of nation states to promote sustainability differ greatly.<sup>23</sup> This is because sustainability, first of all, is a political issue. Sustainability as a political standard was underscored by President E. Levits upon coming into office, highlighting the common good, responsibility for the future generations, which is a style of thinking typical of a modern and

<sup>15</sup> Environmental sustainability speaks about preserving and protecting ecosystem and natural sources

<sup>16</sup> Sustainable development (economy) highlights the principle that economical activities should avoid depleting natural resources and damaging ecosystems.

<sup>17</sup> Social or equity tools for more equitable distribution of environmental impacts, natural resources, good, service, income and wealth.

<sup>18</sup> Portney K. Sustainability. Cambridge: The MIT Press, 2015, p. 7.

<sup>19</sup> See more: Swedbank’s Sustainability Indicators: towards the 2030 Agenda. Available at: [https://www.swedbank-research.com/english/macro\\_focus/2018/january/sustainability\\_indicators\\_2018-01-23.pdf](https://www.swedbank-research.com/english/macro_focus/2018/january/sustainability_indicators_2018-01-23.pdf) [last viewed July 16, 2019].

<sup>20</sup> Judgement of Administrative Regional Court of 26 April 2018 in case No. A420296416 para. 3. 27. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi> [last viewed October 4, 2019].

<sup>21</sup> Corporate Income Tax Law. *Latvijas Vēstnesis*, No. 56 (5983), 08.08.2017.

<sup>22</sup> Regulations of the Cabinet of Ministers No. 545 of 5 July 2011. Sustainability criteria for biofuels and bioliquids, their implementation mechanism and monitoring and control mechanisms. *Latvijas Vēstnesis*, No. 111 (4509), 19.07.2011.

<sup>23</sup> Portney K. Sustainability. Cambridge: The MIT Press, 2015, p. 141.

sustainable state.<sup>24</sup> The finding that solidarity, belonging to Latvia and to Europe, the possibility to live in a modern state is the basis for the will for a sustainable state points to the purpose of the state – to be sustainable.<sup>25</sup>

The “road map” for the development of Latvia is based on political document “National Development Plan of Latvia for 2014–2020”, which was approved by the *Saeima* (parliament).<sup>26</sup> In addition to this document, the parliament has approved also the Sustainable Development Strategy of Latvia until 2030 or “Latvia 2030”. It aims to reach sustainable development of a country, i.e., an integrated and balanced development of the public welfare, the environment and economics, which satisfies the present social and economic needs of inhabitants, ensures the observation of the environmental requirements, without endangering the possibility to satisfy the needs of future generations, and ensuring the biological diversity.<sup>27</sup> “Latvia 2030” is the main national planning instrument, which means that all other policy planning documents must comply with the guidelines defined in this legal act. The content of sustainability is presented in this document, comprising the general understanding of the concept in Latvia and reflecting, first of all, the three globally known dimensions of sustainability and the need to find a balance between them (public welfare, environment, economics), and, secondly, it links the interests of the present and the future society and discusses the need to balance these.

In Latvia, the principle of sustainability is not solely a political or governmental principle. This principle is included in normative acts *expressis verbis* in specific areas, turning into a principle of a certain field. Moreover, the principle of sustainability has become a constitutional principle.

Latvia is one of those rare countries, where, almost 100 years after its constitution was adopted, an extensive Preamble was added to the *Satversme* in 2014.<sup>28</sup> The Preamble to the *Satversme* comprises, *inter alia*, the following phrases: “Each individual takes care of [...] future generations, the environment and nature” and “Latvia protects its national interests and promotes sustainable and democratic development of a united Europe and the world.”<sup>29</sup> The conclusion that follows from the Preamble is, first of all, that sustainability has become one of the principles for national development. To foster sustainable Europe and the world, Latvia itself must be oriented towards such development. Secondly, the constitutional legislator expects also responsible actions from each individual for the sake of future

<sup>24</sup> Speech by President Egils Levits at the *Saeima* upon entering office. Available at: <https://www.president.lv/lv/jaunumi/zinas/valsts-prezidenta-egila-levita-runa-saeima-amata-stajoties-25796> [last viewed October 5, 2019].

<sup>25</sup> Ibid.

<sup>26</sup> National Development Plan of Latvia for 2014–2020. Available at: [https://www.pkc.gov.lv/sites/default/files/inline-files/NDP2020%20English%20Final\\_\\_\\_1.pdf](https://www.pkc.gov.lv/sites/default/files/inline-files/NDP2020%20English%20Final___1.pdf) [last viewed October 5, 2019].

<sup>27</sup> Sustainable Development Strategy of Latvia until 2030. Available at: <http://varam.gov.lv/lat/pol/ppd/?doc=13857>, para. 8. [last viewed October 10, 2019].

<sup>28</sup> Amendments to the Constitution of the Republic of Latvia. *Latvijas Vēstnesis*, No. 131 (5191), 08.07.2014.

<sup>29</sup> The Constitution of the Republic of Latvia. Available at: <http://saeima.lv/en/about-saeima/work-of-the-saeima/constitution/> [last viewed October 5, 2019].

generations, which is also an integral part of sustainability. Moreover, it is noted in a study of the preambles of different states that usually preambles include norms belonging to three groups: 1) those that reflect the constitutional foundations of the state, 2) matters related to fundamental human rights, and 3) the elements of national nature that are characteristic of the particular country.<sup>30</sup> The author believes that sustainability does not fall within any of these groups typical of preambles' texts. Sustainability should be recognised as being a new – a future principle of national development, which has been differently reflected *expressis verbis* in constitutions of various states.

It has been noted that nearly 20 countries expressly recognize a constitutional goal of “sustainability” or “sustainable development”.<sup>31</sup> For example, the Constitution of Switzerland notes that the aim of the Federation (Article 2) is to promote common welfare, sustainable development, inner cohesion, and cultural diversity of the country.<sup>32</sup> This principle is reflected in the Preamble to the Constitution of Montenegro.<sup>33</sup> This concept is also included in constitutions of Poland, Mozambique, Greece, Serbia, and Thailand.<sup>34</sup> Other constitutions refer to the concept of “future generations”. For example, Article 110B of the Constitution of the Kingdom of Norway states that “Natural resources should be made use of on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.”<sup>35</sup> The concept of protecting future generations is included in several constitutions, e.g., in Germany and Brazil, and those norms mainly speak about preserving natural resources and environment and responsibility to the future generation.<sup>36</sup> A study mentions that in some countries constitutions include both: sustainability and also the future generation concept (Angola, Bhutan, Georgia, Guyana, Malawi, Maldives, Sweden).<sup>37</sup> Latvia belongs to the latter group

<sup>30</sup> Constitutional Preambles. A comparative analysis. Voermans W., Stremmer M., Cliteur P. (eds.), Chaltenham: Edward Elgar Publishing: 2017, p. 25.

<sup>31</sup> James R. May Sustainability and Global Environmental Constitutionalism. In: *New Frontiers in Environmental Constitutionalism*. Available at: <https://wedocs.unep.org/bitstream/handle/20.500.11822/20819/Frontiers-Environmental-Constitutionalism.pdf?sequence=1&isAllowed=y> [last viewed October 10, 2019], p. 310.

<sup>32</sup> Federal Constitution of the Swiss Confederation of April 18, 1999. Available at: <https://www.refworld.org/docid/3ae6b6040.html> [last viewed October 7, 2019].

<sup>33</sup> Constitution of Montenegro. Available at: <https://www.wipo.int/edocs/lexdocs/laws/en/me/me004en.pdf> [last viewed October 7, 2019].

<sup>34</sup> James R. May Sustainability and Global Environmental Constitutionalism. In: *New Frontiers in Environmental Constitutionalism*. Available at: <https://wedocs.unep.org/bitstream/handle/20.500.11822/20819/Frontiers-Environmental-Constitutionalism.pdf?sequence=1&isAllowed=y> [last viewed October 7, 2019], pp. 312–313.

<sup>35</sup> Constitution of the Kingdom of Norway of 1814. Available at: <https://ihl-databases.icrc.org/ihl-nat/6fa4d35e3025394125673e00508143/eee956c813a2da0ec1256a870049de0c/%24FILE/Constitution.pdf> [last viewed October 7, 2019].

<sup>36</sup> James R. May Sustainability and Global Environmental Constitutionalism. In: *New Frontiers in Environmental Constitutionalism*. Available at: <https://wedocs.unep.org/bitstream/handle/20.500.11822/20819/Frontiers-Environmental-Constitutionalism.pdf?sequence=1&isAllowed=y> [last viewed October 7, 2019], pp. 313–314.

<sup>37</sup> *Ibid.*, pp. 314–315.

of countries, as the constitution contains the sustainable development concept and responsibility towards future generations.

Although the principle of sustainability is included in the Preamble to the *Satversme*, it is a directly applicable principle. The Latvian theory of constitutional law does not doubt that all norms of the *Satversme* that have been included in the whole text of the *Satversme* are real and applicable.<sup>38</sup> Therefore, sustainability is one of the constitutional principles aimed at protecting and implementing the aims and values enshrined in the *Satversme*.<sup>39</sup> One might also say that sustainability has become a principle that will take a more prominent place alongside principles like democracy, a country governed by the rule of law, and human dignity.

### 3. Application of sustainability principle in case law: diversity of areas and practice

It would be wrong to assume that, in Latvia, the principle of sustainability has been applied only since the Preamble to the *Satversme* was adopted and entered into force. The Constitutional Court had applied this principle on several occasions before that, because the sustainability principle has been defined in special laws, for example, in the Environmental Protection Law since it came into force in 2006.

The study of case law shows that the principle of sustainability is applied both by the Constitutional Court and the courts belonging to the court system, and that in the case law the sustainability principle had been applied in very diverse areas, for example, even terms “sustainability of a judgement”<sup>40</sup>, “sustainability of a tree”<sup>41</sup> have been used. At the same time, it must be noted that the contribution by the European Court of Human Rights to sustainable development has been assessed as being small.<sup>42</sup> Therefore, embodiment of the sustainability principle in Latvia depends, first and foremost, on courts: the Constitutional Court and courts of the court system, which have been called upon to care for the protection of normative acts and the *Satversme*.

In view of the origins and development of sustainability, it is clear that initially the sustainability principle was applied in the environmental law. Although at present it has acquired new horizons, the diversity of its application in environmental

<sup>38</sup> Pleps J. *Satversmes ievada piemērošana* [Application of the Preamble of *Satversme*]. *Jurista vārds*, No. 30 (832), 5.08.2014.

<sup>39</sup> Judgement of the Constitutional Court of the Republic of Latvia of 6 October 2016 in case No. 2016-24-03, para. 11. *Latvijas Vēstnesis*, No. 201, 10.10.2017.

<sup>40</sup> Judgement of Riga Regional Court of 23 November 2016 in case No. C30692915. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi> [last viewed October 10, 2019].

<sup>41</sup> Judgement of regional Administrative Court on 14 June 2018 in case No. A420511213. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi> [last viewed October 11, 2019].

<sup>42</sup> Verschuuren, J. Contribution of the case law of the European Court of Human Rights to sustainable development in Europe. In: W. Scholtz, & J. Verschuuren (eds.), *Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development*. Cheltenham: Edward Elgar Publishing Ltd, 2015, p. 15.

law is obvious also in Latvia. Thus, for example, similarly to other European countries<sup>43</sup>, also in Latvia, sustainability is one of the principles of spatial planning.<sup>44</sup> The Constitutional Court of Latvia even describes the principle of sustainability as “one of the fundamental principles of land use planning”.<sup>45</sup> As the Constitutional Court has been vigorously involved in solving legal issues connected to spatial planning, the Constitutional Court has developed some rules on the application of this principle or provided some guidelines to users.<sup>46</sup>

Alongside environmental law, the sustainability principle is being actively applied in social law. For example, since Latvia has recognised itself as being a socially responsible state, it has been derived from this principle that it is the duty of the state to form a sustainable and balanced policy for ensuring the welfare of the society.<sup>47</sup> It has been recognised in the case law of the Constitutional Court that Article 109 of the *Satversme* guarantees the inhabitants the right to a stable and predictable, as well as effective, just and sustainable system of social protection, which ensures commensurate social services.<sup>48</sup> Also, it has been explained that the sustainability of the system means that it should be of the kind that would allow ensuring social

<sup>43</sup> Vincent Hély, Jean-Philippe Antoni. Combining indicators for decision making in planning issues: A theoretical approach to perform sustainability assessment. *Sustainable Cities and Society*, Vol. 44, 2019, p. 844.

<sup>44</sup> Spatial Planning Law says that in the development of a spatial plan the principle of sustainability, which ensures a qualitative environment, balanced economic development, rational utilisation of natural, human and material resources, development and preservation of the natural and cultural heritage for the present and next generations, should be observed. Spatial Planning Law. Available at: [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Spatial\\_Planning\\_Law.doc](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Spatial_Planning_Law.doc) [last viewed October 1, 2019].

<sup>45</sup> Judgement of the Constitutional Court of the Republic of Latvia of 17 January 2008 in case No. 2007-11-03, para. 15. Available at: [http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/05/2007-11-03\\_Spriedums\\_ENG.pdf#search=2007-11-03](http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/05/2007-11-03_Spriedums_ENG.pdf#search=2007-11-03) [last viewed October 10, 2019].

<sup>46</sup> Judgement of the Constitutional Court of the Republic of Latvia of 24 September 2008 in case No. 2008-03-03, para. 17.2. *Latvijas Vēstnesis*, No. 151 (3935), 30.09.2008; Judgement of the Constitutional Court of the Republic of Latvia of 30 January 2004 in case No. 2003-20-01, para. 8.2. Available at: [http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2003/09/2003-20-01\\_Spriedums\\_ENG.pdf#search=2003-20-01](http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2003/09/2003-20-01_Spriedums_ENG.pdf#search=2003-20-01) [last viewed October 11, 2019]; Judgement of the Constitutional Court of the Republic of Latvia of 3 May 2011 in case No. 2010-54-03, para. 12.1.1. *Latvijas Vēstnesis*, No. 70 (4468), 06.05.2011. Judgement of the Constitutional Court of the Republic of Latvia of 9 October 2014 in case No. Nr.2013-19-03, para. 15.1. *Latvijas Vēstnesis*, No. 201 (5261), 10.10.2014; Judgement of the Constitutional Court of the Republic of Latvia of 19 November 2009 in case No. 2009-09-03, para. 14. *Latvijas Vēstnesis*, No. 184 (4170), 24.11.2009.

<sup>47</sup> Judgement of the Constitutional Court of the Republic of Latvia of 15 March 2010 in case No. 2009-44-01, para. 22. Available at: [http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/07/2009-44-01\\_Spriedums\\_ENG.pdf#search=2009-44-01](http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/07/2009-44-01_Spriedums_ENG.pdf#search=2009-44-01) [last viewed October 11, 2019].

<sup>48</sup> Judgement of the Constitutional Court of the Republic of Latvia of 19 December 2011 in case No. 2011-03-01, para. 15.2. Available at: [http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2011/02/2011-03-01\\_Spriedums\\_ENG.pdf#search=2011-03-01](http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2011/02/2011-03-01_Spriedums_ENG.pdf#search=2011-03-01) [last viewed October 11, 2019].

security not only to the present but also to the future generations.<sup>49</sup> This means that the legislator should always be able to balance and use reasonably the state budget resources, weighing the rights of an individual and the welfare of the whole society.<sup>50</sup> I.e., the state's actions should never jeopardise the sustainability of the social budget.<sup>51</sup> Ensuring the sustainability of the social budget has been deemed to be a legitimate aim for restricting fundamental rights in the case law of the Supreme Court.<sup>52</sup> With respect to the pension system, it has been found that the sustainability of pension system is based on three principles: adequacy, financial sustainability and capability to adapt itself to changes.<sup>53</sup>

Sustainability also has been recognised as an essential principle in the regulation of the system of higher education.<sup>54</sup> Recently, this principle has gained a new dimension in the case law of the Constitutional Court, which has applied the sustainability principle to various institutions of constitutional law (see further).

#### 4. Some remarks about global constitutionalism, global environmental constitutionalism and sustainability

Presently, a new concept – global constitutionalism – has emerged.<sup>55</sup> As noted by professor Klaus Bosselmann, the phenomenon of global constitutionalism is created by the growing interdependence of nation states, which has generated a certain “constitutionalization of international organizations” recognizing such principles as human rights, state responsibility, and *ius cogens* or *erga omnes* norms.<sup>56</sup> I.e., values, which usually have been examined in a national framework (for example, the rule of law, justice, human rights), today are addressed more comprehensively

<sup>49</sup> Judgement of the Constitutional Court of the Republic of Latvia of 15 February 2018 in case No. 2017-09-01, para. 15.1. *Latvijas Vēstnesis*, No. 35 (6121), 19.02.2018.

<sup>50</sup> Judgement of the Constitutional Court of the Republic of Latvia of 19 October 2017 in case No. 2016-14-01, para. 19.3. *Latvijas Vēstnesis*, No. 209 (6036), 20.10.2017.

<sup>51</sup> Judgement of the Constitutional Court of the Republic of Latvia of 15 February 2018 in case No. 2017-09-01, para. 15.1. *Latvijas Vēstnesis*, No. 35 (6121), 19.02.2018.

<sup>52</sup> Judgement of the Supreme Court of the Republic of Latvia on 14 December 2015 in case No. A420445113 para. 5. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi> [last viewed October 10, 2019]; Judgement of the Supreme Court of the Republic of Latvia on 2 October 2014 in case No. A420401913, para. 4.6. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi> [last viewed October 10, 2019].

<sup>53</sup> Judgement of the Constitutional Court of the Republic of Latvia of 21 December 2009 in case No. 2009-43-01, para. 27.2. Available at: [http://www.satv.tiesas.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/07/2009-43-01\\_Spriedums\\_ENG.pdf#search=2009-43-01](http://www.satv.tiesas.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/07/2009-43-01_Spriedums_ENG.pdf#search=2009-43-01) [last viewed October 10, 2019].

<sup>54</sup> Judgement of the Constitutional Court of the Republic of Latvia of 7 June 2019 in case No. 2018-15-01, para. 18. *Latvijas Vēstnesis*, No. 116, 10.06.2019.

<sup>55</sup> See more about constitutionalism in World Constitutionalism, Principal V. M. et al. (eds.), Cambridge Scholars Publisher, 2007, pp. 1–16.

<sup>56</sup> Bosselmann K. Global Environmental Constitutionalism: Mapping the Terrain. *Widener Law Review*, Vol. 21, No. 2, p. 171. Available at: <http://datubazes.lanet.lv:2095/login.aspx?direct=true&db=a9h&AN=110507334&site=ehost-live> [last viewed July 16, 2019].



due to their global nature. This principle is known in Latvia because, for example, the harmony of the national fundamental human rights and international human rights is recognised.<sup>57</sup> Human rights as the most important aspect of contemporary constitutionalism are relevant in all countries. It could be said that Latvia is integrated in this global chain of constitutionalism.

Today, protection of the environment is of fundamental importance. The Constitutional Court has upheld this finding.<sup>58</sup> One can subscribe to professor K. Bosselmann's thesis – if environmental protection has constitutional status in many states and if “we accept that the twenty-first century will be defined by its success or failure of protecting human rights and the environment”<sup>59</sup> then it is possible to talk about global environmental constitutionalism. Environmental constitutionalism concerns not only the duty to realize environmental obligations but also the procedure in which those obligations should be fulfilled.<sup>60</sup> Sustainability is one of the principles of environmental constitutionalism.<sup>61</sup> It can be said that, in Latvia, lots of attention is paid to the development, implementation and effectiveness of environmental rights in the constitution, because, first of all, the *Satversme* includes Article 115<sup>62</sup>, and the obligation of institutions of public power is derived thereof to establish and maintain an effective system for environmental protection; and, secondly, as noted above, the concept of sustainability, environmental protection has been enshrined *expressis verbis* in the Preamble to the *Satversme*. Thus, it can be said that Latvia successfully fits into global environmental constitutionalism with sustainability as one of its elements.

<sup>57</sup> Judgement of the Constitutional Court of the Republic of Latvia of 21 December 2009 in case No. 2009-43-01, para. 20. Available at: [http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/07/2009-43-01\\_Spriedums\\_ENG.pdf#search=2009-43-01](http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/07/2009-43-01_Spriedums_ENG.pdf#search=2009-43-01) [last viewed July 16, 2019].

<sup>58</sup> Judgement of the Constitutional Court of the Republic of Latvia of 24 February 2011 in case No. 2010-48-03, para. 6. Available at: [http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2010/07/2010-48-03\\_Spriedums\\_ENG.pdf#search=2010-48-03](http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2010/07/2010-48-03_Spriedums_ENG.pdf#search=2010-48-03) [last viewed July 16, 2019].

<sup>59</sup> Bosselmann K. Global Environmental Constitutionalism: Mapping the Terrain. *Widener Law Review*, Vol. 21, No. 2, p. 173. Available at: <http://datubazes.lanet.lv:2095/login.aspx?direct=true&db=a9h&AN=110507334&site=ehost-live> [last viewed July 16, 2019].

<sup>60</sup> Kotzé L. J. Arguing Global Environmental Constitutionalism. *Transnational Environmental Law*, Vol. 1, No. 1, 2012, p. 208.

<sup>61</sup> Prof. Kotzé notes that that environmental constitutionalism includes several elements, like, environmental rights; environmental justice; intra- and intergenerational equity; ecological integrity; sustainability and its associated principles (functioning here as universal environmental moral and ethical ideals or values); an extended vision of the environmental obligations of the state and the private sector; judicial control of executive and legislative environmental governance functions; and an expansive notion of private and public accountability. Kotzé, L. J. Arguing Global Environmental Constitutionalism. *Transnational Environmental Law*, Vol. 1, No. 1, 2012, p. 209.

<sup>62</sup> Article 115 of the Constitution states that “The State shall protect the right of everyone to live in a benevolent environment by providing information about environmental conditions and by promoting the preservation and improvement of the environment.”

## 5. Sustainability and the duty of individuals

Clearly, the primary responsibility for preserving environment in the context of sustainability principle lies with the state and those institutions that have various obligations that follow from Article 115 and other normative acts. The thesis that the possibilities of the current and the future generations to live in a wholesome environment in many ways depend on the state's readiness to ensure sustainable development should be upheld.<sup>63</sup> Moreover, the responsibility of the state should be understood broadly and it cannot be attributed only to performing the function of sanctioning. The state's obligation to preserve and improve environmental quality, to use sustainable natural resources should be discussed. However, at the same time, it is important to understand also the responsibility of each individual – each member of society – for implementing the sustainability principle. Hence, in the context of the sustainability principle, also the principle of personal responsibility should be discussed. Everyone's responsibility follows from the third sentence in the fifth paragraph of the Preamble to the *Satversme*, which provides that everyone should care for, among others, future generations, environment and nature, thus imposing an obligation on all to become involved in the implementation of sustainability. This does not concern only the environmental protection. Responsibility to the future generations means responsible actions in various areas of life. In other words, sustainability is not solely the state's responsibility. Each and every member of society should care for the implementation of this principle.

In view of everyone's duty in the context of sustainability, the matter regarding agricultural land, which is one of the most important natural resources for the national economy in Latvia has been dealt with in the case law.<sup>64</sup> The Constitutional Court, referring to the sustainability principle included in the Preamble to the *Satversme*, including everyone's duty and responsibility to the next generations and environment, has defined the obligations of the owners of agricultural land, *inter alia*, to ensure preservation, effective use and tilling of agricultural land, which includes preservation of biological diversity typical of Latvia, as well as to care for the use, cultivation of such land and to preserve it for future generations.<sup>65</sup> It can be said that case law recognises the principle of personal responsibility in the context of sustainability.

<sup>63</sup> Judgement of the Constitutional Court of the Republic of Latvia of 6 October 2016 in case No. 2016-24-03, para. 7. *Latvijas Vēstnesis*, No. 201, 10.10.2017.

<sup>64</sup> Judgement of the Constitutional Court of the Republic of Latvia of 18 October 2018 in case No. 2018-04-01, para. 16. *Latvijas Vēstnesis*, No. 208 (6294), 22.10.2018.

<sup>65</sup> *Ibid.*

## 6. Sustainability and constitutionalism. Sustainability in the Latvian constitutional law

The concept of “sustainability constitutionalism”, which incorporates both values – constitutionalism and sustainability, is known in legal science.<sup>66</sup> This concept can be used in various ways. It can be taken as the basis for making new normative acts and also applied in state law. Analysis of case law shows that in Latvia, in the field of constitutional law, sustainability has been applied in various ways. For example, it has been recognised in case law that national sustainability means the state’s responsibility for adopting a sustainable budget<sup>67</sup>, which is always linked to the obligation to ensure the existence of appropriate resources in the state budget.<sup>68</sup> Sustainability is linked also to democracy and respect for human rights and fundamental freedoms, which are interconnected and mutually reinforcing values.<sup>69</sup> The concept of “sustainability of democracy” has become enshrined in case law. It is understood as the need to care for the protection of the national constitutional bodies and national security institutions against persons, who by their actions pose a threat to the independence of the State of Latvia and to the principles of a democratic state governed by the rule of law.<sup>70</sup>

In the case law of the Constitutional Court over the last years findings have crystallised that are attributed to the legislator and the policy it implements, by adopting generally binding legal norms in the context of developing a sustainable state. Since the legislator has been called to exercise the legislative power, the outcomes of its work and also the procedure should be oriented towards a sustainable result. It can be said that sustainable development is closely linked to the existence of sustainable legal regulation.<sup>71</sup> Thus, two main aspects have crystallised: the sustainability of the state and sustainable legal regulation as one element of a sustainable state.

The author believes that a sustainable legal regulation, first and foremost, complies with the *Satversme*, both as to its content and form, or in the process of

<sup>66</sup> James R. May Sustainability and Global Environmental Constitutionalism. In: *New Frontiers in Environmental Constitutionalism*. Available at: <https://wedocs.unep.org/bitstream/handle/20.500.11822/20819/Frontiers-Environmental-Constitutionalism.pdf?sequence=1&isAllowed=y> [last viewed October 7, 2019], p. 315.

<sup>67</sup> Judgement of the Constitutional Court of the Republic of Latvia of 3 February 2012 in case No. 2011-11-0, para. 17.5. Available at: [http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2011/05/2011-11-01\\_Spriedums\\_ENG.pdf#search=2011-11-01](http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2011/05/2011-11-01_Spriedums_ENG.pdf#search=2011-11-01) [last viewed October 8, 2019].

<sup>68</sup> Judgement of the Constitutional Court of the Republic of Latvia of 25 March 2015 in case No. 2014-11-0103, para. 20. Available at: [http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2014/04/2014-11-0103\\_Spriedums\\_ENG.pdf#search=2014-11-0103](http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2014/04/2014-11-0103_Spriedums_ENG.pdf#search=2014-11-0103) [last viewed October 8, 2019].

<sup>69</sup> Judgement of the Constitutional Court of the Republic of Latvia of 29 June 2018 in case No. 2017-25-01, para. 20.2. *Latvijas Vēstnesis*, No. 130 (6216), 02.07.2018.

<sup>70</sup> *Ibid.*, Judgement of Regional Administrative Court of 30 August 2018 in the case No. A43007918. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi> [last viewed October 5, 2019].

<sup>71</sup> Judgement of the Constitutional Court of the Republic of Latvia of 18 April 2019 in case No. 2018-16-03, para. 17. *Latvijas Vēstnesis*, No. 80 (6419), 23.04.2019.

its adoption the norms and principles of the *Satversme* have been complied with. It has been found in the case law of the Constitutional Court that the sustainability principle is applicable also to the legislative process and thus, sustainability can be attained by implementing also the principle of good legislation that is derived from the principle of a state governed by the rule of law.<sup>72</sup> Likewise, the principle of a sustainable state requires a legislative outcome that is well-considered, is not hurried and is stable. In the context of the principle of legal security<sup>73</sup>, the legal norms adopted by the legislator, in addition to being predictable and clear must also be stable and constant, allowing a person to make not only short-term decisions but also to build the long-term future plans.<sup>74</sup> The case law of the Constitutional Court recognises a solution as being sustainable if it, for example, in a particular field – electricity production – will facilitate “sustainable and safe production of electricity”.<sup>75</sup> In hearing the so-called case of “Solidarity Tax – Natural Persons”, the Constitutional Court found that, notwithstanding the legislator’s discretion in the area of taxation policy, it had to abide by the principles of effectiveness, fairness, solidarity, and timeliness.<sup>76</sup> Although these principles have been applied to the normative regulation in a narrow field – taxation, the author believes that, obviously, these principles, taking into account the specificity of each particular area, may be applied to any sustainable normative solution. Any legal regulation should be just. The principle of justice is always the main leitmotif of a state governed by the rule of law. The opinion can be upheld that justice can be attained if harmony and balance are ensured; the principle of equality is abided by; the distribution of benefits is merit-based.<sup>77</sup> The whole legislative process should be aimed at attaining justice. Obviously, normative regulation should be effective, which includes economic effectiveness. Alongside the economic effectiveness, another standard for measuring the effectiveness of the law exists.<sup>78</sup> It has been explained that the effectiveness of a law is determined by the fact whether society and courts abide by the particular law.<sup>79</sup> Likewise, timeliness is not of a minor importance also in other areas, not only in that of taxation.

Timeliness means that new normative regulation is introduced in a well-considered way and timely manner. Hurried, ill-considered, constantly amended laws do not create and develop society’s trust in public power.<sup>80</sup> A law, which is amended already in the year following its adoption, cannot be deemed to be sustainable. President of the State R. Vējonis also has pointed to this problem, concluding that the outcome of an ill-considered legal regulation is the need to improve and amend it.<sup>81</sup> However, the legislator should strive for constantly growing trust of persons in the state and law, as well as increasing awareness of the democratic process. This is an element of the principle of a rule-of-law state – to ensure stable laws in the state that

<sup>79</sup> Falcón y Tella M. J. Justice and Law. Leiden: BRILL, 2014, p. 26.

<sup>80</sup> Van der Meer T. In what we trust? A multi-level study into trust in parliament as an evaluation of state characteristics. *International Review of Administrative Sciences*, Vol. 3, No. 76, 2010, p. 518.

<sup>81</sup> Valsts prezidenta 2019. gada 4. februāra vēstule Nr. 36 Saeimas Juridiskajai komisijai [Letter of the State President of 4 February 2019 to Saeima Legal Committee]. Available at: [https://www.president.lv/storage/kcfinder/files/VP\\_040219\\_Nr.36.pdf](https://www.president.lv/storage/kcfinder/files/VP_040219_Nr.36.pdf) [last viewed July 12, 2019].

determine human lives.<sup>82</sup> Laws that are constantly amended do not create a stable legal environment. Likewise, the laws, in the adoption of which substantial and procedural violations have been committed, cannot promote and ensure sustainable national development. Sustainable normative regulation cannot be aimed at ensuring benefit to a particular person. It must serve society. Therefore, also in case law, sustainable solution is oriented towards protection of public welfare.<sup>83</sup>

The legislator's actions always should be aimed at a sustainable solution, and not only formally so. The legislator's aim should always be the adoption of good law – one that fosters trust in the state and law.<sup>84</sup> The legislator should always keep in mind that law influences the future, not the past.<sup>85</sup> This conclusion appositely fits into the context of sustainability.

## Conclusions

1. Although sustainability is a new term in legal science, it has become the guiding principle for human development and the central issue for states.
2. Although the sustainability principle originated in environment law, it has acquired broad dimensions and is being applied in the most diverse areas, retaining the essence of sustainability: the need to satisfy the present needs of humanity, at the same time taking care of the future generations. To phrase it differently – the sustainability principle demands long-term thinking.
3. In Latvia, the sustainability principle is not solely a political or governmental principle. This principle is included in normative acts *expressis verbis* in specific areas, turning it into a principle of a specific area. Moreover, the principle of sustainability has become a constitutional principle aimed at protection and implementation of aims and values included in the *Satversme*.
4. A conclusion follows from the Preamble to the *Satversme* that sustainability has become one of the principles of national development. To promote sustainable Europe and the world, Latvia itself should be oriented towards such development.
5. The research of the case law shows that the sustainability principle is applied both by the Constitutional Court and the courts belonging to the court system, and in the case law the sustainability principle has been applied in very diverse areas – environmental law and legal institutions related to it, in social law, in the area of higher education, and in state law. The case law of the recent years outlines the following trend: 1) the sustainability principle is constantly being

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<sup>82</sup> Lautenbach G. *The Concept of the Rule of Law and the European Court of Human Rights*. Oxford: Oxford University Press, 2013, p. 21.

<sup>83</sup> Judgement of the Constitutional Court of the Republic of Latvia of 18 October 2018 in case No. 2018-04-01, para. 16. *Latvijas Vēstnesis*, No. 208 (6294), 22.10.2018.

<sup>84</sup> Dissenting opinion of the Justice of the Constitutional Court of the Republic of Latvia Daiga Rezevska in case No. 2016-14-01, para. 6. *Latvijas Vēstnesis*, No. 251 (6078), 18.12.2017.

<sup>85</sup> Driesen D. M. *The Economic Dynamics of Law*, Cambridge University Press, 2012, p. 1.

applied in new branches of law; 2) the significance of sustainability pronouncedly dominates in the rulings by Constitutional Court and also the courts belonging to the court system created in the recent years.

6. Latvia successfully fits into the global environmental constitutionalism, one element of which is sustainability.
7. Sustainability is not solely the state's responsibility. The constitutional legislator expects responsible actions from each individual for the sake of the next generations, which is an integral part of sustainability.
8. Since the legislator has been called to exercise the legislative power, the outcomes of its work and also the procedure should be oriented towards a sustainable result. It can be said that sustainable development is closely linked to the existence of sustainable legal regulation. Thus, two main aspects have crystallised: the sustainability of the state and sustainable legal regulation as one element of a sustainable state.
9. Sustainable legal regulation, first and foremost, complies with the *Satversme*, both as to its content and form, and in the process of its adoption the norms and principles of the *Satversme* have been complied with, *inter alia*, the principles of effectiveness, justice, solidarity and timeliness, it is well-considered and dependable regulation.

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## SECTION 2

PERSONAL HUMAN LIBERTY  
AND AN INDEPENDENT  
STATE GOVERNED BY THE  
RULE OF LAW, FOUNDED  
ON DEMOCRATIC VALUES.  
200 YEARS SINCE THE  
ABOLITION OF SERFDOM IN  
THE BALTICS

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## THE INSTITUTE OF SERFDOM IN HILCHEN'S DRAFT LAND LAW OF 1599 – A REGIONAL COMPARISON

### Summary

Hilchen's draft land law for Livonia, a comprehensive work in three volumes written in 1599 at the request of the Polish king and on behalf of the Livonian nobility, was and is often regarded in legal literature and historical research as a document that tried to codify a particularly hard form of serfdom in Livonia. Comparisons with contemporary German and Polish land laws, Lithuanian and Curonian statutes and Roman law in the form of the contemporary *ius commune* provide a much more serf-friendly picture of Hilchen's draft, which will be analysed in more detail by this contribution.

**Keywords:** serfdom, early modern period, land law, David Hilchen, Livonia

### Introduction

In historiography and literature from the 19<sup>th</sup> century to the end of 20<sup>th</sup> century David Hilchen (1561–1610), who was Livonia's leading humanist in the late 16<sup>th</sup> century, was known mainly as the creator of the draft Land Law (*Landrechtsentwurf*)<sup>1</sup> of 1599, according to historians, for example, Arveds Švābe (Sigismunda Augusta Livonija politika. In: *Latvijas vēsture*, 1964). In terms of the oppression of servants, "Hilchen's draft Land Law reflects the maximum demands and endeavours of the Livonian nobility."<sup>2</sup> In our contribution, we will first provide the background for drafting of the Land Law and the contemporary political environment, than we will compare the provisions of the draft Land Law on serfdom with sources from Roman law, i.e., the Justinian Institutes and Codex. We will then move on to a comparison with contemporary German, Polish, Lithuanian and Curonian laws.

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<sup>1</sup> The research and writing of this article is supported by grants PUT1030 and IUT20-50 from the Estonian Research Council.

On the draft Land Law in general see Hoffmann T. *Der Landrechtsentwurf David Hilchens von 1599: Ein livländisches Rechtszeugnis polnischer Herrschaft* [David Hilchen's Land Law draft of 1599: A Livonian legal testimony of Polish rule]. Frankfurt am Main: Peter Lang, 2007), as well as Hoffmann T. *Livonian Law under Late Polish Rule*. In: *Einheit und Vielfalt in der Rechtsgeschichte im Ostseeraum*. Frankfurt am Main: Peter Lang, 2011, pp. 81–88.

<sup>2</sup> Švābe A. *Sigismunda Augusta Livonija politika*. [The Politics of Sigismund August in Livonia]. In: *Latvijas vēsture*, Stockholm: Daugava, 1962, p. 429.

## 1. Background of the draft Land Law

At the time, the middle knightly law (*Mittleres Ritterrecht*, printed in 1537), which constituted a fusion of the most important German medieval law collections, still applied in Livonia. The Livonian nobility had previously intended, under the rule of the Teutonic order, to draft a modern land law; when the Livonian nobility surrendered to Poland in 1561, it succeeded in their request to King Sigismund August to include their claim for a comprehensive land law for Livonia in the *Privilegium Sigismundi Augusti*<sup>3</sup>. It did provide that Livonian Land Law should be drawn up on the basis of Polish, Lithuanian and Livonian laws.<sup>4</sup>

The Polish king commissioned a learned lawyer, syndic of the city of Riga, notary of Wenden and king's secretary David Hilchen<sup>5</sup>, who composed a corresponding draft within only a few months. However, the draft was not finally promulgated by the Polish Sejm; only its procedural regulations in their substantial parts were put into force immediately by resolution of Sigismund III.<sup>6</sup>

## 2. The draft Land Law and its alleged role as the origin of serfdom in Livonia

Since the early 20<sup>th</sup> century, the draft Land Law has grown in infamy for its provisions on serfdom, which, in turn, gave Hilchen the role of “creator of serfdom for the Livonian peasantry”. The person who drew the most detailed attention to this aspect of the land law was the historian Roberts Vipers (Robert Wipper, 1859–1954), who went into exile from the Soviet Union to Latvia before he returned with his family to Moscow in 1941, working from 1943 at the Academy of Science of the Soviet Union (1943–1954).<sup>7</sup> Vipers states that Hilchen “had implemented [in the draft Land Law] artfully and in a sophisticated and well-planned manner the theory of slavery based on Justinian's *Institutiones*”.<sup>8</sup> Vipers compared the initial parts of the *Institutiones* of Justinian and the second book of the draft Land Law and came to the conclusion that Hilchen “intended to protect the ears of his more enlightened contemporaries by carefully avoiding terms as ‘slave’ or ‘slavery’ and used instead the expression ‘*alieno iuri subiectae*’

<sup>3</sup> Schirren C. Die Capitulationen der livländischen Ritter- und Landschaft und der Stadt Riga vom 4. Juli 1710, nebst deren Confirmationen [The *Capitulationen* of the Livonian Nobility and the City of Riga of 4<sup>th</sup> July 1710, including their Confirmations]. Dorpat: Karow, 1865, pp. 2–23.

<sup>4</sup> See art. 7 in the second *Ordinatio Livonia*, available in: *Volumina Legum* II, St. Petersburg: Ohryzko Jozafat, 1859, p.377.

<sup>5</sup> See for the latest biography and edition of his Latin correspondence 1577–1603: Viiding K., Hoffmann T., Siimets-Gross H., Sapala P. David Hilchen [Heliconius] (1561–1610). In: *Early Modern Letters Online*. Oxford: University of Oxford, 2018. Available at: <http://emlo-portal.bodleian.ox.ac.uk/collections/?catalogue=david-hilchen> [last viewed October 27, 2019].

<sup>6</sup> On details of the genesis of the draft Land Law see Hoffmann T. 2007, pp. 62–65.

<sup>7</sup> Jüristo D. Mõnedest Läti ülikooli esimestest ajaloo professoritest. [About some of the First Professors of History in the University of Latvia]. Manuscript [used with the permission of the author], pp. 2–6.

<sup>8</sup> Vipers R. David Hilchen. Die erste rechtliche Fixierung der Leibeigenschaft in Livland [The First Legal Fixation of Serfdom in Livonia]. In: *Filologu biedribas raksti*, No. 8, 1928, pp. 225–240, here pp. 234–235.

(*sc. personae*)”, even though in his understanding “it in fact was slavery that was constituted here by law”.<sup>9</sup> However, as a historian Vipers did not know or did not pay attention to the systematic features of the Justinian Institutes<sup>10</sup> as a legal text. However, beyond that, his analysis was so convincing and suitable to Soviet doctrine that subsequent literature – for example, from Estonia, Latvia, and also Germany – in many cases followed Vipers’ verdict on Hilchen.

Even as late as in 1992, the “Eesti talurahva ajalugu”, for instance, states the following: “The manor owners wished to increase their power over their peasants, which can clearly be seen from the codex drafts by David Hilchen (1599) [...]. They are mainly based on provisions concerning the slavery of Roman law”.<sup>11</sup>

## 1. The draft Land Law on serfs and its Roman Law sources

In the draft Land Law, the regulation of serfs says that they belong to the category of persons “who are dependant of the rights of another” together with persons under guardianship. While guardianship was regulated in the Institutions, serfs were not, and so that these parts had to be composed by Hilchen himself.

Title 11 § 1 about serfs reads, as follows: “Serfs and their offspring – just as their possessions<sup>12</sup> – are in the power of their landlord, and they cannot dispose over those without their landlord’s consent, neither can they leave to go somewhere else.”<sup>13</sup>

The ban of leaving the land was the fundamental element that distinguished serfs or “hereditary peasants” (*Erbbauer*) from free person or lease farmers. In Ancient Rome slaves had to obey their owner’s commands, but were not bound to the land by the law.

In early modern German scholarly discussion serfs were mainly compared to Roman *coloni*, for example in Cod. 11, 48, 23, 1. According to this, the land-bound peasants or colons and their children were perpetually free, but “they shall have no right [...] to leave the estate and go to another, but shall always be

<sup>9</sup> Vipers R. 1928, pp. 234–235.

<sup>10</sup> See for a detailed analysis of the land law draft and Justinian Institutes Siimets-Gross H., Hoffmann T. Der Einfluss der Justinianischen Institutiones auf die Regelung der Leibeigenschaft im Landrechtentwurf David Hilchens (1599) [The Influence of Justinian’s Institutiones on the Regulation of Serfdom in David Hilchen’s Land Law draft (1599)]. In: Forschungen zur baltischen Geschichte, No. 13, 2018, pp. 9–23.

<sup>11</sup> Eesti talurahva ajalugu [The History of Estonian Peasantry], Vol. 1, Tallinn: Olion, 1992, p. 463.

<sup>12</sup> About the right of possession see more in Seppel M. Die Kreditbeziehungen der leibeigenen Bauern Livlands im 16. Jahrhundert [Loan Relationships on and among Livonian Serfs in the 16th Century]. In: Estnisches Mittelalter: Sprachen – Gesellschaft – Kirche. Schriften der Baltischen Historischen Kommission, No. 20, 2015, pp. 145–166.

<sup>13</sup> For details, see: Siimets-Gross H., Hoffmann T., 2018, pp. 9–23.

bound to the soil which their father has once undertaken to cultivate”<sup>14</sup>, which is closest to Hilchen’s provision on serfs.<sup>15</sup>

This provision stresses the personal freedom of a *colonus* but still provides that he was bound to his land. The category of *colonus* in the sense of land-bound tenant was unknown to the Justinian Institutes.

It is true that Hilchen used Justinian’s systematic private law textbook as a model, but not only in the first part of the regulations about persons and their division – which is the only issue analysed by Vipers –, but also in the structuring of the entire beginning of the second book of the draft Land Law. In doing so, he followed the contemporary practice of his time and centuries after. Also in Lithuania, the neighbouring territory to Livonia, Roman law had already been received. Even the Lithuanian First Statute of 1520 had been influenced by Roman law in the form of Institutes, as well as Digest and Codex. The Second (1566) and Third Lithuanian Statutes (1588) were even more strongly influenced by Roman law.<sup>16</sup>

A detailed comparison also reveals that Hilchen explicitly did not include the regulations of the Institutes on slaves into the draft Land Law (he omitted them in their entirety). After continuing according to the division in Institutes, Hilchen turns to the division of *alieni iuri subiectae*, the legal status that Hilchen’s land law draft distributes to peasants. The concrete classification of those provisions was not found in the Institutes, so Hilchen had to invent those provisions himself. This chapter includes doubtlessly free peasants as well as lease farmers (*Geldpächter*), who in Livonia were generally free to move or leave as far as they paid their regular payment of the lease.

It is quite probable that Hilchen – a lawyer who had studied in Germany – knew not only the regulations of Justinian’s Codex, but also the contemporary

<sup>14</sup> Annotated Justinian Code. Translation by Blume F. H. II (ed.). Available at: <http://www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2/index.html> [last viewed October 27, 2019].

<sup>15</sup> See for detailed analysis of Hilchen’s land law draft with Codex of Justinian: Siimets-Gross H., Hoffmann T. David Hilchen (1561–1610) und das “Kolonenrecht” des Codex Justinianus [David Hilchen and the law on “Colones” in the Code of Justinian]. In: Recht und Wirtschaft in Stadt und Land. /Law and Economics in Urban and Rural Environment. Neunter Rechtshistorikertag im Ostseeraum (The 9<sup>th</sup> Conference in Legal History in the Baltic Sea Area). Luts-Sootak M, Schäfer F. (eds.), Frankfurt am Main: Peter Lang, 2020, pp. 421–436.

<sup>16</sup> For an overview see Steinke D. Die Zivilrechtsordnungen des Baltikums unter dem Einfluss ausländischer, insbesondere deutscher Rechtsquellen [The Private Law Systems in the Baltics under the Influence of foreign, especially German Law Sources]. Göttingen: Universitätsverlag Osnabrück, 2009, p. 93ff, as well as Danilowicz I. Historischer Blick auf das Litthauische Statut und den Einfluss des Römischen Rechts auf das Polnische und Litthauische. [A historical View of the Lithuanian Statute and the Influence of the Roman Law to the Polish and Lithuanian Law]. Dorpat: Schünmann, 1834.

discussion about the statutes of the serfs that was on-going at that time in Germany.<sup>17</sup>

## 2. Regulation in earlier Livonian Law and in German contemporary legal discussion

The previous Livonian Middle Knightly Law had mentioned the peasants, although not in any great detail. The notion in Chapter 234 has the following wording: “Wor ein here ein dorp hefft, dar mach he synen buren geven ein sündellick recht” (“Where a Lord has a village, there he has a proper right in his peasants”).

The *Privilegium Sigismundi Augusti* did not define a serf, although it did regulate the right of a former land owner to demand the serf back, Art. XXII: “Peasants, who [...] are in the power of another, must not be kept captive by this landlord, but have to be returned [...] to the one who makes the claim”. This did bind the serfs to the land, according to the *Privilegium* that was given by the king in 1561. In Livonia, land-bound peasants from the late 16<sup>th</sup> to the 18<sup>th</sup> century had a very similar status to that in northern Germany.<sup>18</sup> The prohibition on them abandoning their land was present in the contemporary discussion on the northern German serfdom, as remarked on by eminent lawyers such as Husanus<sup>19</sup>, Mevius<sup>20</sup> und Zasius<sup>21</sup>. It was the central element that distinguished serfs or hereditary peasants from free tenants.<sup>22</sup> But this would not necessarily

<sup>17</sup> See for introduction Knothe H.-G. Zur Entwicklung des Rechts der Gutsherrschaft im deutschen Ostseeraum im Spiegel von Mevius Abhandlung über die “Bauers-Leute” [On the Evolution of the Legal Framework of the Concept of *Gutsherrschaft* in the German Baltic Sea Area as reflected in Mevius' Writings on Peasants]. In: Geschichte und Perspektiven des Rechts im Ostseeraum. Erster Rechtshistorikertag im Ostseeraum, hrsg. von Eckert J., Modéer K. A., Frankfurt/Main *et al.*: Peter Lang, 2002, pp. 237–274.

<sup>18</sup> Schmidt C. Leibeigenschaft im Ostseeraum [Serfdom in the Baltic Sea Area]. Köln: Böhlau 1997, on Livonia pp. 51–62. The comprehensive research on serfdom in the Baltic Sea area, on Livonia, does not deal substantially with the Polish period.

<sup>19</sup> Heinrich Husanus (1536–1587) was a German jurist, diplomat, legal scholar and author of various legal opinions. On legal humanism see in general Wieacker F. *Privatrechtsgeschichte der Neuzeit* [A History of Private Law in Modern Times], Göttingen: Vandenhoeck & Ruprecht, 1996, p. 145f.

<sup>20</sup> David Mevius (1609–1670) was a legal practitioner and preeminent lawyer of his time. For details, see David Mevius (1609–1670), *Leben und Werk eines pommerischen Juristen von europäischem Rang* [David Mevius – Life and Achievements of a Pomeranian lawyer of European Rank], hrsg. Jörn N., Schriftenreihe der David-Mevius-Gesellschaft, No. 1, 2007, Hamburg: Kovac, 2007.

<sup>21</sup> Ulrich Zasius (lat. Udalricus Zasius; 1461–1535) was among the most influential humanistic legal scholars of his time and was author of legal opinions and legislative drafts. For details, see Meußner A., Für Kaiser und Reich. Politische Kommunikation in der Frühen Neuzeit: Johann Ulrich Zasius (1521–1570) als Rat und Gesandter der Kaiser Ferdinand I und Maximilian II [For Emperor and Empire. Political Communication in Early Modern Times]: Johann Ulrich Zasius (1521–1570) as Counselor and Legate of Emperors Ferdinand I and Maximilian II]. Husum: Matthiesen Verlag, 2004 (= Historische Studien).

<sup>22</sup> Wiese M. Leibeigene Bauern und Römisches Recht im 17. Jahrhundert. Ein Gutachten des David Mevius [Serfs and Roman Law in the 17<sup>th</sup> Century. A legal Opinion about David Mevius]. In: *Schriften zur Europäischen Rechts- und Verfassungsgeschichte* 52, 2006, pp. 155–158.



mean that serfs were seen as slaves in terms of ancient Roman law. Böckelmann<sup>23</sup>, for instance, points out the word serf in his home region (the Palatinate) in Latin would not be translated as “*servus/servi*”, as only those lacking all freedom were designated by this title.<sup>24</sup>

### 3. The notion of the ‘serf’ (*Erbpauren*) in Polish, Lithuanian and Curonian law

In 1557, king Sigismund August started promoting agrarian reforms, which did concern both agrarian property of the sovereign as well as private property. According to Zytkowicz, these reforms “increased peasants’ obligations in terms of paying the roll of rent rather in money than in kind which had the effect that more and more peasants tried to escape their place [*Scholle*]”<sup>25</sup>. But in Poland, a “gradual narrowing of the peasant’s legal status on the land (*glæbe adscriptio*) is already witnessed from the development of the latifundia (1496). The many laws issued by the Diet against escape (more than 60 in the 16<sup>th</sup> and 17<sup>th</sup> centuries) are evidence that escape was proving an efficient means of resistance for the peasants.” At the same time, relations between the peasant and government authorities were gradually broken off. From the middle of the 15<sup>th</sup> century, suits brought by subjects against their lords disappeared from the royal courts of justice. The legal situation of the peasant population can be defined as strict serfdom.<sup>26</sup>

As described in detail by Cerman,<sup>27</sup> different forms of serfdom prevailed in Central and Eastern Europe. Szoltysek<sup>28</sup> elucidates for the Rzeczpospolita that “the most extreme form was the manorial system based on peasants’ personal and hereditary subjection, as well as on their labour obligations (*corvée*) to the manors. While this system was introduced in the territories of Poland–Lithuania during the 16<sup>th</sup> to early 17<sup>th</sup> centuries, the strongest manorial systems developed in western Poland and in some parts of Ukraine (esp. Volhynia).”<sup>29</sup>

<sup>23</sup> Johann Friedrich Böckelmann (1633–1681) was from 1661 Palatinian Council, and from 1664 Vice-President of the *Hofgericht*. For details, see Scholz L. Leibeigenschaft rechtfertigen – Kontroversen um Ursprung und Legitimität der Leibeigenschaft im Wildfangstreit [Justifying Serfdom – Controversies on the Origin and Legitimacy of Serfdom in the Context of *Wildfangstreit*]. *Zeitschrift für Historische Forschung*, No. 45 (S2), 1, 2018, pp. 41–81.

<sup>24</sup> Scholz L. 2018, p. 69.

<sup>25</sup> Zytkowicz L. The Peasant’s Farm and the Landlord’s Farm in Poland from the 16<sup>th</sup> to the Middle of the 18<sup>th</sup> Century. *Journal of European Economic History*, Vol. 1, No. 1, 1972, pp. 135, 143.

<sup>26</sup> Zytkowicz L., 1972, p. 147.

<sup>27</sup> Cerman M. *Villagers and Lords in Eastern Europe, 1300–1800*. Basingstoke: Palgrave Macmillan, 2012.

<sup>28</sup> Baten J., Szoltysek M. A golden age before serfdom? The human capital of Central-Eastern and Eastern Europe in the 17<sup>th</sup>–19<sup>th</sup> centuries. MPIDR Working Paper No. WP 2014-008, August 2014. Available at: <https://www.demogr.mpg.de/papers/working/wp-2014-008.pdf> [last viewed October 27, 2019].

<sup>29</sup> Szoltysek M. Three kinds of preindustrial household formation system in historical Eastern Europe: A challenge to spatial patterns of the European family. *The History of the Family*, No. 13 (3), 2008, pp. 223–257.

Lithuanian law regulated serfdom in detail in the third Lithuanian Statute from 1588<sup>30</sup>. For example, its chapter 12 states: "If domestic servants [...] and other serfs [...] escape from their landlord, the landlord shall not be impeded by remote location, long duration, or prescription periods to reclaim [...] the serf". According to Lithuanian Statutes, Art. 14, the landlord to whom the serf fled has to give him back complete with family and possessions. After being cited by court, he has to compensate the serf's work and if he does not render the serf upon being ordered so by the court, he has additionally to pay a fine and compensate the work: "[...] If the person summoned to court does not admit and return the serf [...], he has – just as if he has to pay a fine for each person on basis of this statute – to make restitution for each person double, as well as compensate the damage caused by the serf [...] and his missing work [...]."

These regulations quite closely correlate to the respective provisions in contemporary Curonian law (Statutes from 1617), where the term "serf" is defined, as well as the questions of fugitive serfs resolved. According to Art. 50<sup>31</sup>: *Prima potestas privata est dominorum in homines proprios, sive rusticos* (First of all, the Lords (=domines) have personal power over their own people, i.e. their peasants). Art. 52 states further – "*Si tales homines mares sine voluntate domini sui ad alios transfugerint [...] reddi debebunt*". (If male persons without consent of their owner flee to others [...] they should be given back), and Art. 53 clarifies that "*Adversus tales fugitivos [...] nullus sit praescriptioni locus [...]*" (against fugitives [...] no limitation of action can take place [...].)

Regarding the question of a period of limitation of action, Lithuanian statutes differentiated according to the distance from the old landlord and the type of dependant persons. According to Art. 12, the option to remain with a new landlord – on the condition that the old one did not reclaim him – after a period of 10 years was only granted to "Erbunterthanen" (i.e., a peasant who rendered his work service: *arbeitsleistender Pawr*), who now lived within a radius of 5 or 6 miles from the old landlord. Household servants (*ErbHaussGesind*) belonged to the other type of person, captives and other serfs (*sonst leibeigene*) and the right to claim them was limited neither by "the distance of the place, by the length of time nor by the prescription period". The other group of serfs was made up only of the persons "that were taken captive during the war or other servants that were serfs and their offspring and children" (Art. 21). Thus, under Lithuanian law household servants and other serfs endured the hardest conditions.

Curonian law did not foresee the possibility that the actions could be limited, and the same applies partly to Lithuanian law, although there the picture is more differentiated. Concerning the prescription period, this correlates to the Codex

<sup>30</sup> The text used stems from the German manuscript from the Rara collection of the University Library in Tartu: Das gantze Statuten Buch des Gross Fürsten=thumbs Littawen. Aus dem Polnischen ins Teütsche gebracht und geschrieben [The Entire Book of Statutes of the Grandduchy of Lithuania. Translated from Polish into German]. Collection of Manuscripts, No. 134.

<sup>31</sup> Die Quellen des Curländischen Landrechts [The Sources of Curonian Land Law]. Bd. 1, Lief. 3, Acta Commissionis de anno 1617. Hrsg Rummel C v. Dorpat: Kluge, 1848. The numeration could vary according to the edition or manuscript.

of Justinian, where the *fugitivus* or runaway was seen as a thief – theft, too, had no prescription period.

In comparison to Lithuanian and Curonian law, Hilchen’s draft Land Law was more serf-friendly, as it provided a limitation period of ten years and grants serfs the right to remain with their new landlord after those ten years, as stated in Book 2, Art. 12 (2): the landlord to whom the serf escaped had – if the landlord did not return the serf and did not attend court after being duly summoned – to pay a fine of 20 Polish Florins, and still return the serf, unless the serf has been missing for ten years, in which case his claim expired.<sup>32</sup> This fine was smaller than, for example, in the Curonian Statutes, according to which 40 florins should be paid (Art. 54).

## Conclusions

Ultimately, it should be noted that the allegedly hard rules on serfs in Hilchen’s draft Land Law originate primarily from previous customs, laws or other legal acts. Already the *Privilegium Sigismundi Augusti* mentioned serfdom as “old [...] legal usus in Livonia”.

Hilchen’s draft, however, contains several regulations that deviate from the privilege and other contemporary local rules, but, above all, from the Roman tradition and other regional rules, such as the Curonian or Lithuanian statutes. In this draft, the provisions on serfdom – such as the provisions on the return of fugitive peasants or about the limitation period of claims, etc. – are more favourable to the serf and his new landlord than many contemporary practices or laws in northern Germany, Polish Law, the Code of Justinian or the Curonian and Lithuanian Statutes, which stipulated harsh punishment for fugitive serfs, and additionally did not grant them the possibility to stay with their new landlord even after ten years.

As a fugitive serf would choose a landlord known for good and fair treatment of his serfs and as this landlord would, from his own economic interest, try to keep (and to eventually hide) such a serf, landlords also had a genuine interest in granting fair conditions to serfs both in order to prevent escape, as well as to attract fugitive serfs. In contrast to previous evaluations of the draft Land Law, and in comparison to contemporary regulation in the region, this difference in Hilchen’s draft would, in practice, have had the considerable effect of significantly improving, rather than reducing, the legal status of serfs.

<sup>32</sup> “[...] so oft soll er dem gegentheil 20 Fl Polnisch erlegen, undt soll gleichwoll den verlauffen wiedergeben. Eß were dan [...], daß zehen jahr von zeit der mißenheit verfloßen, dan nach solcher zu recht verwarthen zeit kann er ihn allß verjahret nicht abforderen” “[...] he shall pay 20 Polish Florin to the other party, and he shall return additionally the runaway – unless he was missed longer than ten years. In that case, if he has been lawfully kept for such a time, he cannot claim return of him, as the claim has become time-barred].

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## THE ORIGINS OF A CIVIL SOCIETY BASED ON DEMOCRATICALLY LEGITIMATE VALUES IN BALTICS AFTER ABOLITION OF SERFDOM

### Summary

The article is dedicated to the origins of civil society in the Latvian-populated Baltic Governorates during the rule of the Russian Empire. Reforms linked to the abolition of serfdom at the beginning of the 19<sup>th</sup> century turned into the point of reference for this process. The genesis and evolution of awareness of legitimate democratic traditions were gradual, concurrent with decreasing impact of the estate on the society of a civil parish. Emancipation of peasants was closely related to accumulation of experience in the governance of a civil parish and the right to administer justice independently in lower instance courts. Until the First World War (1914), the administration of a civil parish for the majority of Latvians turned into a school of the rule of law and understanding of democracy.

**Keywords:** abolition of serfdom, liberation of serfs, peasant laws, freedom, civil parish, parish court, legitimate values, democracy

### Introduction

At the end of the 12<sup>th</sup> century and in the 13<sup>th</sup> century, the lands of the Balts and Livs were colonised by Catholic Christians (predominantly from Germany)<sup>1</sup>, who were spreading the Christian faith. During the roughly century-long military skirmishes, the majority of local aristocracy perished or left their homeland. The remaining gradually assimilated into the German culture. German turned into the language of culture and education but German knighthood – into masters of the land.

The Latvian nation formed on the basis of Baltic and Liv peasants. Languages of the Baltic tribes merged into one Latvian language over a couple of centuries. Literary

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<sup>1</sup> Šterns I. *Latvijas vēsture. 1180–1290. Krustakari* [The History of Latvia 1180–1290. Crusades]. Rīga: Latvijas vēstures institūta apgāds, 2002; Seraphin E. *Geschichte Liv-, Est- und Kurlands von den "Ausseglung" des Landes bis zur Einverleibung in das russische Reich. I. Band. Die Zeit bis zum Untergang livländischer Selbständigkeit* [History of Livonia, Estonia and Courland from the "discovering" of the country to its incorporation into the Russian Empire. Vol. 1. The time until the loss of independence of Livonia]. Reval: Verlag von Franz Kluge, 1895, S. 3–109.

Latvian can be spoken of starting with the 16<sup>th</sup>–17<sup>th</sup> centuries.<sup>2</sup> Simultaneously with the formation process of the Latvian nation, the majority of peasants lost not only land but also personal freedom.<sup>3</sup>

The abolition of serfdom in the Baltic Governorates of the Russian Empire was a historical event for Latvians (1817–1819). The majority of people regained the rights of a free person.<sup>4</sup> The author discerns in the abolition of serfdom also the first step on the path towards the proclamation of the Latvian State (1918). If serfdom had not been abolished at the beginning of the 19<sup>th</sup> century, it is highly unlikely that the Republic of Latvia would have been proclaimed at the beginning of the 20<sup>th</sup> century.<sup>5</sup>

The Russian Empire was governed in accordance with the principles of monarchy. Latvia was proclaimed as a democratic republic.<sup>6</sup> This proves that awareness of democratically legitimate values existed before the state was established. In the current article, the author aims to identify those factors of influence that for the majority of Latvians became the basis for understanding of democratically legitimate values following the abolition of serfdom. The article is a limited-scope study. Therefore, the contribution of the New Latvians (*jaunlatvieši*)<sup>7</sup> and members of the New Current movement (*jaunstrāvniki*)<sup>8</sup> to the formation of the Latvian national identity remains outside the framework of this article.

<sup>2</sup> Bušs O., Jansone I. Ieskats latviešu valodas vēsturē (no pirmsākumiem līdz 20. gadsimtam) [Insight into the History of the Latvian Language (from Origins to the 20<sup>th</sup> Century)]. In: Latvija un latvieši. II sējums [Latvia and Latvians. Vol. II]. Rīga: Latvijas Zinātņu akadēmija [Latvian Academy of Sciences], 2018, pp. 117–128.

<sup>3</sup> Lazdiņš J. Dzimtūšanas atcelšana, pagasta sabiedrības organizācija un nacionāli valstiskas domāšanas pirmsākumi [Abolition of Serfdom, Organisation of Parish Society and the Origins of Nation-State Thinking]. In: Latvieši un Latvija. II sējums. Valstiskums Latvijā un Latvijas valsts – izcīnītā un zaudētā [Latvians and Latvia. Vol. II. Statehood in Latvia and the State of Latvia – Won and Lost]. Rīga: Latvijas Zinātņu akadēmija [Latvian Academy of Sciences], 2013, pp. 179–182; Prutz H. Der Kampf um die Leibeigenschaft in Livland [The Struggle for Serfdom in Livonia]. München: Verlag der Königlich Bayerischen Akademie der Wissenschaften, 1916, S. 24–28.

<sup>4</sup> In Latgale or the three Latvian districts of the Governorate of Vitebsk of the Russian Empire, serfdom was abolished considerably later (1861). See Манифестъ. – О Всемилоостивейшемъ дарованіе крепостнымъ людемъ правъ состоянія свободныхъ сельскихъ обывателей, и объ устройстве ихъ быта [Manifesto. – On the All-Gracious Granting to the Serfs of the Right to the Status of Free Rural People and Their Living Conditions], (19.02.1861): Law of the Russian Empire. Полное собрание законовъ Россійской имперіи. Отделение первое [Complete Collection of Laws of the Russian Empire. First Chapter], т. XXXVI, № 36650, 1861. Available at: [http://nlr.ru/e-res/law\\_r/content.html](http://nlr.ru/e-res/law_r/content.html) [last viewed August 31, 2019].

<sup>5</sup> Lazdiņš J. 2013, pp. 173–196.

<sup>6</sup> Latvijas pilsoņiem! (18.01.1918) [To the Citizens of Latvia! Declaration by the Republic] [Latvia]. Pagaidu Valdības Vēstnesis [Herald of the Provisional Government], 1918. g. 14. (1.) decembrī, Nr. 1; Latvijas Tautas padomes politiskā platforma [The Political Platform of the Latvian People's Council] (18.01.1918): The Provisional Law of the Republic of Latvia. Pagaidu Valdības Vēstnesis [Herald of the Provisional Government], 1918. g. 14. (1.) decembrī / Latvijas Valsts Vēstures arhīvs [The National Archives of Latvia] (hereafter – LVVA), 1307. fonds (hereafter – f.), 1. apraksts (hereafter – apr.), 327. lieta (hereafter – l.), pp. 27–29.

<sup>7</sup> Developed national culture and fought against the dominance of the Baltic German culture.

<sup>8</sup> Promulgators of social democratic-Marxist views.

## 1. Origins of the understanding of legitimate democratic values

1.1. The reforms, maintained in the spirit of humanism, were launched shortly before the abolition of serfdom. This process was ushered in by the adoption of the law of 20 February 1804 – the Law on Peasants in the Governorate of Livonia.<sup>9</sup> The purpose of the law was not only to align the relationships between the estate and the land used by peasants but also to start the process of peasant emancipation. To implement the reform, a special system of peasant courts was created. Instead of being just an extra in judicial proceedings, a peasant had to turn into the party in charge of legal proceedings in lower courts. To highlight the role of peasant judges in administering justice, Alexander I Romanov (*Александр I Романов*, 1801–1825) noted in his epistle to Landrat Friedrich von Sivers:

*The goal of justice for the peasants will not be reached if every gentleman [landlord] will be recognised as their [the peasants'] sole judge. This post ought, justifiably, to be entrusted to a judge selected by the peasants themselves.*<sup>10</sup>

The beginning of peasant emancipation process by far did not mean its prompt completion to the full extent. The Emperor had intended only to limit the power of the estate rather than abolish it. Therefore, the peasants' court (civil parish) as the first-instance court consisted of judges belonging to the peasant class. In each composition of the court, one judge from among peasants for the term of three years was elected by the landlord or the leaseholder of the estate, the second, by majority vote, was elected by farm owners, and the third – by workers (servants).<sup>11</sup> The democratic significance of electing the majority of peasant judges was decreased by retained supervision of the estate over civil parish courts. A judgement by the peasant court had to be approved by the landlord, the leaseholder or the manager of the estate.<sup>12</sup> In religious parish courts (*приходской суд*) as the courts of the second instance and land courts (*ландгерихт*) as third-instance courts<sup>13</sup>, peasants performed only the duties of assessors. Peasants were not involved in the highest court of the Governorate (*Говфгерихт*).<sup>14</sup>

<sup>9</sup> Положение о крестьянахъ Лифляндской губернии [Regulation on the Peasants of the Governorate of Livonia] (20.02.1804): Law of the Russian Empire. Полное собрание законовъ Россійской имперіи, съ 1649 года [Regulation on the Peasants of the Governorate of Livonia since 1649], 1804–1805, т. XXVIII, № 21162. Available at: [http://nlr.ru/e-res/law\\_r/content.html](http://nlr.ru/e-res/law_r/content.html) [last viewed August 31, 2019].

<sup>10</sup> Cited from: Tobien A. Die Agrargesetzgebung Livlands im 19. Jahrhundert. I. Band: Die Bauerverordnung von 1804 und 1809 [The Agricultural Legislation of Livonia in the 19<sup>th</sup> Century. Vol. I: The Peasant Law of 1804 and 1809]. Berlin: Puttkammer & Mühlbrecht, 1899, S. 163.

<sup>11</sup> Положение о крестьянахъ Лифляндской губернии [Regulation on the Peasants of the Governorate of Livonia] (20.02.1804), Art. 80, 82.

<sup>12</sup> Ibid., Art. 90.

<sup>13</sup> Land court was the first instance court for hearing cases of peasants and nobility.

<sup>14</sup> Положение о крестьянахъ Лифляндской губернии [Regulation on the Peasants of the Governorate of Livonia] (20.02.1804), Art. 100, 118, 125, 128, 130 etc.



The right of a Latvian peasant to vote and to be elected to positions in a lower court should not be underestimated. Henceforth, a judge had to be able not only to read and write but also to make a judgement and provide legal reasoning for it. The 1804 Law on Peasants in Livonia Governorate did not abolish serfdom. Thus, the basic pre-requisite for a democratically organised society – human liberty – was not attained.

1.2. In the Latvian-populated Baltic Governorates, serfdom was abolished on the basis of two laws:

- 1) by the law of 25 August 1817 in the Governorate of Courland (hereafter – the 1817 Law on Peasants in the Governorate of Courland)<sup>15</sup>;
- 2) by the law of 26 March 1819 in the Governorate of Livonia (hereafter – the 1819 Law on Peasants in the Governorate of Livonia)<sup>16</sup>.

The abolition of serfdom was both a triumph for the Enlightenment ideas of natural rights in respect to personal freedom, as well as a pre-requisite for transition to new economic relations, i.e. capitalism.<sup>17</sup> Regretfully, not everything related to the abolition of serfdom can be seen in a positive light. Peasants were granted freedom without the right to retain the right to use the land. From the perspective of nobility's interests, the following principle was implemented – the land is mine, yours is the time (that is, freedom) (*Land mein und Zeit dein*<sup>18</sup>) or – land to the landlord, freedom to the peasant. Thus, for farm owners in the Baltic Governorates, the abolition of serfdom turned into “the same freedom as birds in the forest have to be chased from tree to tree”<sup>19</sup> or the so-called freedom of a bird. The author holds that such terms of the agrarian reform, undoubtedly, were unjust. However, this negative aspect of “emancipation” and also retaining of the nobility's privileges should not be

<sup>15</sup> Учреждение о Курляндскихъ рѣстьянахъ / Kurländische Bauer-Verordnung [Decree on the Peasants of Courland] (25.08.1817): Law of the Russian Empire. Полное собрание законовъ Россійской имперіи, съ 1649 года [Complete Collection of Laws of the Russian Empire since 1649], 1817, т. XXXIV, № 27024. Available at: [http://nlr.ru/e-res/law\\_r/content.html](http://nlr.ru/e-res/law_r/content.html) [last viewed August 31, 2019].

<sup>16</sup> Положение о Лифляндскихъ крестьянахъ / Liefländische Bauer-Verordnung [Regulation on the Peasants of Livonia] (26.03.1819): Law of the Russian Empire. Полное собрание законовъ Россійской имперіи, съ 1649 года [Complete Collection of Laws of the Russian Empire since 1649], 1819, т. XXXVI, № 27735. Available at: [http://nlr.ru/e-res/law\\_r/content.html](http://nlr.ru/e-res/law_r/content.html) [last viewed August 31, 2019].

<sup>17</sup> Lazdiņš J. Abolition of serfdom and organisation of civil parish communities. In: Latvia and Latvians. Riga: Latvian Academy of Science, 2018, Vol. II, pp. 329–336.

<sup>18</sup> Sivers J. von. Zur Geschichte der Bauernfreiheit in Livland [On the History of Peasant Freedom in Livonia]. Riga: Nicolai Kymmels Buchhandlung, 1878, S. 68.

<sup>19</sup> Cited from: Åbers B. Vidzemes zemnieku “putna brīvība” pēc 1819. g. likuma [“The Bird's Freedom” of Vidzeme's Peasants after the Law of 1819]. Tieslietu Ministrijas Vēstnesis [Herald of the Ministry of Justice], 1936, No. 3, p. 463.

the sole focus, as often seen in Latvian scholarly writing.<sup>20</sup> It should be understood that a serf, prior to “emancipation”, was seen as a chattel in the meaning of the Roman law.<sup>21</sup> For a good reason, Prof. Jānis Zutis introduced the term – serf-slaves<sup>22</sup>, whereas Leonid Arbusow wrote about serfdom bordering on slavery<sup>23</sup>. At the end of the 18<sup>th</sup> century, humanist August Wilhelm Hupel recorded the unenviable conditions of a serf, as follows:

*Moonlighters (rightless workers) and their children are here occasionally sold or bartered for other objects – horses, dogs, pipe bowls, etc.; people here are not as expensive as Negroes in the American colonies, a bachelor may be bought for 30–50 roubles, but if he has a trade (or semblance of one) such as cook, weaver, etc., the price might be as high as 100 roubles; the same amount buys an entire family (parents and their children); a serving girl rarely fetches more than 10 roubles, and a child, approximately 4 roubles).*<sup>24</sup>

A peasant's personal freedom changes the social relations that have developed over centuries.<sup>25</sup> The law, rather than the landlord's will, had to become the yardstick for every action. “Emancipation” laws, on the level of positive law, defined peasants' rights, *inter alia*, the order for administering the civil parish.

The civil parish assembly was convened upon the proposal by the parish elder or the civil parish court with the permission of the estate (board/police) or upon the estate's initiative.<sup>26</sup> All peasants had to be invited to the parish assemblies. Only one category (*разряд*) of peasants could be invited.<sup>27</sup> Prof. Voldemārs Kalniņš writes

<sup>20</sup> Ābers B. Vidzemes zemnieku stāvoklis 19. gs. pirmā pusē [The Situation of Vidzeme's Peasants in the First Half of the 19<sup>th</sup> Century]. Rīgā: Izdevusi grāmatu apgādniecība A. Gulbis, 1936, pp. 120–128; Dunsdorfs M. Baltijas muižniecība laikmetu maiņā [The Baltic Nobility in the Change of an Era]. Rīga: Zinātne, 1986; Zutis J. Vidzemes un Kurzemes zemnieku brīvlaišana XIX gadsimta 20. gados [Setting Free of Vidzeme and Kurzeme Peasants in the 20s of XIX Century]. Rīgā: Latvijas Valsts izdevniecība, 1956, etc.

<sup>21</sup> Vigrabs J. Landrāta Rōzena 1739. gada deklarācija par Vidzemes dzimtkungu tiesībām uz zemnieku miesu un mantu [The Declaration of Landrat Rosen of 1739 on the Rights of Vidzeme Feudal Lords to the Body and Property of Peasants]. Rīgā: A. Gulbis, 1937, p. 94; Švābe A. Zemes attiecības un zemes reformu vēsture Latvijā [Land Relationships and the History of Land Reform in Latvia]. Rīga: Novilkums no Zemkopības ministrijas izdevuma: “Latvijas agrārā vēsture” [Copy of the Edition of the Ministry of Agriculture “The Agrarian History of Latvia], 1930, pp.125–127.

<sup>22</sup> Zutis J. 1956, p. 8.

<sup>23</sup> Arbusow L. Grundriß der Geschichte Liv-, Est- und Kurlands. Vierte, verbesserte und ergänzte Auflage [The Outline of the History of Livonia, Estonia and Courland. The Fourth Improved and Expanded Edition]. Riga: Verlag von Jonck und Poliewsky, 1918, S. 263.

<sup>24</sup> Hupel A. W. Topographische Nachrichten. Bd. 2 [Topographic News. Vol. 2]. Riga: Johann Friedrich Hartknoch, 1777, S. 127–128

<sup>25</sup> Ābers B. 1936, pp. 214–232.

<sup>26</sup> Учреждение о Курляндскихъ крестьянахъ [Decree on the Peasants of Courland] (25.08.1817), Art. 43; Положение о Лифляндскихъ крестьянахъ [Regulation on the Peasants of Livonia] (26.03.1819), Art. 72–73.

<sup>27</sup> Положение о Лифляндскихъ крестьянахъ [Regulation on the Peasants of Livonia] (26.03.1819), Art. 72.

that in the Governorate of Livonia these usually had been farm owners. Electing the civil parish officials was almost the sole task of the parish assembly.<sup>28</sup> Decisions were adopted by majority vote. In the Governorate of Courland, if servants were invited then farm owners and servants voted separately. In case of a split vote, the final decision was taken by the estate police.<sup>29</sup>

The decisions adopted by peasants were approved by the estate's board (in the Governorate of Livonia)<sup>30</sup> or the civil parish court/estate police (in the Governorate of Courland).<sup>31</sup> The estate's supervision was particularly pronounced in the election of officials. Parish elders and parish judges were confirmed into offices by the estate. The estate police (board) could refuse to confirm into office any of the proposed candidates and demand a repeated election.<sup>32</sup> Disregard for peasants' opinion was not limited to this. As revealed by the research of Assist. Prof. Benno Ābers, the estate police (board) used to confirm into office a person who had received the lowest number of votes.<sup>33</sup> Significant power of the estate over peasants was retained even after abolition of serfdom.

Henceforth, interests of the civil parish were officially represented by two or three parish elders.<sup>34</sup> The obligations of an elder were perceived as an office of honour. However, the responsibility was considerable – to be in the know about the parish matters and interests, provide for safety, order, etc. “Authors of the law had intended the elders to be “advocates” (*Anwälten*) of the civil parish”<sup>35</sup>

The court systems of the 1817 Governorate of Courland and the 1819 Governorate of Livonia were similar. However, certain differences existed. Actually, the Governorate of Livonia retained the system of courts established in the 1804 Law on Peasants in the Governorate of Livonia. The sole difference was that the duties of land courts were taken over by district courts (*уездный суд, Kreisgericht*). In difference to the Governorate of Livonia, a two-tier peasant court system was established in the Governorate of Courland – the civil parish court (*мірскіі суд, Gemeindegerecht*)

<sup>28</sup> Kalniņš V. Latvijas PSR valsts un tiesību vēsture. I. Feodālisma un topošā kapitālisma laikmets XI – XIX gs. [The History of the State and the Law of the Latvian SSR. I. The Age of Feudalism and Nascent Capitalism XI–XIX c.]. Rīgā: Zvaigzne, 1972, p. 264.

<sup>29</sup> Учреждение о Курляндскихъ рѣстьянахъ [Decree on the Peasants of Courland] (25.08.1817), Art. 47.

<sup>30</sup> In the Governorate of Livonia, the manor board also performed the duties of the manor police as a general rule. See Положение о Лифляндскихъ крѣстьянахъ [Regulation on the Peasants of Livonia] (26.03.1819), Art. 134.

<sup>31</sup> The civil parish could appeal an estate's decision to Hauptmannsgericht in the governorate of Courland and to Kirchspielsgericht in the Governorate of Livonia. See Учреждение о Курляндскихъ рѣстьянахъ [Decree on the Peasants of Courland] (25.08.1817), Art. 48, 49; Положение о Лифляндскихъ крѣстьянахъ (26.03.1819) [Regulation on the Peasants of Livonia], Art. 78, 80.

<sup>32</sup> Учреждение о Курляндскихъ рѣстьянахъ [Decree on the Peasants of Courland] (25.08.1817), Art. 33; Положение о Лифляндскихъ крѣстьянахъ (26.03.1819) [Regulation on the Peasants of Livonia], Art. 90, 101.

<sup>33</sup> Ābers B. 1936, pp. 188–189.

<sup>34</sup> The number of elders could be higher in larger civil parishes. See Mucenieks P. Latvijas pašvaldību iekārta [The System of Self-Governments in Latvia]. Rīgā: L. u. Studentu padomes grāmatnīcas izdevums, 1938, p. 123.

<sup>35</sup> Ibid., pp. 123–124.

and district court (*Hauptmannsgericht 2ter Abtheilung*). The principle introduced by the 1804 Law on Peasants in the Governorate of Livonia that only in the civil parish court all members came from the peasant class was retained in both Governorates. In religious parish courts (*Kirchspielsgericht*) and in district courts, peasants performed only the duties of assessors. Peasants were not represented in the composition of the higher (revision) court of the Governorate – the (governorate) High Manorial Court (*обер-зофзерухт / Oberhofgericht*, in Courland) and the (governorate) Manorial Court (*зофзерухт / Hofgericht*, in Livonia).<sup>36</sup>

Civil parish courts heard peasants' civil cases, imposed punishments for transgressions and also attempted to reconcile peasants with landlords. The disputes between peasants and landlords were heard, on their merits, by the district court.

As Melita Mieriņa's research shows, Latvian peasants usually were attached to "their own piece of land". Therefore, one of the most unpleasant tasks for civil parish courts was evicting unsuccessful tenants from their homes.<sup>37</sup> Peasant judges had to learn to make not only lawful but also unpopular judgements. Massive responsibility entailed also, for instance, hearing of labour (servitude) disputes<sup>38</sup>, settling the inheritance matters of the civil parish members,<sup>39</sup> etc. Although under the supervision of estate officials, "emancipation" laws granted rights, imposed obligations, as well taught awareness of the significance of electing civil parish officials.

## 2. Enhancing the understanding of democratically legitimate values

The 1860s are known as the decade of major reforms in the Russian Empire. During the reign of Alexander II Romanov (*Александр III Романов*) (1855–1881), on 19 February 1861, serfdom was abolished throughout the Russian Empire, judicial reform was instigated<sup>40</sup>, new regulations on procedural law were

<sup>36</sup> Formally, it was possible to request the Ruling Senate to overrule a court's ruling or, with the mediation of the Governorate's government, the Emperor himself. See Учреждение о Курляндскихъ рѣстьянахъ [Decree on the Peasants of Courland] (25.08.1817), Art. 205–214, 373, 392–395, 402–403; Положение о Лифляндскихъ крестьянахъ [Regulation on the Peasants of Livonia], Art. 97–98, 133, 157–182, 183–197, 247.

<sup>37</sup> Svarāne M. Saimnieks un kalps Kurzemē un Vidzemē XIX gadsimta vidū (sociālekonomisks pētījums) [The Master and the Servant in Kurzeme and Vidzeme in Mid-XIX Century (Social Economic Study)]. Rīga: Zinātne, 1971, p. 85.

<sup>38</sup> Švābe A. Drustu pagasta tiesas spriedumi 1830 – 1835 [The Court's Judgements of Drusti Parish Court 1830–1835]. Rīgā: Latvijas Skolotāju Savienība, 1927.

<sup>39</sup> See for instance LVVA, 5890. f., 1. apr., 36. l.

<sup>40</sup> Учреждение судебныхъ установлений [Establishment of Judicial Institutions] (20.11.1864): Law of the Russian Empire. Полное собрание законовъ Россійской имперіи [Complete Collection of Laws of the Russian Empire], Собрание второе [Second Collection], т. XXXIX, Отделение второе [separation of the second], 1864, № 41475. Available at: [http://nlr.ru/e-res/law\\_r/content.html](http://nlr.ru/e-res/law_r/content.html) [last viewed August 31, 2019].

adopted<sup>41</sup>, etc. The decade of major reforms affected also the Balts. The law, “On Public Administration at the Level of Civil Parishes in the Baltic Provinces”<sup>42</sup>, was adopted on 19 February 1866 (hereafter – the Law of 19 February 1866). The Law of 19 February 1866 altered the relations between the state, estate and civil parish. The aim of the Law of 19 February 1866 was to free civil parish society from tutelage by the estate<sup>43</sup> and unify administration of civil parishes in the Baltic Governorates.

Experience of nearly 50 years of liberty had demonstrated the ability of Latvian peasants to act and to think independently. Hence, supervision by the estate had become redundant. Religious parish courts (in the Governorate of Livonia) and district court (in the Governorate of Courland) were entrusted with the supervision of the peasant self-governance. Chairmen of the supervisory body were nobles. However, the tie between the estate and the civil parish was severed.

On 9 July 1889, the 20 November 1864 Regulation on Courts of the Russian Empire<sup>44</sup> (hereafter – the Judicial Reform) was applied to the Baltic Governorates. The aim of the Judicial Reform was separating the competence of the public administration, police and courts.<sup>45</sup> Thus, the judicial supervision over the civil parishes of the Baltic Governorates contradicted the legal policy of the state. On the basis of the 9 July 1889, Provisional Regulation on Changing the Composition and Jurisdiction of Peasant Bodies, the office of a commissioner for peasant matters

<sup>41</sup> Уставъ уголовного судопроизводства [Code on Criminal Proceedings] (20.11.1864): Law of the Russian Empire. Полное собрание законовъ Россійской имперіи [Complete Collection of Laws of the Russian Empire], Собрание второе [Second Collection], т. XXXIX, Отделение второе [Second Chapter], 1864, № 41476. Available at: [http://nlr.ru/e-res/law\\_r/content.html](http://nlr.ru/e-res/law_r/content.html) [last viewed August 31, 2019]; Уставъ гражданскаго судопроизводства [Code on Civil Proceedings] (20.11.1864). Полное собрание законовъ Россійской имперіи [Complete Collection of Laws of the Russian Empire], Собрание второе [Second Collection], т. XXXIX, Отделение второе [Second Chapter], 1864, № 41477. Available at: [http://nlr.ru/e-res/law\\_r/content.html](http://nlr.ru/e-res/law_r/content.html) [last viewed August 31, 2019].

<sup>42</sup> Положение о волостномъ общественномъ управленіи въ Остзейскихъ губерніяхъ [*Прибалтійскихъ*] [Regulation on Rural Municipality Public Administration in the Ostsee Governorates [Baltic]] (19.02.1866): Law of the Russian Empire. Полное собрание законовъ Россійской имперіи [Complete Collection of Laws of the Russian Empire], Собрание второе [Second Collection], т. XLI, отделение первое [Second Chapter], 1866, № 43034. Available at: [http://nlr.ru/e-res/law\\_r/content.html](http://nlr.ru/e-res/law_r/content.html) [last viewed August 31, 2019].

<sup>43</sup> Schmidt O. Rechtsgeschichte Liv-, Est- und Curlands [The History of Law of Livonia, Estonia and Courland]. Jurjew (Dorpat): In Commission bei E. J. Karow, 1895, S. 265.

<sup>44</sup> О примененіи къ губерніямъ Лифляндской, Эстляндской и Курляндской Судебныхъ Уставовъ 20 ноября 1864 года и о преобразованіи мѣстныхъ крѣстьянскихъ учрежденій [On Application to the Governorates of Livonia, Estonia and Courland of the Regulation of 20 November 1864 and on the Reform of Local Peasant Bodies]: Law of the Russian Empire. Полное собрание законовъ Россійской имперіи [Complete Collection of Laws of the Russian Empire], Собрание третье [Third Collection], т. IX, 1889, № 6187. Available at: [http://nlr.ru/e-res/law\\_r/content.html](http://nlr.ru/e-res/law_r/content.html) [last viewed August 31, 2019].

<sup>45</sup> Lazdiņš J. Die Justizreform vom Jahr 1889 und ihre Bedeutung für die Baltischen Provinzen Russlands und (später) Lettland [The Judicial Reform of 1889 and its Significance for the Baltic Governorates of Russia and (Later) Latvia]. In: Schäfer Frank L., Schubert W. (Hrsg.) Judiciary and Judicial System. The 7<sup>th</sup> Conference in Legal History in the Baltic Sea Area, May 3–5, Schleswig-Holstein. Frankfurt am Main: Peter Lang GmbH, PL Academic Research, 2013, S. 94.

was introduced.<sup>46</sup> The commissioner for peasant matters was tasked with supervising, whether the parish community applied the laws correctly, and with annulling any illegal decisions.<sup>47</sup> Assist. Prof. Pēteris Mucinieks has aptly commented on the reduced significance of the estate and the growth of power exerted by the state:

*Supervisory bodies had to confirm all officials in their posts. Despite the law stating that conformation could only be denied in cases where electoral procedures were not correctly followed or inappropriate individuals were selected and, therefore, would be denied taking office; in practice confirmation was also refused to individuals who had been correctly elected. The same applied to decisions rescinded based on considerations of relevance.<sup>48</sup>*

Due to absence of detailed research, the prevalence of arbitrariness by state officials in peasant matters is not known. Most probably, P. Mucinieks is expressing the social memories retained in inter-war Latvia (1918–1940) about governance in the period of the Russian Empire at the end of the 19<sup>th</sup> century – beginning of the 20<sup>th</sup> century. No irrefutable evidence exists regarding the statements by V. Kalniņš made during the Soviet period about the commissioners for peasant matters as persons servile before the German nobility.<sup>49</sup> Indubitably, every reform has its “darker sides”. However, the author holds that the positive contribution of the reform to the civil parish administration should not be ignored. Peasant administration of the civil parish was released from direct supervision by the landlord classes.<sup>50</sup> Henceforth, this task was performed by the state, similarly to the present.

Following the Law of 19 February 1866, a civil parish did not become a territorial body of self-governance. The estate remained outside the civil parish. All peasants registered in the civil parish belonged to the parish community – farm owners (tenants), servants (workers), as well as the persons who, although they did not belong to the peasant class, had obtained title or lease to peasants’ plots of lands (houses).<sup>51</sup>

<sup>46</sup> I. О преобразовании судебной части въ Прибалтійскихъ губерніяхъ и II. О преобразованіи крѣстьянскихъ присутственныхъ мѣстъ Прибалтійскихъ губерній. В. Временные правила объ измененіи состава и предметовъ ведомства крѣстьянскихъ присутственныхъ мѣстъ [I On the Reform of the Judicial Area in the Baltic Governorates and II On Reform of Peasant Representative Bodies in the Baltic Governorates. В. Provisional Rules on the Changes in the Composition and Subject Matters of Peasant Representative Bodies]: Law of the Russian Empire. Полное собраніе законовъ Россійской имперіи [Complete Collection of Laws of the Russian Empire]. Собраніе третіе [Third Collection], т. IX, 1889, № 6188, Art. 1, 8. Available at: [http://nlr.ru/e-res/law\\_r/content.html](http://nlr.ru/e-res/law_r/content.html) [last viewed 31.08.2019].

<sup>47</sup> Kalniņš V. 1972, pp. 295–296.

<sup>48</sup> Mucinieks P. 1938, p. 129.

<sup>49</sup> Kalniņš V. 1972, p. 294–295.

<sup>50</sup> Положеніе о волостномъ общественномъ управленіи въ губерніяхъ Остзейскихъ [Regulation on Rural Municipality Public Administration in the Ostsee Governorates], Preamble.

<sup>51</sup> Mucinieks P. 1938, p. 124.

The governance of the parish community comprised four bodies:

- 1) a general civil parish assembly (*общий волостной сход*) (henceforward – the assembly);
- 2) contingent of deputies (*сход выборных*);
- 3) the civil parish elder and his assistants (*волостной старшина с помощниками*, as well as
- 4) the civil parish court (*волостной суд*).<sup>52</sup>

Attendance at the assembly was mandatory for all farm owners (tenants) (hereafter – farm owners) and for every tenth elected representative from among the servants. The latter were sometimes scornfully called a one-tenth of a man<sup>53</sup> or flies.<sup>54</sup> Obviously, only the farm owners were politically full-fledged members of the civil parish. The assembly elected all officials of the civil parish for the term of three years (the civil parish elder, assistants, judges, etc.), and the contingent of deputies. The assembly was competent to decide if it was attended by the civil parish elder and at least a half of the assembly's members. The decisions were adopted by reaching a common agreement or by a majority vote of those present.<sup>55</sup>

In contrast to the emancipation laws, a new body was introduced to ensure governance of the civil parish – the contingent of deputies. The contingent of deputies consisted of the civil parish elder as the chairman and, according to the number of inhabitants in the civil parish, from 4 to 24 elected persons. Farmers and servants elected an equal number of members to the contingent of deputies. Seen in the light of the present practice, these individuals had the same functions as the modern local authority deputies – they decided on dealing with the property of the civil parish, capital, examined complaints and petitions, set wages for the officials, etc.<sup>56</sup>

The Law of 19 February 1866 consolidated the power of the civil parish elder as the sole official. The civil parish elder represented the civil parish, headed the civil parish police, took care of order, welfare of inhabitants, etc. The civil parish elder with his assistants was also the executive body of the civil parish. Only farm owners could be elected to offices of the civil parish elder, an assistant to the elder and the chairman of the civil parish court.<sup>57</sup>

The Law of 19 February 1866, obviously, was not compatible with the spirit of civil society. The classes of inhabitants in the state were not annulled. Inequality in

<sup>52</sup> Положение о волостном общественном управлении в губерниях Остзейских [Regulation on Rural Municipality Public Administration in the Ostsee Governorates], Art. 4.

<sup>53</sup> Mucinieks P. 1938, p. 125.

<sup>54</sup> Kalniņš V., Apsītis R. Latvijas PSR valsts un tiesību vēsture. II. [The History of the State and the Law of the Latvian SSR]. Rīga: Zvaigzne, 1980, p. 24.

<sup>55</sup> Положение о волостном общественном управлении в губерниях Остзейских [Regulation on Rural Municipality Public Administration in the Ostsee Governorates], Art. 7.

<sup>56</sup> Ibid., Art. 9–12.

<sup>57</sup> Estate police had to be informed about the election of an elder and confirmation by the supervisory body was needed. See Положение о волостном общественном управлении в губерниях Остзейских [Regulation on Rural Municipality Public Administration in the Ostsee Governorates], Art. 15–24, 26–28.

rights to stand for offices in the governance and courts of the civil parish existed even within one class of peasants (farmer – servant). The principle of equality of all citizens before the law and the court, *inter alia*, the principle of gender equality, was embodied only after the Republic of Latvia was proclaimed.

Although the laws on peasants in the Baltics of the 19<sup>th</sup> century had significant deficiencies, if viewed from the vantage point of the civil society's values, they occupy a permanent place in the history of Latvian law. Before the First World War (1914), the participation of Latvians in municipal governance was insignificant, and Latvians were not represented in the knightly Landtags of the Baltics. "The Basic Laws of the State"<sup>58</sup> (hereafter – the Basic Laws) of the Russian Empire, promulgated on 23 April 1906, envisaged convening a lower chamber of the Parliament of the Russian Empire (*Дума*) (hereafter – the Parliament). Some Latvians also gained the experience of parliamentary work before the Republic of Latvia was proclaimed. Thus, for instance, on 16 February 1912, Andrejs Priedkalns submitted a project of local government, which was later dismissed, envisaging merging all the lands inhabited by Latvians into one administrative-territorial unit.<sup>59</sup> However, for the most of Latvians, "the schooling in statehood" came through activities in the governance of the civil parish. Aligning the interests of different persons and social classes laid the foundations for the awareness of a democratically organised society.

During the reign of Alexander III Romanov (*Александр III Романов*) (1881–1894), on 9 July 1889, the Judicial Reform of the Russian Empire was applied to the Baltic Governorates. In the Baltic Governorates, the Judicial Reform was implemented in the framework of Russification policy.<sup>60</sup> However, the general assessment of the Judicial Reform should not be negative.<sup>61</sup> Following the model of the Russian Empire, magistracies and general courts were established in the Baltic Governorates<sup>62</sup>. Moreover, the system of peasant courts in the Baltic Governorates was unified.<sup>63</sup> The impact of the noble class on peasant courts was eliminated, at least formally. Henceforth, the judicial power itself supervised peasant courts.<sup>64</sup> Pursuant

<sup>58</sup> Основные Государственные Законы [The Basic Laws of the State]: Law of the Russian Empire]: Law of the Russian Empire. Полное собрание законовъ Российской империи [Complete Collection of Laws of the Russian Empire]. Собрание третие [Third Collection], т. XXVI, 1906, № 27805. Available at: [http://nlr.ru/e-res/law\\_r/search.php](http://nlr.ru/e-res/law_r/search.php) [last viewed August 31, 2019].

<sup>59</sup> Šilde Ā. Pirmā republika. Esejas par Latvijas valsti [The First Republic. Essays on the State of Latvia]. Elpa, 1993, p. 63.

<sup>60</sup> Švābe A. Latvijas vēsture. 1800–1914 [The History of Latvia. 1800–1914]. Uppsala: Daugava, 1958, pp. 496–497.

<sup>61</sup> Lazdiņš J. Krievijas impērijas 1864. gada Tiesu reforma un tās nozīme Baltijas guberņās un vēlāk Latvijā [The Judicial Reform of the Russian Empire of 1864 and its Significance in the Baltic Governorates and Later in Latvia]. In: Tiesību efektivitātes piemērošanas problemātika. Latvijas Universitātes 72. zinātniskās konferences rakstu krājums [Papers of the 72<sup>nd</sup> Scientific Conference of the University of Latvia]. Rīga: LU Akadēmiskais apgāds, 2014, pp. 57–68.

<sup>62</sup> General courts included – regional courts, court chamber and the Ruling Senate.

<sup>63</sup> П. О преобразованіи крестьянских присутственных местъ Прибалтийскихъ губерній. А. Волостной судебный уставъ (hereafter – Волостной судебный уставъ [Act of civil parish court]). I. Учрежденіе волостныхъ и верхнихъ крестьянскихъ судовъ [Establishment on civil parish court and upper civil parish courts] (hereafter – I.).

<sup>64</sup> Ibid., Art. 43.



to the law policy of the Russian Empire, this symbolised separation between the governance and the judicial power.<sup>65</sup>

The Regulation on Civil Parish Courts established a two-tier court system:

- 1) civil parish court (*волостной суд*);
- 2) civil parish high court (*верхний крестьянский суд*).

The territorial remit of the civil parish court was not aligned with that of a particular civil parish. Upon the decision by the assembly of magistrates, it could comprise several civil parishes and estate lands adjacent to civil parishes. A single civil parish court was foreseen to be able to deal with issues arising from 1000 to 2000 male souls (inhabitants), and it could not be sited more than 12 *verst*s from the most distant settled place of its territorial remit.<sup>66</sup>

Civil parish judges and candidates for a judge's office were elected through secret ballot for a term of three years at an assembly of a single civil parish (or several). Members of the civil parish court elected the court chairman from their midst. The assembly of magistrates confirmed in post the chairman, judges and candidates for a judge's office after these had been elected. Before assuming the duties of office, a solemn oath had to be given in the presence of a priest or before the civil parish court.<sup>67</sup> The civil parish court had jurisdiction over petty civil cases and cases of punishable transgressions.<sup>68</sup> Until 1904, corporal punishments were also applied.<sup>69</sup>

Appeals of decisions taken by a civil parish court could be launched at the civil parish high court. The civil parish high court consisted of a court's chairman, appointed by the Minister for Justice, and invited chairmen of the civil parish courts. A case had to be heard by at least three judges. The assembly of magistrates was responsible for examining complaints about the work of civil parish courts and civil parish high courts.<sup>70</sup>

During the second half of the 19<sup>th</sup> century, the scope of peasants' property was changing rapidly. Thus, for example, mass-scale purchasing hereditary titles to houses

<sup>65</sup> Švābe A. 1958, p. 498.

<sup>66</sup> Волостной судебный уставъ [Act of civil parish court], I, Art. 1–2.

<sup>67</sup> Ibid., Art. 7–10, 13, 14.

<sup>68</sup> Civil parish courts examined claims amounting up to 100 roubles. Claims derived from title to immovable property were outside the competence of civil parish courts. In cases of punishable transgressions, a civil parish court could apply a monetary fine up to 12 roubles, detention up to seven days, public works and indemnity of losses, corporal punishment up to 20 switches, etc.

See Волостной судебный уставъ [Act of civil parish court]. II. Правила о производстве гражданскихъ дель [Rules on the Proceedings in Civil Cases], Art. 7–9. III. Правила о производстве дель о проступкахъ [Rules on the Proceedings in Cases of Transgressions], Art. 9. IV. Временные Правила о наказаниях, налагаемыхъ Волостными Судами [Provisional Rules on the Punishments Applied by Civil Parish Courts], Art. 1, 3; Положение о крестьянахъ Лифляндской губернии [Regulation on Peasants of the Governorate of Livonia] (13.11.1860): Law of the Russian Empire. Полное собрание законовъ Россійской имперіи [Complete Collection of Laws of the Russian Empire]. Собрание второе [Second Collection], 1860, Отделение второе [Second Chapter], т. XXXV, № 36312, Art. 1033, 1038, 1040, 1042, 1043 etc. Available at: [http://nlr.ru/e-res/law\\_r/search.php](http://nlr.ru/e-res/law_r/search.php) [last viewed August 31, 2019].

<sup>69</sup> Kalniņš V., Apsītis R. 1980, p. 46.

<sup>70</sup> Волостной судебный уставъ [Act of civil parish court], I, Art. 29–30, 34, 43.

(buying the title to land) began.<sup>71</sup> According to the requirements of the Judicial Reform, claims above 500 roubles and those related to immovable property fell into the jurisdiction of general courts. Materials found in the Latvian State Historical Archive prove that peasants litigated, *inter alia*, with nobles in general courts.<sup>72</sup> However, comprehensive studies of the case law of the period of the Russian Empire in the lands inhabited by Latvians are absent. Thus, it is easier to consider the evolution of law than the solutions to collisions of law. One thing, however, is clear – following the abolition of serfdom, the Latvian peasant had obtained not only the right to freedom of movement within the whole territory of the state or to administer justice in lower-instance courts but also to litigate, on equal basis, with any person in any court instance of the Russian Empire. Arguably, this more than anything else taught awareness of rights as a value.

## Conclusions

1. Following the abolition of serfdom in the Baltic Governorates, the genesis and evolution of democratically legitimate understanding amongst the Latvians developed simultaneously with a gradual decrease of the estate's influence on the civil parish community.
2. The governance of a civil parish and the experience of administering justice in lower-instance courts shaped the legal awareness of the majority of Latvians in the spirit of democratic values. Before the Republic of Latvia was proclaimed, no other school of legitimate democracy was available to most of the Latvians.
3. The separation between the civil parish governance and supervision of peasant courts in the second half of the 19<sup>th</sup> century, as well as the conditional separation of state powers, implemented on the basis of The Basic Law (1906) started shaping awareness of a legitimately organised society on a new level. However, retaining of class laws precludes discussions about the development of civil society before the First World War (1914).

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<sup>71</sup> Švābe A. 1958, pp. 314–329.

<sup>72</sup> See for instance LVVA 115. f., 4. apr., 48. l.; LVVA 770. f., 6. apr., 32. l.; LVVA 770. f., 6. apr., 348. l. etc.

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## **BALTIC PEASANTS AFTER EMANCIPATION – FREE AND EQUAL PEOPLE OR A NEW SOCIAL ESTATE IN THE ESTATE-BASED SOCIETY?**

### **Summary**

In the Baltic provinces of the Russian Empire, the majority of the population was unfree, serfs, who were part of the land owner's property. The legal acts for peasant emancipation for Estonia were enacted in 1816, whereas for Courland – in 1817, and for Livonia – in 1819. With those acts, the peasants were liberated, nonetheless, they did not become free and equal persons like, for example, in France after revolution or in Prussia from 1810, but rather found themselves in a new estate in the estate-based society. In Prussia, mobility between estates was ensured, while in the Baltic provinces, as a rule, each member of an estate had to remain there. The peasant community was, however, organised in a modern way according to the division of powers. In addition, the table of ranks offered the opportunity to change one's social estate by means of higher education.

**Keywords:** abolition of serfdom, personal liberation, the 19<sup>th</sup> century, Baltic provinces of the Russian empire, peasant community

### **Introduction**

At the beginning of the 19<sup>th</sup> century, the peasants formed approximately 95 % of the total population in the Baltic provinces of the Russian Empire. The peasants were mainly serfs: in Estonia (German Estland), only 3.5 % of the peasants were free, in Livonia (German Livland) only 1.5 % were free, and in Courland (German Kurland) – 9.5 % were free. The Baltic provinces were territories of so-called severe serfdom: a serf was a part of the owner's property and could be sold with land or without it. He could not autonomously end his relationship with the owner. Thus, scholars and lawyers of that period, especially in Eastern Europe, sometimes compared the serfs with Roman slaves, although emphasizing that this was not their

legal status.<sup>1</sup> The peasants in the Baltic provinces were emancipated earlier than in the “inner” provinces of Russian territory and partially before emancipation in the former Polish territories (1861).<sup>2</sup> The legal acts for peasant emancipation for Estonia were enacted in 1816, whereas for Courland – in 1817, and for Livonia – in 1819.<sup>3</sup>

Nowhere was peasant emancipation just a liberation of peasants from serfdom or from being tied to the land, as well as from their obligations to their landlords. As the peasants represented the majority in European societies that were just undergoing modernisation, their emancipation, together with all the manifestations thereof, must be regarded as a constitutional prerequisite for a modern society of free and equal people.<sup>4</sup> In order to make such a society possible at all, at least three fundamental types of liberation were necessary: the liberation of the person, of property, and of work.<sup>5</sup> This multifaceted liberation process is expressed very vividly and illustratively in the Prussian October Edict of 9 October 1807. At first, the title seems like one of the many regulations that had affected land ownership or possession in the rural territories since the early modern era: Edict Concerning the Unburdened Possession and the Free Use of Land, as well as the Personal

<sup>1</sup> The research and writing of this article is supported by Estonian Research Council grants PUT1030 and IUT20-50.

See Knothe H.-G. Zur Entwicklung des Rechts der Gutsherrschaft im deutschen Ostseeraum im Spiegel von Mevius' Abhandlung über die “Bauers-Leute” [On the Evolution of the Legal Framework of the Concept of *Gutsherrschaft* in the German Baltic Sea Area as reflected in Mevius' Writings on Peasants]. In: Geschichte und Perspektiven des Rechts im Ostseeraum. Erster Rechtshistorikertag im Ostseeraum 8.–12. März 2002 [History and Perspectives of Law in the Baltic Sea Area. First Conference in Legal History in the Baltic Sea Area, 8<sup>th</sup>–12<sup>th</sup> March 2002], Eckert J., Modéer K. Å. (eds.), Frankfurt/M. et al.: Peter Lang, 2002, pp. 237–274; about the serfdom regulations in the Baltic region at the end of the 16<sup>th</sup> century, see Hoffmann T., Siimets-Gross H. The Institute of Serfdom in the Hilchen's Land Law Draft of 1599 – a Regional Comparison. In the current volume.

<sup>2</sup> Tarkiainen Ü. Estland and Livland as test for agricultural innovation in the Russian empire in the 19<sup>th</sup> century. In: Russia on the Baltic: imperial strategies of power and cultural patterns of perception (16<sup>th</sup>–20<sup>th</sup> centuries). Wien: Böhlau, 2012, pp. 345–364; on the contemporary but failed attempt to abolish the serfdom in the Wilno Governorate: Bairašauskaite T. Consideration of the Project for the Abolition of Serfdom at the Dietine in the Wilno Governorate in 1817. In: Legal Science: Functions, Significance and Future in Legal Systems: Collected conference papers of the 7<sup>th</sup> International Scientific Conference of the Faculty of Law of the University of Latvia. Riga: University of Latvia Press, 2019, pp. 18–24.

<sup>3</sup> For the historiography of the agrarian reforms in the Baltic provinces, see Lust K. The Impact of the Baltic Emancipation Reforms on Peasant-Landlord Relations: A Historiographical Survey. *Journal of Baltic Studies*. No. 44, 2013, pp. 1–18.

<sup>4</sup> In the frame of the same axiomatics, but concentrated on private law: Schäfer F. L. Transition from Feudal to Modern Society: The Impact of Abolition of Serfdom on German Private Law. In: Legal Science: Functions, Significance and Future in Legal Systems: Collected conference papers of the 7<sup>th</sup> International Scientific Conference of the University of Latvia Faculty of Law. Riga: University of Latvia Press, 2019, pp. 25–34.

<sup>5</sup> See more Rückert J. “Frei und sozial“ als Rechtsprinzip [“Free and Social“ as a Legal Principle]. Baden-Baden: Nomos, 2006, pp. 21–25.



Relationships of the Tenant.<sup>6</sup> However, Article 12 shows that it was supposed to be, in fact, a revolutionary edict: “On St. Martin’s Day Eighteen Hundred and Ten (1810) all serfdom ends throughout our states. After St. Martin’s Day 1810, there will be only free people [..].”<sup>7</sup>

Accordingly, from St. Martin’s Day 1810 every person in the Prussian territories was supposed to be free. The tone of the edict reminds us of a human rights declaration. Not surprisingly, Prussian peasant emancipation was not only caused by the fear of the superiority of the Napoleonic army, the ideology of the Enlightenment was also an important factor. First of all, it was meant to confer innate, inalienable and equal freedom upon all people. Peasants from the state manors of all Prussian countries had already been liberated. What the new general freedom was supposed to mean in reality, however, still required some explanation. Consequently, it was stated that the individual was free from now on, but also that “regardless of their status” everyone was free to conduct trade and to change from peasant into burgher and from burgher into peasant.<sup>8</sup> All this ought to result in a free choice of occupation in that an ex-serf could “achieve prosperity” “by the measure of his strength”. The permanent barriers of social mobility had been abolished and, while the estates remained, they functioned only in *nomina*.

In our article we will shed light on the Baltic version of the personal emancipation of peasants and the resulting legal status of peasants as a community and as individuals.

<sup>6</sup> Edikt den erleichterten Besitz und den freien Gebrauch des Grundeigentums so wie die persönlichen Verhältnisse der Land-bewohner betreffend [Edict Concerning the Facilitated Possession and Free Use of the Real Estate as well as the Personal Circumstances of the Inhabitants of the Country-side]. *Gesetzsammlung für die königlich preußischen Staaten* [Collection of Laws for the Royal Prussian States] 1808–1810, pp. 170–173.

<sup>7</sup> Cf.: “Mit dem Martini-Tage Eintausend Achthundert und Zehn (1810.) hört alle Guts-Unterthänigkeit in Unsern sämtlichen Staaten auf. Nach dem Martini-Tage 1810 giebt es nur freie Leute [..].”

<sup>8</sup> Cf.: “Alles zu entfernen, was den Einzelnen bisher hinderte, den Wohlstand zu erlangen, den er nach dem Maaß seiner Kräfte zu erreichen fähig war [..]. § 2. Jeder Edelmann ist, ohne allen Nachtheil seines Standes, befugt, bürgerliche Gewerbe zu treiben; und jeder Bürger oder Bauer ist berechtigt, aus dem Bauer- in den Bürger- und aus dem Bürger- in den Bauerstand zu treten.” [To eliminate everything that so far hindered the individual from attaining the prosperity he was able to achieve according to the measure of his strength. [..] § 2. Every nobleman is entitled to engage in bourgeois trades, without any harm of his estate; and every citizen or peasant is entitled to move from peasant to citizen and from citizen to peasant.]

## 1. Liberation of peasants in the Baltic provinces

In comparison with the corresponding Prussian provision, the Estonian Peasant Ordinance of 1816<sup>9</sup> explained the new freedom in an overly wordy and complex manner. Remarkably, the emphasis was on the legal basis, not on the content of freedom:

*The Estonian peasants, to whom His Imperial Majesty, answering the requests of the nobility and according to the nobility's declaration of relinquishment of their rights, has promised the rights of a free estate for the future, shall receive these rights by and by within fourteen years.*<sup>10</sup>

Substantially, the Courland Peasant Ordinance had a similar wording and was drafted on the basis of the last.<sup>11</sup> Even though the Livonian Peasant Ordinance of 1819 was not forthright in mentioning the emancipation of peasants, and it was formulated in a most wordy manner, it still expressed the same basic ideas.<sup>12</sup> Despite the enactment of the ordinances of 1816, 1817 and 1819, from which today the abolition of serfdom is accounted, the emancipation of peasants in Estonia was, according to the law, programmed to start only three years later, while for those in Livonia and Curonia four years later respectively, taking place over fourteen years. The finalisation of the emancipation, expressed in surnames for peasants, did not mean that they were free to leave the local community – there were several restrictions on free movement in the Peasant Ordinances and other laws.

<sup>9</sup> On the prehistory of this ordinance in depth, partially based on unpublished sources Wistinghausen H. Freimaurer und Aufklärung im Russischen Reich: die Revaler Logen 1773–1820 [Freemasons and Enlightenment in the Russian Empire: the Reval Lodges 1773–1820], Vol. 2. Köln et al.: Böhlau, 2016, p. 797sq., in particular p. 827sq. On the ordinances of all three provinces see Deutsche Geschichte im Osten Europas: Baltische Länder [German History in Eastern Europe: Baltic Countries], Pistoohlkors G. v. (ed.), Berlin: Siedler, 1994, p. 323sq.

<sup>10</sup> Cf. Ehstländische Bauer-Verordnungen. Transitorisches Gesetz, I Kap. I. Abschnitt. § 1 [Estonian Peasant Ordinances. Transitory Statute, Chap. 1, Section 1 § 1]. In: Ehstländische Bauer-Verordnungen [Estonian Peasant Ordinances]. Reval: Johann Hermann Gressel, 1816, p. 12.

<sup>11</sup> Kurländische Bauer-Verordnung für den transitorischen Zustand. Transitorisches Gesetz [Peasant Ordinance of Courland for the Transitory State]. In: Gesetzbuch für die Kurländischen Bauern. In Auftrag einer Allerhöchstverordneten Kommission zur Einführung der Bauer-Verordnung [Code for Peasants of Courland. On Behalf of a Commission Decreed by Emperor for to Introduce the Peasant Ordinance]. Mitau: Steffenhagen und Sohn, 1819. Chapter I, Section I. § 1: "Den Kurländischen Bauern sind durch die Gnade Sr. Kaiserlichen Majestät und durch die bereitwillige Entäusserung der Rechte des Kurländischen Adels auf die Leibeigenschaft der Bauern, die Rechte eines freyen Standes zugesichert worden. Während vierzehr Jahren sollen alle bisher leibeigen gewesenen Bauern in Kurland nach und nach zum Genuss dieser Rechte auf folgende Weise gelangen." [The peasants of the Courland were granted the rights of a free estate by the grace of Sr. Imperial Majesty and by the voluntary alienation of the rights of the Courland nobility to the serfdom of the peasants. During fourteen years all the peasants in Kurland who have been in bondage up to now shall gradually come to enjoy these rights in the following way.]

<sup>12</sup> Liefländische Bauer-Verordnung [Livonian Peasant Ordinance]. In: Die Liefländische Bauer-Verordnung. Gesetz-Sammlung für das Jahr 1819. 1. Buch, 2. Abth.: Monat März [Livonian Peasant Ordinance. Collection of Laws for the Year 1819, Book 1, Part 2: March]. St.-Petersburg: Тип. комиссии составления законов, 1820, p. 17 (Part 1, Chapter 1, Article 1).

There is neither a trace of constitutional pathos nor the tone of human rights declarations in the Baltic ordinances. At the same time, the ideology of Enlightenment, inclusive of the human rights ideas was not entirely absent in contemporary society, as many literates or pastors had it.<sup>13</sup> Mobility from one social estate to another is not mentioned, either. However, a new free estate was actually created, yet it did not grant any participation in state administration or matters of taxation, this remained within the power of the knighthood as corporations of nobility.

## 2. Peasant communities formed as a result of emancipation and modern institutions that followed

Among the peasantry, the institution of the peasant community was further developed for a while in the tradition that the first wave of so-called agrarian reform<sup>14</sup> had created at the beginning of the century: the peasant community remained under supervision by the landlord and was supposed to share responsibility for public taxes and public duties solidarily. This, however, was about to change. Here we skip the evolution of peasant communities and the beginnings of peasant self-government.<sup>15</sup> The legal culmination of the development of the peasant community into modern self-government was the Peasant Community Code of 1866 valid for all three Baltic provinces in the same manner.<sup>16</sup>

This Peasant Community Act was initially conceived as provisional and was to be replaced with a new one. However, it remained in force until the fall of the Tsarist Empire and created a foundation for describing the rural communities as a preschool of political maturity and of free statehood for Estonians and Latvians. By this we mean

<sup>13</sup> See, for example, Plath U. Politik als Erlösung. Überlegungen zu Karl Gottlob Sonntags Aufklärungstheologie [Politics as Salvation. Reflections on Karl Gottlob Sonntags Enlightenment Theology]. In: Politische Dimensionen der baltischen literarischen Kultur [Political Dimensions of Baltic Literary Culture], Lukas L., Schwidtal M., Undusk J. (eds.), Berlin: Peter Lang, 2018, pp. 123–161.

<sup>14</sup> In the first wave of agrarian reforms from the very beginning of 19th century the personal legal status of peasants was left the same, i.e. they remained serfs, but their relationship to the landlords were regulated according to the principles of the protection of peasants.

<sup>15</sup> Seppel M. Pärisorjuse kaotamine ja talurahvakogukondade konstrueerimine Balti kubermangudes [The abolishment of serfdom and the construction of peasant communes in the Baltic provinces]. *Acta et commentationes Archivi Historici Estoniae*, No. 19(26), 2012, pp. 59–82; from a comparative perspective – Jansson T. Agraragesellschaftlicher Wandel und Landgemeindewesen [Chance of the Agricultural Society and Rural Communities]. *Studia Baltica Stockholmensia*, 1990, No. 5: The Baltic Countries 1900–1914, pp. 45–82.

<sup>16</sup> Landgemeinde-Ordnung für die Ostseegouvernements: (Beilage zu einem Rescripte des Herrn General-Gouverneurs der Ostseegouvernements vom 1. April 1866 sub No. 394). [Peasant Community Code for the Baltic Sea Governorates: (Annex to the Rescript of the Gouverneur-General of the Baltic Sea Governorates 1st of April 1866, no 394)] Reval: [Ehstländische Gouvernements-Typographie], 1866.

not only the “clear separation between the estate and the peasant community”<sup>17</sup>, and the associated cessation of the guardianship (Germ *Vormundschaft*) of the landlords over the peasant communities, but also modern self-government itself. In 1934, Paul Sokolowski argued that the Baltic rural communities were distinctly democratic institutions:

*A spirit very different from the basic attitude of the intellectual upper class but no less democratic developed in the peasant communities. The self-government right granted to them after the abolition of serfdom had a markedly democratic character and was early in increasingly sharp opposition to the landlords. Entire generations grew up in these rural democracies before the two republics of Estonia and Latvia were formed.*<sup>18</sup>

The peasant communities were the very first institutions in the Baltic provinces where on the basis of Peasant Community Code of 1866, repeated in the Implementation Instruction of this Code, given by General Governor of Baltic governorates 19 February 1866<sup>19</sup>, the modern separation of powers can be found: the normative and executive bodies were clearly divided and brought into hierarchically ordered interaction. A distinction between judicial and administrative power was also first made at the level of the peasant communities. However, the community courts had only a very limited jurisdiction for small-scale disputes in private law and only for minor or petty violations in criminal law. Nevertheless, various elements educated the Baltic peasants and helped them to become members of the modern law-based society, for example, to achieve the settlement of conflict by legal and judicial means; the awareness of evidence being required both on the side of the parties to the dispute and on the side of the court bench; keeping written records and the awareness of the power of written evidence.<sup>20</sup> This also applies to

<sup>17</sup> It is also expressed in the Baltic German historiography, for example Pistohlkors G. *Ritterschaftliche Reformpolitik zwischen Russifizierung und Revolution* [Reform Politics of Kighthood between Russification and Revolution]. Göttingen et al.: Musterschmidt, 1978, p. 96 or already Tobien A. *Die Agrargesetzgebung Livlands im 19. Jahrhundert*. Bd. 2: *Die Vollendung der Bauernbefreiung* [The Agrarian Legislation of Livonia in the 19<sup>th</sup> Century. Vol. 2: The Completion of the Peasant Emancipation]. Riga: Löffler, 1911, p. 289sq.

<sup>18</sup> Sokolowski P. *Parlamentarismus und Demokratie in den Ostseerepubliken Estland und Lettland* [Parliamentarism and Democracy in the Baltic Republics of Estonia and Latvia]. *Zeitschrift für osteuropäisches Recht, Neue Folge* [Journal for Eastern European Law, New Series], Vol. 1, 1934, p. 55.

<sup>19</sup> See for example § 21. *Vollzugs-Instruction zur Allerhöchst bestätigten Landgemeinde-Ordnung für die Ostseegouvernements vom 19. Februar 1866 (confirmed 29.6.1866)* [Instruction of Execution of the Peasant Community Code for the Baltic Sea Governorates, 19<sup>th</sup> February 1866, Confirmed by the Emperor on 29<sup>th</sup> June 1866]. – *Sammlung der ergänzenden Bestimmungen zur Estländischen Bauer-Verordnung vom Jahre 1856 und anderer Gesetze, betreffend die Estländischen Bauern*. Beilagen [Collection of Supplementary Provisions to the Estonian Peasant Ordinance of 1856 and Other Laws Concerning Estonian Peasants. Supplements]. Reval: [Ehstländische Gouvernements-Typographie], 1877, p. 3.

<sup>20</sup> Luts M. *Gerichtbarkeit im Dienst der Volkspädagogik: Rechtsprechung in Bauernsachen in Estland und Livland 1866–1889* [Jurisdiction in the Service of People's Education: Case law on Peasant Matters in Estonia and Livonia 1866–1889]. In: *Liber Amicorum Kjell Å Modéer*. Lund: Juristförlaget, 2007, pp. 433–448.

the regular elections for the local community assembly. The peasant communities in the Baltic provinces were thus the first bodies to become familiar with the function of modern structures of institutions and the separation of powers. In contrast to Russian reform of the constitution and administration of cities (1892) or the police and judicial reform of 1888/89, the Peasant Community Code of 1866 was not accompanied by russification, which was yet another reason it gained trust.

### 3. Social mobility between the free estates

But what about social mobility? In Prussia, for example, the estates themselves remained intact while mobility between them was made possible: the people could move from the peasantry to become burghers and vice versa; the nobility could also carry out bourgeois trade; all kinds of land could be sold on the free market.

In Baltic territories, farming and manor lands were excluded from free trade. The second volume of the Baltic Provincial Law Code of 1845, which deals with the laws of the estates, in its Article 876 states that the so-called knight manors could only be acquired by locally immatriculated noblemen. This restriction was abolished by the Imperial Acts of 1866. Christian subjects of all estates were still eligible to acquire knight manors. Later even some Estonian and Latvian peasants bought former knight manors. We use the term “former” because the political rights (for example, participation on the diet of knighthood as local ruling body) and economic privileges (for example, a franchise to the village inns) tied to the manor were not transferred to the non-aristocratic or non-immatriculated new owner of the estate. As a consequence, one could not change one’s social estate through the acquisition of a feudal estate.

However, the social estates in the Baltic provinces were not completely rigid. Similarly to Prussia, mobility between the social estates in the Baltic provinces also occurred, especially between the burgher class and the peasantry. It was possible to move this way by registering with the peasant community, and through the acquisition of farming land. Nevertheless, this did not happen very often and mainly applied to burghers of smaller towns. Burghers of larger towns, especially the burghers of Riga, fought vehemently for the right to acquire property in the country. However, they had manors in mind, and not farms.

It was the members of the peasantry who profited most from social mobility in a society that still remained estate-based. Of course, they could not just join the corporations of the nobility and the town burghers because they were free citizens. After the implementation of the Russian Town Ordinance and the abolition of the guild charters, the so-called Large Guilds in the Baltic towns functioned as registered associations, which should not be compared to present-day associations, to which everybody has a free access.

In the Russian Empire, however, one could find a peculiar social ladder, which made social advancement possible outside the estate acquired through birth in the form of the Table of Ranks, introduced by Peter the First. A university degree

made one exempt from the poll tax, while a candidate degree gave access to the Table of Ranks.<sup>21</sup> The empire was large enough to offer academic achievers from the Baltic peasantry a career that they would not have dreamt of in their own provinces. It is no wonder then that Estonian peasants participated in a rural exodus, especially to the capital St. Petersburg. As a result, more Estonians studied at the University of Petersburg than at the University of Dorpat (Jurjew, as the town was called after the russification was initiated in 1892).

## Conclusions

The Baltic, as well as Russian peasant emancipation did not create the basis for a modern society of free and equal individuals. However, it did devise a new free estate within the framework of an estate-based society. Within this estate, relatively modern institutions and structures of self-government were soon created in the Baltic provinces. Although freedom of movement was not permitted with the ordinances of 1816/17/19, this freedom did reach the Baltic peasantry in the second half of the 19<sup>th</sup> century. A lot of Baltic peasants moved to the cities, often to the capital of the Russian Empire, St. Petersburg, and some of them took advantage of the possibility to rise socially, – an opportunity that was made possible for them through higher education and the Table of Ranks established by Russian Empire.

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<sup>21</sup> See Waliszewski K. Peter the Great: His Life and Work. Repr. Forgotten Books, 2010, p. 454sq.

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## **ABOLITION OF SERFDOM IN THE BALTICS – A DEMAND DICTATED BY THE MODERN WORLD**

### **Summary**

The abolition of serfdom in the Baltics is evaluated rather controversially by scholars of the history of Latvia and the history of law. Previously, historians mostly concentrated on the outcome of the abolition of serfdom, highlighting the fact that the peasants, as they acquired personal freedom (becoming *vogelfrei*), lost their lands, which remained the property of the nobility.

Until now, the causes of the abolition of serfdom have seldom been the focus of attention. Why did the czar agree to abolish it earlier in the three Baltic provinces/governorates (1816 in Estonia, 1817 in Courland, 1819 in Livonia)? The answer to this question is crucial because it concerns not only the abolition of serfdom, but also the evaluation of the Baltic German aristocracy as a whole. It is also a question about the extent to which the Baltics remained integrated in the Western European (especially German) cultural, legal and economic space, even while being a part of the Russian Empire.

**Keywords:** Russian Empire, Baltic provinces/governorates, abolition of serfdom, Enlightenment

### **Introduction**

The abolition of serfdom in the Baltic provinces of the Russian Empire (German: *Ostseegouvernements*, Russian: *Остзѣйскіе губѣрніи, Прибалтійскіе губѣрніи*) in the early 19<sup>th</sup> century is one of those events in the Latvian history that are evaluated rather controversially – both positively and negatively. This refers to the attitudes towards the event, but the circumstances leading to it have not yet been discussed sufficiently.

**The aim** of this research is to assess the different views held by various schools of historical thought about the causes that led to abolishing serfdom in the Baltic provinces four decades earlier than in the rest of the Russian Empire, as well as to define the limitations set by the time, social group, political and ideological beliefs, and to draw conclusions about the factors that influenced the decision of Alexander I (1777–1825). On the basis of these conclusions, opinions concerning the Baltic nobility are also evaluated.

**The historical method** has been employed in this research. This method allows facts of the past to be considered from a present-day viewpoint. It does not claim an absolute objectivity, but helps to follow the arguments proposed during various historical periods and to evaluate their advantages and disadvantages in the context of today.

When proclaiming the emancipation of serfs in January of 1820, Peter Wilhelm von Buxhoeveden (1787–1841), land marshal of Saaremaa, said: “This is what [the tzar] Alexander wanted, and what the *Zeitgeist* wanted”<sup>1</sup>. This quote, rather illustrative of its epoch, contains the essence of the issue. Indeed, the tzar of Russia, Alexander I, wanted the abolition of serfdom, but the reasons why he wanted it are not obvious. Was it the way it is depicted in the painting “February 19, 1819” by Johann Leberecht-Eggink – where the philanthropist tzar is handing the emancipation document to the kind-hearted nobility, who will later pass it over to the astonished and overjoyed people? The truth seems to be more complicated.

The other side of the question refers to the concept of *Zeitgeist*. Was the event caused by the ideas of the Enlightenment, the theory of “natural rights”, and the triumph of humanist thought – or by the increasing fears felt by the tzar and the nobility? Was it a necessity dictated by the circumstances?

## 1. The most widespread views in Latvian historiography about the causes of the abolition of serfdom

As already noted, the historiography of Latvia presents a range of different views about this event. Baltic German historians described the abolition of serfdom as a humanitarian act from which the whole of society benefitted<sup>2</sup>. Still, the Baltic German historiography tended to ignore the role of the peasantry.

Quite the opposite view was held in Soviet historiography, particularly by the historian Jānis Zutis<sup>3</sup>. On the basis of the methodology of Marxism-Leninism, the role of individuals was neglected, especially those belonging to the nobility. Soviet historiography analysed everything from the aspect of the class struggle, depicting the nobility as reactionary and only seeking to gain maximum benefit from the peasants’ labour<sup>4</sup>.

<sup>1</sup> Švābe A. *Latvijas vēsture 1800–1914* [History of Latvia 1800–1914]. Uppsala: Daugava, 1958, p. 114.

<sup>2</sup> Rennenkampf G. von. *Bemerkungen über die Leibeigenschaft in Livland und ihre Aufhebung* [Notes about Serfdom and Its Abolition in Livonia]. Kopenhagen: Thielische Buchdruckerei, 1818; *Himmelsstern, von S. Zur Geschichte der Bauernfreiheit in Livland* [On the History of Peasant Freedom in Livonia]. Riga: Nicolai Hummel’s Buchhandlung, 1878; Seraphim E. *Im neuen Jahrhundert. Baltische Rückblicke und Ausblicke von Dr. Ernst Seraphim* [In the New Century. Baltic Retrospects and Aspects by Dr. Ernst Seraphim]. Riga, 1902; Sievers J. *Zur Geschichte der Bauernfreiheit in Livland* [On the History of Peasant Freedom in Livonia]. Riga: Druck von Müller, 1878, etc.

<sup>3</sup> Zutis J. *Vidzemes un Kurzemes zemnieku likumi 19. gs. sākumā (1804–1819)* [Peasant Laws in Vidzeme and Kurzeme in Early 19<sup>th</sup> Century (1804–1819)]. Rīga: Latvijas Valsts izdevniecība, 1954; Zutis J. *Vidzemes un Kurzemes zemnieku brīvlaišana 19. gs. 20. gados* [Liberation of Vidzeme and Kurzeme Peasants in the 1820s]. In: *Apcerējumi par Latvijas PSR vēsturi* [Essays on the History of Latvian SSR]. Rīga, 1956.

<sup>4</sup> *Latvijas PRS vēsture* [History of Latvian SSR]. J. Zutis (ed.), Vol. I, *No vissenākajiem laikiem līdz 1860. gadam* [From the Ancient Times to 1860]. Rīga: Latvijas PSR Zinātņu akadēmija, 1953, pp. 310–401.

The most objective evaluation of the abolition of serfdom has so far been given during the period of the Republic of Latvia – in the works of professor Arveds Švābe, Mārgers Stepermanis<sup>5</sup>, and, after the renewal of independence, in the works of legal historian Jānis Lazdiņš<sup>6</sup>.

Historiographic literature most often gives the following factors as the reasons that led to the abolition of serfdom in the Baltics:

The wish of Alexander I;

The goodwill of the nobility;

The wish of the nobility to obtain the peasants' land;

Safety concerns (fear of peasant revolts, especially in the first stages of the reforms);

The ideas of the Enlightenment;

The development of the market economy.

The important role of Alexander I, namely, his wish, was already noted by Arveds Švābe. He pointed out the fact that Alexander I in his youth had become acquainted with ideas of liberalism, and wanted to demonstrate to Europe that he (regarding himself as Europe's political leader after the defeat of Napoleon) was not afraid to implement French ideas of liberty.

Arveds Švābe wrote: "The part supported by the tzar is the fruit of the French Revolution. The part supported by the nobility is the old privileges dating back to the time of Sigismund Augustus"<sup>7</sup>. He also noted that "even though the decisions about the emancipation of the Baltic peasants and the corresponding bills were made by the Landtags of the provinces, it was no secret that the main incentive came from St. Petersburg."<sup>8</sup>

Indeed, the Baltic nobility usually protested against any reforms that might reduce their privileges. Thus, baron W. F. von Ungern-Sternberg claimed in 1803 that

<sup>5</sup> Stepermanis M. Pirmās cīņas par dzimtbūšanas atcelšanu Vidzemē 1750–1764 [The First Struggle for the Abolition of Serfdom in Vidzeme 1750–1764]. In: Izglītības Ministrijas Mēnešraksts [Monthly of the Ministry of Education]. 1931, No. 10 and 11; Stepermanis M. J. G. Eizens un viņa darbi par dzimtbūšanas atcelšanu Vidzemē [J. G. Eisen and His Works about the Abolition of Serfdom in Vidzeme]. Rīga: Latvijas vēstures skolotāju biedrība, 1934.

<sup>6</sup> Lazdiņš J. Baltijas zemnieku privāttiesības (XIX gs.) [Private Laws of Baltic Peasants (19<sup>th</sup> Century)]. Rīga: Biznesa augstskola Turība, 2000; Lazdiņš J. Abolition of Serfdom and Organisation of Civil Parish Communities. In: Latvia and Latvians. Rīga: Latvian Academy of Sciences, 2018, pp. 312–346.

<sup>7</sup> Švābe A. Latviešu zemnieku brīvlaišanas politiskās un tiesiskās idejas [The Political and Legal Ideas of Latvian Peasant Liberation]. In: Pagātne un tagadne II. Latvijas Vēstures skolotāju biedrības rakstu krājums [Past and Present II. Journal of Latvian History Teachers Association]. [Ed. by] L. Adamoviča un N. Viksniņa redakcijā. Rīga: Latvijas vēstures skolotāju biedrība, 1938, pp. 131–132.

<sup>8</sup> Ibid., p. 112.

serfdom should be preserved by any means, including artillery, in order to suppress rebellious thoughts<sup>9</sup>.

The dominant view in Soviet historiography was that the abolition of serfdom served the interests of the nobility. It was concluded that the existence of serfdom did not allow them to adapt to the fluctuations of the market economy and, most importantly, could not solve the new economic tasks – to raise the productivity of peasant labour to a level that would satisfy the growing demands of the nobility.

Soviet historians referred to Karl Marx and pointed out that the question was not about getting the maximum amount of products from a slave or serf, but about “producing surplus value”<sup>10</sup>.

Similarly, law historian Voldemārs Kalniņš wrote: “Abolition of serfdom in the Baltic provinces served the interests of the nobles themselves”, nevertheless admitting that “it had a progressive effect – it led to the collapse of the corvée labour system”<sup>11</sup>. Since Alexander I, fearing peasant rebellions, did not want to increase their exploitation, the nobility tried to grab peasant lands in order to increase their own properties. It became a particularly hot issue after the Napoleonic wars. The liberation of peasants without their land – in other words, giving the land of the peasants over to the nobles – completely satisfied the interests of the nobility<sup>12</sup>.

If we were to follow this logic, we might say that the supporters of Enlightenment ideas, such as Garlieb Merkel and Johann Georg Eisen von Schwarzenberg – were actually serving the interests of the nobility.

Another factor that might have had a decisive role in abolishing serfdom was the safety concern. After the French Revolution one could not ignore this factor.

As early as in 1796, Garlieb Merkel in his work *Die Letten*: wrote: “The people are no longer a blind dog that will retreat to its kennel when beaten. It is a tiger silently gnawing at its chain and waiting for the moment to break it and to wash off its shame with blood”<sup>13</sup>.

After the involvement of Russia in European politics following the French Revolution, the issue of internal security became particularly essential. Thus, Alexander I was forced to see to the internal stability of his country, especially

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<sup>9</sup> Ungern-Sternberg von W. F. Ist die von einigen des Adels projektierte Einführung der Freiheit unter dem Bauernstande / Bauernzustande in Livland dem Staatsrecht Russlands konform: Eine Abhandlung den Landtag in Livland von 1803 betreffend.

<sup>10</sup> Markss K. Kapitāls [The Capital]. Vol. I, p. 223; Latvijas PSR vēsture [History of Latvian SSR]. Vol. I. No vissenākajiem laikiem līdz 1860. gadam. J. Zutis (ed.), Rīga, 1953, pp. 350–351.

<sup>11</sup> Kalniņš V. Latvijas PSR valsts un tiesību vēsture [State and Legal History of Latvian SSR]. Rīga: Zvaigzne, 1972, p. 254.

<sup>12</sup> Latvijas PSR vēsture. Saīsinātais kurss [History of Latvian SSR. An Abridged Course]. Akad. K. Strazdiņa red. Rīga: Latvijas PSR Zinātņu akadēmijas izdevniecība, 1956, p. 115; Latvijas PSR vēsture. Saīsinātais kurss. Otrās, pārstrādātais un papildinātais izdevums [History of Latvian SSR. An Abridged Course. New and Supplemented Edition]. Drizulis A. (ed.), Rīga: Zinātne, 1967, p. 109.

<sup>13</sup> Merkel G. Die Letten, vorzüglich in Liefeland, am Ende des philosophischen Jahrhunderts. Ein Beitrag zur Völker- und Menschenkunde [The Latvians, Mostly in Livonia, in the End of the Century of Philosophy. A Contribution to the Study of Nations and People]. Leipzig: bey Heinrich Gräff, 1797, S. 226.

near the borders<sup>14</sup>. He paid special attention to the province of Estonia, and in 1808 appointed as its governor general his brother-in-law, prince George of Oldenburg. The war with Sweden over Finland was not yet over.

There had already been several peasant uprisings in the governorates of Livonia and Estonia – for instance, in 1771 they took place in the parishes of Alūksne, Gulbene etc., and had to be suppressed with the help of the army. The largest rebellion took place in Kauguri in 1802. As the result of conflict with the army, four peasants were killed in the action and ten died afterwards.<sup>15</sup> The historians P. Bērziņš and A. Švābe have pointed out that the rebellious peasants knew about the recent revolution in France<sup>16</sup>.

In the summer and autumn of 1805, peasant uprisings were taking place in the district of Tartu and elsewhere in Estonia. The czar urged the nobility to start reforms. Consequently, in 1804 the peasant laws of Livonia were elaborated in order to improve their situation. A peasant farm-owner still was not allowed to leave his landlord, but the landlord had no rights to seize the peasant's land.

During 1805–1807, Russia was involved in warfare in Europe, and the czar's dialogue with the nobility was temporarily interrupted. It resumed in July 1809 in Estonia. In 1811, the Landtag of Estonia decided to grant personal freedom to peasants, but to keep their lands in the ownership of the landlords. The czar approved this project and ordered a commission to prepare a bill. The Landtag adopted it in 1812, but Alexander I implemented it only in 1816, after the Napoleonic wars.

Undeniably, the Enlightenment reached the Baltics sooner than the other governorates of the Russian Empire. Johann Georg Eisen von Schwarzenberg and especially Garlieb Merkel, as well as Georg Friedrich Parrot (1767–1852; a Frenchman born in Württemberg, later to become the first rector of the University of Tartu), in 1802 submitted to the czar a work entitled *Considérations sur la servitude*. In this document, G. Parrot referred to the theory of natural rights, whereby slavery contradicts human nature, and the most abhorrent form of trade is the purchase of human beings.

## 2. The ideas of the Enlightenment as a stimulus to the market economy

The role of the natural rights defined by the Enlightenment has also been pointed out by historians of law. It was also emphasized by Arveds Švābe. In his work “History of Latvia 1800–1914” (published abroad in 1958), he said: “The philosophy of rationalism and the doctrine of natural rights was the ideological workshop for forging the spiritual weapons meant to destroy the old regime, i.e.

<sup>14</sup> Latvija 19. gadsimtā. Vēstures apceres [Latvia in the 19<sup>th</sup> Century. Essays on History]. Bērziņš J. (ed.), Rīga: Latvijas vēstures institūta apgāds, 2000, p. 27.

<sup>15</sup> Bērziņš P. Zemnieku nemieri Kauguros 1802. g. [Peasant Uprising in Kauguri in 1802]. *Latvijas Vēstures Institūta Žurnāls* [Journal of Latvian Institute of History], No. 4, 1937, pp. 540–541.

<sup>16</sup> Bērziņš P. Zemnieku nemieri Kauguros 1802. g. [Peasant Uprising in Kauguri in 1802], p. 551; Švābe A. Latvijas vēsture 1800–1914 [History of Latvia 1800–1914], p. 69.

feudalism, and to build a civil society. On the basis of natural rights, the abolition of serfdom in the Baltics was demanded already in the 18<sup>th</sup> century by Eisen, Merkel and other enlighteners<sup>17</sup>.

It has been formulated even more convincingly by Jānis Lazdiņš: “The abolition of serfdom was not only a victory of natural rights in the struggle for human freedom”<sup>18</sup>.

Last but not the least – the abolition of serfdom was a necessary precondition for the transition to a market economy. In 1764, Johann Georg Eisen von Schwarzenberg’s book *Eines Liefländischen Patrioten Beschreibung der Leibeigenschaft, wie solch in Liefland über die Bauern eingeführt ist*<sup>19</sup> was published in St. Petersburg. The author criticized serfdom not so much from the ethical as from the economic aspect. In 1795, Georg Parrot wrote a booklet *Über eine mögliche öconomische Gesellschaft in und für Livland*<sup>20</sup>, where he pointed out the agricultural backwardness of the region in comparison to Germany and France<sup>21</sup>.

Estonian historian Seppo Zetterberg has pointed out that, even though the intellectuals who criticized the situation of the peasants were mostly clergymen, they rarely spoke from an ethical or moral aspect, and usually supported the need to improve peasant life for economic reasons<sup>22</sup>. Jānis Lazdiņš has also stressed that the abolition of serfdom was a necessary precondition for the transition to a new kind of economic relations – capitalism<sup>23</sup>. Since the epoch of Solon, a citizen’s freedom is considered as a precondition for the prosperity of the state.

The situation could change after the Napoleonic wars. Napoleon pessimistically predicted that the battle of Waterloo in 1815 was a blow not only to France but also to liberalism. Even though after the Napoleonic wars there was a certain reaction in Europe, a complete return to the old order was no longer possible. When the wars were over, there appeared a chance to dispose of agricultural products, thus causing the growth of agricultural intensity.

<sup>17</sup> Švābe A. Latvijas vēsture 1800–1914 [History of Latvia 1800–1914], p. 122.

<sup>18</sup> Lazdiņš J. Dzimtības atcelšana, pagasta sabiedrības organizācija un nacionāli valstiskas domāšanas pirmsākumi [Abolition of Serfdom, Local Social Organizations, and the Beginnings of National and State-oriented Thinking]. In: Latvija un latvieši. II sēj. [Latvia and Latvians. Vol. II]. Rīga: Latvijas Zinātņu akadēmija, 2013, p. 182; Lazdiņš J. Abolition of Serfdom and Organisation of Civil Parish Communities, p. 345.

<sup>19</sup> Eisen J. G. *Eines Liefländischen Patrioten Beschreibung der Leibeigenschaft, wie solch in Liefland über die Bauern eingeführt ist*. In: *Sammlung Russischer Geschichte [A Patriot’s Description of Serfdom and its Establishment over the Peasants in Livonia]*. 9. S. 491–527. Available at: <https://dspace.ut.ee/bitstream/handle/10062/6489/eisen1.pdf?sequence=1&isAllowed=y> [last viewed November 1, 2019].

<sup>20</sup> Parrot G. *Über eine mögliche öconomische Gesellschaft in und für Livland [On the Possible Economic Society in Livonia]*. Rīga, 1795.

<sup>21</sup> Švābe A. Latvijas vēsture 1800–1914 [History of Latvia 1800–1914], p. 69.

<sup>22</sup> Zeterbergs. Igaunijas vēsture [History of Estonia]. Rīga: Latvijas Mediji, 2018, pp. 202, 203.

<sup>23</sup> Lazdiņš J. Dzimtības atcelšana, pagasta sabiedrības organizācija un nacionāli valstiskas domāšanas pirmsākumi [Abolition of Serfdom, Local Social Organizations, and the Beginnings of National and State-oriented Thinking], p. 182.

The existence of serfdom did not encourage the peasants to work effectively, thus harming both the peasants and landlords<sup>24</sup>. The abolition of serfdom and liberation of the peasants, meanwhile allowing them to keep their land, corresponded to the natural rights formula “to each his own” (*sum cuique*).

## Conclusions

Following the age of Enlightenment and the French revolution, a new situation had emerged in Europe. A return to the old feudal system would condemn a state to backwardness, which would be harmful both to the peasants and the nobility.

The educated part of society in Russia, including the emperor Alexander I, understood this. However, in the situation of Russia one had to take into account the opposition of the nobility. It is noteworthy that the support for the reforms grew during the period when the veterans of the Napoleonic wars returned to Russia after having seen Western Europe.

The Baltics became a testing ground for further reforms in Russia, because here the ideas of the Enlightenment had spread earlier and had been more widely supported. The Baltic nobility was readier for change than the Russian nobility. Neither can the role of the peasant revolts be ignored.

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<sup>24</sup> Zeterbergs S. *Igaunijas vēsture* [History of Estonia]. Riga: Latvijas Mediji, 2018, p. 200.

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# SECTION 3

CHALLENGES TO  
LEGAL SCIENCE IN  
THE INTERACTION  
BETWEEN THE  
INTERNATIONAL AND  
NATIONAL LEGAL SYSTEMS:  
INTERNATIONAL PRIVATE  
LAW AND EU LAW

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## **NE BIS IN IDEM PRINCIPLE IN ARBITRATION – LATVIAN PERSPECTIVE**

### **Summary**

On the basis of one case where an arbitration institution twice has rendered two arbitral awards in the same claim between the same parties and with the same subject matter in Latvia, this article examines the differences between the notion *ne bis in idem* and *res judicata* of arbitral award in international and national scenery. Unfortunately, Arbitration Law of Latvia is so incomplete that both the practice and commentators suggest that re-arbitrating the same claim is a standard. Moreover, as Latvia does not follow Model Law, there is no set aside proceedings available in Latvia.

**Keywords:** *ne bis in idem*, arbitral award, set aside, *res judicata*

### **Introduction: *Ne Bis In Idem* in international arbitral scenery**

The *ne bis in idem* (not twice for the same thing) principle is a corollary of *res judicata* (a thing adjudicated) principle. Once a case has been decided by a valid and final judgment (award), the same issue may not be disputed again between the same parties, so long as that judgment stands (negative effect of *res judicata*).<sup>1</sup> The latter doctrine is a clear example of a general principle of law recognized by civilised nations and reflects a permanent wisdom regardless of times.<sup>2</sup>

If *ne bis in idem* is not explicitly mentioned in the international arbitration sources, such as New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)<sup>3</sup> or European Convention on International Commercial Arbitration (European Convention)<sup>4</sup>, *res judicata* concept is obviously incorporated in Article III of the New York Convention, stating:

*Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.*

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<sup>1</sup> Hanotiau B. *Complex Arbitration: Multiparty, Multicontract, Multi-Issue and Class Actions*. Kluwer Law International, 2006, p. 240.

<sup>2</sup> Barnett P. *Res Judicata, Estoppel, and Foreign Judgments*. Oxford University Press, 2009, p. 8

<sup>3</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 330 UNTS 38, 1968.

<sup>4</sup> European Convention on International Commercial Arbitration. 484 U.N.T.S. 364, 1961.

The drafters of the New York Convention intended to eliminate wasteful, duplicative litigation following arbitration.<sup>5</sup> Therefore this wording leads us to determine that also arbitral awards have preclusive effect and the case has been concluded and reviewed on merits. In other words, internationally arbitral awards, too, can amount to “judicial decisions” for *res judicata* purposes.<sup>6</sup> Moreover, generally an award made in a locally-seated arbitration does not require confirmation in order to have preclusive effects; the award will have preclusive effects from the moment it is made. In the case of an award made in a foreign-seated arbitration, most jurisdictions require that the award first be recognized, before it will have preclusive effects in local courts.<sup>7</sup>

Do Latvian law and practice reflect this wisdom?

The purpose of this article is to discuss whether a legal construct *ne bis in idem* exists in Latvian arbitration environment. The article also will show how shortcomings in the national legislation can lead to the breach of one of the main legal principles. The article does not discuss historical development or any other versions of the principle. The author will mostly use inductive reasoning to draw a general conclusion from one specific case.

## 1. Facts and holding: the Latvian case<sup>8</sup>

On 20 May 2013, natural persons A and B (Russia) as borrowers and the bank (Latvia) as a creditor concluded the Credit Agreement. This Agreement provided that all disputes shall be settled upon choice of a claimant either by the court of the Republic of Latvia or by the Court of Arbitration of the Association of Latvian Commercial Banks.

As borrowers did not fulfil the Credit Agreement, the Bank submitted the claim to the Court of Arbitration of the Association of Latvian Commercial Banks that rendered award against A and B on 3 August 2015. The bank sought recognition and enforcement of the award in the Russian Federation but the Russian court refused to recognize and enforce the award referring to its public policy, i.e., the Court of Arbitration of the Association of Latvian Commercial Banks did not properly inform both respondents about the arbitration and that arbitrators exceeded its mandate.

<sup>5</sup> David V. Rivkin. Chapter 10. The Impact of Parallel and Successive Proceedings on the Enforcement of Arbitral Awards. In: Bernardo Cremades Sanz Pastor and Julian David Mathew Lew (eds.), *Parallel State and Arbitral Procedures in International Arbitration*, Dossiers of the ICC Institute of World Business Law, Vol. 3, Kluwer Law International; International Chamber of Commerce, 2005, p. 272.

<sup>6</sup> Barnett p. 13, also Hanotiau, 2006, p. 245; International Law Association Resolution No. 1/2006 Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration, 4-8 June 2006:

*An arbitral award has conclusive and preclusive effects in further arbitral proceedings if: 3.1 it has become final and binding in the country of origin and there is no impediment to recognition in the country of the place of the subsequent arbitration.*

<sup>7</sup> Born G. *International Commercial Arbitration*, Vol. III, Wolters Kluwer, 2014, p. 2909.

<sup>8</sup> Judgment of Riga District Court of 1 November 2017 in the civil case No C30748516. Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/347096.pdf> [last viewed October 21, 2019].

However, the bank repeatedly submitted the same claim against both persons in the Court of Arbitration of the Association of Latvian Commercial Banks. Persons A and B were informed properly about the arbitral proceedings, and thus the procedural discrepancies of the first proceedings were “cured”. On 23 May 2016, the Court of Arbitration rendered the second award against persons A and B in the same case.

On 20 September 2016, the court of the Russian Federation recognized and enforced the latter award in accordance with New York Convention.

Right before recognition, on 16 September 2016 Persons A and B submitted the claim requesting to acknowledge the arbitration clause invalid in the court of the Republic of Latvia. Persons’ A and B, *inter alia*, considered that the arbitration clause was executed and it became invalid after rendering the first award. The court of the Republic of Latvia denied the claim on the following grounds. Firstly, the court of the Russian Federation recognized the second arbitral award thus there were no reasons to acknowledge the arbitration agreement inoperative and executed. Secondly, the bank had the right to initiate the second arbitration against debtors in accordance with Article 537 of the Civil Procedure Law of the Republic of Latvia.<sup>9</sup>

The decision of the second instance court was appealed but the Supreme Court denied initiating the case in the cassation instance and it became into force on 14 March 2018.

This case may raise different legal questions: is an arbitration clause asymmetric? What is the scope of public policy? Are A and B consumers? What (if any) effect the Russian court decision shall have on the Latvian court’s decision? Is arbitration agreement executed after award is made? Is this arbitration independent because one of the parties is the founder of the founding institution of the arbitral institution?

However, as indicated above, this article focuses on the issue whether the arbitration institution had a right to re-consider the case having the so-called “triple-identity criteria” (proceedings involving the same subject matter or relief, the same legal grounds and the same parties).

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<sup>9</sup> Civil Procedure Law. Available at: <https://likumi.lv/ta/en/en/id/50500-civil-procedure-law> [last viewed October 28, 2019]:

*Section 537. Consequences of Refusal to Issue a Writ of Execution for Enforcement of a Judgment of a Permanent Arbitration Court*

*After a decision to refuse to issue a writ of execution for enforcement of a judgment of a permanent arbitration court has entered into effect:*

1) *the civil legal dispute may be resolved in a court according to the general procedures, if issue of the writ of execution for enforcement of a judgment of a permanent arbitration court has been refused on the basis of Section 536, Paragraph one, Clauses 1, 2, 3 and 7 of this Law;*

2) *the civil legal dispute may be repeatedly referred for resolution to an arbitration court, if the issue of the writ of execution for enforcement of a judgment of a permanent arbitration court has been refused on the basis of Section 536, Paragraph one, Clauses 4, 5 and 6 of this Law.*

## 2. Legal framework and discussion

### 2.1. No set aside procedure in Latvia

Initially, it shall be explained why it is possible in Latvia to render two arbitral awards in the same case and both arbitral awards stay in force. Latvia is not a UNCITRAL Model Law on International Commercial Arbitration (*Model Law*)<sup>10</sup> country, even though “the Constitutional Court of the Republic of Latvia has also recognised that the Model Law is a standard of legal regulation used throughout the world.”<sup>11</sup> Latvia has chosen its own approach, thus, there is almost no court assistance in the arbitral proceeding as provided in UNICTRAL Model Law, and likewise there is no recourse against the award. Explicitly, in Latvia the interested party (like A and B in the case at hand) cannot request the court to set aside (annul, vacate) an arbitral award.<sup>12</sup> It is striking that Latvia is party to the European Convention providing for the grounds to set aside the arbitral award, but there is no national procedural law to implement it in the practice. It has been proven that a legislative regime not providing for a possibility to challenge arbitral awards before ordinary jurisdiction courts violates parties’ rights of access to a court under Article 6(1) of the European Convention of Human Rights.<sup>13</sup>

### 2.2. Binding arbitral award under Latvian Arbitration Law?

Article 51(2) of the Arbitration Law<sup>14</sup> provides: “an award of an arbitration court shall come into effect on the day it is made” and Article 58 (1) states: “a judgment of an arbitration court is mandatory for the parties [...]”. This differs from Article 35(1) of the Model Law that explicitly reads as follows: “an arbitral award, irrespective of the country in which it was made, shall be recognized as binding [...]”. Such wording

<sup>10</sup> UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. Legislation based on the Model Law has been adopted in 80 States in a total of 111 jurisdictions. See: [https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration/status](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status) [last viewed October 21, 2019].

<sup>11</sup> The Court continues:

*the Model Law was elaborated with the aim of creating clear and comprehensive rules that would comprise fair and modern standards of international arbitration, which, as general legal principles, would be applicable in various legal and economic systems existing in the world.*

Judgment of the Constitutional Court of 28 November 2014 in the case No. 2014-09-01, § 15.4. Available at: [http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2014/03/2014-09-01\\_Spriedums\\_ENG.pdf#search=2014-09-01](http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2014/03/2014-09-01_Spriedums_ENG.pdf#search=2014-09-01) [last viewed May 2, 2019].

<sup>12</sup> Born, 2014, p. 3390:

*If an award is set aside in the place where it was made, then the award arguably ceases to have legal effect or existence (or becomes null), at least under the laws of the state where it was annulled, just as an appellate court decision vacates a trial court judgment.*

<sup>13</sup> Krūmiņš T. Arbitration and Human Rights: Lack of Setting-Aside Proceedings as a Violation of the ECHR. PhD Thesis at the University of Copenhagen, Faculty of Law, 2019, p. 381.

<sup>14</sup> Arbitration Law. Available at: <https://likumi.lv/ta/en/en/id/269189-arbitration-law> [last viewed October 28, 2019].

also contrasts Article 16 (3) and (4) of the Law on Judicial Power: a judgment [of the court of the general jurisdiction] shall be binding on a court when examining other cases related to such matter and such a judgment shall have the force of law, shall be mandatory for all, and shall be treated with the same respect as is due law.<sup>15</sup> If an arbitral award is binding only to the parties, the judgment of the court is mandatory for all. This means that the judgment of the court has a preclusive effect on arbitral proceedings, i.e., if the court (despite the arbitration clause) has rendered the judgment, that arbitral tribunal cannot review the same case again.

But what about the preclusive effect of arbitral award then? The above-cited ambiguity in the wording of the Arbitration Law leads to respective case law and commentaries. To be exact, the court of general jurisdiction has acknowledged that an arbitral award has no preliminary importance because the award is made by the arbitration, not the court.<sup>16</sup> Similarly, the commentators have stated that the arbitral award has no prejudicial effect for the courts.<sup>17</sup> Such conclusion is in contradiction with well-established international practice that the arbitral award has the same preclusive effects that national judgments.<sup>18</sup> This clearly shows that both legislator and established practice did and do not trust national arbitral institutions, do not validate the arbitral awards thus facilitating duplication of proceedings and abuse of process.

However, in another case the Supreme Court concluded that when the court issues a writ of execution for compulsory enforcement of the award the court is under obligation to examine prejudicial award as far as it might affect another award in execution.<sup>19</sup> This leads to conclusion that arbitral award might have *res judicata* effect towards another arbitral award. It is internationally agreed that, indeed, an arbitral award has conclusive and preclusive effects in the further arbitral proceedings.<sup>20</sup>

In general, it is questionable why in one case the court gives the preclusive effect to arbitral award (towards another arbitral award), but in another case (towards the court judgment) – does not.

Yet, applying this formula to the case at hand, one can determine that the first award made by the Court of Arbitration of the Association of Latvian Commercial Banks has *res judicata* effect and the claimant was barred from arbitrating the same

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<sup>15</sup> Law On Judicial Power. Available at: <https://likumi.lv/ta/en/en/id/62847-on-judicial-power> [last viewed October 28, 2019].

<sup>16</sup> Judgment of Supreme Court of Latvia of 24 January 2013 in the civil case No. SKC-7/2013. Available at: <http://www.at.gov.lv/downloadlawfile/3027> [last viewed October 28, 2019]. The court stated that the Article 96(2) of the Civil Procedure Law does not apply to arbitration awards:

*Facts established pursuant to a judgment that has come into lawful force in one civil case need not be proved again in trying other civil cases involving the same parties.*

<sup>17</sup> Civilprocesa likuma komentāri. I daļa (1.-28. nodaļa), Torgāns K. (scientific ed.), Tiesu namu aģetūra, 2011, p. 268.

<sup>18</sup> Born, 2014, p. 3741.

<sup>19</sup> Judgment of Supreme Court of Latvia of 29 December 2014 in the civil case No. SPC-36/2014. Available at: <http://www.at.gov.lv/downloadlawfile/2975> [last viewed October 28, 2019].

<sup>20</sup> International Law Association Resolution No. 1/2006 “Recommendations on Lis Pendens and Res Judicata and Arbitration, 4-8 June 2006, para. 4.

claim in the same arbitration. Nevertheless, A and B had no legal remedy to set aside either of the awards, as Latvian law does not provide for recourse of the arbitral award. Even more strikingly, the particular Court of Arbitrations in its rules provides that should the claimant repeatedly apply to the Court of Arbitration with the same claim because it has not received the writ of execution, the Chairman of the Arbitral Tribunal upon request of the claimant may release the claimant from payment of the arbitration expenses, provided that issue of the writ of execution was rejected due to breaches caused by the Court of Arbitration, and such breaches can be stated impartially.<sup>21</sup> The Rules confirm that the same dispute can be re-arbitrated.<sup>22</sup>

The Constitutional Court also has stated: “[..] the control of arbitration courts is concentrated on the stage of issuance of the writ of execution.”<sup>23</sup> However, in the case at hand there was no need to turn to a court of general jurisdiction and request issuing a writ of execution because it needed recognition in another state. Even if there would be need for a writ of execution, the court had no direct legal powers to cure this procedural injustice and invalidate the arbitral award. This raises the next question: what would happen with both arbitral awards if in the case at hand the court were to acknowledge that the arbitration clause is not valid? Both arbitral awards would still be in force, as they cannot become automatically invalid. Therefore, the cited Article 537 (2) of the Civil Procedure Law is not logical.<sup>24</sup> This problem was also recognized by the Constitutional Court, already in 2014, before the new Arbitration Law came into force,<sup>25</sup> but again legislator failed to address it.

One more interesting aspect not discussed in the case at hand and in legal literature in Latvia is about the party’s duty to raise the objections as concerns the prevention of duplicative claims. In general, arbitrators are not bound to observe *res judicata* effect of prior arbitral award *ex officio*, the preclusive effect of *res judicata* should be raised on a party’s initiative as soon as possible in the proceedings.<sup>26</sup> From the facts of the particular case we cannot establish whether A and B did or did not waive their rights to object. Still, in Latvia, despite such objections, even if

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<sup>21</sup> Article 38(5) of the Rules of the Court of Arbitration of the Association of Commercial Banks of Latvia, 2017. Available at: [http://www.fsties.lv/en/court\\_of\\_arbitration/](http://www.fsties.lv/en/court_of_arbitration/) [last viewed October 28, 2019].

<sup>22</sup> It shall be noted that this norm is cited in the referred judgment but clearly this norm should not have been applied to the case at hand, as this is not national case, where a writ of execution was refused.

<sup>23</sup> Judgment of the Constitutional Court of the Republic of Latvia of 17 January 2005 in the case No. 2004-10-01 § 9.1.

<sup>24</sup> See footnote 9.

<sup>25</sup> “Law does not provide what happens with the award by an arbitration court if a court of general jurisdiction has refused to issue a writ of execution for its compulsory enforcement.” Judgment of the Constitutional Court of 28 November 2014 in the case No. 2014-09-01, § 22.

<sup>26</sup> Erk-Kubat N. *Parallel Proceedings in International Arbitration: A Comparative European Perspective*. Kluwer Law International, 2014, p. 234.

the arbitral tribunal continues with the review of the second case, again there are no legal remedies to challenge such decision of arbitrators.<sup>27</sup>

In earlier judgment, the Constitutional Court has stressed: “in accordance with the general principle, the state is not responsible for violations of the fundamental rights in arbitration court”, nevertheless, it could be liable for the incomplete legislation that violates international law, human rights and rights to due process. Moreover, the court of general jurisdiction shall interpret an incomplete law and fill the legal gaps and apply general legal principles of law if it can determine injustice.<sup>28</sup>

## Conclusions

- It is internationally accepted that the facts established in one judgment or arbitral award that has come into lawful force (*res judicata*) shall not be re-litigated or re-arbitrated (*ne bis in idem*), otherwise this results in abuse of process, fairness and economy of justice.
- Due to incomplete and outdated Arbitration Law in Latvia, the principle of *ne bis in idem* has clearly been violated. The cases have been re-arbitrated several times. This questions the creditability of the arbitration and legal system in general. Therefore, Latvia is not an internationally approved seat of arbitration and it is not endorsed as a forum of modern, clear and transparent rules.
- The Arbitration Law shall be harmonized with UNICTRAL Model Law, and there is a particularly urgent need to introduce the set-aside of arbitral awards in the local law.
- While there is no legislative will to introduce UNCITRAL Model Law, the courts of general jurisdiction shall be able to determine the violations of due process, to find correct applicable law and, if there is no law governing the contested relation, a court shall act in accordance with general legal principles.

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<sup>27</sup> See in opposite Article 16(3) of the Model Law:

[..] *If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal [..].*

<sup>28</sup> Article 5(5) of the Civil Procedure Law.



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## THE RIGHT TO SOCIAL SECURITY: FROM STATE TO EU RESPONSIBILITY?

### Summary

The right to social security is a fundamental human right, emphasising solidarity and equality among the members of society. Historically, responsibility has shifted from family to State or social solidarity. Social relations are changing faster than ever before. We are facing new forms of families and organisation of work. Within the EU, mobility is promoted, also with regard to cross-border healthcare. Can the existing EU and national social security laws cope with all the changes, or would more competence of the EU be required in order to preserve the right to social security?

**Keywords:** social security, coordination, cross-border healthcare, family benefits, non-standard workers, equal treatment

### Introduction

The right to social security is one of the fundamental human rights, often not in the forefront of the human rights law, which is predominately guided by the European Convention on Human Rights. Nevertheless, especially during the quite recent times of crises, the importance of the right to social security has been (re)emphasised.

Historically, family solidarity has been expressed among family members of, as a rule, larger rural families.<sup>1</sup> With industrialisation, the structure of the family has changed and workers were left without the support extended by larger families, fraternities and mutual insurance companies. In order to restrict workers' movement and remain in power, German Chancellor and Prussian Prime Minister Otto von Bismarck advocated social insurance, financed by workers and their employers. The first State-organised social security system was thereby established.<sup>2</sup>

Social security is first and foremost regulated by national law, which takes into account various historically conditioned and rather distinctive structural

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<sup>1</sup> The Slovenian Constitutional Court also took solidarity between family members as a basic starting point. It argued that when the legislator decides to completely replace the family solidarity with social solidarity, it has to ensure such solidarity (not merely abolish the maintenance duty for disabled children after reaching certain age). Judgment of Slovenian Constitutional Court of 13 December 2007 in case No. U-I-11/07. Available at: <http://odlocitve.us-rs.si/documents/b9/45/u-i-11-074.pdf> [last viewed December 6, 2019].

<sup>2</sup> More Köhler P. A., Zacher H. F. Ein Jahrhundert Sozialversicherung in der Bundesrepublik Deutschland, Frankreich, Großbritannien, Österreich und der Schweiz [Hundred years of social insurance in the Federal Republic of Germany, France, Great Britain, Austria and Switzerland]. Berlin: Duncker & Humblot, 1981.

(e.g. educational, living and working conditions) and cultural elements (e.g. powers of trade unions or civil movements), policy preferences (which may emphasise more individual responsibility or more solidarity), and even ideologies in every State. This is the reason why national social security systems have not developed in a more uniform way.<sup>3</sup>

However, societal relations are changing and stemming from the rule of law is the duty of the legislature to follow this development with its normative action. Moreover, family structures, forms of work organisation and patterns of mobility have changed. Single-parent and same-sex families are nothing new anymore. We have concepts of father-plus (instead of stepfather) and co-mothership in some Member States. Work could be organised via electronic platforms, be of short duration, last for a limited time period, even on-call, and self-employed persons may be economically dependent or actually perform work as workers. Moreover, patterns of movement have changed from longer residence to shorter term stays in another Member State. All these factors influence the shaping of social security systems.

Therefore, the question is, whether the right to social security could still be guaranteed by the Member States alone, based on the principle of territoriality, or does it call for a greater involvement of the European Union (EU)? It should enable and even promote mobility within the Union. Hence, the research question of the present paper is to what extent the responsibility of providing social security is and should be divided between the Member States and the EU as a supranational structure. Could it be argued that, in order to safeguard national social security systems under the more dynamic development of societal relations, more EU competencies in social security are required?

## 1. The right to social security

The right to social security is firmly rooted in international, European and national constitutional law. It is built upon the principle of solidarity among the various groups in a given society.

### 1.1. Fundamental social right

Human rights are at the core of civilised societies. They are not only limiting the powers of the State, but are the purpose and guidance of the State's (also normative) action. The culture of human rights in the democratic society governed by the rule of law<sup>4</sup> is emphasised for at least 70 years, since the adoption of

<sup>3</sup> For an overview, see [www.missoc.org](http://www.missoc.org) [last viewed November 02, 2019].

<sup>4</sup> Furthermore, democracy, rule of law and human rights are firmly emphasised by the Council of Europe.

the Universal Declaration of Human Rights (UDHR)<sup>5</sup>, which reflects the human kind as aspiring to live in peace by respecting, promoting and protecting all human rights, including social rights.

Foundation of social human rights is the presumption of principal equality of all people. It is based on the conviction that optimisation of individual interest does not necessarily guarantee the highest social interest. Hence, next to civil and political rights, social rights are equally important. The right to social security is indispensable for connecting people within a certain (national or even supranational) society.<sup>6</sup> It should guarantee every individual and society as such existence and more or less free development.

The right to social security is well established in international law as one of the fundamental human rights. It is regulated not only in the UDHR,<sup>7</sup> but also in the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>8</sup> and the Convention on the Rights of the Child (CRC).<sup>9</sup> At the European level, the right to social security is enshrined in the (initial and revised) European Social Charter (ESC)<sup>10</sup> of the Council of Europe and the Charter of Fundamental Rights of the EU (CFR-EU).<sup>11</sup> The ESC formulates the right to social security by obliging the Contracting Parties, i.e. the States, to ensure it.

The ILO Convention 102 (1952) was the first and remains one of the most important international instruments to define the substance of the international human right to social security.<sup>12</sup> It lists nine social risks and limits its scope to the 'traditional' social security branches and described categories. At the time, standard beneficiary, for whom the benefits should suffice, was a man with his wife and two children. Social security systems have been built around such perception of a single-breadwinner model, which today, of course, has become outdated.

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<sup>5</sup> Very recently another important declaration has been adopted by the UN General Assembly, i.e. Declaration on Universal Health Coverage. Available at: <https://www.un.org/pga/73/wp-content/uploads/sites/53/2019/07/FINAL-draft-UHC-Political-Declaration.pdf> [last viewed November 2, 2019].

<sup>6</sup> It could hardly be agreed that 'there is no such thing as society' as advocated in 1987 by former UK Prime Minister Margaret Thatcher. Available at: <https://www.margaretthatcher.org/document/106689> [last viewed November 2, 2019].

<sup>7</sup> Articles 22 and 25, UDHR.

<sup>8</sup> Article 9, ICESCR.

<sup>9</sup> Article 26, CRC.

<sup>10</sup> Article 12 of the (initial and revised) ESC.

<sup>11</sup> Article 34, CFR-EU, OJ C 202, 7.6.2016.

<sup>12</sup> Although it neither enshrines the right to social security nor defines social security as such.

Nevertheless, ILO Convention 102 has been an important source of inspiration for other international legal instruments.<sup>13</sup> Moreover, the right to social security is also enshrined in many national constitutions, including the Slovenian and the Latvian constitutions.<sup>14</sup> As such, it cannot be regulated as a very precise and concrete legal rule. It is one of the basic values and guidance for all legal subjects in a society. It has to be noticed that there might be no direct correlation between the constitutional provisions and concrete rights stemming from the social security system. Hence, the right to social security has to be determined, first and foremost, by the national legislature, by regulating individual social security rights of insured persons (and other beneficiaries). By doing so, it also draws a line between public and private responsibility for providing income security when one of the social risks or a specific situation of need occurs.

In more general terms, social security can be described as a public system of income protection in case of its loss or important reduction (e.g. due to old age, invalidity, decease, accident at work or occupational disease, sickness, maternity or unemployment) or in case of increased costs (e.g. for healthcare, raising of children or reliance/dependency on long-term care), organised through a process of (broader or narrower) social solidarity.<sup>15</sup> The latter could be vertical, horizontal or intergenerational solidarity.<sup>16</sup>

## 1.2. Solidarity as a cornerstone of social security

Solidarity is the most important characteristic of any social security system. It is *differentia specifica* between social and private insurance (where certain reciprocity between insured persons may exist, but solidarity is as a rule absent). Its slogan of liberty, equality and brotherhood (Fr. *liberté, égalité, fraternité*) was developed in the times of the French revolution (1789). These values were also incorporated in the UDHR. Its first Article states that all human beings are born *free and equal* in dignity and rights. They are endowed with reason and conscience and should act

<sup>13</sup> The initial ESC sets as satisfactory standard of social security the standard required for the ratification of the ILO Convention No. 102. The latter was used as a model for the initial Code of Social Security, which is a standard of the satisfactory level of social security for the revised ESC. Also, the Regulation (EC) 884/2004 on coordination of social security systems enumerates in its material scope the same branches of social security as found in the ILO Convention No. 102. Moreover, the CFR-EU does not mention only the traditional risks, but adds a “new” one, i.e. “dependency” (reliance on long-term care).

<sup>14</sup> Article 50 of the Slovenian Constitution and Article 109 of the Latvian Constitution. Other articles may be of importance, since they relate not only to healthcare, human dignity and rights of specific groups of people (e.g. persons with disabilities), but also the nature of the state, social state or socially responsible state, respectively.

<sup>15</sup> Pieters D. *Social Security: An Introduction to the Basic Principles*, 2<sup>nd</sup> edition, Alphen aan den Rijn: Kluwer Law International, 2006, p. 2.

<sup>16</sup> More on solidarity: Strban G. Constitutional protection of the right to social security in Slovenia. In: Egorov A., Wujczyk M. (eds.), *The Right to Social Security in the Constitutions of the World: Broadening the Moral and Legal Space for Social Justice*. ILO Global Study, Vol. 1: Europe. Geneva; ILO, 2016, p. 245.

towards one another in a spirit of *brotherhood*. In the times of gender equality, it would be only equitable to add also in the spirit of sisterhood, or maybe a more general term of solidarity could be used instead.

Solidarity has gained importance also in the EU law, where it is expressly mentioned. Treaty on European Union, signed in Maastricht on 07.02.1992 [in the wording of 07.06.2016], emphasises the values, which are common to all Member States<sup>17</sup> in a society characterised not only by pluralism, non-discrimination, tolerance, justice, equality between women and men, but also solidarity. Among distinctive forms of solidarity, the solidarity between generations is accentuated and should be promoted.<sup>18</sup>

Moreover, the CFR-EU, which has the same legal value as the Treaties, explicitly mentions solidarity as an indivisible and universal value of the Union.<sup>19</sup> In a special chapter, titled “Solidarity”, the Charter defines the rights to social security, social assistance and health care.<sup>20</sup> Although the Charter does not introduce new competencies of the EU,<sup>21</sup> it is an important guidance in interpretation of the EU law, also by the Court of Justice of the EU (CJEU).<sup>22</sup>

Solidarity in a more specific sense also plays a role when it comes to the influence of basic economic freedoms and the EU competition law on national social security systems. According to the CJEU, systems based on solidarity (or carriers of such systems) cannot be qualified as undertakings and are exempted from the application of competition law.<sup>23</sup>

Solidarity constitutes a core principle of European social security and unites European national constitutions on the basis of their shared values. It is laid down as an express legal norm in many constitutions, including the Latvian one.<sup>24</sup> In Slovenia, the Constitutional Court on several occasions has mentioned solidarity

<sup>17</sup> The values are human dignity, freedom, democracy, equality, the rule of law and human rights. Article 2 Treaty on EU, OJ C 202, 7.6.2016 (consolidated version).

<sup>18</sup> Article 3 of the Treaty on EU.

<sup>19</sup> Second paragraph of the preamble, CFR-EU.

<sup>20</sup> Title IV, Articles 34 and 35, CFR-EU.

<sup>21</sup> Article 6 Treaty on EU and Article 51 CFR-EU.

<sup>22</sup> E.g. CJEU judgments of 8 March 2011 in case No. C-34/09 *Zambrano*, of 24 April 2012 in case No. C-571/10 *Kamberaj*. It might also play a role in the pending Latvian case No. C-243/19 *Veselibas ministrija*.

<sup>23</sup> More in CJEU judgments of 17 February 1993 in joined cases No. C-159/91 and C-160/91 *Poucet et Pistre*, but also in some later cases like CJEU judgments of 3 March 2011 in case No. C-437/09 *AG2R Prévoyanc*, of 5 March 2009, in case NO. C-350/07 *Kattner Stahlbau*, or in the field of social security of migrant workers CJEU judgment of 14 October 2010 in case No. C-345/09 *van Delft et al.*

<sup>24</sup> See the preamble of the Latvian Constitution. For instance, in Austria, Italy, Spain, France, Belgium and the Netherlands, the solidarity principle is at any rate invoked to establish and legitimate the existence of social insurance. Becker U. Solidarity, Financing and Personal Coverage. *The Japanese Journal of Social Security Policy*, No. 1, 2007, p. 1. The Slovenian Constitutional Court has also emphasized solidarity as a core of the social state principle, enshrined in Article 2 of the Slovenian Constitution.

between persons with higher earnings and those with lower income (the so-called vertical solidarity), as well as intergenerational solidarity.<sup>25</sup>

The right to social security is in many Member States (mainly of continental Europe) provided by social insurance schemes. They have to be mandatory in order to establish relations between persons who present a higher (social) risk with those who present a lower (social) risk. It may sound as a paradox, but due to such coercion (and mandatory pooling of risks), both groups may enjoy more freedom. An individual would be willing to engage in more risky activities, if he/she would be confident that there is a legally regulated social security system guaranteeing certain rights in case of sicknesses or injury, unemployment, old-age, reliance on long-term care, invalidity or decease.

## 2. Sharing of competencies in social security

Competencies in the field of social security are shared between the Member States and the EU. Member States are exclusively competent to shape the substance of their social security systems, i.e. its personal and material scope, as well as enforcement procedures. Hence, considerable differences between social security systems within the EU remain present.<sup>26</sup>

When the Member States fall short of achieving the goal themselves, e.g. the goal of freedom of movement in the EU, or when a certain fundamental legal principle has to be ensured, the EU steps in. Hence, the EU holds certain, even if limited, competencies in harmonising the substance of social security systems. They concern equal treatment of women and men, legally non-binding cooperation between the Member States in a form of Open Method of Coordination (OMC) and a recent European Pillar of Social Rights (EPSR), encompassing Social protection and inclusion.<sup>27</sup>

### 2.1. Freedom of movement within the EU

In order to guarantee free movement of workers (Article 45 TFEU)<sup>28</sup> and Union citizens in General (Article 21 TFEU), social security systems have to be coordinated, i.e., legally and administratively linked.<sup>29</sup> Some of the coordination

<sup>25</sup> See Strban G. Constitutional protection of the right to social security in Slovenia, 2016, p. 247.

<sup>26</sup> The continental Member States mainly realise the right to social security by way of contributory financed social insurances. Some northern, as well as some southern Member States implement or combine it with tax-financed, residence-based national protection schemes. See [www.missoc.org](http://www.missoc.org) [last viewed November 2, 2019].

<sup>27</sup> Commission recommendation on the European Pillar of Social Rights, C(2017) 2600 final, Brussels, 26.04.2017.

<sup>28</sup> Treaty of the Functioning of the European Union (TFEU), OJ C 202, 07.06.2016 (consolidated version).

<sup>29</sup> Article 48, TFEU.

techniques are explicitly mentioned by Article 48 TFEU, i.e. aggregation of all relevant insurance, employment or residence periods and export of social security benefits to another Member State.

Moreover, self-employed “workers” have been squeezed into Article 48 TFEU in order to gain explicit legal basis for coordinating their social security. Although, other provisions of TFEU primarily apply to self-employed persons, such as freedom of establishment and freedom of providing services.<sup>30</sup>

The measures in the field of social security, which are necessary to provide freedom of movement of (economically active) persons have to be passed in accordance with the ordinary legislative procedure and no longer unanimously.<sup>31</sup>

However, a so-called “alarm procedure” or “brake procedure” has been installed. If the Commission proposal were to affect important aspects of its social security system (including its scope, cost or financial structure) or impact the financial balance of that system, the Member State may refer the matter to the European Council. The ordinary legislative procedure is suspended, and the European Council may accept or reject the proposal.<sup>32</sup>

Nevertheless, the European Council, as a rule, adopts its decisions unanimously (except where the Treaties provide otherwise). Hence, the Member State referring the matter to the European Council may still block the adoption of the proposal in the Council. Moreover, if no decision is taken in four months, it is deemed that the originally proposed act has not been adopted. The right of Member States to a veto has not been completely abolished, but merely modified.

In addition, for the economically non-active persons, a second legal basis, i.e., Article 352 TFEU remains applicable, according to which unanimity is always required. All this is an expression of reluctance of the Member States to transfer the competence in the social security field to the EU and to limit the influence of the EU law to national social security systems.

## 2.2. Coordination with a regulation

It is correct that EU law does not unify national social security systems. However, paradoxically, their coordination is achieved with a Regulation, which is a unifying measure. It is generally applicable, binding in its entirety and directly applicable in all Member States<sup>33</sup>. The attribute of direct applicability is linked to the doctrine of supremacy. In principle, it is not open to Member States to interfere with the direct application of a regulation in the national legal order. Nevertheless, social security systems are not unified, at least not in their substance. Rather, the part of formal

<sup>30</sup> Articles 49 and 56, TFEU.

<sup>31</sup> After coming into force of the Lisbon Treaty in December 2009 (OJ C 306, 17.12.2007). Articles 48, 294 TFEU.

<sup>32</sup> Jorens Y., Van Overmeiren F. General Principles of Coordination in Regulation 883/2004, European Journal of Social Security (EJSS), 2009, No. 1–2, p. 55.

<sup>33</sup> Article 288, TFEU.



social security law, governing the application of the substantive social security law in cross-border situations, is unified among all Member States. Positive and negative conflicts of national social security laws are prevented.

Historically, the text on coordinating social security systems of the six founding Member States of the EU<sup>34</sup> was agreed upon in the form of an international convention. However, it was decided to avoid the time-consuming procedure of ratification<sup>35</sup> and the already agreed rules were passed in the form of a regulation. In fact, it was the third regulation ever adopted by the EU, i.e., Regulation (EEC) No. 3/58 concerning the social security of migrant workers.<sup>36</sup> It was the first real legal instrument of the EU.<sup>37</sup> The Regulation (EEC) No. 4/58 was the implementing Regulation, mainly containing rules of behaviour of the institution responsible for social security coordination.<sup>38</sup>

Choosing a regulation over the traditional international convention has important implications. It gives the CJEU the possibility to interpret the secondary legislation and establish its conformity with the Treaties, or apply the Treaties directly to the situations under the material scope of EU law.

However, the patterns of migration are changing and the states with distinctive social security systems (no longer based on economic activity, but rather on residence in the country) have joined the Union. Therefore, Regulation (EEC) No. 1408/71 and its implementing Regulation (EEC) No. 574/72 were introduced. With many modifications, some to codify, some to oppose the judgments of the CJEU, they have become a very complex piece of Union legislation.

The process of modernisation and simplification of social security coordination law resulted in the Regulation (EC) No. 883/2004. It was passed only a couple of days before the largest enlargement of the EU so far.<sup>39</sup> The 10 states (among them Latvia and Slovenia) joined the EU on the first of May 2004 and the unanimity of 25 Member States would be required. The lengthy procedure of obtaining unanimity is shown in passing the implementing Regulation (EC) No. 987/2009<sup>40</sup>, five years later. Both Coordination Regulations are applied since May 2010. It could be argued, that the more diverse the social security systems of the growing number of Member States have become, the more complex coordination regime is required.<sup>41</sup>

<sup>34</sup> Founding Member States were Belgium, France, Germany, Italy, Luxembourg and the Netherlands.

<sup>35</sup> More in: Strban G. Social rights of migrants in the European Union. In: Regional aspects of integration: European Union and Eurasian space. Davletgildeev R. Sh. (ed.), Moscow: Statut, 2019, p. 73.

<sup>36</sup> OJ L 30, 16.12.1958.

<sup>37</sup> Regulations No. 1 and 2 dealt with the use of languages and the form of the *laissez passer* to the Members of the European Parliament, respectively.

<sup>38</sup> Both Regulations became applicable as of January 1959.

<sup>39</sup> OJ L 166, 30.4.2004. The latest proposal for the revision of Coordination Regulations was presented in December 2016. Strasbourg, 13.12.2016, COM(2016) 815 final.

<sup>40</sup> OJ L 284, 30.10.2009.

<sup>41</sup> The same applies *vice versa*. The more similar the national social security systems are, the less complicated their coordination is.

Some principles of social security coordination law can be deduced already from primary law (the Treaties),<sup>42</sup> while others – from the secondary law, most notably, from the Coordination Regulations.<sup>43</sup> These principles are equal treatment of Union citizens, unity of applicable legislation, protection of the rights in course of acquisition (with aggregating all relevant periods), protection of acquired rights (with export of benefits) and good administrative cooperation (e.g. by exchanging first electronic documents between Austria and Slovenia in 2019).<sup>44</sup>

### 3. Specific issues of coordinating national social security systems

Modified social relations present a challenge not only for national social security systems, but also for the EU social security coordination law. Examples might encompass cross-border healthcare, export of family benefits and coordination of social security for non-standard workers and self-employed.

#### 3.1. Cross-border healthcare

Revived interest in cross-border healthcare has been triggered by the adoption of the Directive 2011/24/EU,<sup>45</sup> although it has been already enabled by the Coordination Regulations and certain provisions of national law (not to mention bilateral and multilateral social security agreements). It may sound as another paradox that a user of national legal norms might be more familiar with a Directive, which has to be transposed into national law, rather than a Regulation, which has to be read alongside it (although it is applicable in its entirety in all Member States).

Nevertheless, the Directive 2011/24/EU codified the CJEU case law and established a parallel system of social security coordination. It is not based on linking national public, social security systems in order to provide healthcare to insured persons, which cannot be provided in a home Member State in due time, but promotes free movement of (medical) goods and (health) services in the internal market. Prior authorisation according to Coordination Regulations is an obstacle to such free movement and may be justified only in exceptional cases (of hospital

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<sup>42</sup> Articles 18, 21, 45 and 48, TFEU.

<sup>43</sup> More in: Strban G. Social rights of migrants in the European Union. In: Regional aspects of integration: European Union and Eurasian space. Davletgildev R. Sh. (ed.), Moscow: Statut, 2019, p. 75.

<sup>44</sup> Available at: [https://www.zzzs.si/ZZZS/info/gradiva.nsf/0/3517d834858ff3cac12584410032ce88/\\$FILE/PR\\_ESSI%20izmenjava%20podatkov%20z%20Avstrijo\\_24.7.2019.pdf](https://www.zzzs.si/ZZZS/info/gradiva.nsf/0/3517d834858ff3cac12584410032ce88/$FILE/PR_ESSI%20izmenjava%20podatkov%20z%20Avstrijo_24.7.2019.pdf) [last viewed November 2, 2019].

<sup>45</sup> Directive 2011/24/EU on the application of patients' rights in cross-border healthcare, OJ L 88, 4.4.2011.

treatment or use of highly specialised and cost-intensive medical infrastructure or medical equipment).<sup>46</sup>

The situation might get complicated, when the same healthcare provider offers medical services for public and private patients. A tendency might arise to treat cross-border patients as private patients, with no waiting lists in a nicer setting and with kinder personnel due to direct payment. However, direct payment (of as a rule higher private prices) may be afforded only by a limited number of better-off private patients. Reimbursement of healthcare costs (according to the prices of the competent, home Member State) might be requested later on, but not in all situations.<sup>47</sup> Steering the patients towards private provision of healthcare is, as a rule, not allowed. However, cross-border patient lacks all specific information on healthcare provision in the Member State of treatment in order to make an informed and truly free choice.

Moreover, an insured person may be treated by a purely private physician (outside of public healthcare network) in another Member State, which might not be possible in the home Member State, at least not at the account of the public healthcare system (social health insurance or national health service). Is it a kind of reverse discrimination<sup>48</sup> and is it legally admissible? From the aspect of the EU law, a moving person should not be in a worse legal position than a non-moving person, but he or she might be in a better one.<sup>49</sup> Hence, it is the question of choosing a better law (national or EU law), but, the choice could only be made when crossing the border. Nevertheless, should not the highest attainable standard of health<sup>50</sup> be provided to all EU citizens, moving or not within the Union? The CJEU has already recognised the rights based on EU citizenship alone, without any (direct) movement within the Union.<sup>51</sup> Or should the national law be modified in order to allow access

<sup>46</sup> Article 8, Directive 2011/24/EU. More in: Strban G. Patient mobility in the European Union: between social security coordination and free movement of services, ERA Forum, No. 3, 2013, p. 392. Carrascosa Bermejo D. Cross-border healthcare in the EU: Interaction between Directive 2011/24/EU and the Regulations on social security coordination, ERA Forum, No. 3, 2014, p. 366.

<sup>47</sup> E.g. if prior authorisation is required, but not issued under the Directive 2011/24/EU.

<sup>48</sup> A so-called reverse discrimination might occur when an EU citizen finds him- or herself in a purely internal legal situation of a certain Member State and cannot rely upon the EU law (on the free movement of services) to obtain a certain benefit. Only national law could be invoked, which is less favourable than EU law. Verschueren H. Reverse Discrimination: An Unsolvable Problem. In: Minderhoud P., Trimikliniotis N. (eds.), Rethinking the free movement of workers: the European challenges ahead, Nijmegen: Wolf Legal Publishers, 2009, p. 99.

<sup>49</sup> So-called Petroni principle (after CJEU judgment of 21 October 1975 in case No. C-24/75 *Petroni*) or principle of favourability.

<sup>50</sup> Article 12 ICESCR and Point 11, Part I (initial and revised) ESC.

<sup>51</sup> CJEU judgment of 8 March 2011 in case No. C-34/09 *Zambrano*. CJEU judgment of 1 April 2008 in case No. C-212/06 *Government of the French Community and the Walloon Government v. The Flemish Government*.

to purely private physicians in the Member State of affiliation (possibly with lower reimbursement)?<sup>52</sup>

### 3.2. Family benefits

There are many issues related to coordination of the entire plethora of family benefits, existing in each Member State.<sup>53</sup> The EU social security coordination law employs a rather broad notion of family benefits. It encompasses all benefits in kind and in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances (listed in Annex I to the Coordination Regulation).<sup>54</sup>

Coordination of such variety of family benefits has become a challenge. Additionally, CJEU is trying to find the best possible solution for a moving person, e.g. by designating as a competent Member State outside of the Coordination Regulations rules<sup>55</sup> or by establishing family benefits of distinctive kind and hence providing more family benefits in their full amount.<sup>56</sup>

Moreover, Member States are trying to circumvent the Coordination Regulations by adjusting (indexing) the benefits according to the living costs in the Member State of children's residence. Austria, seems to be the first one to act upon such idea.<sup>57</sup> Since the beginning of 2019, family benefits are actually adjusted.<sup>58</sup> Adjustment goes both ways. Nevertheless, many more children of cross-border workers in Austria live in lower income Member States and Austria is reducing its expenditure for family benefits. However, the compatibility with the EU law is questioned, since CJEU already established inadmissibility due to unequal treatment of workers in its previous case law.<sup>59</sup>

<sup>52</sup> E.g., as in the case of Austria, reimbursing 80 percent of public price to all insured persons visiting a physician outside of public healthcare (in Austria or any other Member State). If many insured persons opt for it, public system might remain only for poor persons. Systems for poor may become poor systems as such.

<sup>53</sup> More Strban G. Family benefits in the EU – is it still possible to coordinate them? *Maastricht Journal of European and Comparative Law* (MJ), No. 5, 2016, p. 775.

<sup>54</sup> Article 1(z) of Regulation (EC) 883/2004.

<sup>55</sup> CJEU judgment of 20 May 2008 in case No. C-352/06 *Bosmann*. CJEU judgment of 12 June 2012 in joined cases No. C-611/10 and C-612/10 *Hudziński and Wawrzyniak*.

<sup>56</sup> CJEU judgment of 8 May 2014 in case No. C-347/12 *Wiering*.

<sup>57</sup> The idea is supported also by Denmark, Germany, the Netherlands, and the UK. See also the Conclusions of the European Council meeting on 18 and 19 February 2016, Brussels, 19 February 2016, EUCO 1/16 (special arrangements never came into force, due to the referendum "Leave" vote in the UK on 23 June 2016).

<sup>58</sup> *Familienlastenausgleichsgesetz and Einkommensteuergesetz*, both BGBl. I No. 83/2018.

<sup>59</sup> CJEU judgment of 15 January 1986 in case No. C-41/84 *Pinna*. CJEU judgment of 7 November 2002 in case No. C-333/00 *Maaheimo*. See also E. Felten, Export von Sozialleistungen, Soziale Sicherheit Online, March 2017. Available at: [www.hauptverband.at](http://www.hauptverband.at) [last viewed November 2, 2019].

### 3.3. Non-standard workers

Social security systems were primarily developed for a worker with a permanent, full-time employment contract for an indefinite period of time, upon which standard social security is built. Non-standard forms of employment and new forms of self-employment are deviations from the standard, i.e. temporary or short-term contracts, part-time work, employment relationships between more than two parties, casual work, including on-demand work and intermittent contracts, platform work temporary agency work, domestic work, voucher-based work, telework, traineeship and student work, self-employment, especially involuntary, bogus, dependent, new and part-time self-employment, or other country-specific non-standard contracts (mini-jobs, civil law contract, etc.).

Such new forms of organising work present not only challenges for national social security systems, which try to assimilate non-standard workers with workers or self-employed persons, but also for the EU social security coordination law. It is no longer clear, how such work might be classified in order to determine the legislation of which Member State is applicable. Marginal work is not taken into account only when a person is simultaneously employed in two or more Member States, but if in one he or she is self-employed, the closest link seems to be with (marginal) employment. Moreover, could marginal employment in more Member States still be considered as marginal? What if the competent Member State (according to the *lex loci laboris rule*) provides limited or no protection?<sup>60</sup> Should it still be applied or should another closest link to such non-standard worker be established? For instance, self-employed may only voluntarily be covered by certain schemes, and voluntary insurance is not coordinated, or country or work might not consider marginal work (mini jobs) for social security purposes. Also, the minimum of one year of pension insurance in a Member State in order to aggregate such period might be questioned with regard to shorter stays in another Member State.<sup>61</sup>

## 4. Equal treatment of women and men

The Treaty of Rome provided legal bases not only for the coordination of national social security systems, but also for gender equality. It is harmonisation of the legal standard of equal treatment of women and men. It could be argued that social security coordination and gender equality represent the two pillars of the EU social security law. The distinction is that for application of the latter no cross-border

<sup>60</sup> CJEU judgment of 23 April 2015 in case No. C-382/13 *Franzen et al.* CJEU judgment of 19 September 2019 in joined cases No. C-95/18 and C-96/18 *van den Berg and Giesen*.

<sup>61</sup> More in Strban, G. (coord.), Carrascosa Bermejo, D., Schoukens, P., Vukorepa, I. Social security coordination and non-standard forms of employment and self-employment: Interrelation, challenges and prospects, MoveS Analytical report 2018, not yet published.

movement is required. Both the TEU and the TFEU prohibit differentiation on the basis of gender as a matter of principle.<sup>62</sup>

The acceptance of the social and economic importance of ensuring equality is reflected also in the CFR-EU. It contains general anti-discrimination provision, where the negative aspect is stressed, i.e. any discrimination based on sex is prohibited. Moreover, special provision is emphasising a positive aspect, i.e. ensuring equality between women and men and advocating positive measures providing specific advantages in favour of the underrepresented sex. Both provisions are general enough to cover also gender differences in social security.<sup>63</sup>

More direct legal influence is provided by the non-discrimination directives. The only directive still in force from the initial 1970s “package” is Directive 79/7/EEC.<sup>64</sup> This is no coincidence, since the Member States are still rather reluctant to transfer their competencies in social security to the EU.<sup>65</sup> Moreover, based on the single breadwinner model, the gender discrimination may still exist, e.g. when recalculating part-time work to full time equivalent, which may cause indirect discrimination of women.<sup>66</sup>

## Conclusions

Social security is and even has to be one of the most rapidly changing areas of law. When it aspires to fulfilling its basic task and providing security to the people, it has to be adapted to continuously changing society. The principle of adjustment of the law to social relations is one of the principles of the state governed by the rule of law.<sup>67</sup>

Moreover, the relations in the European society also have changed. It is characterised by more dynamic and shorter movement patterns, new forms of families and cross-border economic activities. New legal paths of cross-border healthcare maintain an evergreen discussion on delineating between public and private income security.

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<sup>62</sup> In the primary legislation, men and women are alternately mentioned first. Although not contributing to increasing equality as such, it is a symbolic gesture confirming that both form equal parts of humanity. Arts 2 and 3 TEU (placing women first), Arts 8, 153, 157 TFEU (mentioning men first). Cf. Arts 10 and 19 TFEU.

<sup>63</sup> Articles 21, 23 and 34 CFR-EU.

<sup>64</sup> Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6, 10.1.1979.

<sup>65</sup> Exceptions provided in Article 7(1) of the Directive have to be construed narrowly and Member States have to periodically examine matters excluded in order to ascertain, in the light of social developments, whether there is justification for maintaining such exceptions. Strban G. Gender Differences in Social Protection, MISSOC Analysis 2012/2, November 2012, p. 12.

<sup>66</sup> CJEU judgment of 22 November 2012 in case No. C-385/11 *Elbal Moreno*. CJEU judgment of 8 May 2019 in case C-161/18 *Villar Láiz*.

<sup>67</sup> So the Slovenian Constitutional Court in judgment of 20 October 2005 in case No. U-I-69/03. Available at: <http://odlocitve.us-rs.si/documents/5c/e5/u-i-69-032.pdf> [last viewed December 6, 2019].

Hence, not only national legislatures, but also the EU face difficulties in coping with rapidly changing societies and solutions that cause the national social security systems to grow apart. Sensitivity of social security law can be observed in every competence assigned (or not) to the EU. However, it is possible that the existing competencies of the EU are no longer sufficient. Maybe we need a true EU social security system for (mobile) Union citizens, if we want to preserve the characteristics of social security, based on equality and solidarity. Trying to find solutions only for mobile economically active persons might place others, especially non-mobile and non-active Union citizens, in a disadvantaged position.

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## THE EFFECT OF GDPR ON SECONDARY USE OF DATA CONCERNING HEALTH IN RESEARCH: LATVIAN CASE IN THE EUROPEAN CONTEXT

### Summary

The article analyses legal background for using data concerning health (including administrative health data) for research purposes in Latvia in the context of the General Data Protection Regulation (GDPR)<sup>2</sup>. Latvia is used as an example to reflect on how the GDPR interacts with the national legal framework regulating scientific research. The article argues that there are several gaps in regulation requiring systematic amendments, considering both the GDPR and the practical needs of Latvian researchers.

**Keywords:** GDPR, data concerning health, administrative health data, personal data, scientific research

### Introduction

Data concerning health according to the GDPR is “personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status.”<sup>3</sup> This type of data is an important source of information for medical, epidemiological and health research. During the development of GDPR, there were active discussions about impact of the proposed regulation to medical research, and several researchers

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<sup>2</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

<sup>3</sup> Regulation (EU) 2016/679.

and organizations raised concerns about possible negative impact of GDPR on research<sup>4,5,6,7</sup>. Therefore, the aim of the article is to analyse the possibilities of using data concerning health, including administrative health data, for research purposes in the context of the GDPR, as well as to reflect on how the GDPR influences the legal framework for use of data concerning health for research purposes and interacts with it in Latvia.

## 1. GDPR and research using data concerning health: an overview

In the 21<sup>st</sup> century, the need for balance between protection of personal data and procession of personal data for public benefit, like analysing the data for health research, gains ever increasing importance. This search for balance is especially manifest within the European Union (EU), which can be regarded as a worldwide example of data protection<sup>8</sup>. The EU not only regards the right to data protection as a part of the right to privacy, but also recognizes within the Article 8 of the Charter of Fundamental Rights of the EU a specific right to the protection of personal data<sup>9</sup>. Even more, it is argued that recognition of a separate fundamental right to data protection guarantees a more comprehensive system of personal data protection<sup>10</sup>.

On the level of EU, secondary legal acts, the balance between the protection of personal data and the procession of these data for research purposes is firmly established. Even so early as during the first discussions on the GDPR, the importance of medical research was mentioned<sup>11</sup>, and the current version of the GDPR includes provisions on the use of the data concerning health in research. However, at the same time, application of GDPR provisions is complicated<sup>12</sup> and

<sup>4</sup> de Jong J. D., Coppens R., Verheij R. A., Groenewegen P. P., Vroom E., van Veen E. B., Reijneveld S. A. Will the trilogue on the EU Data Protection Regulation recognise the importance of health research? *European Journal of Public Health*, No. 25(5), 2015, pp. 757–758.

<sup>5</sup> Nyrén, O., Stenbeck, M., & Grönberg, H. The European Parliament proposal for the new EU General Data Protection Regulation may severely restrict European epidemiological research. *European Journal of Epidemiology*, No. 29(4), 2014, pp. 227–230.

<sup>6</sup> Ploem M. C., Essink-Bot M. L., & Stronks K. Proposed EU data protection regulation is a threat to medical research. *British Medical Journal*, No. 346, 2013, p. 3534.

<sup>7</sup> Rumbold J. M. & Pierscionek B. The Effect of the General Data Protection Regulation on Medical Research. *Journal of Medical Internet Research*, No. 19(2), 2017, p. 47.

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<sup>10</sup> Mostert M., Bredenoord A. L., Slootb B. v. d., & Delden J. J. M. From Privacy to Data Protection in the EU: Implications for Big Data Health Research. *European Journal of Health Law*, No. 25(1), 2017, pp. 43–55.

<sup>11</sup> Pieper F. An outlook on the future of medical research in Europe and data protection: grim or prosperous? *European Journal of Health Law*, No. 21(3), 2014, pp. 241–244.

<sup>12</sup> Dove E. S. The EU General Data Protection Regulation: Implications for International Scientific Research in the Digital Era. *The Journal of Law, Medicine & Ethics*, No. 46(4), 2018, pp. 1013–1030.

the overall design of the national legal framework can be deduced by following the interplay of several provisions of the GDPR.

Article 9 of the GDPR incorporates data concerning health into “special categories of personal data”<sup>13</sup>, for which there is a presumption that its processing is prohibited. At the same time, part 2 of Article 9 provides a long list of exceptions on when the processing of special categories of personal data is permitted. Mostly those exceptions are related to the consent of data subject or to overriding public interests that justify procession of special categories of personal data.

Of particular importance is point (j) of Article 9(2), which allows to process special categories of personal data, when it is done “for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes”<sup>14</sup>. However, in this case, too, data processing must be provided in the EU or national legislation and must be proportionate, including the duty of the data processor to take “suitable and specific measures to safeguard the rights and freedoms of the data subject”<sup>15</sup>.

Article 9(2) (j) of the GDPR also includes a reference to the Article 89, which further explains how to apply the aforementioned conditions to processing special categories of personal data. Among other matters, Article 89 refers to the principle of data minimization explained in the Article 5, namely, that the data must be adequate, relevant and only include what is necessary for the purposes of the processing. Whenever possible, data processing not allowing data subjects to be identified should be given priority. One of the possible safeguards mentioned by the Article 89(1) of the GDPR is the use of pseudonymisation, which is not obligatory, but rather its use is encouraged, if it allows the achievement of research objectives.

Finally, the GDPR includes a preamble with more than 170 recitals, which can be used as an additional tool for interpreting the articles of the GDPR clarifying also the processing of data concerning health for research purposes. Recital 56 of the preamble refers to the main objective that justifies the processing of special categories of personal data – it must be in the public interest. However, the processing of personal data for scientific research is mostly covered by recitals 156 to 159 of the preamble. Recital 159 states that the processing of personal data for research purposes should be interpreted in a broad manner, including technological development and demonstration, fundamental research, applied research and privately funded research. Furthermore, the same recital expressly points out that “scientific research purposes should also include studies conducted in the public interest in the area of public health”<sup>16</sup>. Thus, the recitals in the preamble of the GDPR not only emphasize the importance of collecting data for research purposes but also recognize potential difficulties in full identification of the purpose of the processing of personal data for scientific research at the time of data collection.

<sup>13</sup> Regulation (EU) 2016/679.

<sup>14</sup> Regulation (EU) 2016/679.

<sup>15</sup> Chico V. The impact of the General Data Protection Regulation on health research. *British Medical Bulletin*, No. 128(1), 2018, pp. 109–118.

<sup>16</sup> Regulation (EU) 2016/679.

## 2. Latvian legislation of research using data concerning health: an overview

Article 288 of the Treaty on the Functioning of the EU<sup>17</sup> stipulates that all regulations shall have general application and shall be binding in their entirety and directly applicable in all Member States, which also applies to the GDPR. In practice, however, the differences between the directly applicable regulations and directives, which should be transposed into national law, tend to blur. The content of the GDPR is an example of this tendency. While outlining the basic principles of data protection, the GDPR at various places points out to the discretion of Member States to adopt further legislation, providing “an unusually wide margin of maneuver for Member States”<sup>18</sup>. This includes the field of scientific research and allows to classify requirements of the GDPR in two broad groups: (1) directly applicable research exemptions and (2) research exemptions needing implementation into national law<sup>19</sup>.

In 2018, Latvia adopted the Personal Data Processing Law, Article 2 of which puts forward the aim of the law: “to create legal preconditions for the establishment of the system of protection of personal data at the national level”<sup>20</sup>. Regrettably, the new law is overly brief regarding regulation of scientific research. Although the law contains Article 31 on the processing of data for scientific or historical research purposes, in substance this article is just a blanket norm referring to the GDPR and copying Article 89 (2) of the GDPR.<sup>21</sup> Interestingly enough, in the earlier draft version of the Personal Data Processing Law this article contained more detailed provisions for scientific or historical research, stating that certain rights of the data subject are exercised in accordance with the “laws and regulations governing the field of science and research.”<sup>22</sup> Even this earlier version of the law seems rather vague – what should be understood by laws and regulations governing the field of science and research? However, there is even more ambiguity in the final wording of the Article 31 of Personal Data Processing Law, as any clarifications on how the research exception should be applied are entirely absent.

<sup>17</sup> Treaty on the Functioning of the European Union 2012/C 326/01. Signed in Lisbon on 13.12.2007 [in the wording of 26.10.2012].

<sup>18</sup> Dove E. S., 2018, p. 1015.

<sup>19</sup> van Veen E.B. Observational health research in Europe: understanding the General Data Protection Regulation and underlying debate. *European Journal of Cancer*, No.104, 2018, pp. 70–80.

<sup>20</sup> Fizisko personu datu apstrādes likums [Personal Data Processing Law]. Available at: <https://likumi.lv/ta/id/300099-fizisko-personu-datu-apstrades-likumi> [last viewed November 2, 2019].

<sup>21</sup> Regulation (EU) 2016/679. Exact text of the Article 31: “Where personal data are processed for scientific or historical research purposes, data subject’s rights referred to in Articles 15, 16, 18 and 21 of the GDPR shall not apply so far as such rights are likely to render impossible or seriously impair the achievement of those purposes and such derogations are necessary for the achievement of those purposes”.

<sup>22</sup> Fizisko personu datu apstrādes likums [Personal Data Processing Law (Draft Law)]. Available at: [http://tap.mk.gov.lv/doc/2017\\_10/TMLik\\_091017\\_dati.1080.docx](http://tap.mk.gov.lv/doc/2017_10/TMLik_091017_dati.1080.docx) [last viewed November 2, 2019].

Such a lack of clarification within the Personal Data Processing Law seems to be contrary to the aim of Article 89(2) of the GDPR. It follows from the Article 89(2) (“Where personal data are processed for scientific or historical research purposes or statistical purposes, Union or Member State law may provide for derogations”<sup>23</sup>) that exceptions to the rights of the data subject for the purposes of research should be explained in detail. This obligation can be regarded as one needing implementation into national law<sup>24</sup>. Brief and mechanical quoting of the general wording of the GDPR clearly fails to do that.

To complicate matters further, in relation to the use of data concerning health in research the Personal Data Processing Law is not the only relevant piece of Latvian legislation. There is also the Law on the Rights of Patients,<sup>25</sup> which aims to regulate relationships between the patient and the healthcare provider. The Law on the Rights of Patients has not been amended following the GDPR, but its Article 10 sets out criteria for research use of health data recorded in the medical documents. Article 10(7) and (8) of the Law on the Rights of Patients provide that “patient data recorded in medical documents may be used in a research” in the following three situations:

- 1) the patient cannot be directly or indirectly identified according to the information to be analysed;
- 2) the patient has consented in writing that the information regarding him or her may be used in a specific research;
- 3) if all the following conditions are fulfilled:
  - the research is being performed in the public interest;
  - a competent State administrative institution has allowed the use of the patient data in a specific research in accordance with the procedures stipulated by the Cabinet;
  - the patient has not previously prohibited the transfer of his or her data to a researcher in writing;
  - it is not possible to acquire the consent of the patient with commensurate means;
  - the benefit of the research for the public health is commensurable with the restriction of the right to the inviolability of private life.

Based on this provision of the Law on the Rights of Patients, the Cabinet of Ministers has issued Regulation No. 446 “Procedures for Using the Patient Data in

<sup>23</sup> Regulation (EU) 2016/679.

<sup>24</sup> van Veen E. B. 2018.

<sup>25</sup> Pacientu tiesību likums [Law On the Rights of Patients]. Available at: <https://likumi.lv/ta/id/203008-pacientu-tiesibu-likums> [last viewed November 2, 2019].

a Specific Research”<sup>26</sup> However, that regulation has not been amended in the context of the GDPR.

Thus, in general, the interaction between the most important national legislative acts on the use of data concerning health in research and the GDPR cannot be perceived as thoroughly successful in Latvia. One of these national laws, Personal Data Processing Law, merely makes a formal reference to the GDPR regarding scientific research in a situation where the GDPR rules result in an obligation to provide more detailed legislation at the national level. Another law, the Law on the Rights of Patients has not been amended and harmonized with GDPR.

Moreover, a detailed assessment of the situation shows several ambiguities that are not fully addressed by the existing legal framework and are discussed in greater detail in the next section of the article.

### **3. Research using data concerning health: legislative gaps and ambiguities**

#### **3.1. Concept of “data concerning health”**

Comparing Latvian legal acts and the GDPR, there is a certain ambiguity regarding the definition of “data concerning health”. The GDPR gives a broad scope to this term in the recital 35 by including “all data pertaining to the health status of a data subject which reveal information relating to the past, current or future physical or mental health status of the data subject”<sup>27</sup>. This means that, e.g., administrative data regarding the patient’s stay in medical institutions or data of the registers of patients suffering from certain diseases are also covered by the term “data concerning health”. On the other hand, Latvian Law On the Rights of Patients uses slightly different terminology. In the context of research, the Latvian law in the Article 10(7) uses the term “medical documents” which, in turn, is explained in the Article 1 as “information [...] regarding a patient, his or her state of health, the diagnosis and prognosis of the illness, the preventive, diagnostic and medical treatment methods used, as well as the results of diagnosis and medical treatment”. Thus, the Law On the Rights of Patients might be interpreted in a narrower way that excludes use of certain administrative data for research purposes.

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<sup>26</sup> Republic of Latvia Cabinet Regulation No. 446. Kārtība, kādā atļauj izmantot pacienta datus konkrētā pētījumā [Procedures for Using the Patient Data in a Specific Research]. Available at: <https://likumi.lv/ta/id/275747-kartiba-kada-atlauj-izmantot-pacienta-datus-konkreto-petijuma> [last viewed November 2, 2019].

<sup>27</sup> Regulation (EU) 2016/679.

### 3.2. Anonymisation of data

Section 4 of the GDPR states that data lawfully obtained for any purpose may be used in statistical, scientific or historical research, provided that adequate protective measures are in place. These guarantees may be ensured by anonymisation or pseudonymisation of data prior to sharing of the data with third parties.

The practical situation in Latvia and other European countries currently shows that there is no common understanding of the techniques and criteria to be used in order to anonymize identifiable personal data. Moreover, there may be situations where data subjects can be identified from allegedly anonymous health data sets, for example, by linking health data to other types of information or in cases where the study group is very specific (e.g. rare disease patients). There is also no consensus about detailed requirements for data coding and the storage of code keys. Consequently, a more detailed framework would be required for the way health data is pseudonymised or anonymised, thus introducing appropriate protection measures for health data.

Although the scope of GDPR does not include anonymised data and allows the use of identifiable health data in research under certain conditions, it is often not necessary to identify the data subject directly for scientific research purposes. It is also apparent from Article 89 of the GDPR that data processing, which does not allow data subjects to be identified, should be preferred for research purposes.

### 3.3. Use of anonymous data in research

There is currently no straightforward legal framework in Latvia regulating the use of anonymous health data in research, for example, it is not clear how to use anonymized patient data included in different databases in research. This problem is not raised directly by GDPR, since GDPR does not apply to the processing of data other than personal data. However, this issue must be mentioned in the context of this article, because it is closely linked to the problem that has been addressed above.

There is a legal presumption in Latvia that any anonymized information held by state institutions should be available and shared unless it has a limited accessibility status. Where information requested for research purposes from different databases does not constitute personal data, it shall be subject to the society's right to information. The right to receive information falls within the right to freedom of expression, and information shall be provided to anyone who expresses a wish to receive it. The applicant should not specifically justify his or her interest to receive the information. In practice, however, authorities avoid releasing such data because they fear that this might violate data subjects' right to the protection of personal health data, which results in researchers experiencing difficulties in obtaining such data.

### **3.4. Storing of previously collected administrative health data for research**

Currently, the situation regarding the storage of administrative health data and their secondary use in the public interest is unclear. In fact, following the adoption of the GDPR and in the absence of new regulations specifying this area in Latvia, the storage and subsequent secondary use of the data are threatened. For example, administrative data on services provided to patients and their costs are stored in the National Health Service, but there is no practical need to store these data for a long time in the context of their primary use. At the same time, their potential for secondary use for research in the public interest is very high; therefore, these data should be stored for secondary use, and there should be a possibility to link these data to the data stored by other national authorities (e.g., records of the causes of death) prior to anonymisation. It would be very important to ensure that an appropriate regulatory framework is in place, defining the minimum amount of data to be stored for future research, and a procedure to determine how they might be linked to other types of personal data before anonymisation.

### **3.5. Subjects eligible for using health data for research**

Simultaneously with ensuring access to health data for research purposes, the issue of a range of subjects who have a right to request health data for research should be addressed. Currently, broad terms, like “person” or “researcher” are used in the law, and there is a lack of criteria for the required qualifications (e.g., PhD degree or employment as a researcher). It is not clear, for example, whether students have a right to request health data for research purposes. Additionally, the Cabinet Regulation No. 446 includes a requirement to provide information on the education and experience of the principal investigator and researchers, but there are no criteria for evaluation of this information. The absence of precise regulations on this matter is somewhat compensated by an inter-institutional agreement between four state institutions, all of whom are subordinated to the Ministry of Health (Centre for Disease Prevention and Control, National Health Service, State Emergency Medical Service and Health Inspectorate). Those state institutions have agreed to limit the access to data for scientific research to organisations listed in the Registry of scientific institutions by providing anonymized data link for health care quality monitoring.

One of the reasons why there is a need for a clear definition of subjects having a right to request health data for research is prevention of conflicts of interest by limiting the possibility of using health data for commercial purposes. An important issue is also the opportunity for students to use health data for developing research projects during the studies. To date, several hundred student research projects analysing health data are carried out each year in Latvia, but the GDPR raises the issue of the compliance of such research activities with the GDPR in cases where the person’s consent to the processing of data has not been obtained.



### 3.6. Feedback to the institution providing data

Providing data to researchers is only a single step in the research process, and often the results of the study could be useful for the institution that has provided the health data. Therefore, it would also be necessary to define researcher's duties to the institution providing the data – most likely, in the form of obligation to inform about the results of the study. It should also be considered whether the institution providing the data could, in certain cases, retain the right to control or at least express an opinion on a publication based on the health data issued by this institution. In case of the abovementioned data link for health care quality monitoring, institutions providing the data request the applicant to pre-authorise publication of the study results.

## Conclusions

There are several ambiguities and challenges regarding use of the data concerning health for the research purposes, which are not fully addressed by the existing legal framework in Latvia. Filling in these gaps requires thoughtful and systematic amendments in laws and regulations, taking into account both the GDPR, as well as practical needs of Latvian researchers.

The most ambitious, but at the same time the most comprehensive and transparent solution would be to draft an entirely new piece of legislation. Such an act (law or regulation of the Cabinet of Ministers) should be linked to the preamble and Article 89 of the GDPR, providing appropriate safeguards for the rights and freedoms of the data subject for archiving personal data in the public interest, scientific or historical research or statistical purposes. These safeguards should ensure that all the necessary technical and organizational measures in the sense of the GDPR are in place.

Alternatively, a less ambitious solution might also be applied, namely, amending Latvian legislative acts mentioned in this article (both the laws and Cabinet regulations deriving from these laws).

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## **TRANSPPOSITION OF DIRECTIVE (EU) 2016/680 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 27 APRIL 2016 IN PERSONAL DATA PROTECTION ACT IN REPUBLIC OF BULGARIA**

### **Summary**

The digitalization of the world around us, also known as “the 4<sup>th</sup> Industrial Revolution”, requires a rethinking of approaches to the protection of personal data and privacy. Various solutions are offered on global, regional and national scale, including regulatory, institutional, organizational and technological solutions.

In 2012, European Commission initiated the adoption of an entirely new legal framework for the protection of personal data within the Union. After 4 years of intensive negotiations, on 4 May 2016 the result was published in the Official Journal of the European Union: Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing personal data and on the free movement of such data (General Data Protection Regulation) and Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 <sup>1</sup> on the protection of natural persons with regard to the processing of personal data by the competent authorities for the purposes of the prevention, investigation, detection or prosecution of crimes, or the enforcement of penalties and on the free movement of such data.

By the Act Amending and Supplementing the Personal Data Protection Act published in issue 17/2019 of State Gazette of Republic of Bulgaria was transposed the Directive (EU) 2016/680. This ensured homogeneous and high-level protection of personal data and facilitated the exchange of information with the competent authorities of other EU Member States, which is crucial for effective implementation of this cooperation.

The present paper analyses the Directive (EU) 2016/680 and its transposition in the national legislation concerning protection of personal data in the prevention, investigation, detection/prosecution of criminal offences and enforcement of criminal penalties.

**Keywords:** EU law, personal data protection, national law

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<sup>1</sup> Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

## Introduction

In April 2016, EU Directive 2016/680 was adopted by the European Parliament and the Council, together with the General Data Protection Regulation (GDPR). This Directive regulates the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. The Directive (EU) 2016/680 and its transposition in the national legislation concerning protection of personal data in the prevention, investigation, detection/prosecution of criminal offences and enforcement of criminal penalties poses a number of questions reviewed in the current article.

### 1. EU Directive 2016/680

Personal data protection policy has a pronouncedly horizontal character, affecting almost all areas of life and business. This has been considered by European legislators when adopting the General Data Protection Regulation, which is a comprehensive and complex legal act.

From the standpoint of EU law, the regulation is directly applicable and obligatory in its entirety. Its purpose is to ensure uniform application of European Union law in all the Member States. The regulation, unlike the directive, does not need to be transposed. However, one of the challenges of the General Data Protection Regulation is the heterogeneous nature of its rules, which remain an option and, in some cases, oblige legislators in the Member States to adopt national implementing measures.

The General Data Protection Regulation (GDPR) has generated quite a lot of public attention from both sides – public and private sector. The new legal regime is applicable as of 25 May 2018. The GDPR replaces EU Directive 95/46/EC on the protection of personal data (in short, the Data Protection Directive, DPD)<sup>2</sup> and introduces several new elements in data subjects' rights (such as a right to data portability and the right to be forgotten), and new obligations for data controllers (such as data breach notifications, mandatory appointment of data protection officers and concepts like Data Protection Impact Assessments and Data Protection by Design and by Default). Another very important novelty that the GDPR brings is the possibility for the supervisory authorities to impose administrative fines in case of non-compliance.

It is important to note that Directive (EU) 2016/680 was adopted together with the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive

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<sup>2</sup> Directive (Eu) 95/46/Ec Of The European Parliament And Of The Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

95/46/EC (General Data Protection Regulation) (further referred to as GDPR), which indicates the attempt to ensure the integrity and complexity of data protection reform. This Directive focuses on the processing of personal data by organisations in the criminal law chain (e.g., the police, public prosecution services, courts and the prison system) within their legal tasks and competences (e.g., preventing, investigating, prosecuting and sentencing crimes and executing criminal penalties). For instance, when a law enforcement agency or a court processes personal data of their employees to pay the wages, the GDPR is the applicable legal act, since these data are not directly related to the implementation tasks under the scope of criminal investigation. Regarding such cases, Article 9, para. 1 of the Directive states that the GDPR shall apply. GDPR is also applicable in cases where competent authorities process personal data for archiving purposes in the public interest, for scientific or historical research purposes, or statistical purposes (Article 9, para. 2 of the Directive). The focus of the Directive's provisions is on the so-called competent authorities, which may not only include public authorities but also other bodies and entities entrusted by national law to exercise public authority and public powers in view of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. The Directive (EU) 2016/680 ought to be considered as a *lex specialis* for personal data protection in criminal law, whereas the GDPR is the *lex generalis* for personal data protection.

Directive's history runs mostly in parallel with that of the GDPR. The GDPR mainly builds upon and extends the notions of the EU Data Protection Directive (DPD) from 1995. This Directive was mostly based on the provisions in Convention 108 of the Council of Europe (also referred to as the Treaty of Strasbourg) from 1981.<sup>3</sup> The Council of Europe also published a recommendation that supplements Convention 108 for the use of personal data by the police in 1987.<sup>4</sup> This recommendation specified who had access to police data, under which conditions police data could be transferred to authorities in third countries, how data subjects could exercise their data protection rights and how independent supervision was organized. These recommendations, however, are not legally binding and many Member States have not fully implemented them. In 2008, the EU published Framework Decision 2008/977/JHA on the protection of personal data processing in the framework of police and judicial cooperation in criminal matters.<sup>5</sup> The aim of this decision was, on the one hand, the protection of personal data processed for the prevention, investigation, detection and prosecution of crimes and the execution of criminal penalties and, on the other hand, the facilitation and simplification of police and judicial cooperation between Member States.

Finally, in 2012, the European Commission presented the first draft for a Directive that would harmonize the processing of personal data in criminal law

<sup>3</sup> Council of Europe. Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, No. 108, 28.01.1981.

<sup>4</sup> Council of Europe. Police Data Recommendation Rec(87)15, 17.09.1987.

<sup>5</sup> Europese Raad. Framework Decision 2008/977/JHA, 27.11.2008.

matters.<sup>6</sup> According to the Directive, the deadline for its implementation in national legislation was two years, with a final deadline in May 2018.

## **2. Transposition of Directive (EU) 2016/680 in Bulgarian Law. Personal Data Protection Act of Republic of Bulgaria**

In 2019, in the Personal Data Protection Act of Republic of Bulgaria amendments were made concerning transposition of Directive (EU) 2016/680, and a new Chapter 8 was created concerning transposition of the Directive.

Art. 42, para. 1, defines the scope of Chapter 8

*[..] the processing of personal data by competent authorities for the purpose of prevention, investigation, detection or prosecution of criminal offenses or execution of penalties, including prevention from threats to public order and security and their prevention.*

In Art. 3, No. 7 of the Directive, the European legislator provides the definition of “Competent authorities”, which includes:

- (a) any public authority competent for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, and
- (b) any other body or entity entrusted by Member State law to exercise public authority and public powers for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.

The category “Competent authorities” is defined in Personal Data Protection Act, Art. 42, para. 4, as follows: “state bodies, which have the authority to prevent, investigate, detect or prosecute criminal offenses or enforce penalties, including the prevention from threats to public security and their prevention.” So, these state bodies are entities involved in the criminal justice system framework, such as the police authorities, public prosecutors, courts and the prison system within their legal tasks such as preventing, investigating, prosecuting and sentencing crimes, as well as executing criminal penalties.

Most of the principals for data processing are common to the ones outlined by GDPR. The processing of personal data must be lawful, fair and used for specific purposes mentioned in the pertinent law. The purpose of the processing should

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<sup>6</sup> Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data. COM(2012). Available at: <https://eur-lex.europa.eu/legal-content/ENG/TXT/PDF/?uri=CELEX:52012PC0010&from=en%20> [last viewed November 3, 2019].

be explicit and legitimate, and determined when that data is collected. Individuals should be informed of the possible risks, rules, safeguards, and rights in relation to the processing of their personal data and how to use their rights. The main principles are defined in Personal Data Protection Act, Art. 45, para. 1:

- Lawfulness and fairness;
- Purpose specification and limitation;
- Data minimization;
- Accuracy;
- Storage limitation;

The time limits and storage of data is in the “hands” of the administrator of data.

There are special categories of data, as race, ethnic origin, politics, religion or philosophical beliefs, trade union membership, genetics, biometrics (where used for ID purposes), health, sex life, or sexual orientation, for which shall be permitted, where absolutely necessary, adequate safeguards of the rights and freedoms of the data subject, and it is provided for in the EU law, or in the legislation of the Republic of Bulgaria, Personal Data Protection Act, Art. 51, para. 1. However, there is an exception provided in para. 2 of the same articles, stating: “When the processing under para. 1 is not provided for in the law of the European Union, or in the legislation of the Republic of Bulgaria, the data under para. 1 may be processed when absolutely necessary, there are appropriate safeguards for the rights and freedoms of the data subject, and:

1. processing is to protect the vital interests of the data subject or another natural person, or
2. if processing refers to data that is obviously made public by the data subject.”

Both Directive 2016/680 and of Personal Data Protection Act provide for data subject’s rights, including a right to information and a right to access. The right to rectification (Art. 16, para. 1 of the Directive, Art. 56, para. 1 of the Personal Data Protection Act) applies to incorrect or incomplete data. Data subjects have the right to obtain from the data controller the rectification of inaccurate personal data relating to him or her. When data are incomplete, data subjects have the right to have incomplete personal data completed.

For personal data administrator and personal data processor, a list of obligations with regard to the processing of personal data is included in both Directive 2016/680 and the Personal Data Protection Act. Both personal data administrator and personal data processor maintain registers in writing and electronic formats. The registers include data about name and contact details of the administrator, the processor or the processors of personal data; the purposes of the personal data processing; the categories of recipients, to whom the personal data have been, or will be disclosed, including recipients in third states or international organizations; a description of the categories of data subjects and categories of personal data; where applicable, information on whether profiling is being carried out; where applicable, the categories of transfer of personal data to a third state, or international organization; the legal basis for the processing operation, including the transmission

of the data, for which the personal data have been intended; when possible, the deadlines for deletion of the different categories of personal data; where possible, a general description of the technical and organizational security measures under Art. 66.

One of the main goals of Directive 2016/680 is the protection of personal data of data subjects. Since many countries outside the EU are not offering such protection in their legal systems, there are strict rules in the Directive for the transfer of personal data to recipients in third countries.<sup>7</sup> The transfer of personal data to third countries (non-EU Member States) and international organizations is prohibited. Nevertheless, there are exceptions. Personal data in criminal law may be transferred outside the EU – only to competent authorities and only when there is a sufficient legal protection for data subjects in the receiving jurisdiction. Such protection can be based on an adequacy decision (Art. 36), appropriate safeguards (Art. 37). When such protection is absent, the transfer of personal data outside the EU may still take place in very specific situations (Art. 38–39), for instance, in case of immediate and serious threats to public security.

According to Section IV of Personal Data Protection Act, titled “Transfers of personal data to third countries or international organizations”<sup>8</sup>:

*A competent authority may transfer personal data [...] to a third state or to an international organization, [...] when:*

- 1. the transfer is necessary for the purposes referred to in Article 42 (1);*
- 2. the personal data are transferred to a controller in a third country or international organisation that is an authority competent for the purposes referred to in Article 42 (1);*
- 3. where personal data received from another Member State of the European Union are transmitted, that Member State has given its prior authorisation to the transfer in accordance with its national law;*
- 4. where:*
  - (a) the European Commission has adopted a decision to the effect that the third country, territory or one or more specified sectors in the third country concerned, or the international organisation concerned, ensure an adequate level of protection, or*
  - (b) in the absence of a decision under Littera (a), appropriate safeguards have been provided or exist pursuant to Article 74, or*
  - (c) in the absence of a decision under Littera (a) and of appropriate safeguards under Littera (b), the transfer of the personal data is necessary in the cases referred to in Article 75;*
- 5. in the case of an onward transfer to another third country or international organisation, the competent authority that carried out the original transfer or*

<sup>7</sup> Bamberger K. A. and Mulligan D. K. Privacy on the Ground: Driving Corporate Behavior in the United States and Europe. The MIT Press.

<sup>8</sup> <https://www.cdpd.bg/en/index.php?p=element&aid=1194>



*another competent authority in the Republic of Bulgaria authorises the onward transfer, after taking into due account all relevant factors, including the seriousness of the criminal offence, the purpose for which the personal data was originally transferred and the level of personal data protection in the third country or an international organisation to which personal data are onward transferred.*

*(2) Transfers of personal data without the prior authorisation by another Member State of the European Union in accordance with Item 3 of Paragraph*

*(3) shall be permitted only if the transfer of the personal data is necessary for the prevention of an immediate and serious threat to public order and security of a Member State of the European Union or a third country or to essential interests of a Member State of the European Union and the prior authorisation cannot be obtained in good time. In such cases, the authority of the Member State of the European Union that provided the personal data, which is competent to give prior authorisation under Item 3 of Paragraph (1), shall be informed.*

In case of an intended data transfer without an adequately substantiated decision or appropriate safeguards, exceptions in Art. 75 of Personal Data Protection Act may apply to specific situations. Such data transfers may be allowed, for instance, when necessary to protect vital or legitimate interests of individuals, to prevent immediate and serious threats to public security.

The supervision of rules in processing of personal data for the purposes of prevention, investigation, detection or prosecution of criminal offenses or execution of penalties, including prevention from threats to public order and security and their prevention by the court, the prosecution and investigative bodies in the performance of their functions of bodies of the judiciary is carried out by the Inspectorate.

## Conclusions

The review on the Personal Data Protection Act and Directive (EU) 2016/680 leads to the general conclusion that the aforementioned legislation is a positive development in data protection policy of the EU and Member States. However, it should be pointed out that, in order to enable an effective criminal law enforcement, there are also inevitable differences. As it has been mentioned, Personal Data Protection Act is *lex specialis* and aims to set specific rules for the personal data processing in criminal law.

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## SECTION 4

# CHALLENGES TO LEGAL SCIENCE IN THE INTERACTION BETWEEN THE INTERNATIONAL AND NATIONAL LEGAL SYSTEMS: INTERNATIONAL PUBLIC AND HUMAN RIGHTS

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## **THE SLOVAK REPUBLIC'S POSITIVE OBLIGATION REGARDING HUMAN RIGHTS AND AGAINST RACIAL DISCRIMINATION<sup>1</sup>**

### **Summary**

The article analyses the positive obligation of a sovereign state regarding the individual's human rights and the enforcement of those rights. The concept of state liability in enforcing the state's positive obligation has developed differently at the international and European levels. International law relied mainly on a diplomatic approach until changes were made to the UN system, in which committees operate as semi-judicial bodies. The European system – established mainly at the Council of Europe – incorporates a stronger legal mechanism for the judicial enforcement of the individual's human rights but there are obstacles to exercising European Court of Human Rights judgements. The content analysis of the case law has been employed to provide comparative insights into the enforcement of positive obligation in human rights and to formulate recommendations based on the principles of good practice.

**Keywords:** human rights, international treaties, supremacy of law, positive obligation

### **Introduction**

Equality of opportunity and the prohibition of discrimination are guaranteed by the Constitution of the Slovak Republic and set out in detail in several legal acts. Fundamental human rights and freedoms have been guaranteed in the Slovak Republic since it was founded, particularly in Article 12, paragraph 2 of the Constitution: “Basic rights and freedoms on the territory of the Slovak Republic are guaranteed to everyone regardless of sex, race, colour of skin, language, faith and religion, political, or other thoughts, national or social origin, affiliation to a nation, or ethnic group, property, descent, or any other status. No one may be harmed, favoured, or discriminated against on these grounds.” Here, the Constitution refers to international human rights treaties adopted mainly within the UN and the existing positive obligation.

The aim of this paper is to provide comparative insights into case law relating to the enforcement of positive obligation in the human rights domain in Slovakia, focusing particularly on non-discrimination in regard to race, and to formulate recommendations based on the principle of good practice.

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<sup>1</sup> This paper was written as a part of project APVV-16-0540 “Human Rights and Sustainable Development in the EU External Relations”.

## 1. The Slovak Republic and the principle of the supremacy of international treaties

Initially, the supremacy principle regarding international law was set out rather generally in the Constitution of the Slovak Republic through Constitutional Act No. 460/1992 Coll, Article 11:

*International treaties on human rights and fundamental freedoms, which had been ratified by the Slovak Republic and announced according to the law, are supreme to law, if and when they provide higher protection of human rights and freedoms.*

The Slovak Republic has recognised its international obligations in the human rights domain since its foundation, consequently, a more precise definition was later added to the national Constitution, as the country developed its constitutional framework regarding international relations, membership of international organisations and ambitious integration in the European regional context. This was the most extensive amendment to the Constitution, in the form of Constitutional Act No. 90/2001 Coll. of Laws, amending the Constitution, Act No. 460/1992 Coll.

The regulation of the supremacy principle applicable to international human rights treaties in the Slovak legal system is stipulated in Article 7 paragraphs 4 and 5 of the Constitution:

*(4) In order for any international treaties on human rights and fundamental freedoms, international political treaties, international treaties of military nature, international treaties establishing the membership of the Slovak Republic in international organizations, international economic treaties of general nature, international treaties whose execution requires a law and international treaties which directly constitute rights or obligations of natural persons or legal persons to be valid, an approval of the National Council of the Slovak Republic is required prior to their ratification.*

*(5) International treaties on human rights and fundamental freedoms, international treaties whose executions does not require a law and international treaties which directly establish rights or obligations of natural persons or legal persons and which were ratified and promulgated in a manner laid down by law shall have primacy over the laws.*

The constitution leaves us in no doubt that internationally the Slovak Republic has a positive obligation under the international human rights treaties, as stated in Article 7, paragraphs 4 and 5. The Constitutional Court of the Slovak Republic has confirmed this:

*The Constitutional Court from the beginning of its existence in accordance with the principle pacta sunt servanda constantly rules that human rights and freedoms as granted by the Constitution have to be interpreted and implemented in the context and the sense of international treaties on human rights and fundamental freedoms (PL ÚS 5/93, PL ÚS 15/98, PL ÚS 17/00). This means also in situations when the Court was not forced to directly rule on violation of the Convention or other*

*international treaty on human rights and freedoms, the Court always, if not excluded by the Constitution itself, took into consideration also the content of such international treaties and related case law, when interpreting content of human rights and freedoms as granted in the Constitution (II. ÚS 55/98).<sup>2</sup>*

## **1.2. Protection of human rights and fundamental freedoms in Slovakia on the basis of the UN treaties**

Human rights protection is one of the fundamental principles of international law, as stated in the UN Charter and in the Universal Declaration of Human Rights. As such, it has to be observed in other international and national documents and treaties, as well. The relevant UN treaties focusing on specific areas of human rights provide a more precise definition of this principle, and the content of the positive obligation. The obligation of the signatory party of such an international human rights treaty is considered a positive obligation, that is, the obligation to grant and protect human rights on the sovereign territory of the signatory party, based on the national constitutional regulation.<sup>3</sup>

As international human rights treaties are sources of law in the Slovak Republic, we aim to analyse Slovakia's fulfilment of its positive obligation under these treaties. The Constitutional Court of the Slovak Republic has ruled, as follows: "International human rights treaties enjoy specific position in the system of legal sources in the Slovak Republic. According to conditions set out in article 11 of the Constitution of the Slovak Republic, these are supreme to laws but not to the Constitution."<sup>4</sup>

Internationally, a country's fulfilment of positive obligation is considered by means of a periodic review aimed at identifying problems and recommending potential legislative amendments to the signatory party and the effective use of application tools and instruments. Competency to review human rights implementation and prevent violation, inequality and discrimination lies with the Human Rights Council, established according to UN General Assembly Resolution No. 60/251 of 2006. As stated in the Resolution, "the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote the effective coordination and the mainstreaming of human rights within the United Nations system".<sup>5</sup> As Fridrich noted, "proceedings in case of individual applications are based

<sup>2</sup> Finding of the Constitutional Court of the Slovak Republic, file ref. No. II. ÚS 5/02, Decision of 21 May 2003. Collection of CC SR Findings, 1<sup>st</sup> half of the year, 2003, p. 284

<sup>3</sup> See more: Fridrich B. (ed.), Ústavné garancie ľudských práv [Constitutional guarantees of human rights]. Bratislava: Law faculty, CU, 2013.

<sup>4</sup> Finding of the Constitutional Court of the Slovak Republic, file ref. No. II. ÚS 91/1991, Decision of 16 December 1999. Collection of CC SR Findings, 2<sup>nd</sup> half, 1999, p. 672

<sup>5</sup> UN General Assembly Resolution No. 60/251 of 2006. Available at: [https://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251\\_En.pdf](https://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf) [last viewed October 10, 2019].

on the principle of subsidiarity”<sup>6</sup>. This means that states are obliged to try to settle the dispute in a friendly manner, if not, a review is undertaken.

Since 2007, the periodic review has consisted of the submission reports on the state of human rights in the country of the signatory party every four-and-a-half years. Slovakia’s first universal periodic review was discussed by the government in 2009. Ninety-one recommendations were delivered. The last universal periodic review covered the period of 2012–2016. The number of recommendations was very similar. The number of individual complaints was rising. The final output of the committee’s work in individual cases comes in the form of an opinion. Opinions can be considered decisions by an international body, because they have individual effects (decision in merit, *res iudicata* at the national level) and general effects for the signatory country of both a legal character (obligation to remedy and legal representation costs) and a political character (recommendations for amendments to national legislation, implementation recommendations). In Slovakia’s case, practical implementation of the conclusions and recommendations contained in the Opinion occurs infrequently and is restricted by national legislation.

## 2. The Slovak Republic and UN Committee decisions on the prohibition of racial discrimination

Since 1993, the UN Committees have received 17 individual complaints relating to discrimination. In eight cases, opinions were issued. Most of the opinions concerned the violation of human rights on the basis of racial and gender discrimination. In the current article, we focus only on UN Committee decisions relating to racial discrimination which is of key interest to both the UN and the EU (on 10 October 2019, the EU Commission issued a reasoned opinion to Slovakia urging it to comply with EU rules on the equal treatment of Roma schoolchildren<sup>7</sup>). Three opinions were issued. Bearing in mind the number of submissions to other human rights organisations (such as the Council of Europe), this figure suggests structural errors in the protection of individual rights.

The non-discrimination obligation as set out in the International Convention on Elimination of All Forms of Racial Discrimination has been incorporated into Slovakia’s Anti-Discrimination Law<sup>8</sup>, but it is also reflected in legislation on education, health and social insurance, and so on.

<sup>6</sup> Fridrich B. Human Rights and Freedoms in the Constitution of the Slovak Republic. In: Constitutional system of the EU member state: The Slovak Republic. Bratislava: VO UK, 2018, p. 101.

<sup>7</sup> European Commission: October infringements package: key decisions. Available at: [https://europa.eu/rapid/press-release\\_INF-19-5950\\_en.htm](https://europa.eu/rapid/press-release_INF-19-5950_en.htm) [last viewed October 10, 2019].

<sup>8</sup> Act No. 365/2004 Coll. of laws on equal treatment in some areas and on protection before discrimination and on amendments and changes of some acts (Anti-discrimination Act). Available at: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---ilo\\_aids/documents/legaldocument/wcms\\_128039.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_128039.pdf) [last viewed September 20, 2019].

The International Convention on Elimination of All Forms of Racial Discrimination was signed by the Czechoslovak Socialist Republic on 7 March 1966 and ratified, with reservations regarding Articles 17 and 22. It was deposited with the UN on 29 December 1966. According to Article 19, it became valid and effective on 4 January 1969. This was announced in a Notice of the Minister of Foreign Affairs on 15 August 1974 and published in the Official Journal with No. 95/1974 Coll. With succession to international treaties, the Slovak Republic became a signatory party to the Convention on 28 May 1993 with retroactive effect to the date of its foundation on 1 January 1993.

In the Koptová review<sup>9</sup>, the Committee assessed a complaint by Anna Koptová, a Slovak citizen of Roma ethnicity and director of the Office for the Legal Protection of Ethnic Minorities in Slovakia – *Dobrá rómska víla Kesaj* foundation in Košice (Košice Legal Defence Foundation) – who had complained of the violation of Articles 2 to 6 of the Convention on Elimination of All Forms of Racial Discrimination. As she informed the Committee, in 1981, seven Romany families had come to work at an agricultural cooperative and were awarded permanent residency in the municipality of Krásny Brod (now Rokytovce, and Nagov). When the agricultural cooperative ceased operations at the end of 1989, the Romany families lost their jobs and were compelled to leave the cooperative. In May 1991, the Romany families returned to the municipalities where they were legally registered, Rokytovce and Nagov. Although the families had raised sufficient money to do so, no village allowed them to place their trailer on its territory. On 21 July 1997, dwellings built and occupied by the Romany families in the municipality of Cabiny were set on fire. No perpetrator was identified.

On 8 June 1997, the Municipal Council of Rokytovce enacted resolution No. 21, which expressly forbade the Romany families from settling in the village and threatened them with expulsion should they try to settle there. On 16 July 1997, the Municipality of Nagov adopted resolution No. 22, which forbade Roma citizens from entering the village or settling in shelters in the village district. The Košice Legal Defence Foundation sent a letter to the General Prosecutor's Office in Bratislava requesting an investigation into the legality of Resolutions No. 21 and No. 22.

On 24 November 1997, the Košice Legal Defence Foundation submitted an application to the Constitutional Court of the Slovak Republic requesting the annulment of both resolutions. In its decision of 18 December 1997, the Constitutional Court dismissed the submission on the grounds that, as a legal person, the Košice Legal Defence Foundation could not have suffered an infringement of the constitutional rights set forth in its application, since those rights were designed to protect only natural persons.

<sup>9</sup> Communication No. 13/1998 of the Committee on the Elimination of Racial Discrimination. CERD/C/57/D/13/1998, 2000. Available at: <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-372-Anna-Koptova-v.-Slovak-Republic.pdf> and [https://www.equalrightstrust.org/sites/default/files/ertdocs//Koptova%20v%20Slovakia%20access%20to%20good%20and%20services\\_.pdf](https://www.equalrightstrust.org/sites/default/files/ertdocs//Koptova%20v%20Slovakia%20access%20to%20good%20and%20services_.pdf) [last viewed September 20, 2019].



On 5 May 1998, Ms. Koptová, together with Miroslav Lacko (another employee of the Košice Legal Defence Foundation) and Jan Lacko, one of the Romany citizens whose dwellings were destroyed on 21 July 1997, filed another submission before the Constitutional Court. This submission challenged the Nagov resolution on the grounds that it unlawfully restricted the freedom of movement and residence of a group of people solely on the grounds of their Roma nationality. On 16 June 1998, the Constitutional Court issued an opinion dismissing the petition. On 8 April 1999, the Municipal Council of Nagov and the Municipal Council of Rokytovce held extraordinary meetings, attended by the District Prosecutor, and decided to revoke resolution No. 22 and resolution No. 21, respectively.

The Committee found that, although the wording of resolutions 21 and 22 referred explicitly to Roma previously domiciled in the municipalities concerned, other Roma would have been equally prohibited from settling, which represented a violation of Article 5 (d) (i) of the Convention.

Once all the documents and evidence had been gathered, the Committee delivered the following opinion on the merits:

- 1) Having received the full texts of resolutions 21 and 22 the Committee finds that, although their wording refers explicitly to Roma previously domiciled in the municipalities concerned, the context in which they were adopted clearly indicates that other Roma would have been equally prohibited from settling, which represented a violation of article 5 (d) (i) of the Convention.
- 2) The Committee notes, however, that the resolutions in question were rescinded in April 1999. It also notes that freedom of movement and residence is guaranteed under article 23 of the Constitution of the Slovak Republic.
- 3) The Committee recommends that the State party takes the necessary measures to ensure that practices restricting the freedom of movement and residence of Roma under its jurisdiction are fully and promptly eliminated.

The Committee's Opinion on racial discrimination was adopted in the case of *L.R. and others*<sup>10</sup>. The applicants were Mr L. R. and 26 other Slovak citizens of Roma ethnicity residing in the town of Dobšiná. They claimed that the Slovak Republic had violated their rights granted in Article 2 paragraph 1 points (a), (c) and (d); Article 4 paragraph (a); Article 5 paragraph (e) point (iii); and Article 6.

The circumstances of the case are, as follows: On 20 March 2002, the councillors of Dobšiná municipality adopted resolution No. 251-20/III-2002-MsZ, thereby approving what the petitioners described as a plan to construct low-cost housing for the Roma inhabitants of the town. More than 1 800 Roma live in the town in what are described as "appalling" conditions, with most dwellings comprising thatched huts or houses made of cardboard and without drinking water, toilets or drainage or sewage systems. The councillors instructed the local mayor to prepare a project

<sup>10</sup> Communication No. 31/2003 Committee on the Elimination of Racial Discrimination, CERD/C/66/D/31/2003, 2005. Available at: <https://undocs.org/CERD/C/66/D/31/2003> [last viewed August 28, 2019].

aimed at securing finance from a government fund set up expressly to alleviate Roma housing problems in the State party. Thereupon, certain inhabitants of Dobšiná and surrounding villages established a five-member “petition committee”, led by the Dobšiná chairman of the Real Slovak National Party. The committee elaborated a petition with the following text:

*I do not agree with the building of low cost houses for people of Gypsy origin on the territory of Dobšiná, as it will lead to an influx of inadaptable citizens of Gypsy origin from the surrounding villages, even from other districts and regions.*<sup>11</sup>

The petition was signed by some 2 700 inhabitants of Dobšiná and deposited with the municipal council on 30 July 2002. On 5 August 2002, the council considered the petition and unanimously voted, “having considered the factual circumstances”, to annul the earlier resolution by means of a second resolution, which included an explicit reference to the petition.

On 16 September 2002, in the light of the relevant law<sup>12</sup>, the petitioners’ counsel requested the Rožňava District Prosecutor to investigate and prosecute the authors of the discriminatory petition, and to reverse the council’s second resolution as it was based on a discriminatory petition. On 7 November 2002, the District Prosecutor rejected the request on the purported grounds of having no jurisdiction over the matter. The Prosecutor found that

<sup>11</sup> Applicants’ translation, which reflects exactly the text of the petition set out in the translated judgement of the Constitutional Court provided by the State party in annexure to its submissions on the merits. The State party suggests in its submissions on the merits that a more appropriate translation would be: “I do not agree with the construction of flats for the citizens of Gypsy nationality (ethnicity) within the territory of the town of Dobšiná, as there is a danger of influx of citizens of Gypsy nationality from surrounding area [sic] and even from other districts and regions.”

<sup>12</sup> Applicants refer to

(i) Article 1 of the Act on the Right of Petition, which provides: “A petition cannot call for a violation of the Constitution of the Slovak Republic and its laws, nor deny or restrict individual rights”;

(ii) Article 12 of the Constitution, which provides:

(1) All human beings are free and equal in dignity and in rights. Their fundamental rights and freedoms are sanctioned; inalienable, imprescriptible and irreversible.

(2) Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds.

(3) Everyone has the right to decide freely which national group he or she is a member of. Any influence and all manners of pressure that may affect or lead to a denial of a person’s original nationality shall be prohibited.

(4) No injury may be inflicted on anyone, because of exercising his or her fundamental rights and freedoms.

(iii) Article 33 of the Constitution, which provides:

“Membership in any national minority or ethnic group may not be used to the detriment of any individual”; and

(iv) The Act on the Public Prosecution Office, which provides that the Prosecutor has a duty to oversee compliance by public administration bodies with laws and regulations, and to review the legality of binding regulations issued by public administration bodies.

*[..] the resolution in question was passed by the Dobšiná Town Council exercising its self-governing powers; it does not constitute an administrative act performed by public administration and, as a result, the prosecution office does not have the competence to review the legality of this act or to take prosecutorial supervision measures in non-penal area.<sup>13</sup>*

On 18 September 2002, the petitioners' counsel requested the Constitutional Court to determine whether Articles 12 and 33 of the Constitution, the Act on the Right of Petition and the Framework Convention for the Protection of National Minorities (Council of Europe) had been violated, annulling the council's second resolution and examine the legality of the petition. Further information was provided on two occasions at the request of the Court. On 5 February 2003, the Court, in closed session, held that the petitioners had provided no evidence that any fundamental rights had been violated by the petition or by the council's second decision. It stated that, as neither the petition nor the second resolution constituted legal acts, they were permissible under domestic law. It further stated that citizens had a right to petition regardless of the content of that petition.

The petitioners argued that the State party had violated Article 2, paragraph 1, subparagraph (a), by failing to "ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation" [to not engage in an act or practice of racial discrimination]. They argued, with reference to the Committee's jurisprudence, that a municipal council is a local public authority<sup>14</sup> and that the council had engaged in an act of racial discrimination.

The Committee's Opinion contained the following observations: the Committee acting according to Article 14 paragraph 7 of the Convention on Elimination of All Forms of Discrimination, finds that the State party is in breach of its obligation under Article 2, paragraph 1 (a), Article 5, paragraph (d) (iii) and Article 6 of the Convention.

- 1) In accordance with Article 6 of the Convention, the State party is under an obligation to provide the petitioners with an effective remedy. In particular, the State party should take measures to ensure that the petitioners are placed in the same position that they were in upon adoption of the first resolution by the municipal council. The State party is also under an obligation to ensure that similar violations do not occur in the future.
- 2) The Committee wishes to receive, within ninety days, information from the Government of the Slovak Republic about the measures taken to give

<sup>13</sup> Communication No. 31/2003 of the Committee on the Elimination of Racial Discrimination, CERD/C/66/D/31/2003, 2005. Available at: <https://undocs.org/CERD/C/66/D/31/2003> [last viewed September 16, 2019].

<sup>14</sup> Communication No. 13/1998 of the Committee on the Elimination of Racial Discrimination, CERD/C/57/D/13/1998, 2000, Available at: <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-372-Anna-Koptova-v.-Slovak-Republic.pdf> and [https://www.equalrightstrust.org/sites/default/files/ertdocs//Koptova%20v%20Slovakia%20\\_access%20to%20good%20and%20services\\_.pdf](https://www.equalrightstrust.org/sites/default/files/ertdocs//Koptova%20v%20Slovakia%20_access%20to%20good%20and%20services_.pdf) [last viewed September 20, 2019].

effect to the Committee's Opinion. The State party is requested also to give wide publicity to the Committee's Opinion.

The last Opinion the Committee issued was in relation to the case of *V.S.*<sup>15</sup> The applicant claimed to have experienced racial discrimination in accessing employment and violation of Article 2 (1) (a) and (c)-(e) and (2), in conjunction with Articles 5 and 6 of the Convention. She also claimed that the State party had failed to provide effective protection and remedy against acts of racial discrimination she had been subjected to.

The petitioner graduated from the University of Prešov in 2006 as a general teacher and history teacher. During her studies, she worked as a teaching assistant and carer in local elementary schools. On 18 June 2009, the applicant made speculative enquires regarding a teaching post in history and civic education at the I. B. Zoch Elementary School in Revúca, stating that, if no such post was available, she was willing to accept a post of a teaching assistant. The applicant alleges that, on the day when she submitted her application in person, she met with the school director, who told her that, instead of looking for a job, she should have children like other women of Roma origin. He allegedly added that, as a Roma woman, she would never get a job even if she tried to improve her qualifications through further study. The applicant felt humiliated and embarrassed by these comments, particularly because Roma were generally perceived as unwilling to work. On 26 July 2009, the director sent a letter to the applicant, informing her that there was no vacancy at the school but that her application would be kept on file in case a position became vacant. In September 2009, the applicant found out that a teaching assistant post had become vacant but that someone of non-Roma origin with fewer qualifications and less experience had been hired instead.

Suspecting that she had been discriminated against because of her Roma origin, the applicant filed a complaint with the Slovak National Centre for Human Rights (the Equality Centre) and requested that it undertake an independent inquiry into her case with regard to what happened at the I. B. Zoch Elementary School, but also at other elementary schools to which she had applied with no success. On 11 October 2010, the applicant initiated a civil complaint against the school before the District Court of Revúca, alleging a breach of the principle of equal treatment under Articles 9 et seq. of the 2004 Anti-discrimination Act. She requested an apology from the school and 10 000 euros compensation for non-pecuniary damages. On 28 March 2011, the District Court dismissed her complaint. On 20 April 2011, the applicant filed an appeal with the Banská Bystrica Regional Court against the District Court decision. In the appeal, she stressed that she had made a *prima facie* case showing that the differential treatment was based on racial discrimination, and that the school therefore bore the burden of proof to demonstrate that no discrimination had taken place by providing reasonable and convincing arguments. She argued that the District Court had wrongly assessed

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<sup>15</sup> Communication No. 56/2014 of the Committee on the Elimination of Racial Discrimination, CERD/C/88/D/56/2014, 2016. Available at: <https://undocs.org/en/CERD/C/88/D/56/2014> [last viewed August 28, 2019].

the facts and the evidence provided by the school and that its arguments should not have been considered reasonable and convincing. On 16 August 2011, the Regional Court affirmed the District Court decision and its assessment of the arguments presented by the school.

On 19 September 2011, the applicant filed for an extraordinary recourse with the Supreme Court against the Regional Court decision, claiming that her right to a fair trial had been violated, since the Regional Court had disregarded her arguments for appealing the decision of the District Court without properly examining them and that the decision of the Regional Court was therefore arbitrary. The applicant considered that, by interpreting the domestic legislation in a restrictive manner, the Regional Court had not provided effective protection of her rights.

On 25 January 2013, the applicant filed a constitutional complaint with the Constitutional Court, claiming that all the domestic courts had come to conclusions that were arbitrary, unjustifiable and unsustainable, resulting in a breach of her fundamental rights and freedoms guaranteed by the Constitution of Slovakia and the Convention (Arts. 5 and 6) and other international treaties. On 10 July 2013, the Constitutional Court dismissed the applicant's complaint as groundless. It reviewed the decisions of the domestic courts and came to the conclusion that they gave clear and comprehensible answers to all the relevant legal and factual issues relating to the judicial protection of the petitioner's rights as her arguments had been duly taken into account by the various courts, and that her rights had therefore not been violated.

The Committee considered the case, and after the observation of the government of the Slovak Republic, decided it was admissible. In the circumstances of the case, the Committee, acting under article 14 (7) (a) of the Convention on Elimination of All Forms of Racism, considered that the facts before it disclosed that the State party had violated articles 2 (1) (a) and (c), 5 (e) (i) and 6 of the Convention. The Committee recommended that the State party convey an apology to the petitioner and grant her adequate compensation for the damage caused by the abovementioned violations of the Convention.

Additionally, the Committee "urges the State party to consider ratifying those international human rights instruments that it has not yet ratified, in particular treaties with provisions that have direct relevance to communities that may be subjected to racial discrimination, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."<sup>16</sup>

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<sup>16</sup> Concluding observations on the combined eleventh and twelfth periodic reports of Slovakia, CERD/C/SVK/CO/11-12, point 29, 2018. Available at: <https://undocs.org/en/CERD/C/SVK/CO/11-12> [last viewed August 28, 2019].

## Conclusions and recommendations

This analysis shows that the Slovak Republic has violated its positive obligation regarding human rights, especially non-discrimination. We consider this violation to be systematic, as each of the periodic reviews refers to the violation of rights granted under the UN conventions. The Human Rights Council has repeatedly pointed to acts of discrimination on national, ethnical and gender grounds, despite the adoption of the Anti-discrimination Law and the sectoral legal regulation. The failures occur mainly in practice, as Slovakia is not able to fulfil its positive obligation in relation to the UN conventions on non-discrimination.

Having analysed the opinions, we conclude that apart from individual rights having been violated, compensation and just satisfaction are also a problem. The Committee's opinions do not have the status of judgements. Nevertheless, they are adopted and published in the form of a review of the international human rights' treaty obligation, which has, as stated in Article 7, paragraph 5 of the Constitution, supremacy over national law.

The UN Committees have the competency to conduct reviews in relation to the obligation arising from the international human rights treaty. According to Optional Protocol No. 3 to the Convention on the Rights of the Child, these committees are quasi-judicial in character. Although the Committees' opinions may seem to be non-legally binding in character, they have to be considered within the wider context of the aforementioned additional protocol and the constitutional obligation stated in Article 1, paragraph 3 of the Constitution of the Slovak Republic: "The Slovak Republic recognizes and honours general rules of international law, international treaties by which it is bound and its other international obligations". In cases where Slovakia is not fulfilling its obligations, as indicated by the UN Committee's opinions, the responsibility can be enforced.

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## **IMPORTANCE OF LEGISLATIVE PROCESS IN EVALUATION OF HUMAN RIGHTS LIMITATIONS IN CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE CONSTITUTIONAL COURT OF LATVIA**

### **Summary**

Traditionally, the debate about limitations of human rights concentrates on the necessity and proportionality of the proposed legal norms. This article focuses on the criterion which are less debated in evaluation of legal norm limiting human rights, namely, whether the limitation is “prescribed by law”. It does not address such aspects of this criterion as accessibility and clarity of legal norm. Instead, it is discussed whether the legislative process and quality of legal norms adopted are among the factors examined by the Latvian Constitutional Court and the European Court of Human Rights when assessing the justification of a restriction of human rights.

**Keywords:** legislative process, restriction of human rights, European Court of Human Rights, Constitutional Court

### **Introduction**

The article aims to answer the following questions: Does the legislative process of adopting the law limiting fundamental rights have any impact on the evaluation of legality of such limitations? Can the Parliament in urgency procedure without discussions pass a law which severely restricts fundamental rights? Is the Parliament restricted in its legislative process only by its own rules of procedure or also by the Constitution and principles of law? If yes, does the Constitutional Court have a competence to check the compliance of Parliament with these rules in legislative process and would not such rights contravene sovereign powers of Parliament and right of Parliament to adopt political decisions? Does the ECtHR examine legislative process when assessing the limitation on human rights? In which cases and under which element of limitation test?

These questions will be assessed first on the basis of analysis of the jurisprudence of the Constitutional Court of the Republic of Latvia. Secondly, the role of the legislative process in the case law of the European Court of Human rights will be analysed.



## 1. Jurisprudence of the Constitutional Court of the Republic of Latvia

In recent years, the evaluation of the legislative process leading to limitation of human rights is of an increasing importance in the jurisprudence of the Constitutional Court when assessing whether the restriction of human rights is prescribed by law. Furthermore, the Court has also considered this criterion when analysing the necessity and proportionality of the restriction. Certain aspects of such approach have also been discussed by the Constitutional Court judges in their dissenting opinions.

### 1.1. Was the law adopted in compliance with the procedure established in the legislative framework?

Already in 2009, the Constitutional Court, when evaluating the legality of some of the austerity measures introduced to overcome the economic crisis, emphasized that:

*In a democratic state the process of adopting a law restricting fundamental rights should allow the society to be sure about the lawfulness of the particular legal act. The society should form an impression that a thorough prior consideration of the necessity to limit the fundamental rights was carried out during the adoption of the law.<sup>1</sup>*

Despite these observations, until 2017 the Court had never declared the legal norm to be contrary to the *Satversme* (Constitution of the Republic of Latvia) on the basis of the flaws of parliamentary procedure of adoption of disputed legal norm.

In October 2017, while evaluating the constitutionality of the solidarity tax, the Court acknowledged that the parliament has wide, but not unlimited discretion in legislative process: “The *Saeima*, in exercising its right to legislate and to set the budget, enjoys discretion insofar as the general principles of law and the norms of the *Satversme* are not violated.”<sup>2</sup> Although the Constitutional Court ultimately ruled that the contested aspect of the solidarity tax was not compatible with the principle of equality enshrined in the *Satversme*, it emphasized that the Parliament had observed the proper legislative procedure, as the evaluation of the necessity of the law was

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<sup>1</sup> See, for example, the Judgment of the Constitutional Court of the Republic of Latvia of 26 November 2009 in the case No. 2009-08-01, para. 17.2. Available at: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2009-08-01\\_Spriedums.pdf#search=2009-08-01](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2009-08-01_Spriedums.pdf#search=2009-08-01) [last viewed October 30, 2019].

<sup>2</sup> Judgment of the Constitutional Court of the Republic of Latvia of 19 October 2017 in the case No. 2016-14-01, para. 25.2. Available at: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/07/2016-14-01\\_Spriedums-2.pdf#search=2016-14-01](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/07/2016-14-01_Spriedums-2.pdf#search=2016-14-01) [last viewed October 30, 2019].

based on the assessment of large amount of data and all the stakeholders were given a chance to express their opinion on the draft legislation.<sup>3</sup>

In a subsequent judgement, the Court made clear that the Parliament must not ignore the principle of good legislation.<sup>4</sup> When analysing the constitutionality of norms regulating the relationship of compulsory lease<sup>5</sup>, the Constitutional Court introduced detailed criteria that should be used in assessing whether the Parliament has complied with this principle:

*[...]to evaluate whether the disputed norms are adopted in compliance with the procedure established in the legislative framework, the Constitutional Court must determine whether the legislator has sufficiently analysed the compliance of the disputed norm limiting the fundamental rights with the Satversme in the context of the set case law of the Court regarding the forced lease.<sup>6</sup>*

It was also noted that the legislator had the duty to analyse the impact of a proposed limitation of fundamental rights before the introduction of the particular norm. The Constitutional Court emphasized that if, in the course of adopting a legal norm, arguments were presented regarding its possible incompatibility with the norms of higher legal force or the case law of the Constitutional Court, the legislator should examine these arguments.<sup>7</sup> In the case at hand, the Court essentially found that the *Saeima* had not paid due attention to the objections and proposals of several stakeholders, and did not have at its disposal due analysis and substantiation of the constitutionality of the restriction of land owners' right to property included in the contested norms.<sup>8</sup> Therefore, the norms, which were aimed

<sup>3</sup> See also Dissenting opinion of the Judge of the Constitutional Court of the Republic of Latvia Daiga Rezevska of 2 November 2017 in the case No. 2016-14-01. Available at: <https://likumi.lv/ta/id/295883> [last viewed October 30, 2019].

<sup>4</sup> See more about the principle of good legislation in: Pleps J. The Principle of Good Legislation. Grām.: The Quality of Legal Acts and its Importance in Contemporary Legal Space. Rīga: University of Latvia Press, 2012, pp. 16–26. Krūkle G. Likumdošanas un tiesu varas savstarpējā mijiedarbība. Aktivā un pasīvā tiesnešu tiesību parlamentārā kontrole [Interaction between the legislature and the judiciary. Active and passive parliamentary control of the rights of judges]. In: Latvijas Universitātes Juridiskās fakultātes 7. starptautiskā zinātniskā konference Tiesību zinātnes uzdevumi, nozīme un nākotne tiesību sistēmās I. Konferences rakstu krājums [University of Latvia, Faculty of Law, 7<sup>th</sup> International Scientific Conference: Tasks, Significance and Future of Legal Science in Legal Systems. Conference Proceedings, Vol. I]. Rīga: University of Latvia, 2019, p. 524.

<sup>5</sup> Compulsory lease is a maximum lease fixed by Parliament, which the land owners can request from the owners of flats or houses built on their land plots. This complex legal relationship was created in the course of land reform after the end of Soviet occupation, when the nationalized property was returned to the former owners or their successors, while in the meantime public houses had been built on these land plots.

<sup>6</sup> Judgment of the Constitutional Court of the Republic of Latvia of 12 April 2018 in the case No. 2017-17-01, para. 21.3. Available at: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/07/2017-17-01\\_Spriedums.pdf#search=2017-17-01](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/07/2017-17-01_Spriedums.pdf#search=2017-17-01) [last viewed October 30, 2019].

<sup>7</sup> Ibid.

<sup>8</sup> Pleps J. Satversmes tiesa un labas likumdošanas princips: piezīmes par spriedumu lietā Nr. 2018-11-01 [The Constitutional Court and the principle of good legislation: remarks on the judgment in case No. 2018-11-01]. *Jurista Vārds*, No. 12, 2019.

to decrease the amount of compulsory land lease, were found to be incompatible with the *Satversme*. However, this decision of the Court was not unanimous. It was emphasized by dissenting judges of the Court that the Parliament enjoyed discretion in establishing the rules of its own procedure and the Court had acted beyond its competence when declaring the disputed norm unconstitutional on the basis of the shortcomings in the legislative procedure.<sup>9</sup>

The idea that in a democratic state governed by the rule of law the legislative procedure leading to restrictions of fundamental rights of an individual should be transparent, well-argued and understandable for the individual was again expressed more recently. In a case that was initiated based on the application submitted by several employees of a number of state-established higher education institutions, the Court ruled that a law, which requires the publication of information about, *inter alia*, the remuneration of all employees of state-established institutions of higher education, as well as other monetary amounts that they are entitled to, on the Internet homepages of the respective higher education institutions for at least eight years is not compatible with the Constitution of the Republic of Latvia. One of the main arguments the Court used was that the legislator had not observed the proper legislative procedure, which “should not only be in compliance with the formal requirements set in law, but also enhance the trust of the society towards the state and the law.”<sup>10</sup> In particular, the Parliament had not evaluated the objections of the President of the Republic of Latvia as regards the law and had not made sure that the contested legislation is compatible with the EU General Data Protection Regulation, which although not legally binding at the time of the parliamentary procedure, was in force already.

However, the Court apparently narrowed down the principle of good legislation. The Court pointed out that only a serious error of the legislator can be considered as a sufficient reason to declare the law unconstitutional: “Not every shortcoming can be sufficient grounds to declare that the law has no legal effect. In order to declare a legal act null and void because of a procedural deficiency, there must be reasonable doubt that a different decision would have been achieved in the case if the proper procedure would have been observed.”<sup>11</sup> As regards the particular case, it was ruled

<sup>9</sup> Dissenting opinion of the Judge of the Constitutional Court of the Republic of Latvia Gunārs Kusiņš of 26 April 2018 in the case No. 2017-17-01. Available at: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/07/2017-17-01\\_Atseviskas\\_domas\\_Kusins.pdf#search=2017-17-01](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/07/2017-17-01_Atseviskas_domas_Kusins.pdf#search=2017-17-01) [last viewed October 30, 2019]; Dissenting opinion of the Judges of the Constitutional Court of the Republic of Latvia Aldis Laviņš and Jānis Neimanis of 25 April 2018 in the case No. 2017-17-01. Available at: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/07/2017-17-01\\_Atseviskas\\_domas\\_Lavins\\_Neimanis.pdf#search=2017-17-01](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/07/2017-17-01_Atseviskas_domas_Lavins_Neimanis.pdf#search=2017-17-01) [last viewed October 30, 2019].

<sup>10</sup> Judgment of the Constitutional Court of the Republic of Latvia of 6 March 2019 in the case No. 2018-11-01, para. 18. Available at: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/07/2018-11-01\\_Spriedums.pdf#search=2018%2011%2001](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/07/2018-11-01_Spriedums.pdf#search=2018%2011%2001) [last viewed October 30, 2019].

<sup>11</sup> Judgment of the Constitutional Court of the Republic of Latvia of 6 March 2019 in the case No. 2018-11-01, para. 18.5. Available at: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/07/2018-11-01\\_Spriedums.pdf#search=2018%2011%2001](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/07/2018-11-01_Spriedums.pdf#search=2018%2011%2001) [last viewed October 30, 2019].

that the disputed norm was not adopted in accordance with the principle of good legislation. The violations in the case at hand, especially if viewed in their context, according to the Court, had to be considered serious.<sup>12</sup> The Court had reasonable doubt that, if the Parliament would have taken into account the objections of the President of the Republic of Latvia, as well as those expressed by the Ministry of Justice, the Legal Department of *Saeima*, the Data State Inspectorate and other stakeholders, the legislative procedure would have allowed the Parliament to come to a different conclusion, comparing to the one enshrined in the contested regulation.<sup>13</sup>

## 1.2. Was the law necessary in a democratic society?

The Constitutional Court has also analysed the legislative process under the necessity requirement of limitations on human rights. In assessing the constitutionality of the norm of Education Law, which imposed absolute and lifelong prohibition for a person, who has been convicted for serious or particularly serious crime, to work as a teacher, the Constitutional Court *expressis verbis* referred to the findings of the European Court of Human Rights:

*It follows from the judicature of the European Court of Human Rights that in assessing the proportionality of an absolute prohibition it should be examined, whether the legislator has:*

- 1) *substantiated the need for an absolute prohibition;*
- 2) *assessed its essence and the consequences of application thereof;*
- 3) *substantiated that if an exception to this absolute prohibition were envisaged the legitimate aim of the restriction on fundamental rights would not be reached in equal quality.*<sup>14</sup>

From these findings of the ECtHR, the Constitutional Court of Latvia also drew its duty to ascertain, whether the legislator had:

- 1) substantiated the need for an absolute prohibition;
- 2) assessed its essence and the consequences of application thereof;
- 3) substantiated that if an exception to this absolute prohibition were envisaged the legitimate aim of the restriction on fundamental rights would not be reached in equal quality.<sup>15</sup>

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Compare ECHR judgment of 22 April 2013 in case *Animal Defenders International v. United Kingdom* (application No. 48876/08), para. 108.

<sup>15</sup> Judgment of the Constitutional Court of the Republic of Latvia of 24 November 2017 in the case No. 2017-07-01, para. 19. Available at: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/03/2017-07-01\\_Spriedums.pdf#search=2017%2007%2001](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/03/2017-07-01_Spriedums.pdf#search=2017%2007%2001) [last viewed October 30, 2019].

Applying these criteria to the particular case, the Court noted that the drafting materials of the contested norm did not provide a confirmation that the legislator had examined, whether, indeed, in all cases the lifelong prohibition for someone who had been recognized as guilty of committing a serious or a particularly serious crime to work as a teacher was substantiated. Likewise, the Constitutional Court did not establish that, following the adoption of the contested norm, the legislator had re-examined the need to retain the absolute prohibition.<sup>16</sup> The Court was also not convinced that the Parliament in setting the absolute prohibition to work as a teacher, had discussed it on its merits and had substantiated the need for an absolute prohibition.<sup>17</sup>

## 2. Case law of the European Court of Human Rights

Before looking at the case law of the ECtHR, it must be noted that because of its supra-national nature, competencies of the ECtHR differ from the competencies of any national courts, including constitutional courts. The ECtHR has traditionally emphasized that margin of appreciation must, inevitably, be left to the national authorities, who by reason of their direct and continuous contact with the vital forces of their countries are, in principle, better placed than an international court to evaluate local needs and conditions.<sup>18</sup> These differences in roles of the courts must also be borne in mind when comparing the findings of the ECtHR and the Constitutional Court of the Republic of Latvia, especially as regards the principle of good legislation as the legislative procedure in general of national regulation.

Nonetheless, the European Court of Human Rights has, in a number of cases, assessed the legislative process and considerations of the legislature to determine whether a restriction of human rights was necessary, and whether a fair balance had been struck between the competing interests in each particular case.

In 2003, in deciding whether the United Kingdom had struck a fair balance between the economic interests of the state and the right of applicants to private life that was disturbed by the noise of the nearby airport, the ECtHR outlined that a governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake.<sup>19</sup> Among other things,

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<sup>16</sup> Judgment of the Constitutional Court of the Republic of Latvia of 24 November 2017 in the case No. 2017-07-01, paras 19.1, 19.2.1. Available at: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/03/2017-07-01\\_Spriedums.pdf#search=2017%2007%2001](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/03/2017-07-01_Spriedums.pdf#search=2017%2007%2001) [last viewed October 30, 2019].

<sup>17</sup> Ibid., para. 19.2.2.

<sup>18</sup> ECHR judgment of 21 June 2006 in case *Maurice v. France* (application No. 11810/03), para. 117.

<sup>19</sup> ECHR judgment of 8 July 2003 in case *Hatton and others v. United Kingdom* (application No. 36022/97), para. 128.

as the government had consistently monitored the situation and the legislation in place had been preceded by a series of investigations and studies, the Court found no violation of the rights of the applicants.

Similar line of argumentation was followed in case *Evans v. United Kingdom* regarding the necessity for the father's consent to the continued storage and implantation of fertilised eggs. The Grand Chamber agreed with the previous judgment of the Chamber that it is relevant that the law, which limited the right to private and family life, was the culmination of an exceptionally detailed examination of the social, ethical and legal implications of developments in the field of human fertilisation and embryology, and the fruit of much reflection, consultation and debate.<sup>20</sup>

However, it is not the case that the legislative procedure in the United Kingdom had always pleased the ECtHR. In *Dickson v. United Kingdom*, the Court ruled that the refusal to grant artificial insemination facilities to enable a serving prisoner to father a child was a violation of the applicants' right of private life. The Court found no evidence that, when fixing a policy for these kinds of situations, the Secretary of State had sought to weigh the relevant competing individual and public interests or assess the proportionality of the restriction. Moreover, since the policy was not embodied in primary legislation, the various competing interests were never weighed, nor had issues of proportionality ever been assessed by Parliament.<sup>21</sup>

Thus, it can be argued that the ECtHR in determining whether a fair balance has been struck between competing interests may, *inter alia*, assess the quality of the legislative procedure. It pays attention to whether the national legislator has done its due research and has weighed all the competing interests in assessing the proportionality of the limitation. Constitutional Court of the Republic of Latvia does that as well, but it attributes this duty to the quality of law rather than the proportionality *strictu sensu*.

As regards the limitation of general measures, the ECtHR has noted that a State can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case, even if this might result in individual hard cases.<sup>22</sup> It was the case of the *Animal Defenders International v. United Kingdom*, that was also quoted by the Constitutional Court of the Republic of Latvia, where the ECtHR ruled that the principle of subsidiarity, the quality of the parliamentary and judicial review of the necessity of the measure, including to the operation of the relevant margin of appreciation, is of particular importance in determining whether general measure is proportional.<sup>23</sup> In that judgment, the Court

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<sup>20</sup> ECHR judgment of 10 April 2007 in case *Evans v. United Kingdom* (application No. 6339/05), para. 86.

<sup>21</sup> ECHR judgment of 4 December 2007 in case *Dickson v. United Kingdom* (application No. 44362/04), para. 83.

<sup>22</sup> ECHR judgment of 22 April 2013 in case *Animal Defenders International v. United Kingdom* (application No. 48876/08), para. 106.

<sup>23</sup> *Ibid.*

found a refusal of permission for non-governmental organisation to place television advert owing to statutory prohibition of political advertising not to be violating the freedom of expression. It established that the government had been carrying out pertinent reviews of the complex regulatory regime governing political broadcasting in the United Kingdom that came to conclusion that the general measure was necessary to prevent the distortion of crucial public interest debates and, thereby, undermining of the democratic process.<sup>24</sup>

It should be emphasized that each particular situation is analysed by the ECtHR taking into account all the circumstances of the case. The margin of appreciation afforded to the state varies according to the nature of the Convention rights in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions.<sup>25</sup> The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation.<sup>26</sup>

## Conclusions

The Parliament has wide but not unlimited power as regards legislative process, when it decides on limitations of fundamental rights. It is the duty of constitutional courts to examine whether the Parliament has acted in accordance with the principle of good legislation when adopting laws limiting fundamental rights. The aim of this examination is not to challenge the sovereign powers of Parliament or to substantiate the Parliament's decision by its own, but to enhance the trust of society in legislator and to ensure that decision-making process was fair, had duly respected the interests safeguarded for the individual and struck a fair balance between the various conflicting interests. There are differences among ECtHR and Latvian Constitutional Court when examining the legislative process, which are explained by the different powers and competencies of both courts. However, both courts have not abstained to examine the legislative process and considerations of the legislature when assessing the restrictions of human rights.

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<sup>24</sup> ECHR judgment of 22 April 2013 in case *Animal Defenders International v. United Kingdom* (application No. 48876/08), para. 106.

<sup>25</sup> ECHR judgment of 23 March 2017 in case *A.-M.V. v. Finland* (application No. 53251/13), para. 83.

<sup>26</sup> *Ibid.*, para. 84.

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# SECTION 5

## CHALLENGES OF THE 21<sup>st</sup> CENTURY TO THE DEVELOPMENT OF THE SCIENCES OF CRIMINAL LAW

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## QUESTIONING THE PENAL CHARACTER OF DISCIPLINARY SANCTIONS IN THE EUROPEAN COURT OF HUMAN RIGHTS' CASE LAW

### Summary

Since the European Court of Human Rights (Court) has autonomously redefined the concept of penalty, it has extended its jurisdiction. However, unless they deprive of liberty, disciplinary sanctions are excluded from this autonomous definition. In this respect, this case law study depicts the Court's approach to disciplinary sanctions and particularly focuses on problems arising from the implementation. From a descriptive point of view, exceptional status for disciplinary sanctions depends on two factors: The first factor is the criteria that was developed by the Court to assess whether autonomous penalties contain a structural incompatibility. In order to prove this argument, the practices indicating the discrepancy between the criteria of the "nature of offence" and the "nature of sanction" will be examined. A critical analysis of this situation shows that if these criteria are used in their current form, the problem will persist, and therefore a reinterpretation is needed. The second factor is the definition of disciplinary sanction undertaken by the Court. The phrase "special" in this definition creates uncertainty in terms of scope, and has controversial results. Therefore, these two factors need to be reviewed in order to ensure that the Court's case law on disciplinary sanctions yields more objective and consistent results.

**Keywords:** ECtHR case law, concept of penalty, disciplinary sanction, criminal offence, nature of offence, nature of sanction

### Introduction

Until 1976, the guarantees concerning criminal issues that involve in the European Convention on Human Rights (ECHR/Convention)<sup>1</sup> applied only to the sanctions that are classified as penalty in the domestic law of Contracting States. In that year, the European Court of Human Rights (ECtHR/Court) initially created an autonomous concept of penalty by specific criteria in the *Engel* judgment.<sup>2</sup> According to these criteria, called *Engel* criteria in the subsequent cases, the concept of penalty was redefined regardless of the subjective classification of the Contracting States. By means of this dynamic interpretation,<sup>3</sup> the Court gradually has widened its

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<sup>1</sup> Convention for the Protection of Human Rights and Fundamental Freedoms. Signed in Rome, 4.11.1950.

<sup>2</sup> *Engel and the others v. the Netherlands* § 80–85.

<sup>3</sup> Harris D., O'Boyle M., Bates E., Buckley C. *Law of the European Convention on Human Rights*. New York: Oxford University Press, 2014, p. 7.

*ratione materiae*, and consequently expanded the implementation of the ECHR and the guarantees therein. However, as the disciplinary sanctions are largely excluded from this implementation, the persons on whom such sanctions are imposed are confronted with negative effects from this interpretation.

These effects could be summed up under two contexts. The first effect is relatively insignificant, and concerns only the rights of access to a court and hearing involving in the first paragraph of Article 6§1 of the Convention.<sup>4</sup> Since these rights are provided not only in criminal but also in civil disputes under this article, the Court considers them as civil disputes, and implements these rights therein.<sup>5</sup> The second effect, however, deprives the disciplinary sanctions completely of the guarantees in the Convention.<sup>6</sup>

In this respect, the purpose of this study is to analyse and criticize the conceptual point of the view in jurisprudence under two controversial facts. The first of these is the subjective consequences of the concept of penalty defined according to *Engel* criteria in terms of disciplinary sanctions. The second is inconsistent and uncertain characteristic of the definition of disciplinary sanctions defined by the Court. Therefore, (1) the questions arising from the application of the *Engel* criteria and (2) the questions arising from the definition of disciplinary sanctions made by the ECtHR will be examined under the following headings.

## 1. Questioning the criteria developed by the court

The basis of the case law on assessing the concept of penalty is the three *Engel* criteria, as follows: “(1) the legal classification of the offence under national law, (2) the very nature of the offence and (3) the degree of severity of the penalty that the person concerned risks incurring”. The first criterion is rarely used and has no decisive role in terms of the classification of disciplinary sanctions. However, the other two directly and indirectly determine whether disciplinary sanctions are included in the definition of penalty.

In this context, firstly (1) the nature of these offences will be questioned within the framework of the second criterion, which directly removes disciplinary sanctions from the concept of penalty. Then, (2) the impact of the third criterion on this assessment, and the conflicting relationship this causes will be discussed.

<sup>4</sup> Article 6 § 1: “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

<sup>5</sup> *Albert and Le Comte v Belgium* § 30.

<sup>6</sup> In this context, presumption of innocence (Article 6 § 2), right to be informed and adequate time for defence, right to legal assistance and attendance and examination of witnesses, right to assistance of an interpreter (Article 6 § 3) will not be applied. In the same line, since it is not considered a criminal offence any disciplinary sanctions shall not be considered within the framework of the prohibition to penalization without law and retroactive practice (Article 7 § 1), and the right of appeal (Article 2 of Protocol 7) shall not be deemed. Finally, the rule of *ne bis in idem* (Article 4 of the Protocol 7), that prevents multiple punishments, will not provide protection to the respondents.

### 1.1. What is the nature of a disciplinary offence?

In the Court's case law, disciplinary sanctions are considered outside the scope of the concept of penalty on the basis of the second criterion. However, this interpretation creates considerable challenges in terms of its literal meaning. First of all, while the nature of sanction belongs to the third criterion, it is tautological to mention the nature of the offence<sup>7</sup>, i.e. the second criterion is far from its literal meaning.

From a chronological point of view, in the *Öztürk* judgment, the nature of offence was explained by the distinction as to whether the offence could be processed by a limited group, or by everyone.<sup>8</sup> According to this point of view, not only disciplinary sanctions, but also other offences that can be committed by anyone in the nature of sanctions to be applied to them would be a penalty.

In the *Weber* judgment, this phrase turned into "potentially affects the whole population". In other words, the focus is not the offence, but the sanction itself as it should be.<sup>9</sup> This point of view focuses on the perpetrator of the offence sanction, not the addressees. This means that the distinguishing feature implied in this criterion is not the number of addressees, but their quality as members of a particular group, combined with the interests protected by the rule.<sup>10</sup>

### 1.2. What is the nature and the severity of a disciplinary sanction?

The nature and the severity of a disciplinary sanction (third criterion) is inconsistent with the second criterion, and its own elements are contradictory. While the nature of sanction is a qualitative feature, the severity of sanction is based on quantity. Therefore, the interaction between them should be examined separately.

In the case law, "the concept of nature" has developed on two separate models depending on two judgments of the Court.<sup>11</sup> According to this duality, a sanction could be classified as a penalty in the cases of depriving liberty or carry punitive and deterrent aims. However, the Court does not apply the purpose issue on disciplinary sanctions. Indeed, even if a disciplinary sanction carries punitive and

<sup>7</sup> Trechsel S. *Human Rights in Criminal Proceedings*. New York: Oxford University Press, 2005, p. 19.

<sup>8</sup> "It is a rule that is directed, not towards a given group possessing a special status – in the manner, for example, of disciplinary law –, but towards all citizens", *Öztürk v. Germany* § 53.

<sup>9</sup> *Weber v. Switzerland* § 33.

<sup>10</sup> Barkhuysen T., van Emmerik M., Jansen O. and Fedorova M. in *Right to a Fair Trial, Theory and Practice of the European Convention on Human Rights Fourth Edition* Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds.), Cambridge; Antwerp; Portland: Intersentia, 2018, p. 528.

<sup>11</sup> The first one is the *Engel* judgment, in which the definition of nature typed under the fact of deprivation of liberty (§ 82). The second and more qualified fact, 'the purpose of sanction' was added to this evaluation in the *Öztürk* judgment (§ 53). "According to the ordinary meaning of the terms, there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, *inter alia*, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty".

deterrent aims, it is not treated as a penalty by the Court, because it is directed only towards a particular group.<sup>12</sup> For example, as the prison disciplinary sanctions are directed towards a group possessing a special status, namely prisoners, they fall outside the scope of the concept of penalty.<sup>13</sup> In this respect, imposition of solitary confinement as a sanction is not a penalty, as it does not deprive liberty.<sup>14</sup> This indicates that the second criterion is more decisive than the third.

However, in the case of depriving liberty, it will be concluded that the sanction has a criminal rather than a disciplinary nature. In this case, the third criterion becomes determinant and excludes the second. Thus, in those cases concerning various types of disciplinary sanctions, such as military,<sup>15</sup> prison,<sup>16</sup> court<sup>17</sup> and the assembly,<sup>18</sup> the sanctions carrying a potential risk of deprivation of liberty were all classified as penalty. In this connection, the Court also considered the possibility that a criminal issue had been regulated as a disciplinary sanction. In fact, in *Ezeh and Connor* judgment, the Court observed that although the acts such as threatening or assault were subject to disciplinary sanctions, these were actually criminal offences.<sup>19</sup> Therefore, if a sanction deprives liberty, it is irrelevant how it is named in domestic law.

The degree of the severity of the sanction will further complicate this picture with its subjectivity. This is because even a sanction that can be classified as penalty according to other criteria is excluded from this classification on the grounds that it carries sufficient severity. Moreover, there is no threshold to evaluate the state of severity. For example, in the *Engel* case, the ECtHR concluded the two-day arrest was not severe enough to qualify the sanction as a penalty.<sup>20</sup> Thus, the “severity” element overcomes the “nature” element, and with the second criterion, ensures that disciplinary sanctions are not penalties.

## 2. Questioning the definition made by the court

For the Court, “disciplinary sanctions are generally designed to ensure that the members of particular groups comply with the specific rules governing their

<sup>12</sup> “Although the size of the potential fine is such that it must be regarded as having a punitive effect, the severity of this sanction in itself does not bring the charges into the criminal sphere”, *Müller-Hartburg v. Austria* § 46.

<sup>13</sup> *Ezeh and Connors v. UK* §103.

<sup>14</sup> *Štitić v. Croatia* § 61.

<sup>15</sup> ‘In a society subscribing to the rule of law, there belong to the “criminal” sphere deprivations of liberty liable to be imposed as a punishment’, *Engel v Netherlands* § 82.

<sup>16</sup> *Campbell and Fell v UK* § 72.

<sup>17</sup> *Weber v. Switzerland* § 34.

<sup>18</sup> *Demicoli v. Malta* § 34.

<sup>19</sup> *Ezeh and Connors v. UK* § 129.

<sup>20</sup> *Engel v. Netherlands* § 85. A more up-to-date application was in the *Brandao Ferreira v. Portugal* decision, in which the Court ruled that the detention of the applicant did not amount to a deprivation of liberty given that he was not locked up during the execution, but continued to discharge his military duties virtually as usual.

conduct”.<sup>21</sup> In this respect, the implementation is developed under the forms of professional groups and special groups, and will be examined under these two headings.

## 2.1. Implication on professional identities

Since the term professional groups includes identities such as doctors, judges and civil servants, there is no serious problem in the field of application. In the case law of the Court, the sanctions imposed on these professionals are generally considered a civil dispute, with some exceptions. For example in the *Suküt* decision,<sup>22</sup> even though the dispute concerned the applicant’s discharge from the army for breaches of discipline, the Court concluded that the question of the “special bond of trust and loyalty” between the applicant and the State and Article 6 is completely inadmissible.

However, in the others, disciplinary sanctions that halt professional activity are considered civil disputes, treated under the civil head of Article 6. In this respect, a temporary ban on practising as a lawyer and being ordered to be struck off the register,<sup>23</sup> the compulsory retirement of a civil servant,<sup>24</sup> the suspension of a judge from duty,<sup>25</sup> and fines imposed on a solicitor,<sup>26</sup> do not constitute a penalty.

The sanction imposed in this context is based solely on professional rules, and it may not be considered that the person has undergone another trial for the same act. In this respect, for example, imposition of a disciplinary sanction besides a criminal penalty shall not violate the rule of *ne bis in idem*.<sup>27</sup> However, it should be also kept in mind that, in a legal system, multiple sanctions for the same act are accepted only if it includes integrated sanctions for different purposes.<sup>28</sup> Consequently, the imposition of multiple fines, both as a judicial penalty and as a disciplinary action, may be contrary to the rule of *ne bis in idem*.

## 2.2. Implication on special groups

The Court’s intended meaning of a “special status” is not limited to professional identity. The motivation for the rules for these groups being regarded as disciplinary sanctions is open to discussion, given the contradiction of the results in practice.

One of the most controversial examples in this context is the discipline practices to which the participants in the judicial activity are subject. Although judges and lawyers also participate in this activity, as mentioned above, they already have their

<sup>21</sup> *Weber v. Switzerland* § 33.

<sup>22</sup> *Suküt v. Turkey* (admissibility decision).

<sup>23</sup> *Müller-Hartburg v. Austria* § 39.

<sup>24</sup> *Mouillet v. France* (admissibility decision).

<sup>25</sup> *Ramos Nunes De Carvalho E Sá v. Portugal* § 127.

<sup>26</sup> *Brown v. UK* (admissibility decision).

<sup>27</sup> *Müller-Hartburg v. Austria* § 63.

<sup>28</sup> *A and B v. Norway* § 123.

own disciplinary regimes. However, there is debate over the scope of disciplinary sanctions imposed on those who are parties to a trial. In the judgment of *Weber*, the Court concluded that the parties to the proceedings could not be categorised as professional groups such as judges and lawyers.<sup>29</sup>

However, in the *Ravnsborg* judgment, in which the applicant was just a part of the proceeding respondent to several fines imposed due to his improper expressions to a national court, the ECtHR concluded in the opposite direction. Here, the ECtHR argued that the authority to impose sanctions to restore order to the courts was of a disciplinary, rather than a criminal nature. This justification, however, was based not only on the nature of the offence, but also due to its categorization as a disciplinary sanction in the domestic law of the Contracting States.<sup>30</sup> The Court continued this line in the subsequent judgment of *Putz*.<sup>31</sup>

Another possibly controversial group may be politicians, who face various types of sanctions. In fact, the problem here is whether it is possible to separate political problems from criminal ones. For example, in the case of *Pierre-Bloch*, the applicant was banned from participating in the elections by the election commission for one year due to exceeding the legal spending limit, and was ordered to make a payment in excess of the amount. However, the Court classified the subjected dispute as electoral rather than criminal or civil, without involving any disciplinary issues. This conclusion was open to criticism because it is arguable that, as anyone can run for parliament, the issue is not disciplinary and politicians do not constitute a special group.<sup>32</sup>

The Court continued this line, even going so far as to remove a politician from a public duty. For example in the *Paksas* judgment the Court decided that the dismissal of President of Lithuania by impeachment reflected a constitutional responsibility, rather than criminal or disciplinary one. Here, the Court took into account the fact that the decision to remove the President from office was taken not by the Constitutional Court but by Parliament.<sup>33</sup> After some years, in the *Haarde* judgment, the impeachment of the PM was treated as a criminal procedure, because this parliamentary procedure led to a criminal court judgment.<sup>34</sup>

## Conclusions

The ECtHR does not consider a sanction as penalty unless directed at the whole society. In the Court's view, a disciplinary sanction must deprive from liberty to be defined as a penalty. Moreover, even two days' arrest was not considered to carry sufficient severity to be treated as a penalty. Additionally, while a fine is regarded

<sup>29</sup> *Weber v. Switzerland* § 33.

<sup>30</sup> *Ravnsborg v. Sweden* § 34.

<sup>31</sup> *Putz v. Austria* § 33.

<sup>32</sup> *Pierre-Bloch v. France* § 54.

<sup>33</sup> *Paksas v. Lithuania* § 66.

<sup>34</sup> *Haarde v. Iceland* § 78.



as being within the concept of autonomous penalty, disciplinary sanctions that may have more serious consequences are not subject to the same regime. Such an application involving the *Engel* criteria yields subjective results.

In the Court's definition, disciplinary offences are committed by members of particular groups. In this respect, professional groups provide a more specific view in terms of scope. However, the other so-called "special groups" create a discrepancy in scope. The persons involved in judicial process without any professional function do not constitute a special group opposite to the case law. The extent to which politicians are included in the definition of this particular group is also controversial. These problems indicate a need for revision of the *Engel* criteria, and the definition of disciplinary sanctions on which the Court's case law is based.

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## **SIMPLIFIED, YET NOT SIMPLISTIC: DECISION-MAKING IN CRIMINAL COURTS IN ROMANIA**

### **Summary**

This study aims to present some basic characteristics of the Romanian model of criminal procedure, based on the enactment of the new Code of Criminal Procedure (2014). The main features of this model are analysed, having in mind the ancient Code (1969), now repealed, in order to reveal a paradigm shift of decision-making within criminal proceedings.

There are three issues to address: plea bargain, guilty plea and *nolo contendere* procedure. All these procedures are new, powered by a heterodox and challenging doctrine. The first procedure adopted is the plea bargaining, the expression of a consensual justice and only apparently negotiated. In particular, during the criminal investigation stage, the defendant, after being charged, has the possibility to initiate or accept a bargain with the prosecutor, in order to admit the committed act and its legal qualification, the type and the amount of the penalty, and even the mode of its execution. Once signed, the agreement is subject to approval by a court of law, which supervises compliance with the legal conditions under which the bargain has been concluded. The defendant does not have the opportunity to negotiate, but, similarly to a pre-defined contract, only to agree or disagree with it.

Another procedure similar to the aforementioned one is the guilty plea of the defendant before a criminal court after being indicted. The two proceedings are alike in terms of their effects, involving a simplified procedure, where the role of the judge is rather formal. Like the plea bargaining, this procedure brings an important benefit to the defendant: a one-third decrease in the legal latitudes of the imprisonment penalty of the offense for which he was indicted (in the case of a fine the decrease is by a quarter). Unlike the plea bargaining, which is a bilateral agreement, the guilty plea is simply a unilateral act of the defendant.

Finally, a *nolo contendere* procedure has been timidly provided for, and involves that evidence collected in the investigation stage shall no further be supplied before the criminal court, after the prosecution of the defendant, if the latter does not contest it. Such a procedure, which underlies from the part of the judge a waiver of the direct examination of the evidence, overrides the importance of the criminal investigation stage as a decisive approach to evidence.

Although the said proceedings simplify the role of the judge, they sometimes run the risk of complicating decision-making in criminal trials, which thus becomes increasingly intricate.

**Keywords:** guilty plea, plea bargain, *nolo contendere* procedure, criminal proceedings

## Introduction

2019 marks the 50<sup>th</sup> anniversary of the entry into force of the Romanian Criminal Procedure Code (1969) and 5 years since the enactment of a new Code of Criminal Procedure (2014). These two events should not be perceived as overlapping, given that the previous code is history, having been repealed on February 1, 2014. However, the “anniversary” is relevant, since 45 years after an authoritarian drift, during which the model that mattered most was the inquisitorial-based process, the Romanian law-maker felt the need to develop a new paradigm of the criminal process<sup>1</sup> capable of facing the contemporary challenges. From this perspective, certain institutions newly introduced in the current code have led to the re-thinking of the decision-making within the criminal proceedings<sup>2</sup>.

Speaking of the inquisitorial-based approach of the ancient code, its first basic feature must be noted: the uniqueness, i.e. unique agent, unique objective, unique standard of proof. All the proceedings were dominated by a magistrate, i.e., a prosecutor and a presiding judge, acting as the main and single agent of the state, one in the investigation phase and the other in the trial. No decision could be adopted without the will of a magistrate, being the truly expression of an almighty state, master of the criminal justice. The new code does not alter this and continues to keep the power of the state unaltered. Once again, we have the same dominant agent, which multiplies its roles: a prosecutor as the chief-investigator in the pre-trial stage, a judge of custody and liberty, as the decider in such sensitive matters as the liberty of the defendants, a judge of a preliminary chamber, a filter-judge for unlawfully conducted investigations and a presiding judge.

Finding the truth was the unique objective of the criminal trial. All participants to trial, including the defendant, were compelled to support this objective. No effort was spared to reach this goal. Thus, the state legitimized oneself by having a noble and important mission. In fact, the obsession for the truth devoured all the energies of the process, only to deliver mere fragments of truth.

The new model brings about the duality: no more unique objective, but two equally powerful goals. Besides finding the truth, another objective was set as trustworthy: the fair trial<sup>3</sup>. This one does not exclude the previous, but channels the energies towards the way of conducting the process. Managing the trial in a good manner will safeguard the rights of the participants and will allow a result strengthened by the idea of a methodologically cleaned truth.

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<sup>1</sup> For a detailed approach to the subject see Ciopec F. The New Romanian Code of Criminal Procedure. *Journal of Eastern European Criminal Law*, No. 1, 2014, pp. 33–52. For an adverse opinion “[...] we are not in the presence of a new model of criminal process” see Mateuț Gh. *Procedură Penală. Partea generală* [Criminal Procedure. General Part]. Bucharest: Universul Juridic, 2019, p. 61.

<sup>2</sup> Decision-making in criminal proceedings is a topic mostly address by the Anglo-Saxon doctrine, but interesting to discuss in a civil law country as Romania. See Ashworth A. & Redmayne M. *The Criminal Process*. New York: Oxford University Press, 2010, pp. 2–9.

<sup>3</sup> Ghigheci C. *Principiile procesului penal în noul Cod de procedură penală* [Principles of Criminal Trial under the New Criminal Procedure Code]. Bucharest: Universul Juridic, 2014, p. 127.

Taking a decision in a trial dominated by a magistrate was very much determined by a unique standard, known as the intimate conviction. This standard was not promoted by the national Constitutional Court in a decision aimed at limiting the margin of discretion assigned to judges<sup>4</sup>. Even if such a standard continued to exist, it certainly would not mean free conviction. Paradoxically, even though the standard had been formally abolished, it managed to survive precisely because the law did not provide for any criteria to explain how the decision-making process worked effectively. The magistrates were the agents of the state, trained to save the state's quasi-monopoly on the criminal justice. Changing the objectives of the trial means also shifting to a new position of the magistrate within the trial. An independent and impartial magistrate, even in relationship with the state, is an outcome consecrated by the European Court of Human Rights as a basic principle of a fair trial. Thus, it was needed to develop new standards of proof, as threshold for adopting a decision in a criminal trial. Dual objectives entail minimum dual standards. The main new instruments include reasonable suspicion and beyond any reasonable doubt<sup>5</sup>.

The second feature of the ancient code was that no settlement was possible (the truth was too much important). The idea of bargaining with criminal charges was totally excluded. The new code introduced three new procedures based on the opposite of such idea (plea-bargaining, guilty plea and *nolo contendere* procedure). The trial opened towards negotiation and party-to-party settlement, in an effort to de-monopolize the absolute powers of the state.

In brief, the decision-making process within the normative ambit of the ancient code was concentrated on facts, guilt and punishment. The model remained constant under the new code but received a supplement: validation of the settlements.

This short introduction has aimed to outline the basic features of the new model of criminal trial in Romania in order to reveal a paradigm shift of decision-making within the criminal proceedings. There are three issues to address: plea bargaining, guilty plea and *nolo contendere* procedure.

## Criminal judge facing paradigm shift

The first adopted procedure is the plea bargaining<sup>6</sup>. In particular, during the criminal investigation stage, the suspect, after being charged and standing as

<sup>4</sup> Art. 63 (2) of the former Criminal Procedure Code (1969) concerning the assessment of an evidence by using the intimate conviction was found unconstitutional. The judges are subject only to the law, which excludes any reference to their intimate conviction (Romanian Constitutional Court judgement No. 171 of 23 May 2001 published in Official Journal No. 387 of 16 July 2001. Available at: <http://legislatie.just.ro/Public/DetaliiDocument/29602> [last viewed November 10, 2019].

<sup>5</sup> Udriou M. *Procedură Penală. Partea generală* [Criminal Procedure. General Part]. 6<sup>th</sup> edition, Vol. I, Bucharest: C.H. Beck, 2019, pp. 418–420.

<sup>6</sup> Criminal Procedure Code, Articles 478–488. Available at: <http://www.just.ro/wp-content/uploads/2016/01/Noul-cod-procedura-penala-EN.doc> [last viewed November 10, 2019].

defendant, has the possibility to initiate or accept a bargain with the prosecutor. The bargain is focused on all the elements of a criminal process, i.e. the defendant has to admit the committed act, to accept the legal qualification of the act as results from the official charges against him, to assume the type and the amount of the penalty proposed for the offence, and to agree even the mode of the penalty execution. The penalty settled is a mitigated one: a one-third decrease in the legal latitudes of the imprisonment penalty of the offense for which he was indicted (in the case of a fine the decrease is by a quarter).

There is a single prerequisite for concluding such an agreement: the legal penalty must be either a fine or imprisonment not exceeding 15 years. Offences like murder, aggravated murder, victim's death consecutive rape or victim's death consecutive robbery are excluded, due to their higher latitudes of penalty.

Plea-bargaining was applied to minor, as well as adult defendants, and could envisage not the imposing of a penalty, but also a waiver of penalty or a postponement of penalty.

Once signed, the agreement is subject to approval by a court of law, which supervises the compliance with the legal conditions, under which the bargain was concluded. The court could reject the agreement, if the solution accepted by the parties was illegal or too lenient compared to the seriousness of crime or the dangerousness of offender<sup>7</sup>.

The second procedure relevant for this study is the guilty plea<sup>8</sup>. Unlike the plea-bargaining procedure, it takes place during the criminal trial stage, after the defendant was indicted and referred to trial. The bilateral feature of the plea-bargaining is not present here, because the procedure is initiated only by the defendant (adult or minor) by filing a request before the court. In particular, the defendant shall ask for a guilty plea, i.e. assume the committed act as charged, based on the evidence collected and supplied in the pre-trial stage. The court could allow the request and thus there shall be no trial. The verdict could be guilty and a mitigated punishment similar to plea bargaining could be inflicted (a 1/3 decrease in the legal latitudes of the imprisonment penalty for the indicted offense or a 1/4 decrease in case of a fine). Nonetheless, the court could dismiss the request and continue the trial as an ordinary procedure. In this case, if the judge's fact-finding confirmed the confession of the defendant, the verdict could be again a mitigated one (as above). The benefit had to be granted since the confession of the defendant occurred at the very beginning.

This procedure is less formal than the plea bargaining, irrespective of the limits of fine or imprisonment, with one notable exception, i.e. life imprisonment.

<sup>7</sup> Bodoroncea G. Acordul de recunoaștere a vinovăției [Plea Bargaining]. In: Codul de Procedură Penală. Comentariu pe articole [Criminal Procedure Code. Commentary on Articles]. 2<sup>nd</sup> edition, Bucharest: C.H. Beck, 2017, pp. 1942–1943.

<sup>8</sup> Criminal Procedure Code, Articles 374 (4), 375, 377 and 396 (10). Available at: <http://www.just.ro/wp-content/uploads/2016/01/Noul-cod-procedura-penala-EN.doc> [last viewed November 10, 2019].

The confession of the defendant refers only to the act committed. No acknowledgment of the legal qualification is required. Thus, the defendant could use the right to challenge the legal qualification of the confessed act.

Despite of the defendant's confession, the court is not legally bound to it and preserves the option to dismiss the criminal charges, if no grounds for conviction appear to exist.

Finally, the third procedure: *nolo contendere*<sup>9</sup>. Similarly to guilty plea, after the defendant (minor or adult) was indicted and sent to trial, the sitting judge shall ask the defendant if he intended to file a motion against the evidence-gathering during the investigation stage. In case of no challenge, no trial occurs, since no grounds exist to overturn fact-finding. The court gives the floor to the parties on the merits of the case and shall rule based on the evidence collected and supplied in the pre-trial phase<sup>10</sup>. In case of challenge, the trial shall follow the regular procedure. Despite the defendant's *nolo contendere* position, the court preserves the option to dismiss the criminal charges, if no consistency of evidence exists whatsoever.

This procedure is not limited by any condition, i.e. it is applicable irrespective of the penalty provided by law (fine or imprisonment), with no exceptions. The significant difference from the other procedures is that the defendant does not enjoy any benefit for contributing to an abbreviated trial.

Simplified by nature, all the aforementioned procedures are not simplistic, since they trigger a paradigm shift of the decision-making in criminal trial. This change (which could also be a challenge) gives room to some observations.

First of all, all procedures are examples of an abbreviated justice, as long as they do not involve an ordinary trial, but a simplified one. Plea-bargaining entails no trial, except a validation procedure of the agreement concluded between the prosecutor and the defendant. Plea bargaining is an example of consensual justice, only apparently negotiated, since the defendant does not have the opportunity to negotiate, however, like in a pre-defined contract, only to agree or disagree.

Guilty plea and *nolo contendere* procedures bring about a short trial. The difference is that plea-bargaining is a bilateral procedure which involves the prosecutor and the defendant, upon concluding the agreement. Guilty plea and *nolo contendere* procedures imply a unilateral approach, of the defendant only. In the first case, the defendant, being aware of the benefit provided by law (mitigated penalty), voluntarily admits the committed act. In the second case, the judge shall ask the defendant if he agrees with the evidence- collected during the investigation phase. By the defendant's decision not to contest (*nolo contendere*) the evidence, without making any statements as to the act committed, the defendant solely changes the course of the trial.

<sup>9</sup> Criminal Procedure Code, Article 374 (7). Available at: <http://www.just.ro/wp-content/uploads/2016/01/Noul-cod-procedura-penala-EN.doc> [last viewed November 10, 2019].

<sup>10</sup> Ciopec F. Crime Control or Due Process? Which are the Tendencies in Romanian Criminal Justice. *Journal of Eastern European Criminal Law*, No. 1, 2017, p. 198.

Nevertheless, an abbreviated trial is an efficient way of dealing with criminal justice. Efficiency instead of Justice? And what does efficiency mean? Several answers could be envisaged.

Efficiency could mean a fast settlement of the trial, no matter what the merit decision could be. The faster, the better. Judicial proceedings are reputedly known as time consumers to that end that a late solution means no solution at all. Are the procedures described above qualified to reverse that situation? Without a doubt, managing a simplified procedure and abandoning the complex architecture of an ordinary trial are real options.

Efficiency could also mean a faster conviction of the defendant. The main goals of a repressive procedure are to control criminality by imposing criminal sanctions. All the abbreviated procedures are convergent towards this goal: the defendant accepts the conviction by signing the plea bargaining or agrees with the indictment either voluntarily (guilty plea), or tacitly (*nolo contendere* procedure). The result is quite the same and it looks like it was supported in Romania by judicial statistics: in more than 10 years the acquittal percentage never exceeded 2.8 % of the total indictments<sup>11</sup> and for 7 years the conviction percentage was more than 98 %. The biggest difference from one year to another emerged in 2013 and 2014, precisely upon enforcement of the new Criminal Procedure Code. Apparently, the new code brought about increased chances of the defendants to enjoy an acquittal decision (from 1.3 % to 2.8 %). The next few years shattered this illusion.

Secondly, all the abbreviated procedures are important for decoding the new role of the judge in criminal proceedings in Romania. In the plea-bargaining procedure, the judge only censors the legality of the agreement. In the guilty plea, the judge only rules on a mitigated punishment. Finally, the *nolo contendere* procedure bears the risk that the direct examination of evidence is waived by the presiding judge. One issue must be emphasized here, namely, the concern about overriding the importance of the criminal investigation stage as a decisive approach to evidence. In all cases, the fact-finding dimension of the trial (performed by a judge) no longer exists, and the evidence 'lab' is totally conceded to the prosecutor.

Thirdly, a consequence arises from leaving the judge aside the trial scene. The judge is the epitome of the modern trial. He is an iron fist in a velvet glove, since he embodies the authority of commanding (*imperium*) in a rationale and argumentative wisdom (*jurisdictio*). At least in civil law countries, the judge is the last bastion of truth. Issuing a verdict on merits actually means that the judge authenticates a factual basis as the truth. By removing the judge's power to authenticate, and transferring it to the participants of the trial (prosecutor and defendant making their own truth, defendant admitting his fate unilaterally, and so on) the truth changes its morphology. We have to get used to a real shift of the notion of justice itself.

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<sup>11</sup> Romanian Superior Council of Magistracy. Reports on the State of Justice 2007–2018. Available at: <https://www.csm1909.ro/267/3570/Rapoarte-privind-starea-justitiei> [last viewed November 10, 2019]. Acquittal index in 2007 – 2.5 %, 2008 – 2.6 %, 2009 – 1.6 %, 2010 – 1.4 %, 2011 – 1.8 %, 2012 – 1.6 %, 2013 – 1.3 %, 2014 – 2.8 %, 2015 – 2 %, 2016 – 1.3 %, 2017 – 1.7 %, 2018 – 2.2 %.



Do all these changes preserve the fair trial principle? Since the defendant as a main character/subject of the criminal trial admits the conviction for the purpose of saving time, costs and benefitting from the minimum public exposure, no one is left to challenge the verdict. If the procedural safeguards are fulfilled, such a verdict mimetically approaches the real truth. Fair trial is not a guarantee for finding the said truth, but only that the final solution is not reached by mistake. From this point of view, better a methodically obtained error, than the sad victory, which is the truth found by chance<sup>12</sup>.

## Conclusions

The present study has been conceived as an introductory survey of the criminal trial in Romania. The research has revealed that three specific procedures have recently developed as alternatives to the ordinary trial. These new procedural frameworks are much faster, simpler and less formal. It is not clear whether three separate procedures were necessary to obtain all such benefits. Moreover, a residual risk of their overlapping is present. A defendant is not overly determined/inclined to have a plea-bargaining agreement concluded with the prosecutor, since the same result (a mitigated penalty) appears to be available with less effort directly by asking the judge to accept a confession to the act. Further, a procedure designed to grant legal effects to the passivity of a defendant (*nolo contendere*) brings a scarce profit, since no mitigating consequence whatsoever occurs here.

Apparently, the Romanian legislator has been seduced by the diversity of modes to optimize the criminal trial and yearns to taste them all. It would not be surprising if this pantagruelic feast ended with indigestion.

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## **DETENTION ON REMAND: AN UPDATED VIEW OF THE CURRENT PROBLEMS OF APPLICATION AND IMPACT ON THE OUTCOME OF CRIMINAL PROCEEDINGS**

### **Summary**

Detention<sup>1</sup> in criminal proceedings in Latvia, similarly to other countries, is the most severe preventive coercive measure, which is used to ensure the legal course of criminal proceedings and reaching the purpose of criminal proceedings. The issue of the practical impact of applied detention on the outcome of criminal proceedings has almost never been examined. The article's main focus is on the prevalence of applying detention in Latvia, the practical issues in application, as seen by parties involved in the practice of law enforcement, as well as the impact of detention on the final outcome of criminal proceedings – probable exoneration of the detained person in the course of proceedings, the type of punishment and sanction applied to the person. On the basis of available statistical information, analysis of court rulings and a survey of professionals involved in the application of criminal procedure, an insight is provided in some aspects of applying detention in practice that either are or are not recognised in practice, the frequency of application; likewise, the impact on the final outcome of criminal proceedings in Latvia is analysed. The research has led to the finding that making of high-quality conclusions is hindered by lack or incompleteness of statistical and other publicly accessible information, whereas the outcomes of the survey of professionals prove that opinions differ significantly, depending on affiliation with a particular group of respondents. In characterising the general trends, it is concluded that there is a trend of decreasing in the prevalence of applying detention in Latvia, the most relevant practical problem in the application of detention is the insufficient substantiation in the proposals to apply detention, also, certain correlation can be discerned between the fact that a person had been detained and the final outcome of criminal proceedings, in particular, with respect to the type of punishment and sanction.

**Keywords:** pre-trial detention, detention on remand, overuse of detention, practical problems in the application of detention, impact of the pre-trial detention on the outcome of criminal proceedings

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<sup>1</sup> This article describes detention, which is applied in pre-trial and trial proceedings to persons, with respect to whom the final ruling in criminal proceedings has not yet entered into effect.

## Introduction

In Latvia, legal regulation on detention as one of the coercive measures linked to the deprivation of liberty, is included in Chapter 15 of the Criminal Procedure Law<sup>2</sup> (hereafter – CPL). Similarly to other countries, in Latvia detention is viewed as the most severe of security measures that is applicable to a suspect or an accused only if there is a valid opinion that other security measures will be unable to ensure an appropriate course of criminal proceedings. In 2015, the General Assembly of the Council of Europe, examining the matter of applying detention and adopting the resolution “Abuse of pretrial detention in States Parties to the European Convention on Human Rights”<sup>3</sup>, once again noted that application of detention as a coercive measure was admissible only as an exception. Likewise, it was recognised “that the laws of most Member States are generally in line with European Convention on Human Rights standards, but their application by the prosecutorial authorities and the courts is frequently not”. Examination of the legal regulation on detention in Latvia allows recognising that, in general, it complies with the human rights standards set in Europe. Some relatively minor deficiencies can be identified in it, for example, uncertainty regarding the possibility to apply detention to persons, who have committed a less serious crime while being minors. Several proposals for improvements could be advanced for a discussion. For instance, expanding the application of bail as an alternative to detention, which, however, should be carefully considered, taking into account also the negative experience of other countries related to possible socially more unfair treatment of persons in a poorer financial situation<sup>4</sup>. Likewise, the matter of mitigating “the regime” of detention could be worth discussion because currently, in several aspects, it can be equalled to or is even more severe than that of a closed prison<sup>5</sup>. The opinion can be upheld that

<sup>2</sup> Criminal Procedure Law. Available at: <https://likumi.lv/ta/en/en/id/107820> [last viewed November 1, 2019].

<sup>3</sup> Resolution 2077 (2015)1 Abuse of pretrial detention in States Parties to the European Convention on Human Rights Available at: <http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZSSpbnQybncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMjIwNiZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZSSuZXQvWHNsdcC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTlyMjA2> [last viewed November 1, 2019].

<sup>4</sup> See, for example, Hopkins B., Bains C. H., Doyle C. Principles of pretrial release: reforming bail without repeating its harms. *Journal of Criminal Law & Criminology*, Vol. 108, No. 4, 2018, pp. 679–700. Available at: <http://datubazes.lanet.lv:3537/ehost/detail/detail?vid=0&sid=fbfdbc6-0155-4e0b-93ac-60c8e2409ae3%40sdc-v-sessmgr02&bdata=JnNpdGU9ZWhvc3QtbGl2ZQ%3d%3d#AN=135676927&db=a9h> [last viewed November 1, 2019].

<sup>5</sup> To compare, see: The restrictions set for a person at an institution for deprivation of liberty while serving the sentence – Sentence Execution Code of Latvia. Available at: <https://likumi.lv/ta/en/en/id/90218> [last viewed November 1, 2019]; Internal Regulations of an Institution for Deprivation of Liberty, Available at: <https://likumi.lv/ta/id/136495-brivibas-atnemsanas-iestades-ieksejas-kartibas-noteikumi> [last viewed November 1, 2019]. The restrictions set for a person at an institution for deprivation of liberty while in detention – Law On the Procedures for Holding under Arrest. Available at: <https://likumi.lv/ta/en/en/id/138990> [last viewed November 1, 2019]. Internal Regulations of a Remand Prison. Available at: <https://likumi.lv/ta/id/167184-izmeklesanas-cietuma-ieksejas-kartibas-noteikumi> [last viewed November 1, 2019].

“Since pre-trial detainees have not yet been convicted, it seems incomprehensible why they should be treated as if they have been”, as well as the concern regarding the compliance of this treatment with the presumption of innocence<sup>6</sup>.

However, in this article, we aimed to focus on the second aspect, i.e., the prevalence of applying detention in practice and relevant problems, whereof the General Assembly of the Council of Europe, assessing the general situation in the CE Member States in 2015, has recognised that overuse of detention and application of it incompatibly with its legal purpose exist and are widespread.

What is the situation like in Latvia – is detention widely applied and what are the trends in its application? What are the problematic situations that the professionals, involved in the practical course of criminal proceedings, identify in the application of detention? Likewise, the question – does the fact *per se* that detention had been applied have or does not have an impact on the final outcome of criminal proceedings? These are the questions, answers to which were sought in this research, the outcomes of which are presented in this publication.

In the course of the research, foreign and international studies on the particular issue have been identified and reviewed, as well as supplemented with the accessible statistics on the Latvian situation, rulings by the Latvian courts, and also the data from surveying professionals practically involved in criminal proceedings.

It must be recognised that rulings- and statistics-based analysis in Latvia is significantly hindered due to several circumstances, mainly, inaccessibility of information for analysis and the fact that accessible sources as to their nature are not sufficiently informative. Hence, research is significantly hindered and, in some aspects, even made impossible by the absence of qualitative statistical data on several matters, for example, refusals to satisfy the request to apply detention and their rate, the number and proportion of persons, who had been detained previously and who have been sentenced to deprivation of liberty, in the total number of persons sentenced to deprivation of liberty<sup>7</sup>, “unconvincing” statistics with respect to the application of detention and its replacement by bail. Likewise, a significant, although objectively justified, obstacle is the fact that rulings on applying detention are not publicly accessible. Research is also significantly hindered by the fact that, in Latvia, since mid-2017, the possibility has been envisaged that the final court’s judgement may be also prepared in the so-called abbreviated form<sup>8</sup>, which often is useless for research purposes due to very small amount of information included in it (for example, often such judgements do not comprise the profile of the sentenced person, which prevents the researcher from assessing the appropriateness of the applied sanction, etc.).

<sup>6</sup> Lippke R. L. Preventive Pre-trial Detention without Punishment. *Res Publica*, 20:111, 2014, p. 112 Available at: <https://doi.org/10.1007/s11158-013-9234-6> [last viewed November 1, 2019].

<sup>7</sup> This kind of statistical information is not available. Likewise, in the course of conducting the research, the absence of it was confirmed by persons responsible for statistical data in various areas (Information Centre of the Ministry of the Interior, the Court Administration, the Prison Administration).

<sup>8</sup> See CPL Section 530.

Notwithstanding the insufficient accessibility of statistical data and rulings useful for analysis, the research was not discontinued and attempts were made to identify the problematic situations by analysing the available information as well as by surveying practitioners. In the course of the research, 274 rulings of first instance court that had entered into force<sup>9</sup> pertaining to six criminal offences, freely chosen, envisaged in the Criminal Law<sup>10</sup> (hereafter – CL) were analysed. Those judgements that at the moment when the research was concluded, i.e., 30 September 2019, for the period from 1 October 2018 until 30 September 2019, were available in the database of anonymised rulings<sup>11</sup> were analysed. The following data characterise the lawyers involved in the survey on the practical application of criminal procedure: the survey was conducted by using Google survey tool, 380 practitioners responded, among them – 121 advocates, 105 investigators, 87 prosecutors, 53 judges, and 10 investigative judges.

## 1. Prevalence of applying detention

Excessive application of detention (overuse and abuse of pre-trial detention) may be viewed in the context of overuse of the criminal justice system, which, validly, has been foregrounded as a problem in Europe<sup>12</sup>.

In the course of the research, the practitioners were also asked to give their opinion regarding the frequency of applying detention in Latvia. The responses revealed a lack of consensus in groups of various respondents, depending on the area of their professional employment (by the way, this trend is also observed in responses to other questions in the questionnaire).

Respondents were given the opportunity to rate the application of detention in Latvia by choosing one of the following responses: 1) much too frequently; 2) more than it would be necessary, 3) in accordance with the need, 4) more rarely than it would be necessary, 5) much too rarely, or to provide another assessment.

The analysis of all responses shows that 38 % of respondents recognise that detention is applied in accordance with the need, whereas the remaining point to inappropriate application, by applying either too frequently or too rarely. There are more of those who consider that detention in Latvia is applied too frequently, compared to ones who believe that detention should be applied more frequently (see Figure 1).

<sup>9</sup> See the list of judgements in Bibliography section below.

<sup>10</sup> Criminal Law. Available at: <https://likumi.lv/ta/en/en/id/88966> [last viewed November 1, 2019].

<sup>11</sup> See <https://manas.tiesas.lv/eTiesasMvc/nolemumi> [last viewed November 1, 2019].

<sup>12</sup> See in greater detail the fundamental study of this issue – Overuse in Criminal Justice System. On Criminalization, Prosecution and Imprisonment. United Kingdom: Interesentia Ltd, 2019.

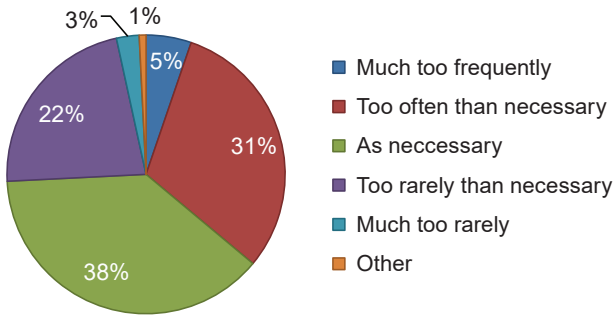


Figure 1. Prevalence of applying detention – All respondents

Assessments provided by various groups of respondents differ significantly (see Figures 2, 3, 4, 5, 6).

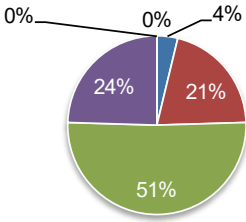


Figure 2. Prevalence of applying detention – Judges

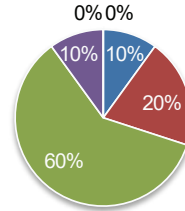


Figure 3. Prevalence of applying detention – Investigative judges

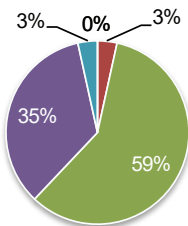


Figure 4. Prevalence of applying detention – Prosecutors

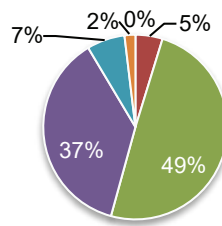


Figure 5. Prevalence of applying detention – Investigators

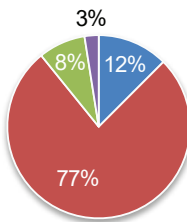


Figure 6. Prevalence of applying detention – Advocates

We see that detention is perceived as being overused in Latvia in the majority of cases (77 % + 12 %) by advocates, i.e., the persons who are basically involved in providing defence, whereas 38 % of prosecutors and 44 % of investigators believe that detention is applied more rarely than it would be necessary or much too rarely. As regards judges (including investigative judges, whose competence includes the application of detention during the pre-trial proceedings), the majority of them (51 % and 60 %) are of the opinion that detention is applied in accordance with the need. At the same time, a sufficiently large number of judges see the application of detention contrary to the need – admitting both too rare and too frequent application thereof. Hence, it can be concluded that the respondents' assessment of the prevalence of applying detention is not homogenous and should be linked to different impressions related to affiliation with a certain criminal procedural "role".

The numbers revealing the dynamics of prison inmates (including those held in detention)<sup>13</sup> in Latvia, reveal a positive trend – in absolute numbers, there is a constant trend in decreasing prevalence of applying detention (see Figure 7). The same applies to changes in the total number of prison inmates – minors.

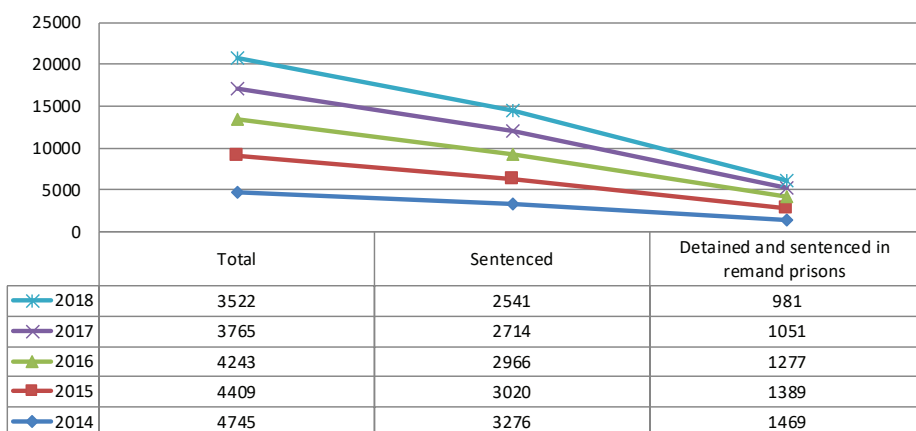


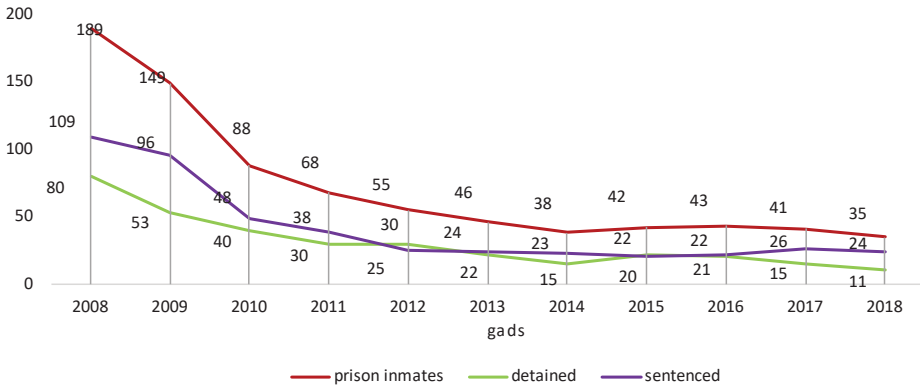
Figure 7. Dynamics in the number of prison inmates

Not very rapidly, yet the proportion of detained persons among prison inmates is also decreasing. Thus, in 2014 it was 31 %, whereas in 2018 – 28 %. However, it has to be noted that looking at the situation in the cross-section of decades, this trend is far from being unequivocal, because, interestingly, immediately after restoration of independence, i.e., on 01.01.1991, percentage-wise the proportion of detained persons among prison inmates in general was 28 %, whereas, for example,

<sup>13</sup> See statistical data available on the homepage of the Prison Administration: Ieslodzījuma vietu pārvaldes publicējamā statistika 2018, and the homepage of the Central Statistical Bureau: <https://www.csb.gov.lv/lv/statistika/statistikas-temas/socialie-procesi/likumparkapumi/tabulas/skg090/cietumos-esoso-personu-skaitis-gada-beigas> [last viewed November 1, 2019].



at the beginning of 2007 it was even 26 %.<sup>14</sup> However, it must be noted that the total number of prison inmates was significantly higher.



**Figure 8. Changes in the number of minor prison inmates**

In a project co-financed by the European Union and the Council of Europe, an effective tool for assessing detention has been developed<sup>15</sup>. It can be used to identify the most important statistical indicators and problematic situations in legal application, as well as to examine a particular country in a comparative context. The Council of Europe Annual Penal Statistics, better known as SPACE, occupies a significant place in using it.

Notwithstanding, in general, the significant progress made, in accordance with the Council of Europe Annual Penal Statistics with respect to applying detention (SPACE I) for the year 2018<sup>16</sup>, evaluation of Latvia is above the median and also above the average.

With respect to the proportion of prison inmates among population (number of prison inmates per 10 000 inhabitants) (see Table 1).

**Table 1**

Median in Europe	Latvia	Lithuania	Estonia	Germany	Finland	Poland	Russian	Average in Europe
102.5	194.6	234.9	191.4	77.5	51.1	194.4	418.3	123.7

<sup>14</sup> Zahars V. Kriminālpolitika:mūsdienu tendencijas un procesi. Daugavpils, Daugavpils universitātes Akadēmiskais apgāds, 2018, pp. 143–144.

<sup>15</sup> Pre-trial detention assessment tool. Available at: <https://rm.coe.int/pre-trial-detention-assessment-tool/168075ae06> [last viewed November 1, 2019].

<sup>16</sup> Aebi M. F. & Tiago M. M. SPACE I – 2018 – Council of Europe Annual Penal Statistics: Prison populations. Strasbourg: Council of Europe. 2018. Available at: [http://wp.unil.ch/space/files/2019/06/FinalReportSPACEI2018\\_190611-1.pdf](http://wp.unil.ch/space/files/2019/06/FinalReportSPACEI2018_190611-1.pdf) [last viewed November 1, 2019].

Admittedly, with respect to the proportion of prison inmates among population, Latvia's indicators are presentable (see Table 2).

Table 2

	Latvia	Lithuania	Estonia	Germany	Finland	Poland	Russia
<b>Dynamics 2014–2018, %</b>	-34.8	-2.5	-29.9	-14.7	-23.4	-10.9	-32.4
<b>Dynamics 2016–2018, %</b>	-8.4	-3.8	-5.7	-1.1	-9.9	3.2	No data

- With respect to the proportion of detained % among prison inmates, see Table 3.

Table 3

Median in Europe	Latvia	Lithuania	Estonia	Germany	Finland	Poland	Russia	Average in Europe
22.4	27.9	9.3	15.5	21.6	20.5	9.8	No data	26.0

- With respect to mortality among prison inmates, see Table 4.

Table 4

	Median in Europe	Latvia	Lithuania	Estonia	Germany	Finland	Poland	Russia	Average in Europe
<b>Total</b>	26.3	31.9	50	15.8	25.4	7.1	14.8	51	31
<b>Of these, suicides</b>	5.5	8	7.6	4	11.8	7.1	3	5.1	10.8

Whereas an assessment below the European median for 2018 Latvia has received with respect to the following conditions:

- Costs per prison inmate (see Table 5).

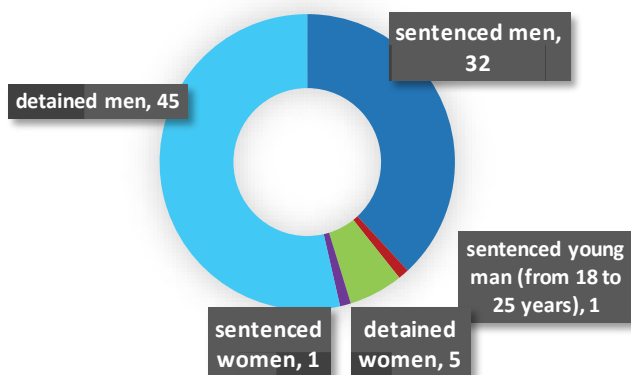
Table 5

Median in Europe	Latvia	Lithuania	Estonia	Germany	Finland	Poland	Russia	Average in Europe
66.5	36.4	23.3	49.8	131.8	180.2	26.9	2.5	128

- Proportion of foreigners among prison inmates.

Indeed, it must be admitted that the number of foreigners among prison inmates in Latvia is pronouncedly low (see Figure 9<sup>17</sup>), hence, actually, there are no current problems linked to this condition.

<sup>17</sup> Statistical data available on the homepage of the Prison Administration: Ieslodzījuma vietu pārvaldes publicējamā statistika 2018 [last viewed November 1, 2019].



**Figure 9. Number of foreign prison inmates at the end of 2018**

Unfortunately, it must be admitted, that it is impossible to assess the average length of detention, reoccurrence and other data in Latvia, since the respective statistics do not exist.

Summing up the outcome of research thus far regarding prevalence of detention in Latvia, the following conclusions can be made:

- » Due to shortage of statistics, several parameters cannot be assessed, for example.
  - Application of detention and refusal to apply detention;
  - Average length of detention;
  - The number of detained persons in the total number of persons who have the right to defence;
- » To a large extent, the subjective attitude towards the application of detention is determined by the affiliation with a certain area of professional activities;
- » There is a decreasing trend in the application of detention;
- » There is a decreasing trend in the proportion of detained persons among prison inmates;
- » Many statistical indicators in Latvia are still above the median and also above the average indicator in Europe, which leaves room for improving the application of detention in practice.

Undeniably, since 2015, when the General Assembly of the Council of Europe adopted the resolution, the situation in Latvia has considerably improved; however, the country still remains in the group of CE countries, where frequent application of detention is observed, and this leads to the recognition that improvements are still required, *inter alia*, possibly, those that GA of CE at the time included in its recommendation, specifically:

- » implement measures aimed at reducing pre-trial detention, including the following:
  - raising awareness among judges and prosecutors of the legal limits placed on pre-trial detention by national law and the European Convention on Human Rights and of the negative consequences of pre-trial detention on detainees, their families and on society as a whole;
  - ensuring that decisions on pre-trial detention are taken by more senior judges or by collegiate courts and that judges do not suffer negative consequences for refusing pre-trial detention in accordance with the law;
  - ensuring greater equality of arms between the prosecution and the defence, including by allowing defence lawyers unfettered access to detainees, by granting them access to the investigation file ahead of the decision imposing or prolonging pre-trial detention, and by providing sufficient funding for legal aid, including for proceedings related to pre-trial detention;
- » take appropriate measures to prevent “forum shopping” by prosecutors;
- » refrain from using pre-trial detention for purposes other than the administration of justice and to release all detainees currently held for any abusive purposes or under any abusive procedure

## 2. Problem situations in practice of applying detention

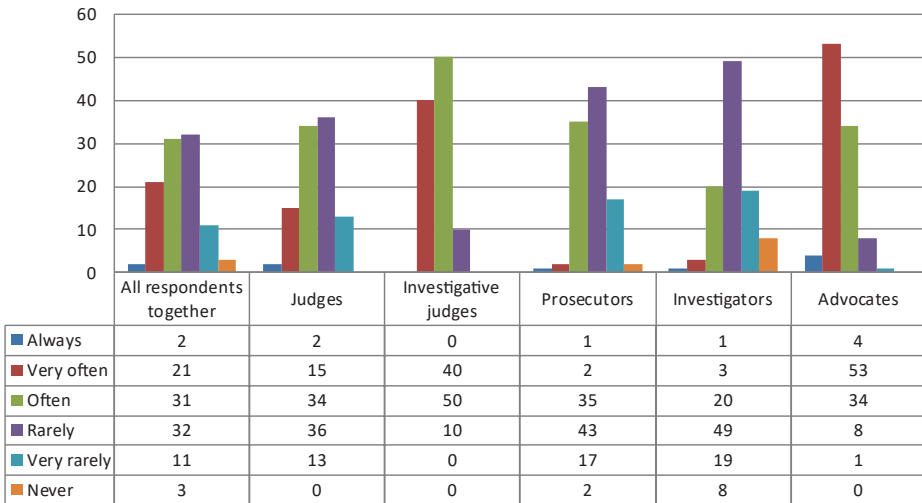
In research, the current problematic issues in applying detention were identified by finding out the opinion of lawyers involved in the practical application of criminal procedure – i.e., a survey. They were asked to provide their opinion on how prevalent (always / quite frequently / frequently / rarely / very rarely / never) the following situations were:

- » Insufficiently substantiated proposals to apply detention;
- » Insufficiently substantiated decisions on applying detention;
- » Too strict (and / or unfeasible in practice) legal requirements with respect to the application of detention;
- » Application of detention that is inappropriate for the actual situation (detention applied without need);
- » Refusals to apply detention that are inappropriate for the actual situation (detention is not applied, although it was necessary);
- » Materials that substantiate detention are not shown to the defence providers.

The assessment of survey outcomes allows to conclude that advocates are the subgroup of respondents that holds the most critical views, whereas the investigative judges are the least critical. Respondents held radically different opinions regarding some positions, depending on the particular group they

belonged to. All groups of respondents, except investigators, saw insufficiently substantiated proposals to apply detention as the most prevalent situation from the entire list. According to the lawyers, almost as prevalent was the failure to show the investigation file to defence providers. All the groups of respondents indicated that the least prevalent was inapplication of detention or inappropriate application with regard to the actual situation (this opinion was not shared by advocates).

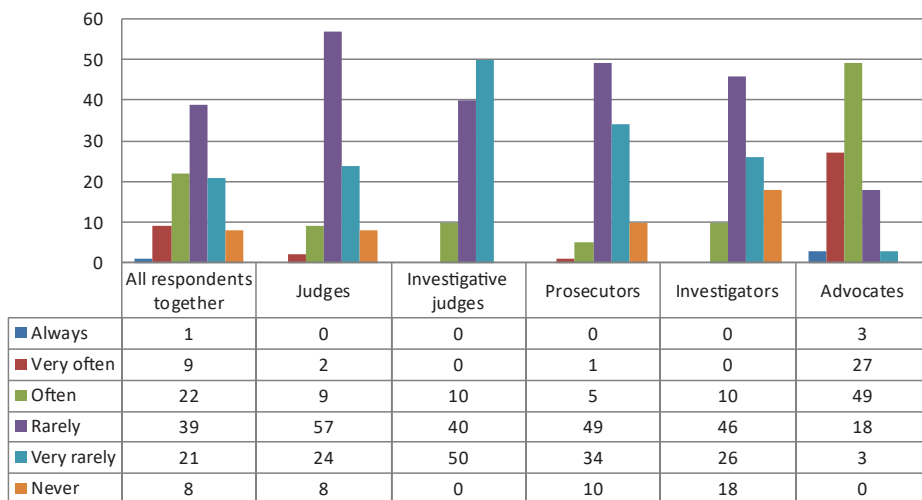
Turning to a slightly more detailed assessment of some problem situations, almost all the groups of respondents noted the prevalence of insufficient substantiation of the proposal to apply detention (i.e., a procedural document whereby, in Latvia, during the pre-trial proceedings, the official in charge of the proceedings proposes to the investigative judge to apply detention to a particular person). Graphical presentation of the summary of opinions is provided in Figure 10 below, showing the variants of responses in % amongst all the responses in the respective subgroups of respondents.



**Figure 10. Insufficiently substantiated proposals to apply detention (% break-down of respondents' answers)**

54 % of respondents assess this problem as prevailing often, very often or always; this opinion was shared by 51 % of all judges, 90 % of investigative judges, whose daily duties include review of such proposals, 38 % of prosecutors, 24 % of investigators (whose duties most often include preparing such proposals) and 91 % of advocates.

Comparatively, judges' decisions on applying detention are assessed much more positively because the prevalence of insufficiently substantiated decisions is assessed as significantly less common in all groups of respondents. Actually, only the majority of advocates assess it as a phenomenon that is observed often, very often or always, whereas in the other four groups of respondents it is assessed, with convincing majority % of voices, as being seen rarely, very rarely or never (see Figure 11).

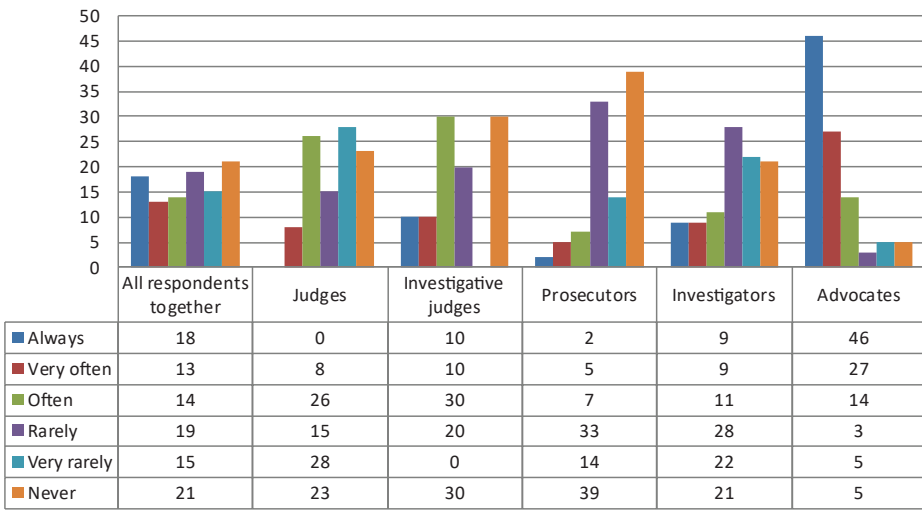


**Figure 11. Insufficiently substantiated decisions on applying detention (% break-down of respondents' answers)**

Excessive strictness of legal and practical requirements regarding proposals/decisions on applying detention was assessed as rarely, very rarely or never prevalent by all groups of respondents. Likewise, application of/refusal of detention inappropriate for the actual situation was assessed in all groups of respondents as rarely, very rarely or never prevalent, except advocates, who did not uphold the others' view regarding the inappropriate application of detention (the majority believe that it is encountered often or very frequently).

The last problem that the respondents were requested to assess is vividly outlined in the judgement by ECHR, unfavourable for Latvia, in case *Mikēlsons v. Latvia*<sup>18</sup>, i.e., the failure to show to defence providers the investigation file, by which application of detention is substantiated. It is not surprising that it is still perceived as a very topical problem by advocates, of which 79 % indicate that this problem is encountered often, very often or always. However, the answers provided by other groups of respondents attract interest. Thus, for example, investigative judges, whose direct job duties include the application of detention, also admit that this problem exists. However, the respondents from this group see the prevalence of this problem as rare or very rare (see Figure 12). At the same time, almost one-fifth of investigators, who, in the majority of cases, would have to ensure that the appropriate file materials are shown, indicate that the problem of not showing the investigation file is never encountered.

<sup>18</sup> ECHR judgment of 3 November 2015 in case *Mikēlsons v. Latvia* (Application No. 46413/10). Available at: <http://hudoc.echr.coe.int/eng?i=001-158350> [last viewed November 1, 2019].



**Figure 12. Not showing the materials of the investigation file, which substantiate application of detention, to defence providers (% breakdown of respondents' answers)**

Summing up the outcome of survey, it can be concluded that the assessment of potentially possible problem situations among the respondents radically differed depending on the group of their professional affiliation, which, to a certain extent, proved the inability to distance oneself from one's own role in criminal proceedings and to provide an impartial assessment even in a situation, where opinions are expressed anonymously. In some measure, this can be explained because professionals associate particular problem situations with difficulties in performing obligations entrusted to them.

### 3. The impact of applied detention on outcome of criminal proceedings

A categorical assessment has been expressed in literature: it is hard to see pre-trial detention as anything other than pre-punishment – that is, as a preliminary for the real or further punishment of the accused that is believed to be more or less inevitable<sup>19</sup>. At this point, abstaining from strictly subscribing to opinion this categorical, the views expressed in literature can be supported, i.e., that the fact of applying detention may have an impact on the outcome of criminal proceedings. This can be manifested in various ways, for example, in the fact that a detained person in reality has more limited access to legal assistance or that his or her possibilities

<sup>19</sup> Lippke R. L. Preventive Pre-trial Detention without Punishment. *Res Publica*, 20:111, 2014, pp. 113–114; Available at: <https://doi.org/10.1007/s11158-013-9234-6> [last viewed November 1, 2019].

to prepare for defence are, actually, restricted<sup>20</sup>. Likewise, that detained persons are more inclined to reach a plea agreement, based on the already mentioned decreased possibilities of legal assistance, as well as the wish for certainty<sup>21</sup>. Arguably, in the Latvian legal situation, which differs significantly from the US or Canada, not all these lines of influence will be equally important, however, undeniably, the detention of a person restricts his or her actual possibility to exercise his or her rights compared to a person who has not been detained. The authors will refrain from assessing how typical it is for Latvia, because that would require a more extensive research that, *inter alia*, requires existence of statistical data, access to relevant documents and persons.

The circumstance, which we have included in this study, is the relation between the fact of detention with the “measurable” final outcome of criminal proceedings – i.e., conviction or exoneration of a person and the type and scope sanction applied to the convicted person. Studies conducted in the USA show that detention has an independent impact on conviction/exoneration/type of punishment and the length of prison sentence<sup>22</sup>. The same findings can be found in literature about Canada<sup>23</sup>, Russia<sup>24</sup>. The impact of the fact that detention had been applied on the sentence has not been studied in Latvia. Objective grounds can be found for this, which have hindered analysis and drawing of conclusions also while conducting the current study, i.e., there was a lack of information to analyse. In Latvia, it is very difficult to conduct

<sup>20</sup> See, for example, Sacks M. & Ackerman A. R. Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment? *Criminal Justice Policy Review*, 25(1), 2014, p. 62. Available at: <https://doi.org/10.1177/0887403412461501> [last viewed November 1, 2019]; Lee J. G. To Detain or Not to Detain? Using Propensity Scores to Examine the Relationship Between Pretrial Detention and Conviction. *Criminal Justice Policy Review*, 30(1), 2019, pp. 128–152. Available at: <https://doi.org/10.1177/0887403416668016> [last viewed November 1, 2019].

<sup>21</sup> Euvrard E., Leclerc C. Pre-trial detention and guilty pleas: Inducement or coercion? *Punishment & Society*, 2017, 19(5), pp. 525–542. Available at: <https://doi.org/10.1177/1462474516670153> [last viewed November 1, 2019]; Lee J. G. To Detain or Not to Detain? Using Propensity Scores to Examine the Relationship Between Pretrial Detention and Conviction. *Criminal Justice Policy Review*, 30(1), 2019, pp. 128–152. Available at: <https://doi.org/10.1177/0887403416668016> [last viewed November 1, 2019]; Petersen N. Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas. *Criminal Justice Policy Review*, 2019, pp. 1–21. Available at: <https://doi.org/10.1177/0887403419838020> [last viewed November 1, 2019].

<sup>22</sup> Sacks M. & Ackerman A. R. Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment? *Criminal Justice Policy Review*, 25(1), 2014, p. 62. Available at: <https://doi.org/10.1177/0887403412461501> [last viewed November 1, 2019]; Lee J. G. To Detain or Not to Detain? Using Propensity Scores to Examine the Relationship Between Pretrial Detention and Conviction. *Criminal Justice Policy Review*, 30(1), 2019, pp. 128–152. Available at: <https://doi.org/10.1177/0887403416668016> [last viewed November 1, 2019]; Dobbie W., Goldin J., Yang C. The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges. *The American Economic Review*, Vol. 108(2), 2018, pp. 201–240. Available at: <https://pubs.aeaweb.org/doi/pdf/10.1257/aer.20161503> [last viewed November 1, 2019].

<sup>23</sup> Euvrard E., Leclerc C. Pre-trial detention and guilty pleas: Inducement or coercion? *Punishment & Society*, 19(5), 2017, p. 538. Available at: <https://doi.org/10.1177/1462474516670153> [last viewed November 1, 2019].

<sup>24</sup> Titaev K. D. Pretrial detention in Russian criminal courts: a statistical analysis. *International Journal of Comparative and Applied Criminal Justice*, 41: 3, 2017, pp. 145–161, Available at: 10.1080/01924036.2016.1239117 [last viewed November 1, 2019].



an objective, numbers-based research because frequently statistical data are non-existent, for example, there are no statistics on how many sentenced prison inmates had been or had not been detained previously. Obviously, this is one of the issues that require in-depth research, with ensured access to comprehensive information about individual persons who are in prisons, which exceeds the boundaries of this study.

In the framework of this research, to identify the situation, the publicly accessible information and information provided by the Prosecutor’s Office of the Republic of Latvia about rehabilitated persons was analysed, practitioners’ observations were collected, and a selection of court judgements was analysed.

The first aspect – the impact of detention on the adjudication of the matter in its merits – exoneration or finding a person to be guilty. The respondents in the survey were asked the question: Can you, on the basis of your professional observations, uphold the statement that, if a person had been detained, the possibility to be exonerated is lower compared to the case when the person had not been detained. The results are summarised in Figure 13.

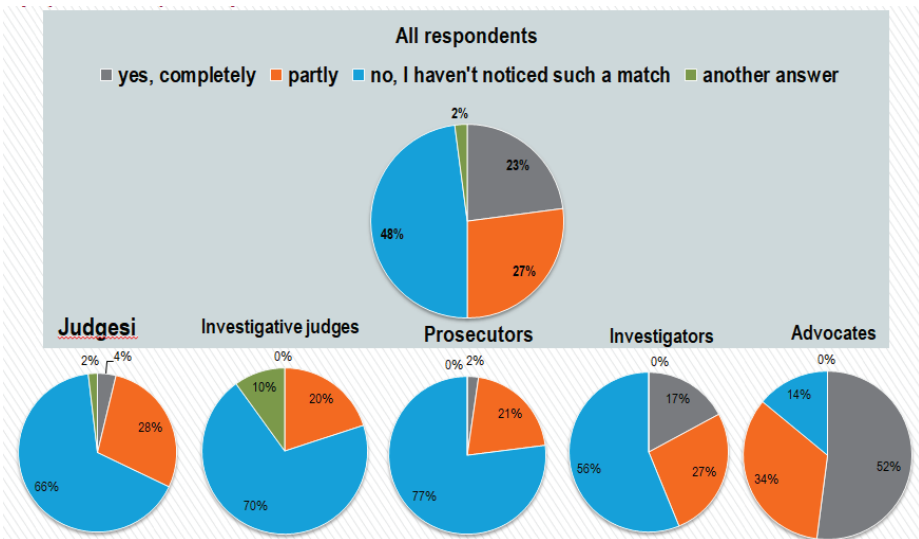


Figure 13

As shown, the respondents’ opinions differ significantly, depending on their “criminal procedural role”. The connection between the application of detention and decreased possibilities to be fully or partially exonerated has been observed by the majority of advocates, whereas the representatives of all other groups of respondents, in the majority of cases, have not discerned this coincidence in their

professional life. The available statistical information on rehabilitated persons<sup>25</sup> during criminal prosecution and adjudication<sup>26</sup> in 2015–2018 is shown in Table 6.

**Table 6**

	2015	2016	2017	2018
<b>Exonerated persons and those, against whom proceedings were terminated on rehabilitative grounds, total</b>	<b>339</b>	<b>301</b>	<b>300</b>	<b>272</b>
including those, to whom detention was applied during the proceedings	8	4	6	16
including persons, who were exonerated or the proceedings against whom were terminated on rehabilitative grounds in court	104	102	134	91
including those, to whom detention was applied during the proceedings	6	4	6	9
including persons, the proceedings against whom were terminated on rehabilitative grounds during the pre-trial proceedings	235	199	166	181
including those, to whom detention was applied during the proceedings	2	0	0	7

As shown above, the number of exonerated persons during criminal prosecution and trial has decreased. At the same time, it must be admitted that, since 2016, the number of cases received for starting criminal prosecution has likewise decreased, and since 2015 – also the number of persons transferred to courts<sup>27</sup>. However, in percentage, the decrease in exonerated persons is many times more significant than the decrease in other statistical indicators. Thus, for instance, the number of persons transferred to a court, comparing 2018 and 2017, has decreased by 2.7 %, whereas the number of rehabilitated persons – by 32.1%. In 2018, the number of those rehabilitated persons, who had been detained during the proceedings, significantly increased.

In Latvia, information on the number or % of all the persons, to whom security measures can be applied and who had been detained, is not publicly accessible; hence, it is impossible to determine exactly, whether those, to whom detention had been applied, are exonerated as often / less often / more often compared to those who had not been detained. Very approximate calculations (taking into account the total number of

<sup>25</sup> Statistical information on the performance outcomes of the Prosecutor's Office of the Republic of Latvia in 2018. Available at: <http://www.prokuratūra.gov.lv/lv/noderigi/gada-parskati> [last viewed November 1, 2019], and information prepared by the Prosecutor's General Office upon the researchers' request – unpublished material.

<sup>26</sup> Statistical data on persons who have been rehabilitated during the pre-trial proceedings is not publicly available.

<sup>27</sup> Statistical information on the performance outcomes of the Prosecutor's Office of the Republic of Latvia in 2018. Available at: <http://www.prokuratūra.gov.lv/lv/noderigi/gada-parskati> [last viewed November 1, 2019].

persons, to whom in the respective year the status of a person with the right to defence has been applied<sup>28</sup> and the number of persons in remand prison) allow to conclude that detention had been applied to less than 8 % of the persons<sup>29</sup>, who had the right to defence. The proportion of detained persons in the total number of rehabilitated accused persons is, as follows: in 2018 – 17.6 %, in 2017 – 4.4 %, in 2016 – 3.9 %, in 2015 – 7.8 %, in 2014 – 2.5 %. Thus, the hypothesis can be advanced (although, to prove it, more precise statistical data and in-depth analysis thereof would be required) that percentage-wise, in recent years, fewer of those to whom detention was applied were rehabilitated, compared to those who had not been detained. At the same time, the statistics of 2018 proved that also the fact that a person had been detained had not hindered rehabilitating a significant proportion of persons.

Although also in literature, with respect to other countries, conjectures have been made regarding the reasons why a relatively small number of those who are detained are exonerated (rehabilitated)<sup>30</sup>, also, in personal conversations with parties involved in criminal proceedings, opinions have been expressed that judges tend to convict more of those who are detained. However, our personal observations, as well as the statistical data, rather supports the opinion that the detention does not have an arbitrary or unlawful impact on exoneration. I.e., judges tend to convict more often those who are detained not simply because a person is detained and, for example, in the case of exoneration, the State would have to pay compensation, but due to fact that already at the moment of applying detention, the validity of the initial suspicion regarding a committed criminal offence is sufficiently strictly examined. Therefore, we would venture a hypothesis that requires further verification that in such an important matter as recognising a person as guilty or not, the fact of applied detention *per se* is not decisive.

Another intuitive approach, which was confirmed in the course of the research, developed with respect to determining the type of punishment and sanction for persons recognised as being guilty, which is the next issue to be examined.

The respondents of the survey were asked three questions regarding their professional observations on how the fact of detention influenced the type of punishment and sanction.

The first question: Can you, on the basis of your professional observations, support the statement that in the conditions where a person had been detained, the possibility to be sentenced to a punishment that is not related to deprivation of liberty is lower than in case where a person had not been detained? The summary of responses is presented in Figure 14.

<sup>28</sup> Statistics on persons with the right to defence, the Information Centre of the Ministry for the Interior. Available at: <https://www.ic.iem.gov.lv/lv/node/769> [last viewed November 1, 2019].

<sup>29</sup> However, this indicator should be viewed as rather vague and unspecific, since security measures, *inter alia*, detention, can be applied to only part of persons enjoying the right to defence. Likewise, this statistical report does not include persons, with respect to whom the proceedings have been terminated because the existence of a criminal offence or elements of it had not been confirmed.

<sup>30</sup> See, for example, Titaev K. D. Pretrial detention in Russian criminal courts: a statistical analysis. *International Journal of Comparative and Applied Criminal Justice*, 41: 3, 2017, pp. 145–161. Available at: 10.1080/01924036.2016.1239117 [last viewed November 1, 2019].

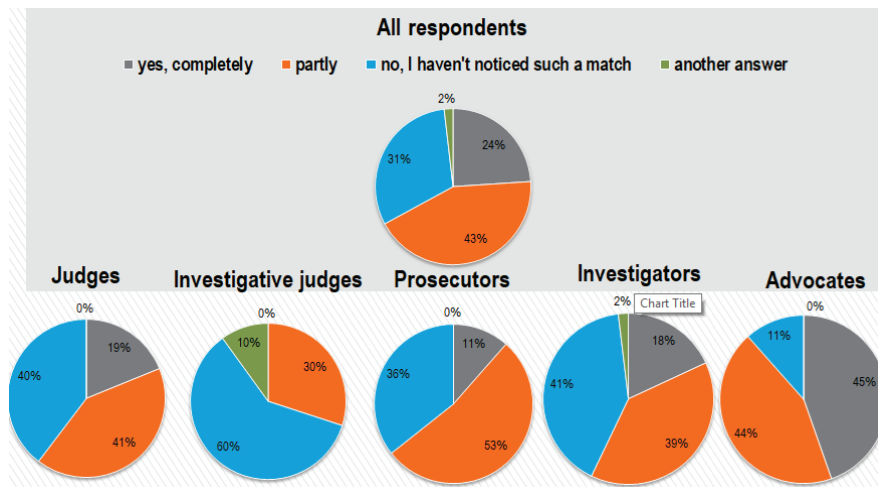


Figure 14

Again, we see that the answers differ depending on the group of respondents. However, the majority of respondents in all the groups, except investigative judges (in accordance with the Latvian legal regulation, these are the judges who do not examine criminal cases on their merits and do not convict), can fully or partially agree that the fact of detention decreases the possibility for a person to be sentenced to a punishment that is not related to deprivation of liberty.

The second question approached the issue from the opposite side, i.e., – Can you, on the basis of your professional observations, support the statement that in circumstances, where a person had been detained, the possibility to receive a prison sentence is higher compared to a situation, where detention had not been applied? The summary of responses is presented in Figure 15.

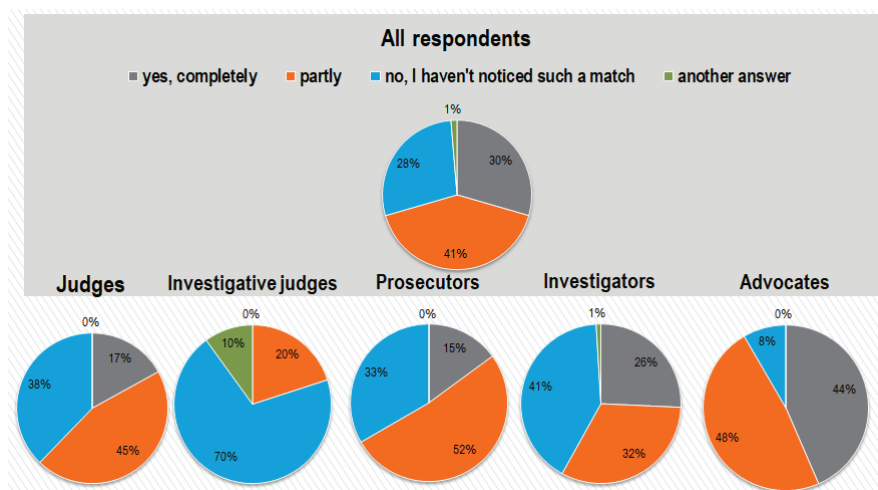


Figure 15

We see that, although the answers should completely correspond to the ones given to the previous question, there are slight differences. Nevertheless, it can be recognised that the majority of respondents (except the investigative judges) admit that their professional observations confirm, in full or partially, the assumption that the type of sanction depends on whether the person has been/has not been detained.

And, finally, the third question, to which the respondents have answered with a surprising consensus – Can you, on the basis of your professional observations, support the statement that upon sentencing to deprivation of liberty a person, who had previously been detained in criminal proceedings, usually the term is not shorter than the period spent in detention? The summary of responses is presented in Figure 16 below.

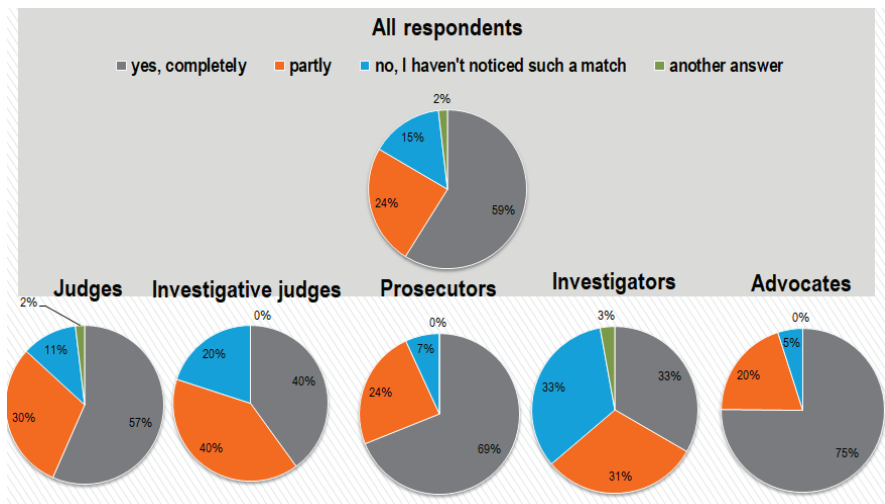


Figure 16

Clearly, in this case all the groups of respondents completely or partially supported the statement that, if a person had been detained in the course of criminal proceedings and later a sanction related to deprivation of liberty was applied then the duration of it, indeed, usually was not shorter than the time spent in detention. This assumption is further confirmed by the analysis of court rulings, conducted as part of the current research.

As regards other aspects of the impact of detention on the type of punishment and sanction, our analysis of court rulings leads to the following conclusions.

As noted above, the court rulings of the first instance courts from the database of anonymised court rulings (covering the period from 01.10.2018 to 30.10.2019) were analysed, these pertained to 274 persons, who had been charged with committing **six types of criminal offences specified in CL**.

**The first type of offence** – CL Section 116 Murder – the applicable punishment is deprivation of liberty for life or deprivation of liberty for the period from five to twenty years and probationary supervision for the term of three years.

At the time of conducting the research, the database contained rulings with respect to 6 persons<sup>31</sup>. During the proceedings, five of them had been detained, while one person had not. However, they all had been sentenced to deprivation of liberty. Thus, the conclusion is that irrespectively of whether detention had been applied or not, they were convicted to actual deprivation of liberty.

**The second type of offence** to be researched were court rulings regarding persons, who had been charged with the offence envisaged in CL Section 125 (3), i.e., intentionally inflicting serious bodily injuries, which, due to the offender's negligence, caused the victim's death, or for intentionally inflicting grave bodily injuries, if this had been committed by an organised group. The applicable punishment is deprivation of liberty for the period from three to fifteen years, with or without confiscation of property, with probationary supervision for a period up to three years or without probation.

Rulings pertaining to 19 persons were examined<sup>32</sup> and the acquired information is presented in Table 7.

Table 7

	Number
<b>Total</b>	<b>19</b>
<b>Detention had been applied</b>	<b>11</b>
<b>Sentenced to DL</b>	<b>8</b>
<b>Sentenced to conditional DL</b>	<b>3</b>
<b>Another sanction applied</b>	<b>–</b>
<b>Detention had not been applied</b>	<b>8</b>
<b>Sentenced to DL</b>	<b>5</b>
<b>Sentenced to conditional DL</b>	<b>3</b>
<b>Another sanction applied</b>	<b>–</b>

As clearly seen in Figure 17, notwithstanding the grave consequences that have set in as the result of the criminal offence, the severity of expected punishment and deprivation of liberty as the only possible punishment envisaged in the sanction,

<sup>31</sup> Available at: <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:RVPT:2018:1026.11087034718.2.S> [last viewed November 1, 2019].

Rulings by district/municipal courts in criminal cases against persons charged with committing of the crime envisaged in CL Section 116. Available at: <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi> [last viewed November 1, 2019]. Information about ECLI numbers of these cases can be found in the list "Legal practice: national" at the end of the article.

<sup>32</sup> Rulings by district/municipal courts in criminal cases against persons charged with committing of the crime envisaged in CL Section 125 (3), which can be found on the site <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi> [last viewed November 1, 2019]. Information about ECLI numbers of these cases can be found in the list "Legal practice: national" at the end of the article.

deprivation is not always applied. Statistically, the possibility of conditional sentencing slightly increases, if the person has not been detained.

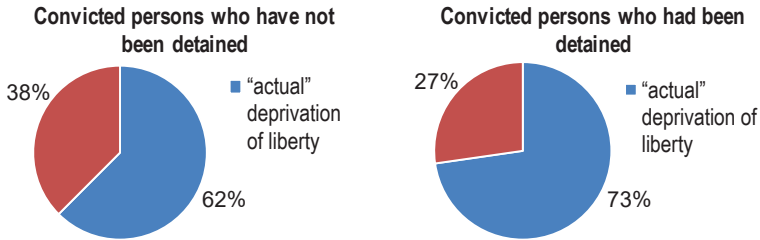


Figure 17

**The third type of offence** – CL Section 177 (1), which sets liability for acquiring property of another or the right to such property by abusing trust or by deceit (fraud), determining the punishment – deprivation of liberty for a period up to three years or temporary deprivation of liberty, or community work, or monetary fine. Rulings regarding 28 persons were analysed<sup>33</sup> and the information is included in Table 8.

Table 8

	Number
<b>Total</b>	<b>28</b>
<b>Detention had been applied</b>	<b>6</b>
Sentenced to DL	3
Sentenced to conditional DL	1
Another sanction applied	2
<b>Detention had not been applied</b>	<b>22</b>
Sentenced to DL	4
Sentenced to conditional DL	7
Another sanction applied	11

As Figure 18 clearly shows, not being detained significantly increases the possibility of a sanction that is not linked to deprivation of liberty and conditional deprivation of liberty. Simultaneously, it should be taken into account that the incriminated crime is a less serious crime, the sanction of which comprises alternative punishments.

<sup>33</sup> Rulings by district/municipal courts in criminal cases against persons charged with committing of the crime envisaged in CL Section 177 (1), which can be found on the site <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi> [last viewed November 1, 2019]. Information about ECLI numbers of these cases can be found in the list “Legal practice: national” at the end of the article.

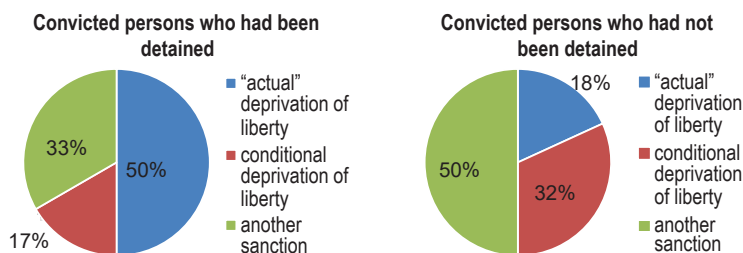


Figure 18

**The fourth type of offence** in accordance with CL Section 253 (1), i.e., unauthorised manufacture, acquisition, storage, transportation or forwarding of narcotic or psychotropic substances without the purpose of disposal of such substances had the largest number of available rulings. This was analysed with respect to persons, who had been convicted, and the applicable punishment for this offence is deprivation of liberty for the period up to three years or temporary deprivation of liberty, or community work, or a fine and probationary supervision for the period up to three years.

Rulings pertaining to sanctioning of 180 persons were examined<sup>34</sup>. The information obtained is presented in Table 9

Table 9

	Number
<b>Total</b>	<b>180</b>
<b>Detention had been applied</b>	<b>34</b>
<b>Sentenced to DL</b>	<b>32</b>
<b>Sentenced to conditional DL</b>	<b>1</b>
<b>Another sanction applied</b>	<b>1</b>
<b>Detention had not been applied</b>	<b>146</b>
<b>Sentenced to DL</b>	<b>36</b>
<b>Sentenced to conditional DL</b>	<b>13</b>
<b>Another sanction applied</b>	<b>97</b>

<sup>34</sup> Rulings by district/municipal courts in criminal cases against persons charged with committing of the crime envisaged in CL Section 253 (1), which can be found on the site <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi> [last viewed November 1, 2019]. Information about ECLI numbers of these cases can be found in the list practice at the end of the article.



As clearly seen in Figure 19 below, not being already detained significantly increases the possibility of receiving a punishment that is not linked to deprivation of liberty and conditional deprivation of liberty.

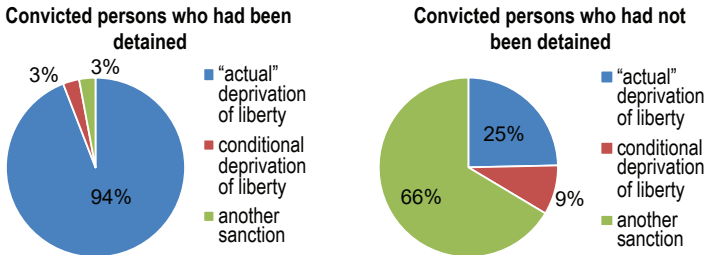


Figure 19

**The fifth type of offence**, whereof rulings were examined, concerned CL Section 195 (3), laundering of criminally acquired financial resources or other property, if this had been committed on a large scale or by an organised group, the applicable punishment for which is deprivation of liberty for the period from three to twelve years, with confiscation of property or without it, and with probationary supervision for the period of up to three years or without it.

In the database of anonymised court rulings for the respective period, rulings on sentencing five persons were available<sup>35</sup>. None of these persons had been applied pre-trial detention, and all of them, finally, were sentenced to deprivation of liberty, applying conditional sentencing.

The same situation was observed, regarding the persons, who had been convicted for in accordance to **the sixth type of offence** listed in CL, Section 260 (2), i.e., for violating traffic rules and provisions regarding vehicle operation, if committed by a person operating the vehicle and resulted in infliction of grave bodily injuries on the victim or causing a person’s death. The applicable punishment thereof is deprivation of liberty for the period up to eight years, with revoking of the driver’s licence for the period up to five years. Court rulings on sentencing 36 persons were examined<sup>36</sup>. None of them had been applied pre-trial detention, and they were sentenced to conditional deprivation of liberty.

<sup>35</sup> Rulings by district/municipal courts in criminal cases against persons charged with committing of the crime envisaged in CL Section 195 (3), which can be found on the site <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi> [last viewed November 1, 2019].

To be searched according to the following ECLI numbers:

ECLI:LV:RVPT:2018:1108.15830004215.1.S; ECLI:LV:RVPT:2019:0306.11816005017.2.S;

ECLI:LV:RVPT:2019:0322.11816012016.2.S; ECLI:LV:RIRT:2019:0328.11518019515.4.S

<sup>36</sup> Rulings by district/municipal courts in criminal cases against persons charged with committing of the crime envisaged in CL Section 260 (2), which can be found on the site <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi> [last viewed November 1, 2019].

Information about ECLI numbers of these cases can be found in the list “Legal practice: national” at the end of the article.

Hence, assessing the impact of previous detention on the type of punishment and sanction, the following conclusion can be made: Observations made by professionals and the analysis of judgements point to the trend that detention has an independent impact on the type of punishment and sanction, and several judgements suggest that the judge's choice of the type of punishment and sanction had been influenced by the fact that the person had been detained. At the same time, absence of statistics and the majority of anonymised judgements only in an abbreviated form prohibits from conducting a fully objective comparison because, in a large part of cases, these judgements do not include the data that characterise a person, which precludes an objective assessment of whether the setting of the type of punishment and sanction had not been influenced by another factor.

## Conclusions

1. In Latvia, there is a decreasing trend in the application of detention, as well as in the number of detained persons.
2. At the same time, many indicators, including those regarding the number of prison inmates per 10 000 inhabitants in Latvia, statistically are above the median and also above the average indicator in Europe.
3. Researching the prevalence of detention, its impact on the final outcome of criminal proceedings, i.e., recognising person as guilty or exoneration, the type of applied punishment and sanction, is significantly hindered by the absence or incompleteness of statistics, unavailability of rulings made in the pre-trial proceedings for research, as well as the court judgements only in the abbreviated form, which do not provide sufficient information for making valid conclusions.
4. To a large extent, the subjective attitude towards the frequency of applying detention, the practical problems in its application, as well as its impact on the final outcome of criminal proceedings are determined by respondents' affiliation to the area of professional activities (the criminal procedural role).
5. The most significant and persisting problem in the practical application of detention is failure to present the investigation file, including the materials that justify detention, to the defence providers.
6. An assumption can be made that the fact of detention has an independent and significant impact on determining the type of punishment and sanction.
7. To confirm or reject the assumptions made in the current and other studies, research on a larger scale should be continued, with access to more detailed statistics and broader accessibility of criminal procedural documents, as well as communication with detained persons.
8. It would be necessary to continue researching the issues outlined in the article to form a more complete view on the practical application of detention in Latvia, which would be valuable for drafting the future law policy documents and improving the practice of law enforcement.

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### Legal practice: international

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### Legal practice: national

1. Rulings by district/municipal courts in criminal cases against persons charged with committing of the crime envisaged in CL Section 116, which can be found on the site <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi> [last viewed November 1, 2019]. To be searched according to the following ECLI numbers: ECLI:LV:RVPT:2018:1026.11087034718.2.S; ECLI:LV:KURT:2018:1102.11261082617.1.S; ECLI:LV:RIRT:2018:1128.11355004115.9.S; ECLI:LV:RIRT:2019:0201.11355012018.2.S; ECLI:LV:ZRT:2019:0304.11905008218.1.S; ECLI:LV:RIRT:2019:0429.11351015518.2.S
2. Rulings by district/municipal courts in criminal cases against persons charged with committing of the crime envisaged in CL Section 125 (3), which can be found on the site <https://manas.tiesas.lv/eTiesasMvc/eclinolemumi> [last viewed November 1, 2019].

To be searched according to the following ECLI numbers:

ECLI:LV:ZRT:2018:1004.11221129517.1.S; ECLI:LV:VRT:2018:1009.11280023314.2.S;  
 ECLI:LV:RPPT:2018:1011.11096198516.1.S; ECLI:LV:KURT:2018:1012.11151052217.1.S;  
 ECLI:LV:ZRT:2018:1015.11390028917.4.S; ECLI:LV:KURT:2018:1112.11261114117.2.S;  
 ECLI:LV:DAUT:2018:1203.11240048417.3.S; ECLI:LV:VRT:2018:1213.11280003618.1.S;  
 ECLI:LV:RVPT:2018:1221.11094080518.4.S; ECLI:LV:DAUT:2019:0116.11181152517.2.S;  
 ECLI:LV:RIRT:2019:0118.11353034518.3.S; ECLI:LV:DAUT:2019:0206.11181054718.1.S;  
 ECLI:LV:KURT:2019:0211.11250000818.4.S; ECLI:LV:RLPT:2019:0220.11088122518.2.S;  
 ECLI:LV:DAUT:2019:0225.11181113418.1.S; ECLI:LV:KURT:2019:0307.11261016216.5.S;  
 ECLI:LV:DAUT:2019:0508.11181060318.2.S; ECLI:LV:DAUT:2019:0613.11181116418.1.S

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To be searched according to the following ECLI numbers:

ECLI:LV:KURT:2018:1017.11270002413.1.S; ECLI:LV:RVPT:2018:1024.11087099417.2.S;  
ECLI:LV:RVPT:2018:1030.11094001815.7.S; ECLI:LV:ZRT:2018:1217.11390039815.2.S;  
ECLI:LV:RLPT:2019:0110.15840124918.2.S; ECLI:LV:ZRT:2019:0114.12210000715.2.S;  
ECLI:LV:VRT:2019:0121.11300003916.3.S; ECLI:LV:KURT:2019:0123.11380039818.2.S;  
ECLI:LV:RVPT:2019:0124.11096190916.1.S; ECLI:LV:KURT:2019:0214.11380003317.1.S;  
ECLI:LV:KURT:2019:0225.11360042316.1.S; ECLI:LV:KURT:2019:0307.15830001917.2.S;  
ECLI:LV:RVPT:2019:0318.11815002917.2.S; ECLI:LV:RVPT:2019:0320.11087032817.2.S;  
ECLI:LV:ZRT:2019:0409.11221110917.3.S; ECLI:LV:DAUT:2019:0415.11181165918.1.S;  
ECLI:LV:RLPT:2019:0429.11088078816.2.S; ECLI:LV:ZRT:2019:0507.11221082517.1.S;  
ECLI:LV:ZRT:2019:0507.11120072116.3.S; ECLI:LV:RIRT:2019:0516.15840016218.2.S;  
ECLI:LV:ZRT:2019:0523.11370005419.1.S; ECLI:LV:RVPT:2019:0524.11087050315.3.S;  
ECLI:LV:KURT:2019:0619.11270002314.5.S; ECLI:LV:RIRT:2019:0627.11352035117.3.S;  
ECLI:LV:RVPT:2019:0628.11091138216.2.S; ECLI:LV:ZRT:2019:0709.11210096316.2.S;  
ECLI:LV:ZRT:2019:0823.11370081118.1.S

4. Rulings by district/municipal courts in criminal cases against persons charged with committing of the crime envisaged in CL Section 253 (1), which can be found on the site <https://manas.tiasas.lv/eTiasasMvc/eclinolemumi> [last viewed November 1, 2019].

To be searched according to the following ECLI numbers

ECLI:LV:RPPT:2019:0709.11519005419.2.S; ECLI:LV:VRT:2019:0715.11300017619.3.S;  
ECLI:LV:RPPT:2019:0717.11519008619.2.S; ECLI:LV:ZRT:2019:0719.11905010317.2.S;  
ECLI:LV:RLPT:2019:0725.11088077617.4.S; ECLI:LV:ZRT:2019:0731.11310018719.3.S;  
ECLI:LV:RIRT:2019:0805.11410005519.2.S; ECLI:LV:RLPT:2019:0809.11088087719.2.S;  
ECLI:LV:KURT:2019:0813.11261067019.1.S; ECLI:LV:RPPT:2019:0814.11095087319.2.S;  
ECLI:LV:KURT:2019:0814.11380055818.1.S; ECLI:LV:REZT:2019:0819.11903011319.2.S;  
ECLI:LV:RLPT:2019:0822.11088073019.2.S; ECLI:LV:RVPT:2019:0823.11091091919.2.S;  
ECLI:LV:RLPT:2019:0827.11815003219.2.S; ECLI:LV:RIRT:2019:0902.11353013819.3.S;  
ECLI:LV:RVPT:2019:0903.11091065219.2.S; ECLI:LV:KURT:2019:0905.11261016219.1.S;  
ECLI:LV:DAUT:2019:0911.11181185518.2.S; ECLI:LV:RIRT:2019:0916.15840027219.2.S;  
ECLI:LV:RLPT:2019:0522.11088011514.4.S; ECLI:LV:RLPT:2019:0522.11087031819.3.S;  
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ECLI:LV:RPPT:2019:0610.11815002918.2.S; ECLI:LV:RPPT:2019:0612.11095161818.3.S;  
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ECLI:LV:KURT:2019:0620.11250013919.2.S; ECLI:LV:ZRT:2019:0620.11310025818.3.S;  
ECLI:LV:ZRT:2019:0621.11310018319.2.S; ECLI:LV:RPPT:2019:0626.11095052519.2.S;  
ECLI:LV:ZRT:2019:0628.15840060519.2.S; ECLI:LV:RLPT:2019:0702.11089041119.2.S;

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ECLI:LV:RLPT:2019:0705.11088235518.2.S; ECLI:LV:ZRT:2019:0408.11905007318.1.S;  
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ECLI:LV:KURT:2019:0411.11270004518.2.S; ECLI:LV:RLPT:2019:0415.11519015116.16.S;  
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ECLI:LV:RLPT:2019:0430.11089007919.1.S; ECLI:LV:RLPT:2019:0502.11089080118.2.S;  
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ECLI:LV:ZRT:2019:0515.11310004617.2.S; ECLI:LV:RLPT:2019:0517.11088066015.3.S;  
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ECLI:LV:RVPT:2019:0304.11088025818.2.S; ECLI:LV:RLPT:2019:0305.11088035318.2.S;  
ECLI:LV:VRT:2019:0306.11400028918.1.S; ECLI:LV:KURT:2019:0308.11261094118.2.S;  
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ECLI:LV:RLPT:2019:0328.11088175818.2.S; ECLI:LV:KURT:2019:0401.11261004719.1.S;  
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ECLI:LV:RPPT:2019:0404.11096223617.4.S; ECLI:LV:RLPT:2019:0115.11088091718.2.S;  
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ECLI:LV:RLPT:2018:1115.11089086418.2.S; ECLI:LV:RVPT:2018:1116.11091141618.2.S;  
ECLI:LV:ZRT:2018:1116.11310094317.2.S; ECLI:LV:REZT:2018:1128.11331015318.3.S;  
ECLI:LV:RVPT:2018:1203.11087133717.2.S; ECLI:LV:RIRT:2018:1203.11410039418.1.S;  
ECLI:LV:RLPT:2018:1204.11088012818.4.S; ECLI:LV:ZRT:2018:1204.11905008118.2.S;  
ECLI:LV:DAUT:2018:1204.11181120818.1.S; ECLI:LV:RIRT:2018:1204.13800019516.1.S;  
ECLI:LV:DAUT:2018:1204.11903006718.1.S; ECLI:LV:RLPT:2018:1205.11089153818.1.S;  
ECLI:LV:KURT:2018:1210.11270005318.1.S; ECLI:LV:RLPT:2018:1210.11088123017.2.S;  
ECLI:LV:RLPT:2018:1212.11089159817.4.S; ECLI:LV:KURT:2018:1219.11270006818.2.S;  
ECLI:LV:RPPT:2018:1023.11095188117.2.S; ECLI:LV:RLPT:2018:1025.11088018818.2.S;  
ECLI:LV:KURT:2018:1025.11261068118.2.S; ECLI:LV:RLPT:2018:1029.11087117018.2.S;  
ECLI:LV:VRT:2018:1030.11280002918.2.S; ECLI:LV:RVPT:2018:1031.11091138518.2.S;  
ECLI:LV:RLPT:2018:1101.11089044318.2.S; ECLI:LV:RLPT:2018:1101.11089094318.4.S;  
ECLI:LV:REZT:2018:1102.11290036818.1.S; ECLI:LV:ZRT:2018:1102.11905000918.2.S;  
ECLI:LV:RLPT:2018:1105.11088087718.2.S; ECLI:LV:RLPT:2018:1105.11087078818.4.S;  
ECLI:LV:RLPT:2018:1106.11088012918.1.S; ECLI:LV:REZT:2018:1107.11331059218.3.S;  
ECLI:LV:RPPT:2018:1108.11095133018.2.S; ECLI:LV:RLPT:2018:1108.11088126718.2.S;  
ECLI:LV:RPPT:2018:1109.11089151617.2.S; ECLI:LV:DAUT:2018:1109.11181162417.1.S;  
ECLI:LV:RIRT:2018:1113.11353030617.1.S; ECLI:LV:RLPT:2018:1113.11087109116.2.S;  
ECLI:LV:RPPT:2018:1002.11096295017.2.S; ECLI:LV:RLPT:2018:1002.11904004118.2.S;  
ECLI:LV:ZRT:2018:1002.11905010417.1.S; ECLI:LV:RPPT:2018:1002.11096265417.2.S;  
ECLI:LV:RPPT:2018:1003.11095112917.4.S; ECLI:LV:RIRT:2018:1003.11410062218.1.S;  
ECLI:LV:ZRT:2018:1003.11905003318.1.S; ECLI:LV:RVPT:2018:1004.11096193712.2.S;  
ECLI:LV:DAUT:2018:1008.11903000518.1.S; ECLI:LV:KURT:2018:1008.11261068218.2.S;  
ECLI:LV:VRT:2018:1008.11130016118.1.S; ECLI:LV:DAUT:2018:1009.11903011118.1.S;  
ECLI:LV:DAUT:2018:1009.11320023018.1.S; ECLI:LV:RVPT:2018:1016.11087087818.3.S;  
ECLI:LV:DAUT:2018:1017.11181006518.1.S; ECLI:LV:RLPT:2018:1017.11095135318.1.S;  
ECLI:LV:RLPT:2018:1022.11904007017.2.S; ECLI:LV:KURT:2018:1001.11380032618.1.S.

5. Rulings by district/municipal courts in criminal cases against persons charged with committing the crime envisaged in CL Section 195 (3), which can be found on the site <https://manas.tiasas.lv/eTiasasMvc/eclinolemumi> [last viewed November 1, 2019].

To be searched according to the following ECLI numbers:

ECLI:LV:RVPT:2018:1108.15830004215.1.S; ECLI:LV:RVPT:2019:0306.11816005017.2.S;  
ECLI:LV:RVPT:2019:0322.11816012016.2.S; ECLI:LV:RIRT:2019:0328.11518019515.4.S.

6. Rulings by district/municipal courts in criminal cases against persons charged with committing the crime envisaged in CL Section 260 (2), which can be found on the site <https://manas.tiasas.lv/eTiasasMvc/eclinolemumi> [last viewed November 1, 2019].

To be searched according to the following ECLI numbers:

ECLI:LV:RVPT:2018:1002.11520025717.1.S; ECLI:LV:RVPT:2018:1003.11520044816.2.S;  
ECLI:LV:RVPT:2018:1008.11520049417.2.S; ECLI:LV:RIRT:2018:1016.11520082817.2.S;

ECLI:LV:ZRT:2018:1018.11390003718.2.S; ECLI:LV:RLPT:2018:1022.11520083017.2.S;  
ECLI:LV:RPPT:2018:1106.11520085116.2.S; ECLI:LV:KURT:2018:1112.11151072117.1.S;  
ECLI:LV:RLPT:2018:1113.11520091816.1.S; ECLI:LV:REZT:2018:1203.11290023717.2.S;  
ECLI:LV:RIRT:2018:1204.11520047417.2.S; ECLI:LV:DAUT:2018:1206.11320009318.1.S;  
ECLI:LV:RIRT:2018:1211.11520060417.2.S; ECLI:LV:RIRT:2018:1213.11520025618.2.S;  
ECLI:LV:DAUT:2018:1214.11320052717.1.S; ECLI:LV:ZRT:2018:1218.11390085717.2.S;  
ECLI:LV:KURT:2019:0116.11360026417.1.S; ECLI:LV:ZRT:2019:0128.11370032818.2.S;  
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ECLI:LV:KURT:2019:0711.11380005319.2.S; ECLI:LV:ZRT:2019:0812.11310043018.2.S

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2. Iekšlietu ministrijas Informācijas centra Statistika par personām, kurām ir tiesības uz aizstāvību [Statistics of the Information Centre of the Ministry of the Interior on persons having the right to defence]. Available at: <https://www.ic.iem.gov.lv/lv/node/769> [last viewed November 1, 2019].
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## CRIMINAL PROTECTION OF PRIVACY IN LEGISLATION OF ROMANIA

### Summary

Increased protection of privacy is a recent concern of Romanian criminal law in the context of the ECHR decisions sanctioning the insufficient protection of the right to privacy.

The new Romanian Penal Code, in force since 2014, provides for a series of offenses without correspondence in the previous penal codes, aimed to protect both against the interference with a person's private life by photographing, capturing images or registering the person and disseminating the information thus obtained, as well as against the interference with someone's professional activity by violating their professional secrecy.

The Romanian legislator also set up, starting with 2018, another means of protecting privacy, namely, a provisional protection order, which may be issued by the police, in the absence of a criminal trial, with respect to a person involved in acts of domestic violence.

**Keywords:** violation of privacy, violation of the professional office, protection of privacy, E.C.H.R.

### Introduction

Efficient protection of privacy constitutes a recent concern of the Romanian legislator, in the sense of ensuring the necessary legal framework in order to defend the values guaranteed by Article 8 of the European Convention on Human Rights, the catalyst being represented by some Decisions of the E.C.H.R. whereby Romania was sanctioned for insufficient protection of the right to privacy<sup>1</sup>.

The new Romanian Penal Code, adopted by Law No. 286/2009<sup>2</sup>, in force as of February 1, 2014, stands out with incriminations, which represent an absolute novelty for the Romanian criminal law and reconfigures the existing incriminations, in accordance with the provisions of international conventions. However, a few years ago, the Romanian legislator rather easily gave up incriminations such as insult and slander<sup>3</sup>, crimes that provided a greater protection of privacy, although, as it was considered, the verbal or written manner of expression also entails responsibilities,

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<sup>1</sup> E.C.H.R., Judgment of 19 November 2013 in the case *Ulariu v. Romania* (application No. 19267/05, pt. 49).

<sup>2</sup> Published in the Official Journal No. 510 of 24 July 2009.

<sup>3</sup> Insult and slander were abolished by means of Law No. 278/2006 regarding the modification and completion of the Penal Code. Official Journal, Part I, No. 601 of 12 July 2006.

and, “in order to avoid insult in its purest form, the one who expresses his/her ideas must manifest a certain prudence in certain sensitive areas in the social context in which they are carried out”<sup>4</sup>.

The present article analyses the limits of the violation of the right to privacy through the prism of the new regulations encompassed in the Romanian Penal Code, such as the violation of private life<sup>5</sup>, the violation of professional headquarters<sup>6</sup>, harassment<sup>7</sup>, but also through reformulated incriminations already existing in the previous Romanian Penal Codes, such as the violation of domicile or the disclosure of the professional secret. The latter regulations were found in the previous Penal Code under the chapter entitled “Offenses against the freedom of the person”, along with offenses such as illegal deprivation of liberty, threat or blackmail.

Harassment, an offense new to Romanian law, was not included by the legislator into the category of offenses affecting the domicile and private life, but instead in the category of offenses against a person’s freedom. Nevertheless, we consider that it is necessary to examine it along with the other offenses, which affect one’s domicile and private life, in terms of its ways of incrimination, the offense of harassment affecting not only the freedom of the person, but also their private life.

As of 2018, the Romanian legislator has established another means of protecting private life, respectively, a provisional order of protection that can be issued by police bodies in the absence of a criminal trial, regarding a person involved in acts of domestic violence.

## 1. Violation of privacy

The violation of privacy represents a new regulation, aimed at counteracting the new forms of harm or endangering social values, which have emerged with the evolution of technology. Until the adoption of the new Penal Code, there was no regulation in the Romanian criminal law that sanctioned the interference within private life by means of photographing, filming a person, presenting or transmitting, without the consent of the concerned subject, the conversations or images captured.

Beyond the need to protect the interference within a person’s private life by denigration in various forms, the regulation of the offense pertaining to violation of privacy was all the more necessary, since in 2006 insult and slander were disincriminated<sup>8</sup>. From the repeal of the two offenses back in 2006, until the entry

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<sup>4</sup> Chiriță R. Convenția europeană a drepturilor omului. Comentarii și explicații, [European Convention on Human Rights. Commentaries and explanations]. Vol. II, C. H. Beck, 2007, p. 173.

<sup>5</sup> Article 226 Penal Code.

<sup>6</sup> Article 225 Penal Code.

<sup>7</sup> Article 208 Penal Code.

<sup>8</sup> Abolished by Law No. 278/2006 regarding the modification and completion of the Penal Code. Official Journal, Part I, No. 601 of 12 July 2006.

into force of the new Penal Code in 2014, the dignity, honour and reputation of persons have not benefited from any other form of real and adequate legal protection.

According to Article 226 of the Penal Code, the violation of privacy consists of *the unlawful violation of privacy, by photographing, capturing or recording images, by listening using technical means or by recording audio of an individual, in a dwelling or room or outbuilding related to them or to a private conversation.*

The legislator also incriminates aggravating variants of the same offense:

*the unlawful disclosure, dissemination, presentation or transmission of sounds, conversations or images to another person or to the general public<sup>9</sup>,*

but also

*unlawfully installing technical means for audio or video recording<sup>10</sup>.*

The provisions of Article 226 of the Penal Code expressly stipulate that invasion of privacy is committed by photographing or recording of a person's private life in a dwelling or room or outbuilding related to them. In this case, photographing a person in a car does not meet the constitutive elements of the offense of violation of privacy.

The High Court of Cassation and Justice has shown that the notion of dwelling is identified with that particular space where the injured person lives even temporarily, including a hotel room or a temporary shelter<sup>11</sup>. Intimacy cannot be restricted exclusively to a person's dwelling, "but must be extended to any place where one person reasonably expects not to be seen by others."<sup>12</sup>

The offense can also be committed outside a dwelling, when the recording concerns a private conversation. Essential for this offense is the existence of a direct contact among the persons participating in the conversation, otherwise the deed will be qualified as containing the elements of another offense, namely, the violation of the secret of correspondence.

In order to establish this offense, the legislator requires that the photographing or capturing of images be done "without right", that is, without the consent of the person caught in the images. As concerns the phrase "without right", the specialized literature expressed the opinion that it does not constitute an offense to photograph or record a person with his or her express or even presumed

<sup>9</sup> Article 226 pt. 2 Penal Code.

<sup>10</sup> Article 226 pt. 5 Penal Code.

<sup>11</sup> Constitutional Court of Romania, Decision No. 33/2017 regarding the rejection of the challenge of unconstitutionality of the provisions of Article 226 para. (1) of the Penal Code. Official Journal, Part I, No. 320 of 4 May 2017.

<sup>12</sup> Slăvoiu R. *Infrațiunea de violare a vieții private – o noutate în legislația penală din România* [The offense of violation of privacy – a novelty in the criminal legislation of Romania]. *Revista Dreptul*, No. 10, 2013, p. 87.

consent<sup>13</sup>. In practice, numerous situations have been identified when former partners, pursuing revenge, have published on social networks the pictures of their victim in indecent situations, taken with their consent during the relationship. In such a situation, despite the fact that this manner of committing the deed is equally invasive and undoubtedly affects the victims and their mental freedom, the deed is an offense only when the picture has been taken without the victim's consent. If one accepts this thesis, the distribution of pictures taken by the injured party by themselves, even if their publication would affect that party's private life, does not entail criminal liability.

The recent practice, however, is of a different opinion, considering that the phrase used by the legislator, "without right", should not be restricted only to the origins of a picture or recording, because it concerns the overall action of violating privacy. Thus, even if the author of the photograph or of the recording had the consent of the injured party to photograph them at the time, respectively, to record images of them, but for purposes other than that the public presentation or dissemination to third parties, the former will not be able to dispose of those materials at will, transmitting or posting them on various social networking sites.

In a contrary opinion, it is shown that when a person gives his/her consent to be registered, "the condition of typicality of the deed will be removed, the person recorded being in a situation of *de culpa in eligendo* of the conversation partner"<sup>14</sup>. By accepting such a hypothesis, we appreciate that we might overly deviate from the legislator's intention to provide, above all, criminal protection of the mental security of the person, the social value protected being the right to privacy of a person, the freedom of the person to live according to their own free will inside a private space<sup>15</sup>.

On the contrary, the above considerations do not apply to a phone call made using the "speaker" function of the telephone. We appreciate that such conversation cannot be classified as a private one, since, when activating the speaker button, on one's own initiative, that person has assumed the risk of being heard by other people who might be around. In this case, the tacit consent of the person being listened to will remove the condition of typicality of the deed.

In 2016, the High Court of Cassation and Justice argued that the use of *Facebook* for the purpose of discrediting a person entails the criminal liability, *Facebook* being considered as a public space<sup>16</sup>. In a recent jurisprudential decision, it was appreciated that transmitting a compromising record through *WhatsApp*, when the said transmitting was done without the consent of the injured party,

<sup>13</sup> Vasiu I. *Infrațiuni ce aduc atingere domiciliului și vieții private* [Offenses affecting the home and private life]. In: *Explicațiile noului Cod penal* [Explanations of the new Criminal Code], Antoniu G., Toader T. (coord.), Vol. III. Universul Juridic Publishing House, 2015, pp. 263–264.

<sup>14</sup> David G., Jelebean M. *Violarea vieții private în noul Cod penal (I)* [Violation of privacy in the new Criminal Code]. *Caiete de drept penal*, 2012, No. 3, p. 65.

<sup>15</sup> In this respect, Mureșan A. *Violarea vieții private în noul Cod penal (II)* [Violation of privacy in the new Criminal Code]. *Caiete de drept penal*, No. 3, 2012, p. 76.

<sup>16</sup> Judgment of High Court of Cassation and Justice. Decision No. 4546/2016 of 27.11.2016. Available at: <http://www.scj.ro>, [last viewed September 27, 2019].

encompasses the constitutive elements of the offense of violation of privacy<sup>17</sup>. By transmitting the message to a third party, the right to the inviolability of the injured party's privacy was violated.

The essential requirement for the existence of the crime is the violation of privacy. The European Court of Human Rights has established in its case law that, although the Convention does not expressly guarantee it, the right to reputation is part of the notion of "private life" as enshrined in Article 8 of the Convention<sup>18</sup>.

Regarding publication of pictures with public persons caught in public, the Romanian legislation is quite permissive, as long as the pictures are not taken in private spaces, and are free from offensive or other connotations. So far, we have not found a practical solution that deals with the crime of violation of privacy committed by publishing materials about public persons.

Another common situation in Romania was the supervision of the online activity of employees, respectively, of the correspondence carried out by them with persons with whom they did not necessarily have a professional connection. In a request addressed by the national courts and rejected by them as unfounded, a former employee complained that he was monitored by his employer, who recorded his real-time communications from *Yahoo Messenger*. The national courts held that "the right of the employer to monitor their employees at the workplace as concerns the use of the company computers is confined into the broad sphere of the notion of control over the way an employee performs his/her tasks", invoking the provisions of Article 40 of the Labour Code. The national courts also showed that as long as it was proved that the employees had been alerted about this possibility, as well as about the employer's right to fire the employees if they were to use the computer for personal purposes, the dismissal is legal.

Nonetheless, the E.C.H.R. condemned Romania and pointed out that those communications of the applicant at the workplace were covered by the concepts of "private life" and "correspondence". As a result, the provisions of Article 8 of the Convention were applicable<sup>19</sup>. The European Court of Human Rights assimilated the correspondence carried out on professional premises with that carried out at home.

## 2. Harassment

Another new regulation introduced in the Romanian legislation is the offense of harassment.

According to Article 208 of the Penal Code, harassment consists in

<sup>17</sup> Judgment of Court of Appeal Braşov, Criminal Section. Decision No. 612/2018 of 11.10.2018. Available at: <https://lege5.ro> [last viewed September 27, 2019].

<sup>18</sup> E.C.H.R., Judgment of 20 December 2011 in the case *Bălăşoiu v. Romania* (application No. 17232/04, pct. 30).

<sup>19</sup> E.C.H.R., Judgment of 5 September 2017 in case *Bărbulescu v. Romania* (application No. 61496/08, pct.73).

*the act of an individual who repeatedly, with or without a right or legitimate interest, pursues an individual or supervises their domicile, working place or other places attended by the latter, thus causing them a state of fear, as well as the making of phone calls or communications through remote communication devices which, through their frequency or content, cause a state of fear to an individual.*

The incrimination of harassment in the new Penal Code was preceded by numerous cases in practice in which different persons, especially women, were tracked in public places or harassed through messages transmitted over the telephone or through social networks, all of which are of a nature affecting their mental freedom.

The offense apparently sanctions acts without a criminal character, but their repetitive and harassing nature has caused the legislator to incriminate them. The specificity of the act consists of repeated harassment actions, and the perpetration of a single action or isolated actions cannot lead to entailing of the harassment offense, since the typicality requirement is not being fulfilled.

The offense mainly affects freedom and only in a subsidiary manner the private life, but, in some ways, the harassment to a greater extent affects the private life than the freedom of a person.

Thus, the manner of the supervision of a person, of the transmission of private or even public messages on social networks, constitutes an intrusion into the private life of a person, which is likely to affect his or her mental freedom or reputation. The surveillance acts, the messages of a harassing nature may cause a person a psychological discomfort, an alarm and not an effective fear that in the future she will be the victim of a crime, in which case the act would meet the conditions for the offense of threat.

In practice, it has been shown that the supervision of a person and the photographing of such person in public places for the purpose of harassment meet the constitutive elements of the offense of harassment. In this context, the offense of harassment completes the content of the offense of violation of privacy by protecting the dignity of a person, when the photographing or filming of the respective person takes place "without right" in a public place<sup>20</sup>.

By strictly interpreting the text of the law, we would be tempted to state that only actions such as surveillance, following a person or making telephone calls or communications by means of transmission at the distance would meet the constitutive elements of a crime. In fact, these actions can be supplemented with other types of actions that cause a mental discomfort or unnecessary inconveniences to a person<sup>21</sup>. Thereby, the legislator provides the same protection for the fundamental right to private life also when its violation takes place in public spaces or in institutions where the victim carries out his/her activity. The specialized literature includes

<sup>20</sup> Judgment of Court of Craiova, Penal Section. Decision No. 1995/2019 of 24.06.2019. Available at: <https://lege5.ro> [last viewed September 25, 2019].

<sup>21</sup> Neagu N. *Infrațiuni contra persoanei* [Offences against the person]. In: Noul Cod penal comentat [Commentaries on the new Criminal Code], Dobrinioiu V. and collab. Bucharest, Universul Juridic Publishing House, 2012, p. 118.

in the category of acts of harassment also the acts of destruction, vandalization of some of the victim's property, even killing of their pets<sup>22</sup>. The practice associated to the bullying/harassing actions indicated above also includes actions like publication of a picture, to which a suggestive image has been attached, such as a picture of a trash bin<sup>23</sup>. The association of images has aroused a wave of comments in the online environment, most of them vulgar and denigrating, which has affected the person's honour and reputation.

Another situation, common in practice, is the harassment of employees in the workplace in order to cause them to resign<sup>24</sup>. They are subjected to harassing, degrading behaviour with a persecutory purpose, capable of instilling in the employee a state of humiliation and inferiority compared to the other employees. The psychological pressures of the employer are capable of exercising a psychological violence against the person, just like the acts which meet the constitutive elements of the offense of violation of the private life. In the category of degrading behaviour, another court includes actions such as the isolation of the employee, preventing the fulfilment of the tasks of the service or the assignation of tasks other than those stipulated in the job description, with the purpose of deprofessionalizing the employee and making his activity "to be sidelined"<sup>25</sup>.

### 3. Violation of the professional headquarters

The new Romanian Penal Code also stands out through the distinct incrimination of the crime of violation of the professional headquarters, since, according to the case law of the European Court of Human Rights, the headquarters of the legal person or the professional establishment of the natural person benefit from the protection conferred by Article 8 of the Convention.

According to Article 225 of the Penal Code, it constitutes an offense

*unlawfully entering, in any way, any of the offices/headquarters where a legal entity or a natural person carries out their business or the refusal to leave them upon the request of the entitled person.*

So far, in practice, few convictions have been passed strictly for this offense, the crime of violating the professional headquarters being absorbed into the crime of theft, which absorbs in its constitutive content, as aggravating circumstance,

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<sup>22</sup> Nițu D. Unele considerații privind infracțiunea de hărțuire introdusă de noul Cod penal [Some considerations regarding the crime of harassment introduced by the new Criminal Code]. *Caiete de Drept penal*, No. 1, 2011, p. 127.

<sup>23</sup> Judgment of Court of Bălș. Decision No. 640/2019 of 11.07.2019. Available at: <https://lege5.ro> [last viewed September 25, 2019].

<sup>24</sup> Judgment of Court of Appeal Pitești, Civil Section I. Decision No. 2806/2019 of 12.06.2019. Available at: <https://lege5.ro> [last viewed September 26, 2019].

<sup>25</sup> Judgment of Court of Appeal Bucharest, Civil Section III. Decision No. 573/2019 of 02.07.2019. Available at: <https://lege5.ro> [last viewed September 25, 2019].

the offense of violation of the professional headquarters stipulated in Article 225 of the Penal Code.

The offense of violating the professional headquarters is a crime threatening the current professional activity. Even so, in the case law it was appreciated that even during the night, when the operations of the legal person mostly cease, the space destined to operations of legal person does not cease to constitute a professional office.

The legislator did not limit the notion of professional headquarters to that of social headquarters, professional headquarters designating any point of work where a legal person carries out its activity.

The act of entering a store which is open to public does not constitute the offense of violation of the professional headquarters, since in this case one presumes the existence of a consent from the person to whom the headquarters belong, the latter accepting the breach of the inviolability of the headquarters by the nature of the activity carried out.

#### 4. Disclosure of professional secrecy

The offense of disclosure of the professional secrecy was also regulated in the previous Penal Code. The new Penal Code only reformulates it, clarifying its scope by introducing the phrase “private life”. Thus, according to Article 227 of the Penal Code, the offense consists in “the disclosure, without right, of data or information regarding the privacy of an individual, which might bring harm to an individual, by someone who has knowledge thereof by virtue of profession or office, and who has the obligation to maintain the confidentiality of said data”.

In recent years, many political figures have been subjected to real media outrage during the criminal proceedings against them. The Romanian media, in possession of information about those persons’ or their families’ private lives, carried out a campaign to denigrate them, before the court ruled on their guilt. The E.C.H.R. sanctioned Romania for the lack of guarantees of the right to respect one’s private life. In the case *Cășuneanu v. Romania*<sup>26</sup>, the Court pointed out that, in domestic law, “the condition of maintaining the confidentiality of the criminal file during the investigations is mainly meant to protect the prosecutors in their efforts to collect evidence and not the accused”. As a result, the publication of excerpts from a defendant’s telephone calls during criminal proceedings, prior to commencement of the adversary proceedings, is likely to affect the right to respect for his/her private life.

Another common situation in the media is the disclosure of information regarding a person’s medical history. The national courts<sup>27</sup>, with express reference to

<sup>26</sup> E.C.H.R., Judgment of 16 April 2013 in the case *Cășuneanu v. Romania* (application No. 22018/10).

<sup>27</sup> Judgment of Court of Appeal Bucharest, Civil Section III. Decision No. 535/2015 of 28.04.2015. Available at: <https://lege5.ro> [last viewed September 30, 2019].



the decisions of the E.C.H.R., have shown that the information regarding the health of a person is confined under the notion of “private life”, within the meaning of Article 8 of the European Convention on Human Rights. Prohibiting the disclosure of such information not only protects the privacy of some people, but also defends their confidence in the medical staff and health services in general.

Thus, the novelty consists in providing for the obligation not to disclose information obtained on a confidential basis, as a result of the profession, and which is capable of affecting a person’s private life. The previous regulation provided the same obligation, not to disclose information obtained by virtue of the profession if “such information is capable of harming a person”.

The new Penal Code expressly stipulates that the data or information provided must concern the private life of a person. Thereby, the legislator narrows the scope of the possible perpetrators of the offense of disclosure of the professional secrecy to persons who directly hear the information from the injured party through their confession, such as the lawyer or the priest or those who discover it by virtue of their profession, such as the doctor. The right to privacy is fundamental not only for the protection of a person’s private life, but also taking into account the confidence entrusted in institutions or their representatives, by affecting the reputation of a certain profession.

The disclosure of data of a different nature, such as office secrets, is subject to separate incriminations, in the chapter concerning office offenses.

## 5. Provisional protection order

The Romanian legislator has also provided, starting with the year 2018, an adequate procedure for the immediate protection of a person’s life, namely, the provisional protection order.

According to Article 22<sup>1</sup> point (1) of Law No. 217/2003<sup>28</sup>, introduced by means of Law No. 174/2018<sup>29</sup>, the provisional protection order

*is issued by members of the police, who, in the exercise of their duties, find that there is an imminent risk that the life, physical integrity or freedom of a person might be endangered by an act of domestic violence, in order to reduce such risk.*

By the provisional protection order, the police officer is entitled to impose protective measures for a period of 5 days to prevent perpetration of a crime, when they find out that there is an imminent risk thereof.

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<sup>28</sup> Law No. 217/2003 for the prevention and combating of domestic violence. Official Journal of Romania, Part I, No. 367 of 29 May 2003.

<sup>29</sup> Law No. 174/2018 regarding the modification and completion of Law No. 217/2003 for the prevention and combating of domestic violence. Official Journal, Part I, No. 618 of 18 July 2018.

Until 2018, the protection could intervene only as a result of difficult and, in the short term, inefficient civil procedures or as a result of a conviction, when the criminal court ordered a complementary punishment.

Until the regulation of the provisional protection order, Law No. 217/2003 for prevention and combating of domestic violence sustained the possibility of establishing a protection order<sup>30</sup> issued by the civil court for a maximum period of 6 months. Even if the request for issuing an order is considered with emergency, the procedure before the court is quite cumbersome, which causes the victim to withdraw their request, either out of fear of the perpetrator or because, apparently, the acts of violence against them have ceased.

Furthermore, when the nature of the offenses demands such an intervention, the criminal court may order a complementary sentence in addition to the main penalty, such as the prohibition of being in certain localities, the prohibition of being in certain places, the prohibition to approach the victim's home or work place or the prohibition to communicate with the victim or their family members. The execution of such complementary sentences starts from the moment when the conviction becomes final. Even if these measures can be taken regardless of the nature of the main punishment, we consider that they are not able to provide an early protection of the private life in the case of a person found in imminent danger of being attacked.

The provisional procedure regulated in 2018 is ordered and put into execution by the police forces and has an immediate applicability. The institution is complementary to criminal law and is essentially of a civil nature, but it is connected to acts having a criminal nature and is capable of protecting the victim.

## Conclusions

The incrimination of the actions that affect the private life is an absolute novelty for Romania. The intervention of the legislator was necessary, yet not sufficient. Concepts such as "private life", "private space" are dynamic concepts, and restrictive interpretations of these terms in a society in perpetual motion and technological development might lead to an impermissible limitation of the protection offered by law.

If the term of dwelling, used by the legislator in the incriminations analysed above would be interpreted rigidly, limiting it to the space where an individual spends his/her private life, the violation of private life would be almost non-existent, given that a person spends less and less time at home. Privacy cannot be restricted exclusively to a person's dwelling, but must be extended to any place, where a person expects not to be seen by others.

Although the legislator aspired to offer protection of this right also in the case where the action takes place in public spaces or in those spaces where a person

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<sup>30</sup> Article 23 of Law No. 217/2003.

carries out his/her professional activity, such an interpretation should be explicitly derived from the text of the law, so as not to allow any room for interpretations or to leave unsanctioned anti-social actions which are as dangerous as those perpetrated inside a dwelling.

By limiting the scope of the aforementioned offenses to definite spaces, to certain anti-social behaviours or to particular social contexts, we risk losing sight of what is actually desired by means of these regulations, namely, the criminal protection of a person's mental safety and reputation.

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## LIVING IN THE FUTURE: NEW ACTORS IN THE FIELD OF CRIMINAL LAW – ARTIFICIAL INTELLIGENCE

### Summary

Artificial Intelligence is omnipresent in all sectors of social life, affecting, influencing, determining or facilitating our lives and decisions. Recently, a robot was “killed” by a self-driving car. The incident reported is mentioned only for the purpose of emphasizing the need of legal regulation in this growing field. Several other incidents – autonomous vehicle crashes with human casualties – have also raised questions on the issue of criminal liability, precisely on the issue of recognizing a new actor in the field of criminal law: Artificial Intelligence.

Several initiatives at the European level and other scientific legal debates have joined in recognition of the need to acknowledge this new subject of law, or, at least to create legal tools in order to sanction Artificial Intelligence for harmful acts.

The current study aims to urge a debate on issues like electronic personality, legal and criminal liability of Artificial Intelligence, on present and future obstacles in creating an efficient legislative frame in a field in need to be properly regulated.

Old debates, such as the peril of over-criminalization or ratio of the criminalization are also reintroduced from an entirely new perspective.

The conclusions of the study point out to the necessity of outlining a set of principles and rules with specific application to Artificial Intelligence, of prompt recognition of a legal and criminal liability of Artificial Intelligence, of setting moral and legal boundaries for the human intervention and of changing the whole paradigm of legal liability by accepting this new actor: Artificial Intelligence.

**Keywords:** Artificial Intelligence, criminal liability, criminal policy, over-criminalization, legal liability.

### Introduction

On January 6, 2019, at 7:00 pm, a self-driving *Tesla Model S* hit and destroyed an autonomous *Promobot* robot model v4 in a car accident that took place in Las Vegas.<sup>1</sup> It is neither a piece of fake news nor a script of a SF movie. It is contemporary reality. Such incidents are far from being regulated in terms of legal liability, raising serious questions on the issue of adapting the legal system to the new technological realities. As Willick noted, “the legal system is more evolutionary than revolutionary”<sup>2</sup>,

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<sup>1</sup> See a brief video available here: <https://www.youtube.com/watch?v=0s4nxcleVd0> [last viewed October 10, 2019].

<sup>2</sup> Willick M. S. Artificial Intelligence: Some Legal Approaches and Implications. *AI Magazine*, Vol. 4, No. 2, 1983, p. 5.

consequently, its changes tend to be “in response to changing cultural and economic realities, rather than the result of advanced planning”<sup>3</sup>. In other words, we need to find ways and techniques in order to impose legal liability (in general) and criminal liability (in particular) to Artificial Intelligence (AI), starting from the actual legal theoretical schemes. Introducing new institutions could prove to be a risky task for legislators due to inherent opposition of the public.

However, in order to address the issue of imposing criminal liability to AI, one should ask the right questions, in order to find the right answers, and these questions are:

- 1) Which kind of AI systems should we impose criminal liability upon?
- 2) Why should we impose criminal liability upon AI systems?
- 3) How are we going to impose criminal liability upon AI systems?
- 4) When? Is it necessary to impose criminal liability to AI systems now?

<b>Whom?</b> <i>identity</i>	<b>Why?</b> <i>necessity</i>
<b>How?</b> <i>theoretical models</i>	<b>When?</b> <i>prematurity</i>

## 1. Whom to impose criminal liability upon?

By asking this question, we aim to clarify the following aspects: identification of type of AI the imposition of criminal liability is suitable to; establishment of legal categorization of AI; identification of the solution from the perspective of legal theory of law and logics.

By making an incursion into the field of legal subjects, we can easily observe that being human is not a necessary a precondition for imposing legal or criminal liability. The theory of law offers sufficient examples according to which the legal responsibility is imposed with regard to non-human entities – the legal person, the state. Being a form of legal liability in general, criminal liability should, in principle, follow the same general rules regarding the quality of legal subjects with the particularities arising from the specificity of this branch of law.

<sup>3</sup> Willick M. S. 1983, p. 5.

In the field of criminal law, it is possible to impose criminal liability on some non-human entities, too. Thus, in the international law doctrine, a criminal liability of the state is accepted<sup>4</sup>.

Also, the legal person may act as a perpetrator of a crime and may be imposed criminal liability upon, and a specific punishment can be applied as a consequence.

A historical reflection on the evolution of law and criminal law shows that the failure of a legislator to identify an individual or entity as a subject of law has not prevented a legislative reform when social needs become imperative and allow the amendment of the legislation for the purpose of introducing new regulations in this regard: slaves and legal entities are eloquent examples regarding the legal recognition of certain subjects of law, which the law has not conceived of until a certain moment.

Being human is not a necessary precondition of being accorded legal personality, an obvious example being the modern business corporation<sup>5</sup>.

Also, the issue of legal liability cannot be discussed in relation with all types of AI, but only in case of “machine learning” systems. These are designed as matrices composed by cells displayed on layers, and the more cells there are, the more complex the AI system is. A “machine-learning” system learns by recognizing patterns and creating new connections between data, and thus, creates new patterns. AI “machine-learning” type system copies the neuronal synapses of the human brain (humans recognize patterns, too). The biased output that occurs sometimes is due to a false connection the system creates during the “learning process” (acting similarly to occurrence of optical illusions) or brought about by the lack quality of data entered into the system.

### 1.1. What is an AI entity in legal terms?

It is very difficult to include AI in one of the following categories: object (*res*), service, abstract entity, legal fiction (*fictio juris*) or person (*persona*). The logical analysis imposes the necessity of identifying *ab initio* the category, in which AI is susceptible to be included: *res* or *persona*.

The term *persona* – person – is synonymous with that of an individual seen as a *rational human being and, as a consequence, capable of self-determination*. The person – as a legal concept – implies the presence of consciousness and free will. Does AI fulfil any of these requirements? The temptation to fit AI into the *res* category is obvious, since we are talking about a machine that is created, assembled and programmed by humans. Moreover, the famous robot Sofia, in order to move from one state to

<sup>4</sup> Pellet A. Can State Commit a Crime? Definitely, Yes! *European Journal of International Law*, Vol. 10, 1999, p. 432.

<sup>5</sup> Chopra S., White L. Artificial Agents – Personhood. *Law and Philosophy*, January 2004. Available at: [https://www.researchgate.net/profile/Laurence\\_White/publication/220837427\\_Artificial\\_Agents\\_-\\_Personhood\\_in\\_Law\\_and\\_Philosophy/links/555c804408ae8f66f3aeec63.pdf](https://www.researchgate.net/profile/Laurence_White/publication/220837427_Artificial_Agents_-_Personhood_in_Law_and_Philosophy/links/555c804408ae8f66f3aeec63.pdf) [last viewed October 1, 2019].

another at a long distance, by plane, cannot occupy a seat intended for people, it has to be disassembled and stored like ordinary luggage.

In the category of *res* we include the goods – useful things that can satisfy people's needs<sup>6</sup>. In the legal sense, we understand things as units that are susceptible to being individually or collectively appropriated. Real estate rights are exercised, and in particular the right to property. Goods or things cannot become holders of rights and obligations, they do not have the capacity to self-determine themselves. In some forms of AI (e.g. Sofia<sup>7</sup>), there is a certain self-determination, self-development capacity, and even human-specific features have been discovered – such as *curiosity*. Apparently, AI could be considered as belonging to *res* category, but sometimes the AI system makes choices and shows a certain degree of autonomy, consequently, such a categorization in the next 20–30 years will seem outdated.

*Services* represent the use of someone's own skills for the benefit of others, an action, a performance or a promise that is changed for a material value (benefit)<sup>8</sup>. In order to occur, the services need human actors/legal entities – providers and beneficiaries – among which are laid the foundations of a legal bond. The services do not have a material existence because their rendering becomes real when a result is expected by the beneficiary and for which he paid a price. AI cannot be classified as a service because it can self-serve various services – e.g. transport, computing, marketing, analysis, etc. Or a service cannot provide another service.

Can we admit that AI entities have the status of a legal person? What would be the logical and legal foundation for such an exercise of imagination? In order to achieve this goal, we need a legal personhood.

## 1.2. Theories that could explain the legal status of AI

### a) The Fiction Theory

The Fiction Theory<sup>9</sup> has been used to justify the enforcement of corporate and collective liability. The Father of Fiction Theory seems to be Pope Innocent IV (1243–1254) who named corporations by the term *persona ficta*<sup>10</sup>. This theory is embraced by numerous scholars – Von Savigny, Coke, Blackstone, Salmond, etc.<sup>11</sup>

<sup>6</sup> Hamangiu C., Rosetti-Bălănescu I., Băicoianu Al. *Tratat de Drept civil român* [Treaty of Romanian Civil Law], Vol. I. Editura All Restitutio, București, 1996, p. 20.

<sup>7</sup> Chung S. Meet Sophia: The robot who laughs, smiles and frowns just like us. CNN News, November 2, 2018. Available at: <https://edition.cnn.com/style/article/sophia-robot-artificial-intelligence-smart-creativity/index.html> [last viewed October 1, 2019].

<sup>8</sup> Lusch R. F., Vargo S. L. (eds.), *The Service-Dominant Logic of Marketing: Dialog, Debate, and Directions*. M. E. Sharpe, Armonk, NY, 2006.

<sup>9</sup> Stănilă L. Răspunderea penală a persoanei juridice [Criminal Liability of Legal Person]. Hamangiu, București, 2012, pp. 125–154.

<sup>10</sup> Dewey J. The Historic Background of Corporate Legal Personality. *Yale Law Journal*, XXXV (6) 1926, p. 655.

<sup>11</sup> Ghadas A., Ariff Z. Real or Artificial? Jurisprudential Theories on Corporate Personality. *US-China Law Review*, 4(5), 2007, p. 7.



According to this theory, the legal personality of a collective entity is the result of a fiction. Since the collective entity is not a living being, the legal person cannot in fact be a person nor can have an individual personality.

The Fiction Theory could be extrapolated to electronic entities because, like legal entities, they are “invisible, immortal and can be found only in the interpretation and consideration of the law”<sup>12</sup>. Some scholars are daring to assert that the human is the only natural person while legal persons are any another kind of entity to whom the law attributes personality<sup>13</sup>. States, corporations and institutions cannot have the rights of a person, but they are seen as individuals. Therefore, the attribution of the status of *persona* to an electronic AI entity remains strictly at the discretion of the legislator who may or may not recognize the status of a subject of law, including criminal law. The legal personality of such an entity is a fiction, and the author of this fiction is the state.

*b) The Concession Theory*

The Concession Theory<sup>14</sup> is not, in fact, an independent theory regarding the nature of legal personality, but rather a theory that attempts to explain its source<sup>15</sup>

The Concession Theory is based on the philosophical concept of *national sovereignty*. The State may grant or withdraw the legal personality to groups and associations, and even to other types of entities, based on the attributes of its sovereignty. For example, a legal entity is merely a creation or concession of the state, and the legal personality of the collective entity cannot exist until it is attributed by law. Therefore, an electronic entity, based on the sovereign power to legislate of the State, may be endowed by the State with legal personality, and thus becoming a person.

*c) The Purpose Theory*

The Purpose Theory – *Zweckvermogen* – proclaims the human as the only entity which may exercise rights and obligations.<sup>16</sup> The other entities are seen as artificial persons and only act as legal instruments for the protection or achieving of real purposes. The Purpose Theory has been used to justify the legal personality attributed to collective entities that are created to achieve a legal purpose. Therefore, if we try to extrapolate this theory to AI electronic entities, AI is created by humans to achieve a purpose – to facilitate the unfolding of human activities, to simplify or expedite procedures – while the object of such an entity is the mathematical algorithm.

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<sup>12</sup> Ghadas A., Ariff Z. 2007, p. 8.

<sup>13</sup> Ibid.

<sup>14</sup> Stănilă L. 2012, pp. 125–154.

<sup>15</sup> Dewey J. 1926, p. 666.

<sup>16</sup> Stănilă L. 2012, pp. 125–154.

#### d) *The Reality Theory*

The Reality Theory<sup>17</sup> has also been used to explain the legal personality of a collective entity. We believe that this theory may also be extrapolated to AI-type electronic entities. According to this theory, the reality of an entity has an extra- and pre-legal dimension. The ability to acquire rights and assume obligations belongs not only to human beings, but to any entity possessing its own will and life. For example, the legal entity is a real objective entity and the law only recognizes and assigns the effects of its existence. Similarly, the electronic entity exists beyond doubt, being a human creation, and having the ability to make decisions in its more advanced forms. According to the theory of reality, the law cannot create a legal entity but only to recognize or not recognize it as such.

### 1.3. The concept of legal personality – electronic personality

#### a) *Legal or juridical personality*

The legal personality of a collective entity is an extremely difficult-to-define concept that gives rise to a series of confusions with the meaning of other philosophical-socio-legal concepts, such as status, legal capacity, ethos and, more recently, culture.

The most frequently used definition of the legal person in international doctrine is the following: “an entity – subject of rights and obligations”<sup>18</sup>. According to one part of the doctrine, the essence of the legal personality consists in the obligations an entity has. If the law imposes legal obligations on an entity, it is logical to recognize that entity as a legal entity, because it addresses a command to a legal logical unit. The difficulty comes when someone tries to explain *why* the legislator is doing that. And the most logical answer would be: because that legal person has free will and its obligations necessarily refer to it<sup>19</sup>.

However, in order to determine whether an entity has a legal personality, the ability to have both rights and obligations must be retained. We need to determine whether the law treats the entity as a separate legal unit. Thus, in the case of a corporation or a minor, the answer is affirmative, while in case of a cat, the answer is obviously negative<sup>20</sup>.

Another definition of legal personality has been provided by French case law which, in a particular case, stated: “Legal personality is not a creation of the law, it belongs in principle to any group having the possibility of legal expression for the defense of legitimate interests, worthy of legal protection”<sup>21</sup>.

<sup>17</sup> Stănilă L. 2012, pp. 125–154.

<sup>18</sup> Radin M. The endless problem of corporate personality. *Columbia Law Review*, Vol. 32, 1932, p. 643.

<sup>19</sup> Machen apud. Allgrove, 2004, p. 45.

<sup>20</sup> Allgrove B. 2004, p. 47.

<sup>21</sup> Streteanu F., Chiriță R. Răspunderea penală a persoanei juridice [Criminal Liability of Legal Person]. 2<sup>nd</sup> ed., C. H. Beck, București, 2007, p. 102.

A point of view was stated in the Romanian doctrine regarding the personality of the legal person, according to which “the personality of the legal person is expressed by the aim pursued, the means used in achieving this purpose, means, tacit attitudes, policies, rules and practices within the legal person and which create the overall climate of activity”<sup>22</sup>. It is the law that confers legal personality to a collective entity, while the elements indicated by the scholars refer to the decision-making apparatus and its way of managing the activity.

*b) Electronic Person – Electronic Personality*

The term “electronic person” was first coined in a 1967 article for LIFE magazine<sup>23</sup> and was more recently introduced in the Draft Report with Recommendations to the Commission on Civil Law Rules on Robotics of the European Parliament’s Committee on Legal Affairs. While the expression does not aim to equate artificial intelligence to humanity, it fulfils its task of drawing attention to the question of whether artificially intelligent agents should possess a legal status<sup>24</sup>.

As for artificially intelligent agents, the same rationale may apply: they would be morally entitled to a separate legal status provided they possess the capacities to act autonomously and to have subjective experiences. “A robot’s autonomy can be defined as the ability to take decisions and implement them in the outside world, independently of external control or influence”<sup>25</sup>.

If society begins perceiving artificially intelligent agents as autonomous actors and counterparties to transactions, as it now perceives corporations as legal entities distinct from their members, “it puts pressure on the law to give legal effect to this social perception”<sup>26</sup>. Thus, my proposal is in favour of admitting an electronic personality.

The scholars have already analysed the pros and cons of AI personhood, as follows<sup>27</sup>:

a) Pros:

- It would allow to pool resources and centralize risks; permits artificial agents to be held liable for harm without the need to identify a responsible

<sup>22</sup> Timofte G., Rus C. Răspunderea penală a persoanei juridice [Criminal Liability of Legal Person]. R.D.P. No. 1, București, 2005, p. 125.

<sup>23</sup> Rosen C., Nilsson N., Bertram R. Shakey. LIFE, 1967. Available at: <http://cyberneticzoo.com/cyberneticanimals/1967-shakey-charles-rosen-nils-nilsson-bertram-raphael-et-al-american> [last viewed October 1, 2019].

<sup>24</sup> Maia Alexandre F. The Legal Status of Artificially Intelligent Robots: Personhood, Taxation and Control. June 1, 2017. Dissertation developed under the supervision of Prof. Erik Vermeulen and submitted to Tilburg University to qualify for the Degree of Master of Laws (LL.M.) in International Business Law, defended on the 12<sup>th</sup> of June, 2017, pp. 17–18. Available at: <https://ssrn.com/abstract=2985466> or <http://dx.doi.org/10.2139/ssrn.2985466> [last viewed May 29, 2018].

<sup>25</sup> Maia Alexandre F. 2017, p. 18.

<sup>26</sup> Allgrove, 2004, p. 48.

<sup>27</sup> Zevenbergen B., Kortz M., Schaich Borg J., Finlayson M. A., Pagallo U., Zapašek T. Appropriateness and Feasibility of Legal Personhood for AI Systems, in Bringsjord S., Tokhi M. O., Aldinas Ferreira M. L., Govindarajulu N. S. (eds.), Hybrid Worlds: Societal and Ethical Challenges, ICRES 2018 Proceedings, New York, USA CLAWAR Association Ltd, UK, 20–21 August 2018, pp. 62–63.

individual, thus avoiding lengthy expensive and arduous process of identifying specific individuals.

- If, in the future, a general AI system is developed that is indistinguishable from a person, by what argument do we deny that system the same rights as enjoyed by a human?

b) Cons:

- The European Parliament suggests creating a collective insurance fund to cover damages arising from AI systems. As the technological trajectory of the AI is uncertain and unpredictable, it would be unwise to construct a financial compensation resources today to meet as yet unknown future needs.
- It would allow producers and owners of AI systems to shift liability to the artefact itself. This will disincentivize investment in adequate testing before deployment. AI personhood could thus result in an unsafe environment.
- It will be difficult to bring proceedings against AIs or hold them to account. An AI system has not yet the capacity to argue its case in court, appoint a lawyer to defend it or engage to reach a settlement with a plaintiff.
- Since AI does not have the capacity to suffer, nor is endowed with empathy, it is unclear how it would understand the suffering of others.

In conclusion, AI electronic/legal personhood is a *sine qua non* condition, which may be justified from the following perspectives:

- Technological – the boundaries of an AI system must be delimited since it could integrate and depend on external elements in order to function properly; in order to acquire legal personhood, these boundaries should be established.
- Economic – since AI is used as a tool in all areas of social life and activities, it provides benefits for the society but could also led to financial losses. It would be much easier to admit legal personhood for AI in order to facilitate the entity responsible.
- Legal – we must think of new legal institution in case the present ones are not adaptable to the specifics of AI entities.
- Moral – since AI system does not have the ability to suffer, the question of morality is useless at this stage of development, in my point of view.

## 2. Why should we impose criminal liability upon AI?

The simpler the question, the more complex the answer. We must wonder what would be the reasons for such an important intervention in the field of law. Why should we create and introduce new legal institutions – electronic personhood,

legal/criminal liability of AI systems, new specific legal sanctions applicable in case of AI agents? In other words what is *ratio criminis* and *ratio sanctionis* in this case?

The answer is quite simple: because the society needs it! But legislators always modify present laws or adopt new ones if there are specific reasons do so. In the criminal law field, introducing the institution of criminal liability of AI systems is determined by the need to protect specific social values – the most important values for the society – from harmful acts and consequences, and since the criminal liability is the most serious form of legal liability, the intervention of the State in this regard needs to be properly and carefully considered.

Does society need a new subject of law? Does society need criminal liability of AI systems? The recent events have shown the great harmful potential of AI systems, the social values harmed or periled by AI being the ones protected by criminal tools by every national legislator: the value of life, health, body integrity, private life, etc. We observe that the condition for the intervention of the legislator in the legal system are met: social values are those protected by criminal law and the social peril of AI acts is present. Bearing in mind all these, we must proceed to the next question: finding the proper legal tools.

### 3. How should we impose criminal liability upon AI? Theoretical models, schemes and tools

By drawing a parallel with the legal liability model of corporations<sup>28</sup>, we must notice that both of the models evolved in the doctrine regarding the criminal liability of legal persons are suitable to AI systems, but with proper alterations: the anthropomorphic model and the constructivist model.

- a) According to the anthropomorphic model, blameworthiness is measured by using the standards traditionally applied to individual culpability<sup>29</sup>, but the identification theory and the collective intent theory – specific to this model do not apply to AI systems in case these systems achieve a level of autonomy or self-determination (very probable in the future). Maybe an imitative anthropomorphic model is to be considered in case of AI by identifying the necessary elements of liability present in case of humans *mens rea*, *actus reus*. This could be very difficult because the human conscience could not yet be replicated by AI.
- b) The constructivist model determines culpability based on the characteristics of the collective entity, on its policies, and its practices.<sup>30</sup> According to the constructivist model, the legal person has a life of his own, a will of his own,

<sup>28</sup> Lederman E. Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity. *Buffalo Criminal Law Review*, Vol. 4, No. 1, April 2000, pp. 641–708.

<sup>29</sup> De Maglie C. Models of Corporate Criminal Liability in Comparative Law. *Washington University Global Studies Law Review*, Vol. 4, Issue 3, 2005, p. 556.

<sup>30</sup> De Maglie C. 2005, p. 556.

from which results also the unrestricted possibility in attributing specific mental states to the crimes. Constructivism allows labelling of an entity by assigning certain characteristics in accordance with the purpose pursued by the legislator. These characteristics become legally relevant. The constructivist model allows the identification of an AI system as a distinct actor in the social relations and an imposition of criminal liability even in the absence of a human conscience, its place being taken over by other elements to which this role or relevance is assigned.

- c) The strict liability solution. Both previous models apply in case of a subjective criminal liability which is based on the culpability element and could be adapted to AI systems but need important amendments. AI systems do not have conscience (yet), cannot judge the consequences of their actions in moral terms (yet?) and sometimes do not commit acts in traditional sense of the term. The culpability element (*mens rea*) is difficult to identify, since these entities have no conscience. Relevant for their sanctioning are the consequences caused by their behaviour. Thus, in the case of AI systems, the strict liability theory is probably the best choice. Strict liability implies an individual or company sanctioned for their deeds, conducts and outcomes that result in damages to others, not as a consequence of a foreplanned action or careless deed. Strict liability implies a retributive blame, which distinguishes wrongdoing (essentially, the ultimate harm) from culpability (essentially, the actor's mental state)<sup>31</sup>. And even if the imposition of severe criminal sanctions in the absence of any requisite mental element has been held by many to be incompatible with the basic requirements of law and "civilized jurisprudence"<sup>32</sup>, in the case of AI agents, we can hazard to anticipate that the opposition of the doctrine will be from weak to absent. It would be almost natural to accept a strict liability in case of an agent lacking in conscience, based solely on the harmful results of its acts.

#### 4. Is it necessary to impose criminal liability upon AI?

The most important question tackles the issue of prematurity in the discussion about criminal liability of AI systems. The answer must be analysed in the context of actual stage of development of AI. Since AI systems are not 100 % autonomous, do not have conscience and self-determination, they apparently cannot be granted rights and imposed obligations, because it would be a nonsense. In the actual stage of development, AI reactions and involvement in social relations entirely depend of human conduct. And in this case, it is better to focus on blameworthiness of humans who designed, operated or manipulated the algorithms. Nevertheless, the research

<sup>31</sup> Simons K. W. When is Strict Criminal Liability Just. *Journal of Criminal Law and Criminology*, Vol. 87, Issue 4, 1997, p. 1095.

<sup>32</sup> Wasserstrom R. A. Strict Liability in the Criminal Law. *Stanford Law Review*, Vol. 12, No. 4, 1960, p. 731.

in the area of machine-learning points to a rapid achievement<sup>33</sup> of an “artificial” conscience.

Until AI research reaches the point of proving the existence of an artificial conscience, my proposal is in favour of a “step-by-step” approach and gradual recognition of AI systems in the field of law: initially in civil/commercial law area, and only as the final step, in criminal law area.

This would be a precautionary approach, since the criminal law system would need important legislative interventions in the sense of creating new institutions. Taking, for instance, criminal sanctions, none of the previously existing ones could be applied to AI systems. The system would need new solutions, proper and effective: unplugging, erasing of the codes, reformatting, etc. There are numerous details to be addressed.

### **Conclusions: can we or should we impose criminal liability on AI?**

The conclusions of the present study are, likewise, presented in the form of a question: can we or should we impose criminal liability on AI? The answer to this final question is – certainly, yes, we can. As demonstrated in the first part of the study, the State through its legislator may grant legal personhood to AI systems and, with extensive effort, it may even create a specific model to impose criminal liability upon AI. Nevertheless, the answer to the second part of this final question is, in my opinion, no, we should not do it at present. The arguments for it focus mainly on elements of technical development of AI, as they present themselves at the time of this discussion. AI systems are not autonomous self-conscious entities yet, and AI reactions depend on several factors, which are predetermined and selected by humans in the design or operating process. Other arguments focus on the legislative element, or, rather, lack of it, since legislators need to conceive a new and efficient legal frame. Old traditional schemes and institutions are not suitable for the specificity of AI systems.

Proactivity is the most important element in the whole discussion. We need to be prepared for the moment when AI systems will resemble humans in the terms of conscience, but rushing things and accepting a new AI subject in the field of law could have disastrous consequences for the law systems. Elements like embodiment or nature of AI system, the degree of autonomy, the function of AI system, the environment, the nature of interaction between AI and humans<sup>34</sup> should be carefully analysed. At this very moment, no one could assess the mid-term or

<sup>33</sup> McLain C. Can Artificial Intelligence Be Conscious? March 27, 2018. Available at: <https://medium.com/hummingbird-ventures/can-artificial-intelligence-be-conscious-e316c2ac4769> [last viewed October 10, 2019].

<sup>34</sup> Van den Hoven van Genderen R. Do We Need New Legal Personhood in the Age of Robots and AI? In: Corrales M., Fenwick M., Forgó N. (eds.), *Robotics, AI and the Future of Law. Perspectives in Law, Business and Innovation*. Springer, Singapore, 2018, p. 20.

long-term effects of these developments on the legal system and more research is still to be done.

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# SECTION 6

LEGISPRUDENCE:  
OPPORTUNITIES PROVIDED  
BY THE THEORY OF LAW  
FOR IMPROVING THE  
QUALITY OF LEGISLATION

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## **LEGAL SCIENCE AND REGULATORY REFORM IN SERBIA: ONE STEP FORWARD, TWO STEPS BACK**

### **Summary**

Governments are faced with a challenge of constant and continuous updating and reforming of regulatory framework in their countries to keep up with the rapidly changing world. Ideally, this process should be underpinned by an evidence-based policy-making approach. Over the past years, Serbia has taken a number of steps in an effort to consolidate the legislative process and ensure a systemic approach founded on evidence-based policy-making, entailing a more prominent role of legal science (and other social sciences) in the policy-making and legislative process. The current paper examines the hypothesis that the Serbian regulatory framework provides strategic incentives for a prominent role of legal science in regulatory reform in Serbia. There is not a univocal definition of “legal science”, hence, it is often disputable, whether a particular discipline meets the requirements to fit into the legal science realm. The authors try to address this ambiguity and to coin a tailored definition of legal science, which will serve to determine against which background the hypothesis is examined. The authors apply the broad concept of legal science, which is distinguished from other non-scientific activities in a mode mainly proposed by defenders of the argumentativist model. The authors go on to explore whether the determination of legal science as modelled by the international standards and national regulatory framework of Serbia fits into the definition of the legal science proposed in this paper. A particular emphasis is to be placed on the potential and already achieved opportunity for legal scholars to make social and economic impact through enhancing the quality of national regulatory framework. Further, the authors critically assess the new regulatory framework governing science and research in Serbia from this standpoint, pointing out to the lack of a systemic approach and the “cherry picking” in regulatory solutions. The authors conclude that indicators for assessing the real impact made by activities of legal scholars are not sufficient. Consequently, they offer three different sets of activities that should be clearly included in the notion of legal science and consequently valorised as contributions of legal scholars to the social and economic development.

**Keywords:** legal science, regulatory reform, expected impact, Republic of Serbia

### **1. Offering a concept of legal science**

There is no univocal definition of “legal science” despite a recurrent discussion on the issue that has lasted several centuries.<sup>1</sup> Particularly, it is often disputable

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<sup>1</sup> Santiago Nino C. *Algunos Modelos Metodológicos de 'Ciencia' Jurídica*. México City: Fontamara – UNAM, 1999, pp. 9–11.

whether a particular discipline meets the requirements to fit into the legal science realm.<sup>2</sup> For the purpose of this paper, we will try to address this ambiguity and to coin a tailored definition of legal science, which will serve to determine against which background we are going to assess whether and to which extent the Serbian regulatory framework provides strategic incentives for a prominent role of legal science in regulatory reform. Herein, the term “regulatory reform” will include the following processes: law-making, policy-making and judicial decision-making.<sup>3</sup>

Given the objective of our analysis, we will rely on the broader definition of legal science. While it is well-established in literature that legal science *stricto sensu* includes activities directed toward identification of content of law, the legal science *ampio sensu* has a much broader meaning. For most authors, legal science *ampio sensu* additionally covers the set of disciplines which have in some sense the law as an object of study. They include, *inter alia*, science of law, legal theory, jurisprudence, legal dogmatics, the sociology of law, legal anthropology, comparative law, history of law, and science of legislation.<sup>4</sup> Some authors use the label “legal sciences” in a plural form to refer to all those disciplines that deal with law.<sup>5</sup> For the purpose of this paper, we opt for the term of legal science in a broader sense.

The recourse to the broader definition is attributable to the fact that all those disciplines should be taken into account when assessing to which extent they play a prominent role in regulatory reform, requiring, *inter alia*, interpretation of jurisprudence of supranational and foreign courts by authorities, intense reliance on comparative law, as well as examination of history of legal drafting. In doing so, it is important to keep in mind the different views of legal scholars regarding the question of whether certain activities originally performed by legal operators,<sup>6</sup> such as judicial decision-making and legislative drafting, fall under the legal science realm.

This issue became particularly debatable when the requirement on interconnectivity between the academic and non-academic sectors entered international law. Regardless of the current positive trend in international fora, some authors still distinguish the aforementioned set of activities, which traditionally belongs to legal operators, from the core activities of positive law scholars, arguably trying to raise the wall between them.<sup>7</sup> According to some of them, the key demarcation criterion should be whether legal system attributes the value of formal source of law to certain

<sup>2</sup> Núñez Vaquero A. Five Models of Legal Science. *Revus*, No. 19, 2013, p. 57.

<sup>3</sup> According to the OECD, the regulatory policy is about achieving government’s objectives through the use of regulations, laws, and other instruments to deliver better economic and social outcomes and thus enhance the life of citizens and business. See Regulatory Policy Overlook 2018. Available at: <https://www.oecd.org/gov/regulatory-policy/oecd-regulatory-policy-outlook-2018-9789264303072-en.htm> [last viewed October 15, 2019].

<sup>4</sup> See, for instance, Jori M. *Il Metodo Giuridico*. Milano: Milano, 1976, p. 4; *Ciencia Jurídica A*. In: *El derecho y la Justicia*, Ernesto Garzón Valdés and Francisco Laporta (eds.), Madrid: Trotta, 1996, p. 18.

<sup>5</sup> Ferrajoli L. *Principia Iuris*. Roma: Laterza, 2007, pp. 8, 21, 39.

<sup>6</sup> The term “legal operators” is used as an umbrella term for legislators, judges, barristers, and lawyers.

<sup>7</sup> See more on the dangers of making sharp delineations between different legal disciplines in Dajović G. *Proučavanje prava – pravna nauka, teorija i filozofija*. *Pravni zapisi* [Study of the Law: Legal Science, Legal Theory and Philosophy of Law. Review], No. 2, 2017, pp. 222–248.

text of legal scholars,<sup>8</sup> while others point to a different methodology they apply; the third group of authors propose the different scope of the sets of activities as a demarcation criterion.<sup>9</sup> The second and third approaches do not seem problematic, as long as they refrain from attempting to separate activities of positive legal scholars from their expected impact on society and economy.<sup>10</sup>

The demarcation criterion referring to the value of formal source of law seems inadequate, as it excludes from the realm of legal science any work to which the legal system recognized the value of a formal source of law. This approach actually separates the legal science from its expected and desirable impact on legal and wider social reform, although the latter is at this stage of scientific development envisaged as one of its key objectives. It remains unclear why the representatives of this approach claim that scholarly driven research once accepted and declared by state authorities as an official state document loses its legal science background and importance. That approach seems obsolete, as it comes from the ancient Roman law, whose classification envisages that once a legal system recognizes legal value to the text of legal scholars, it is no longer a science of law but a source of law.<sup>11</sup>

The approach given by the natural law thinkers, however, seems better grounded. Within the natural law framework, Serbian scholars made significant contributions through developing their own line of thinking based on philosophy of justice as a rational conception of natural law centred around the Hexagon of Natural Rights.<sup>12</sup> In doing so, they followed the view taken by other natural law supporters on pluralism of sources of law, according to which a legal doctrine constitutes a source of law as well as being a part of legal science.<sup>13</sup>

The relevance of legal science contributions to regulatory reform is reaffirmed by numerous authors, such as defenders of argumentativist model, who claim that legal scholars should not be limited to describing the content of positive law, but

<sup>8</sup> Tamayo Salmerón R. *El derecho y la ciencia del derecho*. Mexico, UNAM, 1986.

<sup>9</sup> See in this context: Peczenik A. *Scientia Juris*, Dordrecht: Springer, 2005, p. 2 and Aarnio A. *The Rational as Reasonable*. Dordrecht: Kluwer, 1987, p. 15.

<sup>10</sup> As mentioned before, the second group of authors argue that two set of the aforementioned activities use basically the same methods. However, they stress that positive law scholars in performing a set of “core” scholar research activities are additionally required to meet more qualified requirements amounting to recourse to an empirical demonstration or a practical argumentation. This explanation seems adequate, as it does not undermine the achievement or expected impact of legal science. For the other group of authors, their key distinguishing features derive from the different scope of activities performed by positive law scholars and legal operators. While positive law scholars usually deal with describing standards and generic cases, the work originally performed by legal operators is mostly focused on the particular behaviours. This explanation is not fully justifiable, as it overlooks that, in some cases, the legal science approach shall also take into account the particular behaviours in order to offer best solutions.

<sup>11</sup> See Núñez Vaquero A. 2013, p. 60.

<sup>12</sup> Perovic S. *Neprolaznost Heksagona prirodnog prava*. In: *Besede sa Kopaonika* [Timeless Hexagon of Natural Law. In: *Speeches from Kopaonik*], 2001, p. 299. Available at: <https://kopaonikschool.org/wp-content/uploads/2019/05/BESEDE-2001.pdf> [last viewed December 10, 2019].

<sup>13</sup> See Hall Arnold B. *Review of the Book: The Nature and the Sources of Law* (by John Chipman Grey, New York, Columbia University Press, 1909). *The American Political Science Review*, Vol. 5, No. 4, 1911, p. 646.

must also propose solutions for hard cases to which the law clearly does not provide a single right answer.<sup>14</sup> The defenders of argumentativist model rightly observe that legal scholars should not propose solutions for problematic cases based on their own preferences. Instead, the activity of legal scholars should be governed by the set of values and principles and based on legal reasoning as to justify each of their proposed solutions for hard cases.<sup>15</sup> Similarly, the theory of jurisprudence argues that, to develop an effective law to resolve a social problem, they require a theory to underpin the law.<sup>16</sup> In the context of determining what legal scholars should do in order to make a proper social and economic impact, we will have a recourse to the given views. In particular, we will take into account the recent approach proposed by Barker who insists on social impact to be made by legal scholars. According to her, valuation of legal academic's excellence should also consider whether or not they are cited in case law, as well as their contributions to fostering knowledge and understanding of law among non-lawyers.<sup>17</sup> This model is chosen, as it seems to explain the role of legal scholars in impacting the society and economy in most realistic terms.<sup>18</sup>

In the following subsections, it will be firstly explored whether the determination of legal science as modelled by the international standards and national regulatory framework of Serbia fits into the definition of the legal science tailored within this paper. A particular emphasis will be placed on the potential and already achieved results of legal scholars in making social and economic impact through enhancing the quality of national regulatory framework. However, the research will be limited to the contributions brought by legal researchers employed in scientific research organizations (SROs), while excluding the contributions yielded by legal operators

<sup>14</sup> The argumentativist model is one of five established models of legal science as determined by the cited author. According to his classification, the other models of legal science *ampio sensu* are: the normativist model, the realistic model, the technological model and the critical model. See Núñez Vaquero A. 2013, p. 61.

<sup>15</sup> See, for instance, Alexy R. The Special Case Thesis. *Ratio Juris*, Vol. 12, No. 4, 1999, pp. 374–384.

<sup>16</sup> See Wintgens J. *The Theory and Practice of Legislation: Essays in Jurisprudence*. Aldershot: Ashgate, 2005. The principle premises of jurisprudence are supported and further elaborated in, for example: Seidman R. B. *Between Policy and Implementation: Legislative Drafting for Development*. In: *Drafting Legislation. A Modern Approach*, Constantin Stefanou and Helen Xanthaki (eds.), Ashgate e-Book: London, 2008, pp. 287–320; This approach is defended in Serbian legal science, *inter alia*, by Vasić, who clearly states that legal science sets the requests for those who write the laws, whereas the role of legal drafters is to provide these requests with the proper form and thus ensure they can be implemented. See: Vasić R. *Pravna država i vladavina zakona: Šta pravna teorija poručuje nomotehnicima*. In: *Nomotehnika i pravničko rasuđivanje [Legal State and Rule of Law: What Are the Messages Sent by the Legal Science to the Nomotechnicians*. In: *Nomotechnics and Legal Reasoning*], Vasić R., Stanković M. (eds.), UNDP i Pravni fakultet Univerziteta u Beogradu, 2018, pp. 17–67. Available at: [https://www.rs.undp.org/content/dam/serbia/Publications%20and%20reports/Serbian/DobraUprava/undp\\_rs\\_Nomotehnika\\_Maj2018.pdf](https://www.rs.undp.org/content/dam/serbia/Publications%20and%20reports/Serbian/DobraUprava/undp_rs_Nomotehnika_Maj2018.pdf).

<sup>17</sup> Barker S. *Exploring the Development of a Standard System of Citation Metrics for Legal Academics*. *Canadian Law Library Review*, Vol. 43, No. 2, 2018, pp. 11–20.

<sup>18</sup> This approach seems to also be supported by Dajovic, who argues that disciplinary division of study of law into legal science, legal theory and empirical legal research is more a question of quantity and methodology than of substance. See: Dajovic G. *Proučavanje prava – pravna nauka, teorija i filozofija [Study of the Law: Legal Science, Legal Theory and Philosophy of Law]*. *Pravni zapisi [Review]*, No. 2, 2017, p. 239.

not coming from SROs. It should be noted that in Serbia there is no separate regulatory regime governing legal science, and therefore the paper will outline the regime governing science in general. In the concluding part, the recommendations for improving regulatory frameworks on legal science will be provided along with clarifications for improvement of definition of legal science.

## 2. Concept of legal science in Serbia through the lens of international standards

The interconnectivity between the scientific and non-scientific sectors is a goal recognized by numerous organizations, including the United Nations,<sup>19</sup> Council of Europe,<sup>20</sup> and European Union (EU).<sup>21</sup> However, they are mostly silent on the particular relationships of legal science with regulatory reforms. To better understand the incentives envisaged by international standards for a prominent role of science, and therefore also legal science, in regulatory reform in Serbia, particular attention will be paid to the EU approach toward the aforementioned interconnectivity, given the Serbian status of candidate country.

One of positive features of the EU Research and Innovation Programme is reflected in the requirement to make impact at three different levels: scientific,

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<sup>19</sup> See Transforming Our World: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015 [without reference to a Main Committee (A/70/L.1)]. UNESCO documents in this regard are also relevant.

<sup>20</sup> In this context, Article 1 of the Statute of the Council of Europe is relevant, as it states: “This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.” See the Statute of the Council of Europe, Council of Europe London, S.V.1949, European Treaty Series, No. 1. Available at: <https://rm.coe.int/1680306052> [last viewed October 12, 2019].

<sup>21</sup> A decade ago, the fifteen Member States of the EU set a strategic goal for the EU “to become the most dynamic and competitive, knowledge-based economy in the world, capable of sustaining economic growth, employment and social cohesion” (conclusions of the European Council of March 2000), see Lisbon Strategy, in Investing in European Research, Towards 3 % of GDP. Available at: [http://ec.europa.eu/invest-in-research/action/history\\_en.htm](http://ec.europa.eu/invest-in-research/action/history_en.htm) [last viewed October 12, 2019], and Article 114 paragraphs 3 and 5 of the Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47–390, OJ C 326, 26.10.2012, pp. 47–390 (GA). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT> [last viewed October 12, 2019].

Within the EU operates the European Commission’s Scientific Advice Mechanism. Starting from 1980s, the Europe’s Framework Programmes as a key element of research policy in Europe became operational. See Deighton B. O’Donnell P. Europe’s Framework Programmes – a key element of research policy in Europe. Available at: <https://horizon-magazine.eu/article/europe-s-framework-programmes-key-element-research-policy-europe.html> [last viewed October 20, 2019].

societal and economic.<sup>22</sup> This approach, although not fully conceptualized within the EU, fits into the role of legal science put forward by the paper.

Apart from that requirement, the European Commission in its Recommendation of 2005 encourages both geographical and inter-sectoral mobility in the career appraisal and career advancement systems for researchers.<sup>23</sup> According to this recommendation, the inter-sectoral mobility is a change from one discipline or sector to another, whether as part of the initial research training or at a later stage of the research career. We find the inter-sectoral mobility is of key importance for strengthening societal and economic impact of legal science.

However, although expressly encouraged by EU soft *acquis*, the concept of intersectoral mobility remained out of the scope of the scrutiny, which was conducted over the Serbian compliance with the requirements from the Chapter 25 – Science and Research. Namely, the EU provisionally closed Chapter 25 in the case of Serbia without requiring the benchmarks for its provisional closure. It stressed the general good level of Serbia's state of preparedness in the area of science and research and pointed to the limited scope and particular nature of *acquis* obligations in this chapter. In doing so, the EU failed to take into consideration the Serbian lack of alignment with the EU inter-sectoral mobility standards.

EU annual reports on Serbia for 2018 and 2019 are slightly more progressive, as they underline that Serbia still has to stimulate more intense cooperation between industry and academia, in line with the respective national research strategy.<sup>24</sup> However, the inter-sectoral mobility is a broader notion than the intensified cooperation between industry and academia and as such it should include the cooperation with various other sectors of society beyond the industry. This particularly applies to the legal science, whose economic and societal impacts significantly transcends the industry. Furthermore, the notion of cooperation should be interpreted broadly to include the researcher's transfer from one sector to another

<sup>22</sup> See Commission Proposal for the Next EU Research & Innovation Programme (2021–2027), Hartung H. Inclusive Society, Impact of SSH for a European Research Agenda 28/11/2018, Vienna. Available at: [https://www.ssh-impact.eu/wp-content/uploads/2018/12/Contributions-of-SSH-to-the-topic-Inclusive-and-Secure-Society-focus-Inclusive-Society\\_Harald\\_Hartung.pdf](https://www.ssh-impact.eu/wp-content/uploads/2018/12/Contributions-of-SSH-to-the-topic-Inclusive-and-Secure-Society-focus-Inclusive-Society_Harald_Hartung.pdf) [last viewed October 20, 2019].

<sup>23</sup> Recitals 11 and 12 of the Commission Recommendation of 11 March 2005 on the European Charter for Researchers and on a Code of Conduct for the Recruitment of Researchers. Official Journal, L 75, 22.3.2005, pp. 67–77. It guarantees that such an experience is conducive to their professional development.

<sup>24</sup> Commission Staff Working Document, Serbia 2018 Report, Accompanying the document, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2018 Communication on EU Enlargement Policy {COM(2018) 450 final} Strasbourg, 17.4.2018 SWD(2018) 152 final, p. 76. Available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-serbia-report.pdf> [last viewed October 12, 2019]; Commission Staff Working Document, Serbia 2019 Report, Accompanying the document, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2019. Communication on EU Enlargement Policy {COM(2019) 260 final}, Brussels, 29.5.2019 SWD(2019) 219 final, p. 82. Available at: <http://europa.rs/wp-content/uploads/2019/05/Commission-Staff-working-document-Serbia-annual-report-2019.pdf> [last viewed October 12, 2019].



in order to be in line with the concept of inter-sectoral mobility, which currently is not the case. Apparently, the EU took the lenient and unsystematic approach when scrutinizing the alignment of Serbian scientific policies with the *acquis*. That may have detrimental effects on the development of Serbian scientific policies, as well as on its expected economic and social impact.

### 3. Concept of science in the context of Serbian national standards

Serbian regulatory framework on science has recently undergone significant changes. They were initiated by the adoption of the new national research strategy for the period of 2016–2020<sup>25</sup> and followed by the recent adoption of Law on the Science Fund of the Republic of Serbia<sup>26</sup> and the Law on Science and Research.<sup>27</sup> While some changes are considered as “a right step in the right direction”<sup>28</sup>, others could rather be assessed as drawbacks, which are in sharp contrast with the desired model of providing strategic incentives for a prominent role of legal science in impacting the society and economy. The result raises mixed feelings, as the mission to remodel the science and research policy is completed, but the absence of a systemic approach is notable. In order to assess the success of the undertaken scientific reform, it is important to examine its different aspects.

#### 3.1. Improved national strategic goals are partly reflected in the new legislation

Some initial improvements were envisaged even by the previous national research strategy of 2010, which holds that social sciences do constitute a necessary support of all reform processes in the society.<sup>29</sup> This strategy affirmed the role of social sciences in public policy development through systematic cooperation between SROs and public policy makers as one of research priorities in the field of

<sup>25</sup> It is named Research for Innovation Strategy (2016-2020). Official Gazette of the RS, No. 25 of 9 March 2016. Available at: [www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/vlada/strategija/2016/25/1/reg](http://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/vlada/strategija/2016/25/1/reg) [last viewed October 15, 2019].

<sup>26</sup> Law on the Science Fund of the Republic of Serbia. Official Gazette of the RS, No. 95/2018. Available at: <https://www.paragraf.rs/propisi/zakon-o-fondu-za-nauku-republike-srbije.html> [last viewed October 15, 2019].

<sup>27</sup> The previous key legal act titled the Law on Scientific Research Activities became overshadowed by the two recently adopted law and most of its provisions are set apart. See Law on Science and Research. Official Gazette of the RS, No. 49/2019. Available at: <http://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/skupstina/zakon/2019/49/1/reg> [last viewed October 16, 2019].

<sup>28</sup> Tatalovic M. Serbia passes controversial science reforms to modernize research. Available at: <https://www.chemistryworld.com/new.s/serbia-passes-controversial-science-reforms-to-modernise-research-/3010733.article?adredir=1> [last viewed October 16, 2019].

<sup>29</sup> Strategy of Scientific and Technological Development of the Republic of Serbia. Official Gazette of the RS, No. 13/2010. Available at: [http://demo.paragraf.rs/demo/combined/Old/t/t2010\\_03/t03\\_0227.htm](http://demo.paragraf.rs/demo/combined/Old/t/t2010_03/t03_0227.htm) [last viewed October 10, 2019].

social sciences. In addition, it pointed to the key role of social sciences in supporting the EU integration process and development of negotiation platforms.<sup>30</sup> Similar wording is reiterated in the current research strategy (2016–2020).<sup>31</sup> Both strategies are advanced as they refer to the direct link between the scientific research and the economic and social development. Although both are aimed toward improving mobility of researchers, the new strategy is more advanced than the previous one, as it refers explicitly to inter-sectoral mobility in addition to geographical one.<sup>32</sup>

All the elaborated strategic goals were mostly successfully implemented in in the general provisions of the recently adopted laws which regulate the goals of scientific research activities.<sup>33</sup> Both laws refer to the needed cooperation between the science and the economy, although they not fully implement the mobility requirement.<sup>34</sup> The introduced statutory obligation of the SROs to strengthen the process of evidence-based public policy and law making is also a positive example.<sup>35</sup>

### 3.2. Introducing mixed funding system of science

In contrast to the previous system of exclusive project funding of SROs, the new laws provide for a mixed funding system, combining project funding through the Science Fund and other avenues with institutional funding.<sup>36</sup> It is early to assess the results of the new system, as it will not become operational before 2020. The key positive development of the new funding system is that the same goals related to the mobility and the social and economic impact of the scientific activities have to be achieved regardless of whether the project or institutional funding is applied. Hence, although the institutional funding requires programmes adopted for a seven-year

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<sup>30</sup> Strategy of Scientific and Technological Development of the Republic of Serbia. Official Gazette of the RS, No. 13/2010. Available at: [http://demo.paragraf.rs/demo/combined/Old/t/t2010\\_03/t03\\_0227.htm](http://demo.paragraf.rs/demo/combined/Old/t/t2010_03/t03_0227.htm) [last viewed October 10, 2019].

<sup>31</sup> However, the new Strategy, opposite to the previous one fails to mention the role of science in the EU integration process.

<sup>32</sup> The new strategy expressly recognizes that the inter-sectoral mobility does not exists in the Republic of Serbia and comes up with certain proposals for its introduction. See Research for Innovation Strategy (2016–2020), p. 11.

<sup>33</sup> See Articles 3 and 20 of the Law on the Science Fund of the Republic of Serbia and Articles 3 and 8 of the Law on Science and Research.

<sup>34</sup> While the provisions on mobility are not explicitly introduced in the Law on the Science Fund of the Republic of Serbia, the Law on Science and Research refers to general notion of mobility but in an insufficiently clear manner.

<sup>35</sup> Article 9 paragraph 1 point 7 of the Law on Science and Research.

<sup>36</sup> See Articles 106 and 107 of the Law on Science and Research.

period, the SROs are bound to update and modify their programmes as to make sure that formulated strategic goals are met in each particular case.<sup>37</sup>

Finally, one of main shortcomings of the previous and current legal system is the lack of mechanisms for the SROs to apply for donor projects on regulatory reforms. Although the new laws on science provides for that possibility in principle, other pieces of national legislation are not sound in that regard. Moreover, most of international organizations which are in favour of making links between science and regulatory reforms do not have calls in the area of regulatory reform which would allow SROs to apply for them.

### 3.3. Misconception about certain science-related notions

In line with the offered concept of legal science, the Law on Science and Research rightly recognizes the interconnectivity between scientific and other non-scientific sectors, insisting, among others, on the systemic cooperation among different institutions. In a similar vein, the current research strategy and the Law on Science and Research require the excellence of scientific research and its relevance for the economic and social development.<sup>38</sup>

However, the envisaged cooperation among institutions is wrongly understood and implemented by national lawmakers. For instance, its implementation by the Law on Ministries may undermine the achievement of the values of relevance and excellence of scientific research. That law stipulates that line ministries within their purview give preliminary consent for the allocation of funds from the state budget to SROs which are established in the areas falling under their purview for the realization of programmes of public interest.<sup>39</sup> It seems that this provision hinders the development of science which should rather impact the society without letting the national authorities have full control over the research ideas and activities of SROs.

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<sup>37</sup> See Article 9 of the Law on Science and Research. Furthermore, the new funding system envisages that the research spending in the coming years will be significantly increased. Although the increased budgeted allocations will apparently foster the scientific work with a potential to strengthen its impact, some doubts still remain. Most representatives of the scientific community remain sceptical given that envisaged reforms implying increased budget allocations will do nothing for scientists who do not currently have a job. See Tatalovic M. Serbia passes controversial science reforms to modernize research.

<sup>38</sup> On the other hand, the Law on the Science Fund of the Republic of Serbia requires only excellence of the project idea, probably unintentionally omitting the needed relevance. See Article 23 of the Science Fund of the Republic of Serbia.

<sup>39</sup> In addition, it states that line ministries participate in supervising national scientific research organizations over their spending of the dedicated funds. See Article 22 of the Law on Ministries. Official Gazette of the RS, No. 44/2014, 14/2015, 54/2015, 96/2015 and 62/2017. Available at: [https://www.paragraf.rs/propisi/zakon\\_o\\_ministarstvima.html](https://www.paragraf.rs/propisi/zakon_o_ministarstvima.html) [last viewed October 12, 2019].

The national framework did not properly implement EU standards on the expected societal and economic impact of the research projects.<sup>40</sup> Although the Law on Science and Research introduces the achieved impact as one of criteria for the evaluation of the work of SROs, this legislation fails to properly define it. It wrongly states that impact amounts to “visibility and recognition of the institution in the society”, which may further create confusion on behalf of SRO as to formulating the successful research ideas, while cynics could see it as an invitation for self-marketing.<sup>41</sup>

The current legal framework also missed to fully take into the account the EU standards on inter-sectoral mobility envisaged by the aforementioned recommendation.<sup>42</sup> Although the given recommendation encourages national authorities to recognize inter-sectoral mobility as a valuable contribution to the professional development of researchers, Serbian law is very restrictive on that issue. The Law on Science and Research could have been a good opportunity to address inter-sectoral mobility in the national legislation, but that opportunity was missed. The new law does not provide sufficiently extensive grounds to enable provisional mobility for the researchers from one sector to another.<sup>43</sup> It only leaves room for the inter-sectoral mobility by expressly allowing unpaid leave for researchers from SROs in case of taking up of public office, while younger researchers whose experience qualifies them for taking only lower positions in the public sector are not allowed a provisional change from one sector to another.

### **3.4. Legal scholars, scientific reform and regulatory development in Serbia: a cross-section of the current state of affairs**

In the context of achieving desired impact, the following sets of activities of legal scholars are of key importance: activities toward improving policy development, activities toward improving legal drafting process, and activities toward improving judicial decision-making. Serbian regulatory framework failed to provide equal incentives for those sets of activities. Instead, it has unreasonably favoured some of them at the expense of others. This clearly shows that the scientific reform in Serbia was not conducted in a systematic manner.

Firstly, while the current framework does not provide any incentive for scholars who participate in working groups for legal drafting, the opposite is true

<sup>40</sup> According to the Commission, the societal impact of research should be visible in developing, supporting and implementing EU policies and addressing global challenges, while the economic impact mostly relates to strengthening market deployment of innovative solutions.

<sup>41</sup> See Article 110 of the Law on Science and Research.

<sup>42</sup> Commission Recommendation of 11 March 2005 on the European Charter for Researchers and on a Code of Conduct for the Recruitment of Researchers, Official Journal, L 75, 22.3.2005, pp. 67–77.

<sup>43</sup> See Articles 100 and 101 of the Law.

for scholars who engage in creation of public policy documents.<sup>44</sup> The reason behind the introduction of different regimes remained unclear. The introduction of specific incentives for scholars who take part in working groups drafting legislation would be of utmost importance for the quality of legal drafts, especially when it comes to the demanding legislative tasks Serbia must fulfil in the EU accession process. The existing incentives for legal scholars to participate in public policy document preparation seem weak and therefore should be strengthened. The model for performance assessment of researchers is still driven by the “publish or perish” paradigm; even though development of policy documents and regulatory impact assessments qualify as scientific contributions, their valuation is disproportionate compared to writing of scientific papers, and is not a relevant factor for advancement of academic career. Furthermore, for the time being these incentives are applicable only in case when certain public policy documents are adopted. That regime obliterates the efforts invested by diligent legal scholars, which at times have not been accepted merely due to politically driven reasons.<sup>45</sup> The government also lacks a systemic or proactive approach towards including legal academics in regulatory reform. Publicly available data shows very low participation of legal scholars in working groups for legal drafting and policy making, which undermines the quality of those processes.<sup>46</sup> The practice of having on average only one or no scholars in a working group disables fruitful discussion on different conceptions among respective members.

Furthermore, the practice of participation of legal scholars in various associations gathering legal operators and scholars is neither sufficiently developed nor supported through specific incentives for scholars. For instance, although the National Network on European Judicial Protection of Human Rights was founded to facilitate the interpretation and application of the European Convention on Human Rights through fostering dialogue between holders of judicial offices

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<sup>44</sup> The given public policy documents include strategies, analysis of public policies and impact analyses. See Applicable national rulebook governing the performance assessments of researchers from SROs including faculties.

<sup>45</sup> The criteria for performance assessment of researchers are elaborated in the Rulebook on Procedure, Method of Assessment and Quantitative Expression of Researchers' Scientific Results. Official Gazette of the RS, No. 24/2016, 21/2017, 38/2017. Available at: <http://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/ministarstva/pravilnik/2016/24/1/reg> [last viewed October 14, 2019].

<sup>46</sup> For instance, the working group tasked with developing the Draft Law on State Aid has no lawyers from academia. (Decision on Establishment of Working Group for Drafting the Law on State Aid. Official Gazette of the RS, No. 102/2018). The working group for developing the text of the National Judicial Development Strategy has two members from the academia among its 30 members (Ministry of Justice Ruling No. 119-01-23/2019-06 of January 22, 2019); Working Group for Developing the Draft Law on Amendments to the Law on Judicial Academy has no legal scholars among its 11 members (Ministry of Justice Ruling No. 119-01-00238/2018-06 of January 22, 2019). The working group tasked with drafting the amendments to the Law on Judges, Law on Organisation of Courts and Law on High Judicial Council has one lawyer from the academia among its 11 members (Ministry of Justice Ruling No. 119-01-00235/2018-06 of January 22, 2019).

and legal scholars, it was not sustainable enough to accomplish that goal.<sup>47</sup> The lack of adequate funding along with the lack of other incentives for legal scholars to participate in that platform in practice is reflected by scarce participation.<sup>48</sup>

Finally, there are discrepancies between the incentives provided for legal scholars who work as professors at the Faculty of Law and legal scholars working at other SROs. They discourage those affiliated to other SROs to contribute to judicial decision-making. In contrast to law professors who are in parallel allowed to sit as Constitutional Court judges, the other legal scholars are not even entitled for unpaid leave if they become Constitutional Court judges. This unequal treatment of different categories of legal scholars proves unsystematic approach taken by Serbian law makers to the science reform.

## Conclusions

The view advocated by natural law thinkers, according to which legal doctrine shall be perceived as a source of law instead of a mere wellspring of inspiration, was not implemented either in Serbia or in most of the contemporary national legal systems.<sup>49</sup> This apparently undermines the position of the legal science within the national legal systems and requires additional actions to be taken at international, supranational or at least national *fora*. Those actions should be directed towards improved valorisation of contributions of legal scholars in the field of regulatory reform. In the context of Serbia, even though Serbian national supporters of natural law developed the Hexagon over thirty years ago, during the communism era, having gathered numerous legal scholars, their calls for a clear and systemically proactive role of legal science in spearheading regulatory reforms so far have not been fully locally recognized in practice.<sup>50</sup> As shown above, the reach of legal science in providing substantive contributions to regulatory reform is still limited in Serbia.

<sup>47</sup> Available at: <https://www.pars.rs/images/projekti/JAP/komponenta-1/Strategic-plan-for-the-National-network-on-European-judicial-protection-of-human-rights-in-Serbia-Strateki-plan-za-Nacionalnu-mreu-o-evropskoj-sudskoj-zatiti-ljudskih-prava-u-RS.pdf> [last viewed October 11, 2019].

<sup>48</sup> When it comes to associations which foster the legal science contribution to regulatory reform, the German association "Deutscher Juristentag e.V." may serve as the best practice example in that regard. It brings together lawyers from all parts of the country to investigate on a scientific basis needs for changes of the legal system, and present proposals for the legal development. The Deutscher Juristentag e.V. is a registered association with around 5 000 members. Available at: [www.djt.de](http://www.djt.de) [last viewed October 11, 2019].

<sup>49</sup> See, *inter alia*, Buchanan K. The Role of the "Doctrine" as a Source of Law in France, December 20, 2010. Available at: <https://blogs.loc.gov/law/2010/12/the-role-of-the-doctrine-as-a-source-of-law-in-france/> [last viewed December 17, 2019]; Papaux A. Wyler E. Legal Theory as a Source of International Law: Doctrine as Constitutive of International Law. In: The Oxford Handbook of the Sources of International Law, Besson S., d' Aspremont J. (eds.), Oxford: Oxford University Press, 2018, pp. 513–541.

<sup>50</sup> Perovic S. Neprolaznost Heksagona prirodnog prava. In: Besede sa Kopaonika [Timeless Hexagon of Natural Law. In: Speeches from Kopaonik], 2001, p. 320.

Furthermore, it can be stated that neither international nor Serbian regulatory framework provides sufficient incentives for strengthening the societal and economic impact of legal science. There are certain soft law standards at international and supranational levels governing legal science, while the key problem is a lack of hard law instruments in the field. Although the EU scrutiny during the negotiation process should include control over the fulfilment of its soft law standards, that was not the case for Serbia. Apparently, the applied lenient scrutiny by the European Commission was to an extent enabling towards the national unsystematic approach with regard to legal science reform in Serbia.

Apparently, international and national standards are not fully in line with the broad concept of legal science and its expected contribution to regulatory reform proposed in this paper. Namely, the authors departed from the view taken by the defenders of the argumentativist model stating that primary role of legal scholars is to offer practical solutions for legal disagreements and the theory of legisprudence underlining that, in order to properly resolve a social problem, a regulatory act must be underpinned by legal science. Furthermore, Barker pointed to the importance of social impact which has to be achieved by legal scholars. However, it seems that their views do not provide sufficient indicators for assessing the real impact made by activities of legal scholars. They narrowly understood social impact by limiting it to the insufficiently determined contribution to judicial decision-making, fostering knowledge and understanding among non-lawyers.<sup>51</sup> On the contrary, we find that their main impact-related contribution should be primarily linked to strengthening capacities of legal community in three different areas: law-making process, policy-making process, as well as judicial decision-making at national, supranational and international levels.

Therefore, it is of particular importance that the notion of expected impact that legal science should make is thoroughly elaborated on the theoretical level. After its conceptualization, the given notion should be more systematically followed in practice. Upon embarking on that road, we offer three different sets of activities that should be clearly included in the notion of legal science and consequently valorised as contributions of legal scholars to the social and economic development. These are activities toward improving policy development; activities toward improving legal drafting process, and activities toward improving judicial decision-making process. Their results should be visible in the strengthened participation of legal scientists in working groups and associations for regulatory reforms, developed platforms for improving national and supranational jurisprudence, and through improved mobility of legal operators and legal scholars among sectors. Unless adequate incentives for legal scholars to make the expected impact become available in Serbia and worldwide, it seems that parallel development of society and legal science will be constantly undermined.

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<sup>51</sup> See, *inter alia*, Barker S. 2018, pp. 15–16.

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## DERIVING AND CONCRETIZATION OF THE PRINCIPLE OF GOOD LEGISLATION

### Summary

This article deals with the issue of the emergence of “new” general principles of law, the methods of their derivation and concretization. The author defends the position that general principles of law are derived from the Basic Norm – the democratic rule-of-law-based state – proclaimed by the Sovereign (the people). Yet, the pivotal role in the finding of the contents of the general principles of law belongs to the courts and especially the constitutional courts. General principle of law – principle of good legislation – derived and formulated as generally binding legal norm with its specific content and limits for the first time within the European legal space by the Constitutional Court of the Republic of Latvia is taken as an example for the hypothesis that concretization of a general principle of law is strongly connected with the legal reason of those who apply the law in a given legal arrangement.

**Keywords:** general principles of law, method of finding the content of the general principle of law, the principle of good legislation, case law of the Constitutional Court of the Republic of Latvia

### Introduction

Legal arrangement of Latvia belongs to the Continental European legal system. It is based on Western legal culture with a prevailing meaning of law founded in natural law doctrine and noticeably strong doctrine on general principles of law derived from the Basic norm – democratic state based on the Rule of Law – which is proclaimed by the Sovereign – the people of Latvia. According to the doctrine of the general principles of law, elaborated by the legal science and implemented by the courts and especially by the Constitutional Court of the Republic of Latvia (hereinafter – the Court), general principles of law are recognized as an unwritten, directly applicable legal norms in the hierarchy of legal norms prevailing over all written legal norms, thus determining the content of all written legal norms of the given legal arrangement, as well as setting the limits for the legislators discretion.

The aim of the current article is to prove that the courts and especially – constitutional courts are the main actors in the for a of finding the developing legal contents of the general principles of law on the basis of the example in the case law of the Court. The author analyses the sources of deriving of general principles of law, and as the possible methods of concretization of the contents of these principles on the basis of the case law for the Court, namely, the deriving and concretisation of the principle of good legislation. The Court’s case law is unique

in this regard within the European legal space<sup>1</sup> as it is for the first time when this principle is formulated as a general principle of law – a generally binding legal norm prevailing over all of the written legal norms – with concrete content and limits of its scope. Comparative, systemic, inductive and deductive scientific methods are used in elaboration of this article.

## 1. Deriving of the general principles of law

In democratic state based on the Rule of Law the true source of legal norms is a sovereign – the people. Consequently, the sovereign is the source of a basic norm, and its content represents the sovereign's will. Sovereign's will, in other words, defines the content of the basic norm, it speaks to the type of country in which the sovereign wishes to live. The basic norm is an unwritten norm – the act of the sovereign's will, which subsequently transforms into normative legal acts adopted by the state institutions, which all comply with the will of the sovereign – the basic norm. When the sovereign's will is formulated in a basic norm, the legal arrangement of the relevant country is governed by principles which emanate from that norm. In the case of a democratic country based on the Rule of Law, these become general principles of law. General principles of law define the content and structural elements of the relevant country – the norms which must exist in the legal arrangement so as to settle all disputes that may emerge. General principles of law are unwritten, real and directly applicable legal norms consisting of legal content and legal consequences and having a generally binding effect.<sup>2</sup> These principles can be divided into three groups in terms of what they address: they include all human rights norms; those which define the structure of the legal arrangement and the legal system – for example, sources of law, the hierarchy of legal norms, the principle of the separation of power; and they also include all legal methods – interpretation methods, collision norms, methods of argumentation, etc.<sup>3</sup>

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<sup>1</sup> European Union, its Member States, as well other democratic rule-of-law-based states under different common forums of course have paid close attention to the necessity to improve the quality of the legislative process under better law-making, good regulation programs (see, for example: Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, L123/1; Rule of law checklist of European Commission for Democracy through Law (Venice Commission) of 11–12 March 2016. Available at: <https://www.venice.coe.int> [last viewed December 9, 2019]; OECD Recommendation of the Council on Regulatory Policy and Governance of 22 March 2012. Available at: <https://www.oecd.org/gov/regulatory-policy/49990817.pdf> [last viewed December 8, 2019]; OECD Guiding Principles for Regulatory Quality and Performance of 2005. Available at: <https://www.oecd.org/fr/reformereg/34976533.pdf> [last viewed December 9, 2019]), but the principle of good legislation was not yet formulated as one of the general principles of law.

<sup>2</sup> Compare: Rezevska D. Constitutional Court as a Protector of the Basic Norm and General Principles of Law. In: A Quarter of a Century of Constitutionalism. International Conference Materials Bucharest, 24–25 May 2017. Bucharest: Hamangiu Publishing House, 2018, pp. 220–221.

<sup>3</sup> Rezevska D. Vispārējo tiesību principu nozīme un piemērošana [The Meaning and Application of General Principles of Law]. Rīga: D. Rezevska izd., 2015, pp. 31–32.

The Court in its case law follows exactly this theory of deriving of the general principles of law. However, it has developed its approach comparing with the early days of operation. Firstly, the Court derived general principles of law from the text of the Article 1 of the Constitution, which states: “Latvia is an independent democratic Republic.”<sup>4</sup> Then, the Court continued to develop its approach and indicated that general principles of law are derived not from the text of the Article 1 of the Constitution, but rather from the notion of the democratic republic included in the Article 1.<sup>5</sup> The next step of the development of the approach was taken, when the Court reasoned that general principles of law emerge from the fundamental values established in the Article 1 of the Constitution.<sup>6</sup> Finally, in 2016, the Court evolved its approach, referring to the true source of the general principles of law – the Basic Norm proclaimed by the Sovereign, thus, the Court stated: “The principle of the protection of legitimate expectations **derived from the Basic Norm – democratic state based on the Rule of Law** [emphasis by the author], and embodied in the scope of Article 1 of the Constitution protects only those rights which are based on legal, justified and reasonable expectations, which are the core of this general principle of law.”<sup>7</sup>

## 2. Methods of concretization of general principles of law

General principles of law as a generally binding source of law enter into force with the announcement of the Basic Norm – democratic state based of the Rule of Law – by the Sovereign, even if the Sovereign was not aware at that moment of all the general principles of law which derive from the Basic Norm. Although in a course time, following the development of the legal arrangement, more and more general principles of law “surface”, and their contents become increasingly elaborate through concretization on a case by case basis primarily by the courts, but also by the legal science. For example, conflicts or collisions of general principles of law require further concretization of these principles. There are several reasons why these collisions are more noticeable in recent times. First of all, there is an increasing number of rights, both in terms of quantity and in terms of application by judges as they become richer and more sophisticated, deriving “sub-rights” that were not explicitly envisaged by the legislators. Secondly, increasing recognition of the horizontal effect of human rights – public authorities now have three responsibilities: 1) refrain from violating

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<sup>4</sup> See for example: Judgement of the Constitutional Court of the Republic of Latvia in case No. 04–01(99) on April 20, 1999, para. 1.2.1. Available at: [www.satv.tiesa.gov.lv](http://www.satv.tiesa.gov.lv) [last viewed December 10, 2019].

<sup>5</sup> Judgement of the Constitutional Court of the Republic of Latvia in case No. 04–07(99) on March 24, 2000, para. 3. Available at: [www.satv.tiesa.gov.lv](http://www.satv.tiesa.gov.lv) [last viewed December 10, 2019].

<sup>6</sup> Judgement of the Constitutional Court of the Republic of Latvia in case No. 2009–44–01 on March 15, 2010, para. 15. Available at: [www.satv.tiesa.gov.lv](http://www.satv.tiesa.gov.lv) [last viewed December 10, 2019].

<sup>7</sup> Decision of the Constitutional Court of the Republic of Latvia in case No. 2016–03–01 on October 21, 2016, para. 13. Available at: [www.satv.tiesa.gov.lv](http://www.satv.tiesa.gov.lv) [last viewed December 10, 2019].

human rights; 2) enforce human rights; 3) protect human rights against violations by third parties, including individuals.<sup>8</sup>

To establish the contents of the general principles of law, the method of concretization is used instead of the method of interpretation. Interpretation as a legal method belongs to a textual science, which means that the subject of the interpretation is a text – the text of a written legal norm, and the true content of a written legal norm can be detected using the four interpretation sub-methods: literal, systemic, historical and teleological. It also means that the limits of the interpretation method are set by the widest possible and the narrowest possible meanings of the words used to draft the text of a legal norm. General principles of law are unwritten legal norms, so their content cannot be found by interpretation, but by concretization, which is the legal method of finding the contents of the unwritten legal norms.<sup>9</sup> If the sub-methods of interpretation are mostly widely agreed upon within the Western legal culture generally narrowing down to the four above mentioned,<sup>10</sup> then sub-methods of concretization, as well as the sources used are not as explicitly and extensively described and analysed. The reason why the process of derivation and concretization of the general principles of law in legal science is still described in a very niggardly way, could be because it is essentially a process of further development of law based on common sense rather than a hermeneutic process, which is based upon a generally accepted methodology.

However, in legal literature one can find several steps of the doctrinal method leading to the discovery of general principles of law from the texts produced by the legislator – texts of written legal norms. The first step is to analyse the general legal provisions adopted by the legislator which are relevant to a particular area of legal regulation in order to discover their common and homogeneous elements. Step two: excess, peculiarities, inconsistencies and legislative errors are eliminated. Step three: based on common and homogeneous conceptual elements, an abstract assumption or norm is filtered out. Step four: a higher degree of generality is sought in an attempt to discover the genus (class) to which homogeneous and common concepts belong. Step five: The basic principles thus obtained are the starting point for deduction. Several concepts are being developed. Logic performs a creative function. It creates new concepts that relate to new facts or unexpected elements of the case that have no similar. Step six: concepts derived from deduction are applied in two ways: 1) to clarify words or terms used by the legislator which were ambiguous or vague; this is achieved by elaborating concepts which are logical in accordance with the general principles of law of the legal arrangement; and 2) to provide a logically normative basis for a judgment which could not be based on any written legal provision.<sup>11</sup> This process of the discovery of a general principle of law is

<sup>8</sup> Brems E. *Conflicts Between Fundamental Rights*. Antwerp, Oxford, Portland: Intersentia. 2008, p. 2

<sup>9</sup> Rezevska D. *Vispārējo tiesību principu nozīme un piemērošana* [The Meaning and Application of General Principles of Law]. Riga: D. Rezevskas izd., 2015, pp. 99–100.

<sup>10</sup> See, for example: Peczenik A. *On Law and Reason*. Dordrecht, Boston, London: Kluwer Academic Publishers, 1989, pp. 379–391.

<sup>11</sup> Cueto-Rua J. C. *Judicial Methods of Interpretation of the Law*. Louisiana: The Publications Institute Paul. M. Hebert Law Center, 1981, pp. 124–125.

different from the deriving of the general principles of law of the Basic Norm, which is a deductive process, as here an attempt is made to find the content inductively. This course would be more acceptable for the judge with the prevailing meaning of law based in legal positivism; however, if the result of the discovery is later verified according to the Basic Norm and is compatible with it – it could give some guidelines as to the contents of a general principle of law, as well.

The main methodological guideline that a judge should keep in mind when concretising the general principle of law is that those principles have to be oriented toward a reasonable and just solution. Reasonable and just solution is the one which corresponds to the Basic Norm. Moreover, in the determination of the contents of the relevant principle the method of comparison and typification (“belonging to the same type”) is used when the case to be solved is compared with other similar cases, which have already been solved in the court practice based on certain principles. Thus, the relatively undetermined contents of the principles are constantly refined and concretised in the court practice with regard to definite cases or groups of cases, and resulting in an established system of sample judgments, which can cover any similar life situations in the future.

As it is analysed in legal doctrine, international courts and tribunals use two means to ascertain the content of the general principles of law: 1) using previous decisions; 2) in their absence, or if they choose not to rely on those decisions, with the help of comparative law, by appealing to legal doctrine, as well.<sup>12</sup> Comparative law method suggests to use the so-called “representative legal system” approach by applying principles of law which are common to the major legal systems of the world and are suitable for transposition into the international legal system. This process of transposition is inductive by its nature, where a principle found underlies rules in many national legal systems, while discounting the national differences of detail or procedure and isolating the basic uniform principle, which is common to all.<sup>13</sup>

Another method “finding the right – just and reasonable – answer for a case” is mentioned, as well – when judges turn to their intuition to determine general principles of law, and usually do not disclose the methods, by which they are discovered and concretised, and even rarely refer to comparative law research – normative acts, customary law or case law (judicial and administrative).<sup>14</sup>

The author of this article defends the view that judges refer to their legal reason to find the contents of the general principles of law. This is the reason why the personality of a judge, the previous life and professional experiences, legal consciousness, leading meaning of law possessed by a judge are some of the factors

<sup>12</sup> Fabian O. Raimondo. *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*. Leiden: Martinus Nijhoff Publishers, 2008, p. 45; Redgwell Catherine. *General Principles of International Law*. In: Vogenauer S., Weatherill S. (eds.), *General Principles of Law. European and Comparative Perspectives*. Oxford and Portland: Hart Publishing, 2017, pp. 15–18.

<sup>13</sup> Redgwell C. *General Principles of International Law*. In: Vogenauer Stefan, Weatherill Stephen, (eds.), *General Principles of Law. European and Comparative Perspectives*. Oxford and Portland: Hart Publishing, 2017, p. 16.

<sup>14</sup> Fabian O. Raimondo. *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*. Leiden: Martinus Nijhoff Publishers, 2008, p. 47.

which complement and fill the notion of legal reason. The previous development of legal arrangement, the sources of law – legally binding as normative legal acts or customary law – as well as supplementary – case law, doctrine, *travaux préparatoires* etc., are the starting points for the further development of the contents of general principles of law.<sup>15</sup>

### 3. The principle of good legislation as derived and concretized by the Court

One of the recently acknowledged general principles of law, which has found its refined concretization through the case law of the Constitutional Court of the Republic of Latvia is a principle of good legislation.

The development was gradual. First, on 12 April 2018, for the first time during its existence, the Court recognized the two laws contested in the case as not adopted in due process.<sup>16</sup> Both of these laws were declared incompatible with the Constitution. In this judgment, the Court has offered a view to the legislative process, which corresponds to the Basic Norm – democratic state based on the Rule of Law – but did not formulate the notion of the general principle of good legislation yet. The Court has based the assessment of such legislative process on the necessity to ensure justice. In its judgment, the Court highlights that “the main purpose of the law is to ensure justice.” The Court also accentuates that “the legislative process [not only] must comply with the formal requirements laid down in regulatory enactments, but also has to promote the people’s trust in the state and law.” The Court emphasizes that the legislative process nowadays does not exist for the convenience of the legislator, but serves as an effective mechanism whereby public trust in adopted laws and the legislator itself can be promoted. The Court has pointed out that “the legislator must ensure a legislative process that promotes trust in the state and law, namely, the conviction that the chosen solution is fair”. And the Court starts to outline the contents of the principle of good legislation: 1) the legislator has to provide proper analysis, as well as justification for the constitutionality of a possible regulation, *inter alia* in the context of the established case law of the Court in this matter; 2) in order to adopt a just legal norm, the legislator has to make such an assessment by itself, and not after but before any restriction on fundamental rights is imposed.<sup>17</sup>

The next step in concretization of the principle of good legislation was taken by the Court in the case, where the decision was delivered on 6 March 2019.<sup>18</sup>

<sup>15</sup> Rezevska D. *Vispārējo tiesību principu nozīme un piemērošana* [The Meaning and Application of General Principles of Law]. Rīga: D. Rezevskas izd., 2015, p. 100.

<sup>16</sup> Judgement of the Constitutional Court of the Republic of Latvia in case No. 2017–17–01 on April 125, 2018, paras 21.3., 22.2., 22.3. Available at: [www.satv.tiesa.gov.lv](http://www.satv.tiesa.gov.lv) [last viewed December 10, 2019].

<sup>17</sup> *Ibid.*, para. 21.3. Available at: [www.satv.tiesa.gov.lv](http://www.satv.tiesa.gov.lv) [last viewed December 10, 2019].

<sup>18</sup> Judgement of the Constitutional Court of the Republic of Latvia in case No. 2018–11–01 on March 6, 2019, Available at: [www.satv.tiesa.gov.lv](http://www.satv.tiesa.gov.lv) [last viewed December 10, 2019].



The Court for the first time formulates in the text of the judgment the principle of good legislation and displays that it has derived it from the Basic Norm and the principle of the Rule of Law.<sup>19</sup>

The Court concretizes the content of the principle of good legislation using different types of sources of law (generally binding (independent) sources, but mostly – supplementary) such as: 1) case law – of the Court itself, of the European Court of Justice, of the European Court of Human Rights, including dissenting opinion of the judges of this court; 2) legal doctrine – national and international doctrinal law works (commentaries of the Constitution of the Republic of Latvia, monographies, collected articles), recommendations of national and international bodies for improvement of legislative process (Constitutional Law Commission of the President of the Republic of Latvia, Venice Commission); 3) *travaux préparatoires* and 4) normative legal acts – national and European Union legal acts.<sup>20</sup>

It very precisely states the elements of the content of the principle of good legislation, namely, in order that the legislative process could be recognized as being in compliance with the principle of good legislation:

- 1) the legislator must assess the compliance of the envisaged legal norms with the legal norms of a higher legal force (including the legal norms of European Union and taking into account the principle of sincere cooperation it has to assess the compliance of the intended provisions also with that European Union law, which has entered into force but has not yet become applicable) and their compatibility with the legal system according to the principle of a rational legislator, as well as assess the compliance of the intended regulation to the established case law of the Court in the matter;
- 2) the intended legal framework should, where appropriate, be based on explanatory studies;
- 3) according to the principle of sustainable development the legislator in adopting legal norms, especially in cases where fundamental rights are restricted, has to base its decision on the social impact assessment study of the planned legal framework and consider the measures necessary for the implementation and enforcement of this legal framework;
- 4) the legislator has to assess the risks expressed by the specialists in the field and take timely actions to eliminate the possible risks;
- 5) the legislator must inform the public in a timely manner and appropriately about the intended legal framework, and as far as possible, directly or indirectly, involve public in the legislative process and have consultations with stakeholders;
- 6) it has to be made possible for the members of legislator to participate in an open debate;

<sup>19</sup> Ibid., para. 18.1. Available at: [www.satv.tiesa.gov.lv](http://www.satv.tiesa.gov.lv) [last viewed December 10, 2019].

<sup>20</sup> Judgement of the Constitutional Court of the Republic of Latvia in case No. 2018–11–01 on March 6, 2019, para. 18. Available at: [www.satv.tiesa.gov.lv](http://www.satv.tiesa.gov.lv) [last viewed December 10, 2019].

- 7) the objections about the draft expressed by the State President using the suspensive veto rights have to be considered in a manner which corresponds to the principle of interinstitutional loyalty and principle of *bona fide*.<sup>21</sup>

Furthermore, the Court stated that these requirements are the main, but not the only elements of the principle of good legislation derived from the principle of the Rule of Law. Among other things, they are of utmost importance, as they make it possible to understand why the restriction of fundamental rights set by the legislator in a democratic state based on the Rule of Law is permissible. These requirements must be respected in determining any restriction on fundamental rights.<sup>22</sup> As a result, the Court declared the contested legal norms as not adopted in due process and not according to the principle of good legislation, and thereby incompatible with the Constitution.

## Conclusions

1. The Constitutional Court of the Republic of Latvia has derived a principle of good legislation from the Basic Norm – democratic rule-of-law-based state – as one of the general principles of law, and it has found its refined concretization through the case law of the Court.
2. Judges refer to their legal reason to find the true contents of the general principles of law. This is why the personality of a judge, the previous life and professional experiences, legal consciousness, leading meaning of law possessed by a judge are some of the factors which complement and fill the notion of legal reason.
3. The sources used to concretize the contents of general principles of law are both generally binding legal norms, as well as supplementary sources, but the latter are the key sources with the most influential character in this respect.

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<sup>21</sup> Judgement of the Constitutional Court of the Republic of Latvia in case No. 2018–11–01 on March 6, 2019, paras 18.1., 18.2, 18.3., 18.4. Available at: [www.satv.tiesa.gov.lv](http://www.satv.tiesa.gov.lv) [last viewed December 10, 2019].

<sup>22</sup> *Ibid.*, para. 18.1. Available at: [www.satv.tiesa.gov.lv](http://www.satv.tiesa.gov.lv) [last viewed December 10, 2019].

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# SECTION 7

## TRENDS IN THE DEVELOPMENT OF PRIVATE LAW, CHALLENGES AND FURTHER IMPROVEMENTS

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# CORPORATE SOCIAL RESPONSIBILITY AND THE QUEST FOR INCORPORATING STAKEHOLDERS' INTERESTS IN DIRECTORS' DUTIES

## Summary

CSR is an old debate in Company Law, and so are directors' duties in this regard. Last decades have seen the pre-eminence of the shareholder primacy, whereas a recent awareness of corporate externalities and of the necessity that directors take into account the effects of their decisions on stakeholders, is spreading in the literature and finding significant recognition in the law of some jurisdictions.

**Keywords:** corporate social responsibility, shareholders' primacy, stakeholders' interests, sustainability, externalities, directors' duties, the Accountable Capitalism Act, the UK Companies Act

## Introduction

Despite the significant impact that companies have on society, the purpose they are supposed to achieve has been object of a very long debate among academics and law makers. Do companies have to increase shareholder wealth or do they have a wider responsibility to take into consideration stakeholders and society in general? In pursuing profits, do they have regard to externalities and should they manage to avoid them? Does the law require shareholder primacy or not?

## 1. The corporate purpose

The discussion on the "corporate social responsibility" is tightly linked to the duties of directors and dates back to the 1930s, to the well-known debate between Adolf Berle and Merrick Dodd<sup>1</sup>. Professor Berle argued that directors are trustees for the company's shareholders. He stated that all powers granted to the directors of a company are finalized to the benefit of shareholders. As the power

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<sup>1</sup> Macintosh J. C. C. The issues, effects and consequences of the Berle-Dodd debate, 1932–1932. *Accounting, Organizations and Society*, Vol. 24, 1999, pp. 139–153; O'Kelley C. R. T., Merrick Dodd and the great depression: a few historical corrections. SSRN, 2019. Available at: <https://ssrn.com/abstract=3325481> [last viewed April 8, 2020]; Bratton W. W., Wachter M. L. Shareholder Primacy's Corporatist Origins: Adolf Berle and "The Modern Corporation". *Journal of Corporation Law*, Vol. 34, 2008, p. 99.

to run a company had been delegated by the shareholders to the directors, they were responsible for running the corporation in the interests of the shareholders.

On the other hand, Professor Dodd argued that since corporation upon incorporation becomes a distinct legal entity, it has to serve not only the interests of shareholders but also those of other constituencies. He believed that directors were fiduciaries of the institution rather of its members.

For much of the 20<sup>th</sup> century, American corporations tried to balance the interests of the stakeholders, including employees, customers, communities, with those of the shareholders. Still in the early 1980s, they dedicated less than a half of their profits to shareholders and reinvested the rest in the corporation itself.

Something happened during the 1980s. By the end of the decade, corporations adopted the belief that their only legitimate and legal purpose was to maximize “shareholder value”. The debate became increasingly dominated by the law-and-economics-inspired view of the company, considered as shareholders’ property, as a “nexus of contracts”, in which only the shareholders require protection. In replacement of the old conception was an ideology attributed mainly to the economist Milton Friedman, for whom

*there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud<sup>2</sup>.*

In 2001, Henry Hansmann and Reinier Kraakman stated that there was no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value. However, some U.S. states have enacted constituency statutes<sup>3</sup>, which permit, but generally do not require, directors to take into account the effects of a decision on stakeholders. Their conclusion was that shareholder primacy had become the dominant model of US corporate law.

Profits had become the only purpose of the corporation, committed to provide the highest possible returns for shareholders, disregarding the cost for society, employees, suppliers, and environment. Some American corporations dedicated over 90 % of their earnings to shareholders.

## 2. The resurgence of stakeholders’ interests

In 2011, Michael Porter and Mark Kramer suggested that the purpose of the corporation needs to be partially redefined. A corporation should

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<sup>2</sup> The social responsibility of business is to increase its profits. *The New York Times Magazine*, September 13, 1970. Available at: <http://umich.edu/~thecore/doc/Friedman.pdf> [last viewed October 31, 2019].

<sup>3</sup> Hansmann H., Kraakman R. The End of History for Corporate Law. *Georgetown Law Journal*, Vol. 89, 2001, p. 439.

*integrate a social perspective into the core frameworks it already uses to understand competition and guide its business strategy. [...] Each company can identify the particular set of societal problems that it is best equipped to help resolve and from which it can gain the greatest competitive benefit<sup>4</sup>.*

More recently, it has been pointed out<sup>5</sup> that the shareholder primacy is the main barrier to sustainable companies and has flourished because regulations never clearly specified the definition of societal purpose of companies. Specifically, considering the so-called “intergenerational environmental justice”, it must be admitted that

*corporate governance can no longer be premised on shareholder primacy. Rather, an environmentally sustainable approach to corporate law ought to regulate the decision-making power of directors to ensure that the interests of future generations in the natural environment are taken into account<sup>6</sup>.*

Again, with regard to sustainability, it has been conveniently said that CSR should “entail an integration of environmental and social concerns in the decision-making of the company in such a way as to lead to an internalization of externalities”<sup>7</sup>. The phenomenon of externality is crucial in the definition of what CSR really is. Among the different meanings, the one that, to my view, is to be preferred, considers CSR

*the process by which companies identify and voluntarily neutralise the harmful effects their operations have on society. [...] The process by which corporations assume full responsibility for the effects their activities have on society<sup>8</sup>.*

Voluntary action by companies and their shareholders to embed this process in their production is not an effective remedy. Experience proves that they do not internalize their externalities voluntarily. The roadmap to improve sustainability of companies’ business should necessarily include, among other solutions, mandatory duties for directors.

### 3. New prospects in the world’s largest economy?

In 2018, US Senator Elizabeth Warren (D-Mass.) – a professor of Bankruptcy Law at Harvard Law School, who run for the US Democratic Presidential primaries

<sup>4</sup> Porter M., Kramer M. Strategy and society: the link between competitive advantage and corporate social responsibility. *Harvard Business Review*, December, 2006, p. 5.

<sup>5</sup> Sjafel B., Richardson B. J. *Company Law and Sustainability*. Cambridge, Cambridge University Press, 2015, p. 324.

<sup>6</sup> Henderson G. A fiduciary duty to minimize the corporation’s environmental impacts. SSRN 2011. Available at: <http://ssrn.com/abstract=1932032> [last viewed November 1, 2019].

<sup>7</sup> Sjafel B., Richardson B. J. 2015, p. 315.

<sup>8</sup> Johnston A. Facing up to social cost: the real meaning of corporate social responsibility. *Griffith Law Review*, Vol. 20, 2011, p. 221.

of 2020 – proposed the Accountable Capitalism Act<sup>9</sup>. Stakeholder governance is at the heart of the bill. A model in which corporations are run by, and accountable to, multiple groups of stakeholders, affirming that corporations should have a positive impact on society, mandating that employees have a meaningful voice in corporate governance, and ensuring that the directors of a corporation must take all groups of stakeholders into account when making big decisions about the business. In a *Wall Street Journal* op-ed, announcing her legislation, Senator Warren stated:

*For much of U.S. history corporations sought to succeed in the marketplace, but they also recognized their obligations to employees, customers and the community.*

The bill – whose importance, regardless of its unlikely approval, rests on the principles recognized within the largest economy in the world – would require of very large American corporations:

(1.) to obtain a federal charter as a “United States corporation”, which obligates company directors to consider the interests of all corporate stakeholders: American corporations with more than \$1 billion in annual revenue must obtain a federal charter from a newly formed Office of United States Corporations at the Department of Commerce. The new federal charter obligates company directors to consider the interests of all corporate stakeholders – including employees, customers, shareholders, and the communities in which the company operates.

(2.) to empower workers through their election into the board of directors. Borrowing from the successful approach of Germany and other developed economies, a US corporation should ensure that no fewer than 40 % of its directors would be selected by the corporation’s employees.

(3.) to restrict the sales of company shares by the directors and officers of United States corporations: corporate executives are now compensated mostly in company equity, which gives them huge financial incentives to focus exclusively on shareholder returns. To ensure that they are focused on the long-term interests of all corporate stakeholders, the bill prohibits directors and officers of United States corporations from selling company shares within five years of receiving them or within three years of a company stock buyback.

The federal government could revoke the charter in case of repeated illegal conduct.

The core provisions are in Sec. 5, which states:

*In discharging its duties [...] the board of directors:*

(A) *shall manage or direct the business*

- i) and affairs of the United States corporation in a manner that:*
- ii) seeks to create a general public benefit;*

<sup>9</sup> Palladino L., Karlsson K. The importance of replacing shareholder primacy with stakeholder corporate governance. The Roosevelt Institute, 2018. Available at: <https://rooseveltinstitute.org/wp-content/uploads/2018/10/Towards-%E2%80%98Accountable-Capitalism%E2%80%99-issue-brief.pdf> [last viewed November 3, 2019].



iii) *and balances the pecuniary interests of the shareholders of the United States corporation with the best interests of persons that are materially affected by the conduct of the United States corporation;*

In carrying out such duties, the board shall consider the effects of any action or inaction on:

- i) **the shareholders** of the United States corporation;
- ii) **the employees** and workforce of the United States corporation;
- iii) the subsidiaries of the United States corporation;
- iv) **the suppliers** of the United States corporation;
- v) the interests of **customers** and subsidiaries of the United States corporation as beneficiaries of the general public benefit purpose of the United States Corporation;
- vi) **community and societal factors**, including those of each community in which offices or facilities of the United States corporation, subsidiaries or suppliers are located;
- vii) **the local and global environment**;
- viii) **the short-term and long-term interests** of the United States corporation.

#### 4. Some steps in the right direction

Actually, the first legislation, ever, to provide specific directors' duties, which should take into account not only the shareholders' value maximization, is the UK Companies Act of 2006, which launched the so-called "enlightened shareholder value":

*the idea that corporations should pursue shareholder wealth with a long-run orientation that seeks sustainable growth and profits based on responsible attention to the full range of relevant stakeholder interests<sup>10</sup>.*

According to one of the most in-depth analysis of the "enlightened shareholder value":

*[..] the interests of stakeholders are only relevant to the degree that they contribute to the goal of attaining maximization of the shareholder's wealth<sup>11</sup>.*

<sup>10</sup> Millon D. Enlightened shareholder value, social responsibility, and the redefinition of corporate purpose without law. Available at: <https://ssrn.com/abstract=1625750> [last viewed October 31, 2019]. The "Purposeful Company" is another definition clearly depicted by the UK Big Innovation Centre report of 2015, when stating that "A purposeful company is inspired by a clear role in the world that offers it a reason for being – its purpose [...] Purpose ensures that a company is more than a web of transactions. Instead, purposeful companies contribute meaningfully to human betterment and create long-term value for all their stakeholders". Available at: [http://www.biginnovationcentre-purposeful-company.com/wp-content/uploads/2017/11/feb-24\\_tpc\\_policy-report\\_final\\_printed.pdf](http://www.biginnovationcentre-purposeful-company.com/wp-content/uploads/2017/11/feb-24_tpc_policy-report_final_printed.pdf) [las viewed November 1, 2019].

<sup>11</sup> Keay A. The Enlightened Shareholder Value Principle and Corporate Governance. Abington-New York, Routledge, 2013, p. 17

Section 172 of the UK Companies Act, named “Duty to promote the success of the company”, states that:

- (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to –
  - (a) the likely consequences of any decision in **the long term**,
  - (b) the interests of **the company’s employees**,
  - (c) the need to foster the company’s business relationships with **suppliers, customers and others**,
  - (d) the impact of the company’s operations on the **community and the environment**,
  - (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
  - (f) the need to act fairly as between members of the company.

If it is true that

*stakeholders’ interests shall be taken into consideration by directors in so far as they enhance the value of the company and its shares,*

no one can deny that

*UK legislation is much far ahead compared to European jurisdictions that do not contemplate, require or even permit directors to have regard of stakeholders’ interests in discharging their functions<sup>12</sup>.*

In Canada, the seminal decision of the Supreme Court in *BCE Inc. v. 1976 Debenture holders*<sup>13</sup> makes it clear that directors owe their duty to the corporation. In discharging this duty, directors are required to have fair regard to the interests of various stakeholders.

Italy has been the first EU country to introduce (in 2016) the Benefit Companies which, voluntarily,

*beyond the purpose of dividing profits among its shareholders, pursue one or more common benefit purposes and act in a responsible, sustainable and transparent manner towards people, communities, territories, the environment, goods and cultural and social activities, bodies and associations and other bearers of other interests.*

Such purposes are followed in a way that should balance the interests of the shareholders with those, which can be affected by the company activities. Approximately, two hundred benefit companies operate today in the country,

<sup>12</sup> Bruno S. The “enlightened shareholder value” in UK companies ten years later: what the European Directive No. 2014/95/EC can do. SSRN 2015. Available at: <https://ssrn.com/abstract=2674706> [last viewed October 29, 2019].

<sup>13</sup> 2008 SCC 69, 3 SCR 560.

therefore, these are at present a rather minor phenomenon. The Italian reform is surely to be welcomed, although it entirely leaves the choice of taking into consideration other interests to shareholders. On the other hand, Italian “provisions of the Civil Code do not even mention stakeholders, nor contemplate the possibility that directors may take into consideration those interests”<sup>14</sup>.

The mandatory rule is, instead, the direction taken by the EU Directive 2014/95/UE, which imposes upon large groups of companies the disclosure of non-financial information.

## Conclusions

The policies just reported and the increasing instances coming, worldwide, from the Company Law debate, make clear that incorporating stakeholders’ interests in directors’ duties is the most demanding and realistic horizon for any legislation. The time for spontaneous consideration of stakeholders’ interests and for voluntarily internalization of companies’ externalities is definitely over.

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## **IMPLEMENTATION OF TRADE SECRETS DIRECTIVE IN BALTIC STATES: A STEP TOWARDS PARTIAL HARMONISATION**

### **Summary**

Due to low patenting intensity, trade secret protection is the primary tool for the protection of valuable entrepreneurial knowledge base in the Baltic states. The adoption of the Trade Secrets Directive, which aims to harmonize trade secret protection at the European Union level, potentially has a significant impact in the region. Nevertheless, there are several reasons why the changes brought by the Trade Secrets Directive may not have a desirable harmonization effect. Firstly, it is a minimum harmonization directive which allows more far-reaching protection in the different EU Member States. Secondly, some aspects of the protection of trade secrets are at the discretion of the EU Member States. Two notable examples are the duration of the limitation period and the scope of the lawful acquisition, use and disclosure of a trade secret. Thirdly, the Directive leaves some essential questions outside its scope. One of such issues is the employee's duty of confidentiality, especially after the termination of an employment contract. Besides, the Baltic states differ about the additional level of protection – the so-called “confidential information”.

The paper aims to evaluate the implementation models of the Trade Secrets Directive in the national law of the three Baltic states, i.e., Estonia, Latvia, and Lithuania, and to compare them. Likewise, the paper endeavours to highlight the remaining or newly emerged differences in the legal protection of trade secrets. To achieve this aim, the authors analyse the legal regulation of trade secrets in the three Baltic states before and after the implementation of the Trade Secrets Directive.

**Keywords:** trade secrets, Directive 2016/943, implementation, confidential information, remedies, the Baltic states, employee's duty of confidentiality

## Introduction

Trade secrets have always formed an indispensable part in the overall structure of the protection of valuable information within economic activity. Nowadays, trade secrets are becoming even more critical<sup>1</sup>. The recent acknowledgement of the importance of trade secret protection is reflected in the legislative trend across the globe. Particular examples of this process are the Defend Trade Secrets Act in the US (in 2016)<sup>2</sup>, the EU Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (hereinafter – the Directive)<sup>3</sup> (also in 2016), and amendments to the Chinese Anti-Unfair Competition Law, dealing with trade secrets protection (in 2018 and 2019)<sup>4</sup>.

Trade secret protection is especially relevant for the Baltic states (Lithuania, Latvia and Estonia) for several reasons. To understand the context, it should be explained that patent intensity is rather low in the Baltics. For instance, patent applications by residents in 2017 were 105 for both Lithuania and Latvia and 91 for Estonia<sup>5</sup>. The other reason is the perceived affordability of trade secrets protection. This understanding is caused by lower cost and more lenient requirements of this form of protection. The legal protection of trade secret is automatic since its creation and, therefore, does not require filing and registration or other formal actions. This form of protection is especially relevant for small and medium enterprises when comparing with the classical industrial property rights. Trade secret protection is also used in combination with other intellectual property instruments<sup>6</sup>.

The legal regulation of the trade secrets in the Baltic states (as well as in the other EU Member States) was changed recently due to the implementation of the Directive, which aims to harmonize trade secret protection at the European Union level. Nevertheless, there are at least three reasons why the changes brought by the Directive may not have a desirable harmonization effect even in the comparatively similar jurisdictions of Lithuania, Latvia and Estonia. Firstly, it

<sup>1</sup> For reasons explaining the growing importance of trade secrets, see Almeling D. S. Seven Reasons Why Trade Secrets are Increasingly Important. *Berkeley Technology Law Journal*, Vol. 27, 2012, p. 1091; Lewine D. S., Sichelman T. Why Do Startups Use Trade Secrets? *Notre Dame Law Review*, Vol. 92, 2018, p. 751; Sibble J. International Trend Toward Strengthening Trade Secret Law. *Intellectual Property & Technology Law Journal*, Vol. 26, No. 4, 2014, p. 18.

<sup>2</sup> Defend Trade Secrets Act of 2016. Available at: <https://www.congress.gov/114/plaws/publ153/PLAW-114publ153.pdf> [last viewed November 1, 2019].

<sup>3</sup> Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, 2016 OJ (L 157).

<sup>4</sup> Cyrill M. China Reinforces IP Laws to Protect Trademarks, Trade Secrets. Available at: <https://www.china-briefing.com/news/china-ip-protections-trademarks-trade-secrets/> [last viewed October 10, 2019].

<sup>5</sup> Source: WIPO Statistics database. Available at: [https://www.wipo.int/ipstats/en/statistics/country\\_profile/](https://www.wipo.int/ipstats/en/statistics/country_profile/) [last viewed October 10, 2019].

<sup>6</sup> See Kelli A., Mets T., Pisuke H., Vasamäe E., Värvi A. Trade Secrets in the Intellectual Property Strategies of Entrepreneurs: The Estonian Experience. *Review of Central and East European Law*, No. 35, 2010, p. 315.

is a minimum harmonization directive, which allows more far-reaching protection in the different EU Member States. Secondly, some aspects of the protection of trade secrets are at the discretion of the EU Member States. To mention just a few examples: the EU Member States can decide upon the duration of the limitation period (Art. 8), the scope of the lawful acquisition, use or disclosure of a trade secret (Art. 3(2)), the restrictions of employees' civil liability (Art. 14(1)). Thirdly, the Directive leaves some essential questions outside its scope. The most prominent examples are unfair competition law, which traditionally deals with the protection of trade secrets. Besides, the Baltic states differ about the broader level of protection exceeding trade secret protection, which is usually covered by the term "confidential information".

The paper aims to evaluate the implementation models of the Directive in national law of three Baltic states and to compare them. By doing this, the paper endeavours to highlight the remaining or newly emerged differences in the legal protection of trade secrets in the Baltic states. To achieve this aim, the authors analyse the legal regulation of trade secrets in the three Baltic states before and after the implementation of the Trade Secrets Directive, also taking into account the developments of court practice in each Baltic state<sup>7</sup>.

## 1. Protection of trade secrets in the Baltic states before the Directive

One of the main reasons for the enactment of the Directive was different approaches to trade secret protection and different effectiveness of the latter in the EU Member States<sup>8</sup>. It is true that all EU Member States, being bound by Art. 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>9</sup> (hereinafter – the TRIPS Agreement), had the protection of trade secrets in one form or another. However, the important differences, creating obstacles to the common

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<sup>7</sup> The Directive itself is not analysed in this article. For a general overview of the Directive and its particular provisions, see Aplin T. A Critical Evaluation of the Proposed EU Trade Secrets Directive. King's College London Dickson Poon School of Law Legal Studies Research Paper Series. London: The Dickson Poon School of Law, paper No. 2014-25. 2014; Falce V. Trade secrets – looking for (full) harmonization in the Innovation Union. *International Review of Intellectual Property and Competition Law*, No. 48(8), 2015, p. 940; Knaak R., Kur A., Hilty R. Comments of the Max Planck Institute for Innovation and Competition on the Proposal of the European Commission for a Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure of 28 November 2013, COM(2013) 813 final. Max Planck Institute for Innovation and Competition Research Paper No. 1411; Lapousterle J. et al, What Protection for Trade Secrets in the European Union? CEIPI's Observations on the Proposal for a Directive on the protection of undisclosed know-how and business information. Centre for International Intellectual Property Studies Research Paper No. 2015-02, 2015; Torremans P. The Road towards the Harmonisation of Trade Secrets Law in the European Union. *Revista La Propiedad Inmaterial*, No. 20, 2015, p. 27.

<sup>8</sup> Recital 6 of the Directive.

<sup>9</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights. Signed in Marrakesh on 15.04.1994.

market, persisted. This problem was highlighted by the studies commissioned by the Commission<sup>10</sup>. The most pressing discrepancies concerned the legal protection model, definition of trade secrets, available remedies and protection of the confidentiality of trade secrets during litigation.

The same problems could have been noticed in the Baltic states. Despite all their similarities in terms of their modern (legal) history, market size, development and close ties among themselves, Lithuania, Latvia and Estonia had quite different regulation of trade secrets before the implementation of the Directive. To begin with Lithuania, trade secrets protection was based on two separate legal bases. First of all, Art. 1.116(1) of the Civil Code provided with the definition of trade secrets<sup>11</sup> and this factor placed Lithuania among the minority of the EU Member States, which had legal definition before the implementation of Directive. Lithuanian courts interpreted the definition from the perspective of the TRIPS Agreement and distinguished three requirements for the protection: secrecy, commercial value and reasonable efforts to keep the information secret. Also, Art. 1.116 of the Civil Code contained a specific restriction on the information, which could be considered a trade secret and, most importantly, it established a liability for persons who unlawfully disclose trade secrets. This provision was considered as an independent (*sui generis*) basis of trade secrets protection<sup>12</sup>. The second legal ground for trade secrets protection is found in the Lithuanian Law on Competition. In this law, the unlawful appropriation of trade secrets was considered as a particular case of unfair competition. Therefore, even before the implementation of the Directive, the Lithuanian law recognized the dual grounds of trade secret protection: one based on the protection against the unfair competition and, second – based on the *sui generis* protection regime<sup>13</sup>.

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<sup>10</sup> Hogan Lovells International, Study on Trade Secrets and Parasitic Copying (Look-alikes), MARKT/2010/20/D: Report on Trade Secrets for the European Commission, 2012, p. 43; Baker & Mackenzie. Study on Trade Secrets and Confidential Business Information in the Internal Market, MARKT/2011/128/D, 2013.

<sup>11</sup> Art. 1.116(1): “Information shall be considered to be a trade secret if a real or potential commercial value thereof manifests itself in what is not known to the third person and cannot be freely accessible because of the reasonable efforts of the owner of such information, or of any other person entrusted with that information by the owner, to preserve its confidentiality.”

<sup>12</sup> This view was established in the Lithuanian case law. See Judgment of Lithuanian Supreme Court of 5 February 2016 in case No. 3K-7-6-706/2016. Available at: <http://liteko.teismai.lt/viesasprendimupaiska/tekstas.aspx?id=54e950b3-eaee-4ee0-865f-a7fa0e41cf39> [last viewed November 2, 2019].

<sup>13</sup> Birstonas R. New Trade Secrets Directive and Its Implementation into Lithuanian Law. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3387094](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3387094) [last viewed October 31, 2019], pp. 7–8.



Regarding Latvia, no definition of trade secrets was enacted before the implantation of the Directive<sup>14</sup>. Likewise, legal protection of trade secret in national law was scattered among different legal acts containing legal norms on protection of trade secret falling either within public or private law depending on a legal relationship which is regulated<sup>15</sup>.

Nevertheless, according to Art. 19 of the Commercial Act, the status of a commercial secret may have been assigned by a merchant for matters of economic, technical or scientific nature to information complying with the following criteria:

- 1) it is contained in the undertaking of the merchant or is directly related to it;
- 2) it is not generally accessible to third parties;
- 3) it is of an actual or potential financial or non-financial value;
- 4) its coming at the disposal of another person may cause losses to the merchant;
- 5) the merchant has taken reasonable measures to preserve secrecy.

This legal provision can be considered as the workable definition of trade secrets. Nevertheless, the differences in comparison to the Lithuanian regulation should be noticed. First of all, while Lithuanian definition was based on the three requirements, the Latvian counterpart used five requirements, adding, that information under consideration should be contained in the undertaking of the merchant or is directly related to it and that it is coming at the disposal of another person may cause losses to the merchant. These additional requirements made Latvian understanding of trade secrets narrower comparing to Lithuanian one. The second difference, which is directly linked to the additional requirements, is that Latvian definition was binding to the merchants only. This again was different from Lithuania, where the definition provided in the Civil Code had a general application and covered not only merchants, but all persons.

Yet another understanding of trade secret was provided in Art. 7(1) of the Freedom of Information Law<sup>16</sup>, but this act was supposed to belong to the public law sphere. In any case, the definition introduced by the Trade Secrets Directive complicated things even further in Latvia concerning interrelation between

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<sup>14</sup> Mantrov V. Latvia: Trade secrets: Overlap with restraint of trade, aspects of enforcement (Q247). Available at: <https://aippi.org/wp-content/uploads/committees/247/GR247latvia.pdf> [last viewed October 31, 2019]. But see the opposite view: Rasnacs L. Potential Improvements in the Laws of the Republic of Latvia Concerning the Protection of the Trade Secrets. In: *Legal Science: Functions, Significance and Future in Legal Systems: Collected conference papers of the 7<sup>th</sup> International Scientific Conference of the Faculty of Law of the University of Latvia*. Riga: University of Latvia Press, 2019, p. 194; Strupiņš G. *Komerclikuma komentāri: A daļa: Komerccarbības vispārīgie noteikumi (1.-73.pants)* [Commercial Law Commentary: Part A: General Conditions of Business (Art. 1-73)]. Rīga: A.Strupiņa juridiskais birojs, 2003, p. 106.

<sup>15</sup> See generally Mantrov V. Latvia: Trade secrets: Overlap with restraint of trade, aspects of enforcement (Q247). Available at: <https://aippi.org/wp-content/uploads/committees/247/GR247latvia.pdf>. [last viewed October 31, 2019].

<sup>16</sup> Section 7 of the Freedom of Information Law: “(1) Information, which is created by a merchant or belongs to a merchant and the disclosing of which may have a significant adverse impact on the competitiveness of the merchant, shall be regarded to be a commercial secret.”

this definition and the understanding of trade secret included in Art. 19(1) of the Commercial Act and Art. 7(1) of the Freedom of Information Law.

In Estonia, the situation was even more complicated. The Estonian Competition Act provided the following definition of trade secret: “Information concerning the business activities of an undertaking the communication of which to other persons is likely to harm the interests of such undertaking, above all, technical and financial information relating to know-how, information concerning the methodology of validation of expenditure, production secrets and processes, sources of supply, volumes of purchase and sales, market shares, clients and distributors, marketing plans, expenditure and price structures and sales strategy are deemed to be business secrets” (§ 63 (1))<sup>17</sup>. Instead of formal requirements, a representative list of possible trade secrets was presented. This provision was given in the context of actions of the competition authority. However, it was interpreted as a general norm for the explanation of trade secrets. In the context of disputes relating to trade secrets, the Estonian Supreme Court has relied on the criteria set forth in the Art. 39 of the TRIPS Agreement<sup>18</sup>.

Summing up, the situation in the Baltic states differed significantly: Lithuania had a quite clear definition, while Latvia had a narrower understanding of trade secrets within private law, confined solely to merchants. In Estonia, no general definition was given. The provided definition was intended for the Estonian Competition Authority; however, it was referred to in disputes together with the TRIPS Agreement Art. 39. These conceptual differences in defining trade secrets caused considerable practical uncertainty. Latvian stakeholders, in particular, expressed the position that lack of clarity was detrimental to enforcement of trade secrets protection<sup>19</sup>. Quite a different situation prevailed in Lithuania, where the trade secrets litigation was active and efficient.

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<sup>17</sup> The provision is repealed with the enactment of the Directive.

<sup>18</sup> For instance, Judgment of the Supreme Court of Estonia of 21 March 2007 in case No. 3-2-1-22-07. Available at: <https://www.riigikohus.ee/et/lahendid?asjaNr=3-2-1-22-07> [last viewed November 2, 2019].

<sup>19</sup> European Union Intellectual Property Office. The Baseline of Trade Secrets Litigation in the EU Member States. Available at: [https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/reports/2018\\_Baseline\\_of\\_Trade\\_Secrets\\_Litigations\\_in\\_EU\\_Member\\_States/2018\\_Baseline\\_of\\_Trade\\_Secrets\\_Litigations\\_in\\_EU\\_Member\\_States\\_EN.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2018_Baseline_of_Trade_Secrets_Litigations_in_EU_Member_States/2018_Baseline_of_Trade_Secrets_Litigations_in_EU_Member_States_EN.pdf) [last viewed November 1, 2019], p. 176

## 2. Situation in the Baltics after the implementation of the Directive

### 2.1. Legislative grounds and scope of protection

All three Baltic countries implemented the Directive by introducing new legal acts. In Lithuania, the new Law on Legal Protection of Trade Secrets<sup>20</sup> (hereinafter – Lithuanian LTS) was enacted. Alongside, the former definition in the Civil Code was amended to fully meet the definition as provided in the Directive, and to the Code of Civil Procedure the new provisions, transposing the duty to ensure confidentiality during the litigation were added. Provisions of Lithuanian Law on Competition were not affected; therefore, the pre-existing dual basis of trade secrets protection (*sui generis* and protection against unfair competition) remains.

In Latvia, the new Trade Secret Protection Act<sup>21</sup> (hereinafter – Latvian TSPA) was enacted, which closely follows the text of the Directive, and the Code of Civil Procedure was amended by adding Chapter 30<sup>8</sup>. The old statutory provisions of the Commercial Act were retained. Similarly to Lithuania, this creates dual grounds for protection of trade secrets in Latvia at least with regard to merchants, as the Commercial Act deals solely with regulation of merchants<sup>22</sup>.

In Estonia, the implementation took a slightly different course with a new Restriction of Unfair Competition and Protection of Business Secrets Act<sup>23</sup> (hereinafter – Estonian PBSA). The difference is that the new law is broader and encompasses (other) unfair competition. Besides, in this law, trade secrets are expressly named as a particular case of protection against unfair competition. Also, the new provisions were added to the existing regulation on trade secret protection in the Code of Civil Procedure.

To conclude, both Lithuania and Latvia have enacted a *sui generis* regulation, not identical and going beyond unfair competition law<sup>24</sup>. Meanwhile, in Estonia, trade secrets are regarded as a particular case of unfair competition.

<sup>20</sup> Law on Legal Protection of Trade Secrets of Lithuania. Available at: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/86178ae24dfb11e88525a4bc7611b788?jfwid=-11gea3wdkd> [last viewed October 30, 2019].

<sup>21</sup> Trade Secret Protection Act of Latvia. Available at: <https://likumi.lv/ta/id/305532-komercnoslepuma-aizsardzibas-likums> [last viewed October 30, 2019].

<sup>22</sup> For an overview of the regulation of commercial law in Latvia including regulation on commercial transactions, see Kārklīņš J., Mantrov V. Commercial law. In: Kerikmäe T., Joamets K., Pleps J., Rodiņa A., Berkmanas T., Gruodytē E. The Law of the Baltic States. Cham: Springer, 2017, p. 304.

<sup>23</sup> Restriction of Unfair Competition and Protection of Business Secrets Act of Estonia. English translation available at: <https://www.riigiteataja.ee/en/eli/520122018013/consolide> [last viewed November 2, 2019].

<sup>24</sup> In Lithuania, the question between the Lithuanian LTS and Law on Competition was raised during the debates in the Parliament. The answer was given that while Law on Competition requires additional conditions to establish a goal to compete, seeking self-benefit or inflicting damage, *sui generis* legislation is broader.

## 2.2. Definition of trade secrets and its exceptions

All three newly enacted laws in the Baltic states contain definitions of trade secret (in Art. 1.116 of the Lithuanian Civil Code, Art. 2 of the Latvian TSPA and Art. 5(2) of the Estonian PBSA respectively), which is almost identical to the one required by the Directive (Art. 2(1)). Only minor differences can be noticed. Firstly, the Latvian definition omits the phrase “as a body or in the precise configuration and assembly of its components”. Secondly, both Lithuanian and Latvian definitions clarify that the commercial value of the trade secret (i.e., the second requirement) can be real or potential. Lastly, the Latvian definition, in contrast to the Directive, specifies that trade secret is undisclosed economic information, technological knowledge and information of a scientific or other nature. Arguably, none of these differences are of real practical value, if national courts will interpret and apply respective laws in accordance with the Directive.

A more significant difference is that both Lithuanian and Latvian laws provide the categories of information that are not regarded as trade secrets, while Estonian law has no such list of exemptions. Important to notice, that the Directive itself in the normative part does not set down such a list. Nevertheless, in the recital 14 it specifies that the definition of trade secret excludes trivial information and the experience and skills gained by employees in the normal course of their employment, and also excludes information which is generally known among, or is readily accessible to, persons within the circles that normally deal with the kind of information in question. However, both Lithuanian and Latvian laws are not identical to this provision. Thus, in Lithuania, the following types of information are excluded from the scope of the definition of trade secret (Art. 1.116(2) of the Civil Code):

- 1) information which is confidential but does not meet the requirements of the trade secret;
- 2) information that the holder identifies as confidential, but which is obvious (widely known), made public or readily available within the circles that normally deal with the kind of information in question;
- 3) information which, in the normal course of work, becomes the experience, skills, ability or knowledge of workers in good faith;
- 4) information on the prices and operating costs of services and goods provided by entities which activities are connected to the public interest;
- 5) other information which is provided for in the law.

Latvia, on the other hand, excludes:

- 1) information related to the performance of functions or tasks of the State administration, as well as, in the cases specified in regulatory enactments, handling of state or local government financial resources or property;
- 2) information and data which, in accordance with regulatory enactments, shall be included in the accounts of natural or legal persons engaged in economic activity.

As it was already noted Estonian law provides no exclusions. Thus, while all three Baltic states have an almost identical definition of trade secrets, they have different approach to what is **not** considered as trade secrets. This situation is a potential source of future divergence.

### 2.3. Lawful acquisition, use and disclosure of trade secrets

The Directive describes a lawful acquisition, use and disclosure of trade secrets in Art. 3. Lithuanian LTS just copies these provisions. Meanwhile, Latvian TSPA in its Art. 4 omits lawful use and disclosure, and deals only with lawful acquisition. This makes Latvian TSPA somewhat narrower, comparing to the Lithuanian law and the Directive itself.

The most divergent in this respect is Estonian PBSA, which does not transpose Art. 3 of the Directive, and does not address the issue of lawful acquisition, use and disclosure altogether. According to the Explanatory Memorandum to the draft Restriction of Unfair Competition and Protection of Business Secrets Act of Estonia, the law regulates the unlawful acquisition, use and disclosure of trade secrets and it does not provide instances when the described activities are lawful. The approach is based on the logic of Estonian private law formulated according to the following principle: “Everything which is not forbidden is allowed”. To sum up, if the acquisition, use or disclosure of trade secrets is not unlawful, then it is lawful and allowed. The Estonian law should also be interpreted in the light of the Directive<sup>25</sup>.

It can be seen that all three jurisdictions implemented Art. 3 of the Directive in a different way.

### 2.4. Unlawful acquisition, use and disclosure of trade secrets

Implementing Art. 4 of the Directive (“Unlawful acquisition, use and disclosure of trade secrets”), Lithuanian and Estonian laws repeat the provisions of the Directive. However, Art. 5 of Latvian TSPA, while closely following the Directive, does not make a distinction between the unlawful acquisition on the one hand, and unlawful use and disclosure on the other, although such distinction is found in the Directive. Article 5(1) of the Latvian TSPA defines all these infringing activities jointly without setting them apart, as it is provided in Article 4(2)-(4) of the Directive. This leads to logical problems, for instance, whether the breach of the duty for non-disclosure of the trade secret also means its acquisition. Thus, the drafting of the Latvian TSPA might create additional problems in practice with the application of this Act. Likewise, these three infringing acts are considered as established jointly if any of the infringing situations referred to in above Directive’s provision are established. This leaves doubts whether the provision of the Directive was implemented into Latvian law correctly and what practical consequences can be expected.

<sup>25</sup> Explanatory memorandum to the draft Restriction of Unfair Competition and Protection of Business Secrets Act of Estonia. Available at: <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/9b6f21b8-db1c-436d-a045-326913d80d22> [last viewed November 2, 2019].

## 2.5. Remedies

One of the most important aims of the Directive was the harmonisation of civil remedies. Even though all three countries precisely transposed all the remedies listed in the Directive, several significant deviations can be indicated.

Firstly, Art. 8(2) of Latvian TSPA states that the following remedies: destruction or transfer of material containing trade secrets, the destruction, recall or withdrawal from the market of the infringing goods, elimination of the characteristics of the infringement for the infringing goods and publication of the judgment, can be applied **only simultaneously** with the injunctions and recovery of damages. This statutory condition is not in line with the text of the Directive and aggravates the enforcement of trade secret protection. Furthermore, it causes a discrepancy between the Latvian law on the one hand and Lithuanian and Estonian law (which does not contain a similar requirement) on the other. The solution to this problem could be the interpretation of Art. 8(2) of Latvian TSPA in conjuncture with the Directive that could lead to the application of this provision consistently with this Directive.

Secondly, considering damages, a quite significant departure from the Directive should be noted, because all three Baltic states alongside the pecuniary damage also introduced non-pecuniary damage (Art. 7 of Lithuanian LTS, Art. 8 of Latvian TSPA and Art. 8 of Estonian PBSA). It is remarkable, because traditionally non-pecuniary damage is associated with a violation of the personal rights of the physical person. While the introduction of non-pecuniary damage goes beyond the Directive, there is no difference among the Baltic states. This choice, arguably, does not violate the requirements of the Directive either, because, as was indicated, the Member States can provide for more far-reaching protection.

Thirdly, the Directive (Art. 8(1)) allows the Member States to limit the liability for damages of employees towards their employers for the unlawful acquisition, use or disclosure of a trade secret of the employer where they act without intent. Lithuanian law has not used this opportunity, and while Lithuanian Labour Code is not totally clear in this respect, it provides for an unlimited liability for violations of the duty of confidentiality.

As regards Latvia, the Latvian TSPA did not use this option, therefore, leaving employees without such an additional protection. As a consequence, employees would be obliged to compensate damages incurred on the basis of either general (fault) liability model or strict liability model envisaged by Latvian civil law and repeated by the Latvian Labour Act. Specifically, according to Art. 86(1) of that Act, if an employee does not perform work without a justifiable reason or performs it improperly, or due to other illegal or culpable action has caused losses to the employer, the employee has an obligation to compensate for the losses caused to the employer.

Estonian Employment Contracts Act (hereinafter – ECA) did not have any amendments in this regard. According to the ECA the liability of an employee is connected to consideration whether the damages were caused intentionally or

due to negligence<sup>26</sup>. In cases when the disclosure of a trade secret was intentional, the damages caused must be fully compensated by the employee. If the disclosure has happened due to negligence, the amount of the compensation can be different – from full to partial reimbursement of damages. It mostly depends on the employer's or court's decision.

Fourthly, one of the provisions of the Directive, which enabled the discretion of national legislators, was Art. 6 dealing with limitation periods. It was up to the Member States to choose the particular duration of the limitation period, which shall not exceed six years. Notwithstanding, all three Baltic countries introduced the same 3-year limitation period.

## 2.6. Related issues

### 2.6.1. Post-employment confidentiality duty

One of the crucial questions which are regulated in the Directive only in a fragmentary and abstract way is the existence of the duty not to disclose trade secrets. This question is the more pressing, taking into account that the majority of unlawful appropriation cases concerns employees (including former employees). The Directive (Art. 4(3)(b)) in this regard gives only a general statement that the disclosure of a trade secret shall be considered unlawful whenever carried out, without the consent of the trade secret holder, by a person being in breach of a confidentiality agreement or any other duty not to disclose the trade secret. The substantiation of the duty not to disclose the trade secret is therefore left for the Member States. The answer is more evident concerning the employee's duty to protect trade secrets of the employer during employment: in all Baltic states, there exists a clear understanding that during the employment, the employee is bound by statutory duty not to disclose the employer's trade secrets. However, as to how is this duty should be applied after the termination of an employment contract, there is no uniform answer.

In Lithuania, this question is directly addressed in Art. 15 of the Law on Competition. This article prescribes that post-employment confidentiality duty lasts one year after the termination of the employment relationship, unless otherwise provided by law or contract. Non-disclosure clauses or contracts are widespread in practice.

In Latvia, both the Trade Secret Protection Act and the Labour Act provides a duty for non-disclosure (Article 5 of Latvian TSPA; Article 83(1), the first sentence of the Labour Act). Though neither of these legal acts explicitly states the period for this duty, it may be assumed that it is permanent. As the Labour Act provides duty for non-disclosure by envisaging that an employee has the obligation not to disclose any information brought to his or her knowledge, which is a commercial secret of the employer (Article 83(1), the first sentence of the Labour Act), this provision

<sup>26</sup> § 74(1) and (2) Employment Contracts Act of Estonia. Available at: <https://www.riigiteataja.ee/en/eli/509052019005/consolide> [last viewed November 2, 2019].

could be interpreted broadly by providing such duty in respect of the active or former labour relationships. This conclusion is confirmed in Latvian court practice as the Supreme Court refused the allegation that the former employee could not be under that duty after termination of labour contract relationships. For the sake of truth, it should be noted that this conclusion was made on the basis of Article 19 of the Commercial Act (it was in the time when the Trade Secret Protection Act was not even drafted) but not on the basis of Article 83 of the Labour Act<sup>27</sup>. Employers also usually include a confidentiality clause in an employment contract or – not so frequently – conclude a separate confidentiality contract.

In Estonia, the Employment Contracts Act makes a reference to the Law of Obligations Act (§ 625), which states that the employee's confidentiality duty shall continue after the expiry of the authorization agreement to the extent needed to protect the legitimate interests of the employer. As in Latvia and Lithuania, in Estonian practice it is usually contractually determined for how long the trade secret has to be kept secret. If not, then the legitimate interest of the employer needs to be followed.

Consequently, all three countries have different regulations and the duration of the post-employment confidentiality duty.

### 2.6.2. Confidential information

Notable peculiarities of Latvian and Lithuanian law are related to the recognition of a specific category of confidential information, which goes beyond the concept of trade secret, while in Estonia such an additional layer of protection is not recognised.

In particular, in Lithuania, this specific category was introduced by court practice. In its decision of 2016, Lithuanian Supreme Court stated:

*The category of confidential information goes beyond the legal category of trade secrets, so trade secrets are one type of confidential information. Information that does not meet the requirements of commercial secrecy may fall under the definition of confidential information and be protected on this basis. The information that makes up the content of confidential information is not always a trade secret.*

*The obligation to protect confidential information generally exists where it is provided for in the contract, whereas the obligation to protect commercial secrets derives in particular from the law.*<sup>28</sup>

Although the category of confidential information was never explained in greater detail by the Lithuanian Supreme Court, during the implementation of the Directive this category was expressly added to the Lithuanian Civil Code and now has a statutory basis.

<sup>27</sup> Judgment of the Supreme Court of the Republic of Latvia of 27 February 2015 in case No. SKC-0008/2015 (C29206608). Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/204582.pdf> [last viewed November 2, 2019].

<sup>28</sup> Judgment of Lithuanian Supreme Court of 5 February 2016 in case No. 3K-7-6-706/2016. Available at: <http://liteko.teismai.lt/viesasprendimupaijeska/tekstas.aspx?id=54e950b3-eaee-4ee0-865f-a7fa0e41cf39> [last viewed November 2, 2019].



As in Lithuania, Latvian court practice recognised an additional layer of protection in labour relationships, transcending the protection of trade secrets. The basis for such recognition was Section 83 of Latvian Labour Act (“Non-disclosure Obligation”), which imposes an obligation to an employee not to disclose any information brought to his or her knowledge, which is a commercial secret of the employer. The Supreme Court of the Republic of Latvia, interpreting this provision stated that:

*Although the information in question was not classified as a trade secret, there was sufficient reason to treat such information as confidential because it was intended for internal use by the employer and related to its commercial activities.*

*The employee’s job description included, among other things, the employee’s responsibility for maintaining confidentiality and loyalty, so the court found that unlawful conduct was not limited to the disclosure of trade secrets, but could also include disclosure of other confidential information prohibited by job description, rules of procedure and other documents.<sup>29</sup>*

The availability of the protection of confidential information differs from Estonian law, which does not recognize such a category. If the category of confidential information will be further recognized and developed in Lithuania and Latvia, but not in Estonia, it could result in significant practical enforcement differences among the Baltic states.

## Conclusions

Summing up the analysis above, the following conclusions can be made:

1. After the implementation of the Directive, the statutory regulation of the protection of trade secrets in the Baltic states is to a large extent harmonised. Arguably, this would also lead to a more uniform enforcement.
2. Despite the aforementioned harmonisation, quite many statutory differences in the new legislation among the Baltic states can still be detected. The majority of these differences are not directly connected with the “minimum harmonization” approach or dispositive provisions of the Directive. While these could be considered as the most probable reasons for the deviation, the analysis shows that all three jurisdictions selected very similar or identical solutions (in particular, regarding the duration of the limitation period, non-pecuniary damage). In contrast, the main differences stem from the different implementation of the imperative norms of the Directive.
3. There are important differences in the related matters, not covered in the Directive, in particular, the protection of confidential information, which goes beyond the protection of trade secrets, and post-employment duty to protect trade secrets.

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<sup>29</sup> Judgment of the Supreme Court of the Republic of Latvia of 19 November 2003 in case No. SKC-546.

4. Therefore, despite the partial harmonization, quite many significant differences concerning the protection of trade secrets among the Baltic states remain. The future of the case law can either alleviate these differences or, on the contrary, to expand them even further.

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## PROTECTION OF INCAPACITATED PERSONS: EVOLUTION OF LAW AND FUNDAMENTAL RIGHTS

### Summary

The evolution of medical, social and economic sciences and, more generally, of reasoning has profoundly changed the relationship between society and people with disabilities: these persons have turned, from recipients of social protection and care into active part of society. Their full and effective participation is assured on an equal basis with others.

That has redeveloped the issue of disability in protecting human rights, as is also demonstrated by the UN Convention on the Rights of persons with disabilities. Consequently, to promote their full integration, international and European laws have recognized the right to their self-determination. A new balance must be found between the vulnerable persons' aspirations to decide and the support provided by the law. This reference is obviously made to the extension of the management powers that are attributed to the guardian of the incapacitated. On the one hand, the institutes of protection of the persons with disabilities have changed, as much limiting infringement upon their self-determination. On the other hand, the protection of human dignity and the full realization of the person arouse complicated questions on the exercise of the rights of the disabled: sometimes, both regarding non-patrimonial important choices – for example, medical treatment – and also patrimonial ones, where the power to decide must be attributed to the legal representative. Consequently, it is necessary to identify the basis and limits of these powers to grant people with disabilities real, instead of just apparent protection. The themes clearly involve ethical, political and religious values and, therefore, legal ones.

**Keywords:** protection, incapacitated, fundamental rights, evolution of law, very personal acts, choices about health treatments

### Introduction

The ONU Convention on the Rights of Persons with Disabilities<sup>1</sup> enforces “respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons” (Article 3). This Convention was implemented by the European Union, which approved it with a 2010 Council Decision<sup>2</sup>.

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<sup>1</sup> ONU Convention on the Rights of Persons with Disabilities. Signed in New York on 13.12.2006. Available at: <https://www.un.org/> [last viewed October 16, 2019].

<sup>2</sup> Council decision 2010/48/EC of 26 November. OJ L 2010. 27 January, No. 23/35, p. 35–36 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV). Available at: [http://data.europa.eu/eli/dec/2010/48\(1\)/oj](http://data.europa.eu/eli/dec/2010/48(1)/oj) [last viewed October 16, 2019].

For its part, the Charter of Fundamental Rights of the European Union<sup>3</sup> establishes, among other things, that “Human dignity is inviolable” (Article 1); that “The Union recognizes and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community” (Article 26); and that “Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices” (Article 35).

The Italian Constitution recognizes the inviolable rights of man, both as an individual and in social formations (Article 2); it protects human dignity, guaranteeing the right to freedom (Article 13), the right to health and the right to refuse any medical treatment (Article 32).

The perception of disabilities and, therefore, the relationship between vulnerable persons and protective institutions changed in the Italian Law too: the *amministrazione di sostegno* (also known as *a.d.s.*) was introduced in Italy by Law No. 6/2004<sup>4</sup>, due to protect “with the least possible limitation of the ability to act, people who are wholly or partly lacking autonomy in the performance of the functions of daily life, through temporary or permanent support interventions”. The legislation incorporates some solutions of the *Sauvegarde de Justice*, which represents one of the institutions for the protection of incapacitated subjects within the ambit of the French legal system. However, the influence of the Austrian *Sachwalterschaft* and the German *Betreuung* was really important.

The *amministrazione di sostegno* (translated as “support administration”) represents a more modern and adequate measure compared to the traditional forms stipulating incapacity in the Italian civil code, i.e. *interdizione* and *inabilitazione*. The *a.d.s.* establishes a more flexible model of protection of the person, ensuring a greater respect of his dignity. Aiming for the full realization of the human person in conditions of psychic or physical vulnerability, the leading purpose of the discipline of the *a.d.s.* is, whenever possible, to promote the right of the person to express his will.

In the past, the law established the complete deprivation of the capacity for self-determination for people with mental disabilities; now, in the opposite sense, it provides for specific limitations on the capacity to implement legal acts. In fact, in the previous discipline, the vulnerable person as a subject of protection measures was precluded from fulfilling all or almost all the acts entrusted to the guardian. With the *a.d.s.*, the beneficiary remains capable for all acts not prohibited by the judge.

<sup>3</sup> Charter of Fundamental Rights of the European Union. Signed in Nice on 07.12.2000. OJ C, 26.10.2012, No. 326, p. 391–407 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV). Available at: [http://data.europa.eu/eli/treaty/char\\_2012/oj](http://data.europa.eu/eli/treaty/char_2012/oj) [last viewed October 16, 2019].

<sup>4</sup> Law 09.01.2004, No. 6. Italian OJ 19 January, No. 14, 2004. Available at: <https://www.gazzettaufficiale.it> [last viewed October 16, 2019].

## 1. Support administration (*a.d.s.*) and other institutions for the care of the vulnerable persons

The *a.d.s.* can be applied to people with mental illness, to people suffering from epileptic syndrome<sup>5</sup>, Down's syndrome<sup>6</sup>, and to severely depressed people<sup>7</sup>, also including elderly, drug addicts, and persons only affected by physical incapacity if they are unable to provide for acts in their own interest<sup>8</sup>. We have an administration of a "representative" type, which does not deprive the beneficiary of the capacity to perform a specific act, which the guardian has also been empowered to perform; besides, there is also an "assistance" or "incapacitating" type of administration,<sup>9</sup> wherein only the guardian – under the control of the Court – can perform the act on behalf of the vulnerable person, who is not permitted to perform it autonomously.

*Interdizione* and *inabilitazione* are still in force but just as residual protection systems and must be ordered by the Court not depending on the severity of the incapacitation but on the basis of the concrete needs of protection of the beneficiary<sup>10</sup>. Basically, *interdizione* must be ordered only if the incapable person requires a more radical exclusion from the legal acts, or to preclude the performance of some important acts that cannot be properly supervised by *a.d.s.* For example, *interdizione* can be ordered to safeguard the integrity of the personal assets which, due to their importance, cannot be administered by the person with disabilities; moreover, if necessary, it can be ordered to exclude fundamental freedoms such as marriage<sup>11</sup>.

In force of Article 411 c.c., the judge can extend the effects of rules intended for *interdizione* and *inabilitazione* to the beneficiary of *a.d.s.*: among these, there are the prohibition of making a will<sup>12</sup>, to make a donation<sup>13</sup> or to acknowledge a child<sup>14</sup>.

<sup>5</sup> Delle Monache S. Prime note sulla figura dell'amministrazione di sostegno: profili di diritto sostanziale [First considerations on Support Administration Law]. Nuova giurisprudenza civile commentata, 2004, II, p. 35.

<sup>6</sup> Judgment of Corte di Cassazione No. 22332 of 26 October 2011. Giustizia civile, 2011, I, p. 2807; judgment of Tribunale Varese of 6 October 2009. Giurisprudenza italiana, 2010, IV, p. 846; judgment of Tribunale Busto Arsizio of 12 October 2011. Available at: [dejure.it](http://dejure.it) [last viewed October 16, 2019].

<sup>7</sup> Judgment of Tribunale Bologna-Imola of 2 January 2006. Available at: [www.personaedanno.it](http://www.personaedanno.it) [last viewed October 16, 2019].

<sup>8</sup> Judgment of Corte di Cassazione No. 13917 of 2 August 2012, Available at: [dejure.it](http://dejure.it) [viewed 16.10.2019]; judgment of Corte di Cassazione No. 25366 of 29 November 2006, *ibid*.

<sup>9</sup> Cendon P. Amministrazione di sostegno. a) Profili generali [Support Administration. General considerations]. In: Enciclopedia del diritto, Annali, VII. Milano: Giuffrè, 2014, p. 28.

<sup>10</sup> Judgment of Corte di Cassazione No. 22332 of 26 October 2011. Available at: [dejure.it](http://dejure.it) [last viewed October 16, 2019]; judgment of Corte di Cassazione No. 9628 of 22 April 2009, *ibid*.

<sup>11</sup> See below.

<sup>12</sup> Judgment of Tribunale Varese of 19 October 2011. Available at: [www.personaedanno.it](http://www.personaedanno.it) [last viewed October 16, 2019].

<sup>13</sup> Bugetti M. N. Art. 411 [Commentary on Art. 411 c.c.]. In Commentario al codice civile. Directed by Gabrielli G. and Balestra L. (eds.), Delle persone, Artt. 343–455. Padova: Utet, 2009, p. 327.

<sup>14</sup> Bocchini F. e Quadri E. Diritto privato [Private Law]. Torino: Giappichelli, 2016, p. 276.

According to some judges, the prohibition of marriage<sup>15</sup> or of *Unione civile*<sup>16</sup> (between persons of the same sex) can also be extended to the beneficiary of *a.d.s.* In these cases, where fundamental rights are somehow restricted, the beneficiary requires technical assistance of a lawyer<sup>17</sup>. The right to sexuality can never be restricted<sup>18</sup>.

However, in the author's opinion, the right to marry can be restricted only with *interdizione*. Actually, the law declares the marriage (Article 119 c.c.) and the *Unione civile* (Article 1, co. 5, Law No. 76/2016) invalidity only with regard to the person declared *interdetto*, without references to the *a.d.s.* Thus, the power given to the judge by Article 411 c.c. (to extend the effects provided for by the law for *interdetto*) does not allow the extension of the prohibition of marriage, contrary to what was held by the judges<sup>19</sup>. The restriction of matrimonial freedom is exceptional. It should be remembered that the Charter of Fundamental Rights of the European Union recognizes the right to marry and the right to found a family (Article 9). So only a Court formed by three judges<sup>20</sup> can forbid the marriage<sup>21</sup>. Instead, every decision on *a.d.s.* is pronounced by only one judge.

## 2. Protection of incapacitated persons, very personal acts and fundamental rights

The personality of the individual is also effectuated through performance of negotiation or economic activity. Consequently, there are delicate regulatory areas, some of which have emerged recently, such as choices regarding health treatments and other fundamental rights. Thus, since the beneficiary is not excluded from the legal activity, the *a.d.s.* discipline must be coordinated with the norms concerning the family, contracts, companies, trade, inheritance and donations.

<sup>15</sup> Judgment of Corte di Cassazione No. 11536 of 11 May 2017. Available at: [dejure.it](http://dejure.it) [last viewed October 16, 2019]; judgment of Tribunale Trieste of 28 September 2007. *Giurisprudenza italiana*, 2007, p. 2739.

<sup>16</sup> Introduced by Law 20.05.2016, No. 76. Italian OJ 21 May, No. 118, 2016. Available at: <https://www.gazzettaufficiale.it> [last viewed October 16, 2019].

<sup>17</sup> Judgment of Corte di Cassazione No. 19233 of 11 July 2008. Available at: [dejure.it](http://dejure.it) [last viewed October 16, 2019]; judgment of Corte di Cassazione No. 25366 of 29 November 2006, *ibid.*; judgment of Corte Costituzionale No. 128 of 19 April 2007, *ibid.*

<sup>18</sup> Judgment of Tribunale Varese of 11 November 2011. Available at: [www.personaedanno.it](http://www.personaedanno.it) [last viewed October 16, 2019].

<sup>19</sup> Introduced by Law 20.05.2016, No. 76. Italian OJ 21 May, No. 118, 2016. Available at: <https://www.gazzettaufficiale.it> [last viewed October 16, 2019].

<sup>20</sup> In fact, the judgment of *interdizione* is given by a Court formed by three judges.

<sup>21</sup> Anelli F. Il nuovo sistema delle misure di protezione delle persone prive di autonomia [The new model of protection for vulnerable persons]. *Jus*, 2005, p. 220 ss. See also Di Martino G., L'amministrazione di sostegno. Inquadramento, disciplina ed effetti [Support Administration. Legal framework, regulation and consequences]. In: *Capacità e incapacità*. Napoli R. F. (ed.), Esi, 2018, p. 142 ss. e p. 177 ss.



The beneficiary suffers the limitation of his own capacity only with regard to the specific acts assessed by the judge as potentially prejudicial (for example, contracts involving goods of great value).

In the Italian legal system, the guardian can only continue – but not initiate – the exercise of commercial enterprise on behalf of the *interdetto*, both as an individual company and as a partnership. On the other hand, the beneficiary of *a.d.s.* can directly start and perform business activities and participate in partnerships or capital companies, if there are no specific restrictions ordered by the judge<sup>22</sup>. Sometimes, the beneficiary can be helped by the guardian<sup>23</sup>.

The balance between the opposing needs of autonomy and protection of the person becomes very complex with particular regard to the so-called “very personal” rights and juridical acts; in the Italian law, these acts traditionally do not admit the participation of a legal or voluntary representative.

In the absence of prohibitions imposed by the judge, the beneficiary of *a.d.s.* remains fully capable of making wills and donations<sup>24</sup>. According to some authoritative opinions, the freedom to make a will can be limited only under very exceptional circumstances, to respect the “human feeling”<sup>25</sup>. Moreover, the will is an act without prejudice to its author. The heirs, for their part, are protected by specific legal actions. They can contest the will, if its author has been *non compos mentis* upon completing the act.

These considerations, together with some rules contained in the civil code (Articles 602, co. 1, 603, co. 2, c.c.), further confirm the inadmissibility of any replacement of the guardian in drawing up the testament. In fact, that is called, by Italian law, *olografo* (“holograph”): it must be written only by the “hand” of testator, and every participation of another person, as well as the use of computer or mechanical systems cause the invalidity of the will (Article 602, co. 1, c.c.). The Article 603, co 2., c.c. – which discipline another type of will, made by a public official (a notary) – also prohibits the participation of a *nuncius*, who normally only reports the will of the testator.

However, on an occasion, with a singular (and illegitimate) decision<sup>26</sup>, a judge has appointed a special curator of a vulnerable person (affected by amyotrophic lateral sclerosis) to convey, in a holograph will, the last wishes of the beneficiary, expressed through an ocular pointing communicator. This is an illegitimate decision, as it allowed the participation of another person in the drafting of a holograph

<sup>22</sup> Bonilini G. Art. 411 [Commentary on Art. 411 c.c.]. In Codice civile commentato. Schlesinger A. and Busnelli F. D. (eds.), Milano: Giuffrè, 2008, p. 458 s.; Venchiarutti A., Capacità all’esercizio di impresa [dir. comm.]. [Ability to act in commercial enterprise]. Available at: [www.treccani.it/enciclopedia](http://www.treccani.it/enciclopedia) [last viewed October 16, 2019]. Regarding jurisprudence, see judgment of Tribunale Novara of 5 December 2012. Available at: [www.personaedanno.it](http://www.personaedanno.it) [last viewed October 16, 2019].

<sup>23</sup> Auletta G. Capacità all’esercizio dell’impresa commerciale [Ability to act in commercial enterprise]. In Enciclopedia del diritto, VI. Milano: Giuffrè, 1960, p. 79.

<sup>24</sup> Judgment of Corte Costituzionale No. 114 of 10 May 2019. Available at: [dejure.it](http://dejure.it) [last viewed October 16, 2019].

<sup>25</sup> Bonilini G. Art. 411 [Commentary on Art. 411 c.c.]. 2018, p. 433 s.

<sup>26</sup> Judgment of Tribunale Varese of 12 March 2012. *Famiglia e diritto*, 2012, p. 492.

will. The provisions of the law (regarding holographic will) are clearly violated and the decision of the judge of *a.d.s.* cannot validate a will contrary to the same law<sup>27</sup>.

The legitimacy of the intervention of the legal guardian in the fulfilment of gifts is also very doubtful. In another case, a judge authorized the guardian to proceed, in the name and on behalf of the beneficiary, with gifting of a house, after verifying the intent of the beneficiary and the absence of damage to him<sup>28</sup>. In yet another case, the guardian was authorized by the judge to donate to the daughters of the vulnerable person, in the name and on behalf of the same incapacitated, the co-ownership of a real estate property<sup>29</sup>. This appears patently illegitimate: the civil code excludes the possibility of making a donation on behalf of those who lack full capacity to dispose of their assets. It must be remembered that the Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>30</sup> establishes that “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law”.

The hazards of these kinds of acts are evident, if we consider, for example, the case of a request proposed by a support administrator who was also the brother of a vulnerable person: he asked that the person with disability would be authorized by a judge to draft a will, with the same brother as beneficiary. In this case, the Court rejected the request; according to judge, the person who was supposed to make the will was *non compos mentis* and, moreover, his volition was not ascertainable<sup>31</sup>.

The beneficiary can freely marry, unless there are limitations<sup>32</sup>.

According to some judicial decisions, the spouse subject to *interdizione* may request the separation<sup>33</sup> or dissolution<sup>34</sup> of the marriage through the legal guardian and with the authorization of the tutelary judge; this possibility is admitted with intent to protect the incapacitated spouse from violations of marriage obligations committed by the partner.

<sup>27</sup> Barba V. Testamento olografo scritto di mano dal curatore del beneficiario di amministrazione di sostegno [Holograph will written by vulnerable person's guardian]. *Famiglia, persone, successioni*, 2012, p. 446.

<sup>28</sup> Judgment of Tribunale La Spezia of 2 October 2010. *Nuova giur. civ. comm.*, 2011, I, p. 77.

<sup>29</sup> Judgment of Tribunale Caltagirone of 10 July 2008. *Il diritto di famiglia e delle persone*, 2009, p. 673, with note by Gazzoni F., I giudici, *legibus soluti*, autorizzano il tutore a compiere atti *contra legem*: è ora la volta della donazione [The Judges allow the legal guardian to do acts prohibited by law: now it was the turn of donation].

<sup>30</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. Signed in Paris on 20.03.1952. Available at: <https://www.echr.coe.int> [last viewed October 16, 2019].

<sup>31</sup> Judgment of Tribunale Roma of 30 May 2012. *Nuova giurisprudenza civile commentata*, 2012, I, p. 1005.

<sup>32</sup> Judgment of Corte di Cassazione No. 11536 of 11 May 2017. Available at: [dejure.it](http://dejure.it) [last viewed October 16, 2019].

<sup>33</sup> Judgment of Cassazione No. 14669 of 06 June 2018 Available at: [dejure.it](http://dejure.it) [last viewed October 16, 2019]; judgment of Tribunale Padova of 15 September 2006, *ibid.*

<sup>34</sup> Judgment of Corte di Cassazione No. 9582 of 21 July 2000. *Giustizia civile*, 2000, I, p. 3145.

It is not excluded that the same principle could be also extended to the *a.d.s.*; nevertheless, in the author's opinion, such personal decisions should be expressed only by the beneficiary, if he is able to assume them, with the exclusion of any intervention by the legal guardian.

In these cases, the best way to safeguard the interests of the vulnerable person could be the legal representative's proposition of a request for compensation or the proposition of the so-called *exceptio doli*, which allows the rejection of the claims based on the abuse of the right; in some circumstances, that appears to be more appropriate than acting with the request of separation or divorce. Likewise, only the part of the *Unione civile* can ask for its dissolution, according to the Article 1, co. 24, of Law No. 40/2016, with no possibility for the support administrator to perform that very personal act.

The Law No. 6/2004 does not contain specific provisions regarding non-pecuniary acts but only provides that the choice of the guardian must be made with exclusive regard to the care and interests of the beneficiary; the same law requires the guardian to consider the needs and aspirations of the beneficiary.

Many judges, however, had recognized the power-duty of the legal guardian to express consent to any medical treatment for the beneficiary: otherwise, the recipients of the protection measures could not exercise very personal rights<sup>35</sup>. This conclusion is certainly correct and complies with the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine<sup>36</sup>. The Article 6, co. 3, establishes that "where, according to law, an adult does not have the capacity to consent to an intervention because of a mental disability, a disease or for similar reasons, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law".

In a very well-known case in Italy, a person was in a permanent neurovegetative state and could not express any consent on artificial feeding therapies: however, the guardian requested authorization, in the name and on behalf of the beneficiary, to refuse such therapies. The Supreme Court<sup>37</sup> affirmed that the very personal right

<sup>35</sup> Judgment of Corte di Cassazione No. 14158 of 7 June 2017. Available at: [dejure.it](http://dejure.it) [last viewed October 16, 2019]; judgment of Tribunale Perugia of 20 June 2013. Repertorio del Foro italiano, 2014, voce Interdizione, inabilitazione e amministrazione di sostegno, No. 34; judgment of Tribunale Reggio Emilia of 24 July 2012. Foro italiano, 2013, I, c. 2919; judgment of Tribunale Varese of 25 August 2010. Giurisprudenza italiana, 2011, p. 1805; judgment of Tribunale Firenze of 22 December 2010. Giurisprudenza di merito, 2013, p. 2375; judgment of Tribunale Modena of 14 May 2009, *ibid.*, 2009, p. 1837; judgment of Tribunale Prato of 8 April 2009. Giurisprudenza di merito, 2010, p. 102; judgment of Tribunale Roma of 19 March 2004. Rivista del Notariato, 2004, p. 249.

<sup>36</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine. Signed in Oviedo on 04.04.1997. Available at: <https://www.coe.int/it/> [last viewed October 16, 2019].

<sup>37</sup> Judgment of Corte di Cassazione No. 21748 of 16 October 2007. Foro it., 2007, I, c. 3025. See also judgment of Consiglio di Stato No. 4460 of 2 September 2014. Available at: <https://www.giustizia-amministrativa.it> [last viewed October 16, 2019]; judgment of Consiglio di Stato No. 3058 of 21 June 2017, *ibid.*

to health, by its nature, does not allow the guardian to dispose of it on the behalf of the individual in a state of total and permanent unconsciousness. Consequently, it is necessary to reconstruct the presumed will of the unconscious patient, taking into account the desires he expressed before the loss of conscience, or inferring that will from his personality, his lifestyle, his inclinations, his reference values and his ethical, religious, cultural and philosophical convictions.

Recently, the Italian legislator introduced rules to protect the freedom of choice of medical care<sup>38</sup>. According to the Article 3 of Law No. 219/2017<sup>39</sup>, if a guardian has been appointed, the consent to treatment is expressed or refused by the same guardian, taking into account the will of the beneficiary in relation to his ability to understand. If there are no choices previously declared by the beneficiary when he was of sound mind, in case of disagreement between the legal guardian and the doctor about proposed care, the decision is left to the judge<sup>40</sup>.

However, the Constitutional Court has ruled that the power of representation for health choices always involves the power to refuse the medical treatment necessary for the maintenance of life<sup>41</sup>. The judge must specifically evaluate the clinical conditions of the protected person and the power to refuse treatment must be specifically attributed to the guardian.

It must be emphasized that life-saving treatment can never be rejected – not even by the judge – if the beneficiary had not expressed, when he was of sound mind, the refusal of the same care, according to the provisions of Article 1, co. 4 and 5, and of Article 4 of Law No. 219/2017. The Article 1, co. 4 of the same law establishes that the consent or the refusal to the therapies must be expressed in written form or through video recordings or, in case of a person with disabilities, through devices that ensure communication. According to the Article 4, in view of a possible future incapacity of self-determination and after an adequate information any adult person who is of sound mind may express authenticated private writings or public deeds in relation to (future) health treatments, including refusal thereof. The right to refuse medical treatment is highly personal<sup>42</sup> and can only be exercised by its owner in the forms prescribed by law. The representative can only report the will of others but cannot form it, neither directly or indirectly by its reconstruction.

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<sup>38</sup> Law 22.12.2017, No. 219. Italian OJ 2018, 16 January, No. 12. Available at: <https://www.gazzettaufficiale.it> [last viewed October 16, 2019].

<sup>39</sup> About this law, see Zatti P. Spunti per una lettura della legge sul consenso informato e Dat [Reflections on Law on Living will]. *Nuova giurisprudenza civile commentata*, 2018, p. 247. Maffei D. *Prometeo incatenato: la redazione non informata, o informata per modo di dire, e l'attenuata vincolatività delle Dat (disposizioni anticipate di trattamento) [Drafting in an unconscious way of a Living will and non-binding rules]*. *Responsabilità civile e previdenza*, 2018, p. 1436.

<sup>40</sup> See also below.

<sup>41</sup> Judgment of Corte Costituzionale No. 144 of 13 June 2019. Available at: [dejure.it](http://dejure.it) [last viewed October 16, 2019].

<sup>42</sup> Judgment of Corte di Cassazione No. 12998 of 15 May 2019. Available at: [dejure.it](http://dejure.it) [last viewed October 16, 2019].

It follows from the above considerations that the very recent pronouncement<sup>43</sup> of a judge, who “omitted” to take any decision about the support administrator’s (possible) authorization to order the suspension of a therapy, is clearly wrong; according to the judge, the support administrator is fully entitled to refuse and to propose treatments, once he himself had ascertained the will of the administered person in reference to the health treatment in question (and this also presumptively, in the light of the declarations made in presence of the same administrator).

## Conclusions

The freedom of the person is at the same time the purpose for and the limit of protection of that person’s dignity.

The individual subjected to *a.d.s.* can directly perform highly personal acts, even those with patrimonial content, if in a position to decide with full lucidity; otherwise, those acts can never be executed by the guardian, even if he only carries out the will of the beneficiary. In this context, the beneficiary of the protection is the only person who can refuse medical therapies necessary for that beneficiary’s survival (with the exception of the so-called “therapeutic obstinacy”); this decision cannot be left to the guardian.

The same principle can apply to other fundamental choices, such as separation and dissolution of marriage.

Self-determination is essential; that said, “substitution” in personal choices should be considered as exceptional and seen as an *extrema ratio*.

Opposing solutions do not grant autonomy but, on the contrary, endanger or maybe even annihilate the fundamental rights of vulnerable persons.

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## THIRD-PARTY'S FAULT AS AN EXCLUSION FROM STRICT LIABILITY

### Summary

This article is dedicated to analysis of general regulation of strict liability model in context of circumstances excluding third party's liability. Besides the most common exceptions for imposition of strict liability, i.e. intent or gross negligence of the very victim and *force majeure*, the article also discusses another exception that can be found more often in legislation of different countries – a culpable conduct of third party. The exception noted in the article is analysed in the context of possession of an object of increased risk, seeking an answer to a question whether and in what cases a possessor of a source of increased risk is not liable for damage caused, where the source of increased risk is involved.

**Keywords:** civil liability, strict liability, fault, exclusions from strict liability, source of increased risk, abnormally dangerous activities, fortuitous event (*cas fortuit*), causation, foreseeability, negligence, third-party's fault

### Introduction

Precise determination of civil liability, i.e., which person and to what extent is liable for infringement of rights, is one of the most important questions of the civil law. It is especially important in tort law. Specific nature of tort law differs (unlike the contractual law) that victim usually cannot foresee occurrence of person's infringement (unlawful conducts). Therefore, tort law is regulated stricter, it has imperative regulation, because basically it protects property and non-pecuniary benefits of a person. Unlike contractual relationships, in case of tort, the victim is a person that do not cooperate with the tortfeasor and hence they cannot protect themselves in advance from the potential infringement. Regulation of tort law serves not only to identify the person liable, but it is also preventive<sup>1</sup> – precluding other persons from a conduct that is not accepted as correct by general public. Therefore, precise regulation and correct understanding of legal provisions regarding situations when strict liability is or is not imposed on a person is an essential element for strengthening the principle of legal certainty.

One of the areas allowing exceptions from general concept of civil liability, is the area of strict liability, which facilitates upholding of the tortfeasor's liability. When evaluating the strict liability model, it is important to accurately define

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<sup>1</sup> Torgāns K., Kārklīņš J., Bitāns A. Līgumu un deliktu problēmas Eiropas Savienībā un Latvijā. Prof. K. Torgāna zinātniskā redakcijā [The Contract and Tort Problems in European Union and Latvia. Torgāns K. (scientific ed.)]. Tiesu namu aģentūra. Rīga, 2017, p. 263.

the cases excluding imposition of strict liability. This article is aimed at analysing whether culpable conduct of third-party is also one of exclusions of strict liability.

## 1. The most common exceptions of strict liability in context of the concept of fault

Usually, when someone asks for a difference between a fault-based model and a strict liability model, the answer mainly is that the strict liability model does not evaluate fault, in other words, a person is liable even if there is no negligence in his or her conduct.

Nevertheless, the question is – whether such a simple answer is correct, namely – does the fault play no role indeed in the strict liability model? And if it does, which person's fault is the one playing that role – the fault of a tortfeasor, a victim or a third party? Research and work completed during the recent years have led me to a conclusion that the strict liability and a concept of fault are not distinctly separate.

If we look at the regulation of strict liability in Latvia, the general legal framework applies the strict liability to the damage caused by a source of increased risk. Article 2347 of Latvian CL states:

*A person whose activity is associated with increased risk for other persons (transport, enterprise, construction, dangerous substances, etc.) shall compensate for damage caused by the source of increased risk, **unless** he or she proves that the damage has occurred **due to force majeure**, or through the **victim's own intentional act** or **gross negligence**. If a source of increased risk has arisen from the possession of an owner, holder or user, **without their fault**, but as a **result of unlawful actions** of another person, such other person shall be liable for the damage incurred. If the possessor (owner, holder, user) has also acted without justification, both the person who used the source of increased risk and its possessor may be held liable for the damage incurred, having regard to extent of **fault of each person**.*

The above article indicates that fault has some role in indicating whether the person is liable in accordance with the strict liability. Thus, several bullet points can be highlighted in context of the said article:

- Firstly, *force majeure* event. To establish *force majeure*, the event needs to meet some criteria. There will be *force majeure* if the event was not *foreseeable* and irresistible. Evaluating if the event was *force majeure* from the perspective of the person violating the rights, one must evaluate an “ability to foresee”. As we know, the “ability to foresee” is an element of general clause of a *reasonable person*, which is highly connected to the concept of fault. There is a possibility that, due to fault of the very tortfeasor, the event has not been prevented, even though it was possible! In that case, there are no grounds to conclude that there was *force majeure*. To put it otherwise, when evaluating a *force majeure* event, one must also evaluate the elements of fault.

- Secondly, *intent* and *gross negligence* of the victim. No doubt, intent and negligence are elements or degrees of fault. Therefore, when assessing whether the tortfeasor is subject to the strict liability, one must evaluate conduct of the victim, which also is highly connected to the concept of reasonable person and fault.
- Thirdly, *unlawful conduct of third party*. According to this, there is no strict liability, if the source of increased risk has arisen out of possession of an owner, holder or user without his or her *fault*. Thus, also in this case, when evaluating a possibility to impose the strict liability, one must consider the fault of the owner of source of increased risk. In other words, has the unlawful conduct of third party occurred due to negligence of the very possessor?

Unlike the fault-based model, strict liability does not set in only in cases precisely defined in the law. These particular exceptions stated in the law have always been listed in detail and they never include an excuse for not imposing a liability, such as lack of fault (lack of negligence). At the same time, it must be admitted that there is no common catalogue of exceptions excluding strict liability<sup>2</sup>. In each area of private law, the legislator can provide different exceptions.

Exceptions the civil liability in case of the strict liability model, depend on the field of legal relations. Considering diverse regulations in Latvia containing the strict liability model, in addition to *force majeure* one can find the following exclusive circumstances (they are not exhaustive):

- a. in case of a source of increased risk:
  - i. gross negligence or intent of the very victim;
  - ii. loss of possession over the object due to unlawful conduct of third party;
- b. in environmental law:
  - i. armed conflict, war; civil war; rebellion<sup>3</sup>;
- c. in field of maritime shipment:
  - i. conduct of third party if it intended to cause loss;
  - ii. due to an institution, which is responsible for maintenance of technical navigation means<sup>4</sup>.
- d. in field of consumer rights:
  - i. person has not put a product in circulation;
  - ii. defect of product, leading to a loss, has set in after putting the product in circulation;

<sup>2</sup> Kārklīņš J. Stingro atbildību izslēdzoši apstākļi [Exceptions of strict liability]. LU 74. konferences rakstu krājums. Ārvalstu investīcijas: kad tiesības mijiedarbojas. LU akadēmiskais apgāds. Rīga, 2016, p. 123.

<sup>3</sup> Vides aizsardzības likums [Environmental Protection Law]. *Latvijas Vēstnesis*, 183, 15.11.2006.

<sup>4</sup> Jūras kodekss [Maritime Code]. *Latvijas Vēstnesis*, 91 (2856), 18.06.2003.

- iii. the product was not manufactured to be put in circulation or other kind of dissemination to gain profit; and it was not manufactured or disseminated within the framework of economic activities;
- iv. level of science and technical development at a time when the product was put in circulation was not that high to discover a defect or shortcoming;
- v. defect of product was a result of manufacturer complying with requirements set by the state or local government<sup>5</sup>.

As it can be seen from these exclusions of liability, a part of them can be attributed to a fortuitous event, i. e., an event triggered by unforeseeable and irresistible events, including those resulting from conduct of third parties, for example “armed conflict” in field of environmental law or “conduct of third party” in field of maritime shipment. Nonetheless, fortuity as an exclusion of strict liability is not a common exception, or, to rephrase it, the legal system admits regulation that applies strict liability regardless of whether a damage has been caused by fortuitous event. In certain cases, exclusion of strict liability is unlawful conduct of third party that is believed to be a fortuitous event. Thus, the legal system may have a regulation, according to which a fortuitous event is deemed to be an exclusion of strict liability.

## 2. Role of third party's culpable (unlawful) conduct in strict liability model

When looking at provisions of Article 2347 of CL, one can conclude that it does not contain an explicit indication that unlawful conduct of third party is always an exclusion of strict liability. According to provisions of Article 2347 of CL, unlawful conduct of third party is an exclusion of strict liability in case where third party has unlawfully taken away possession over the source of increased risk.

However, there is one important question to be discussed in this article, namely: is an exclusion of the strict liability solely a detected culpable conduct of third party that is related to unlawful impact of third party on an object under its possession?

No doubt, that in case of unlawful loss of the source of increased risk under his possession, the former possessor would not be liable for damage caused by the source of increased risk. But the question remains – is the strict liability excluded also in other cases when a damage is done by the source of increased risk, but its direct cause is pure conduct of third party?

Generally, unlawful conduct of third party is not *force majeure* but rather a fortuitous event (*cas fortuit*, in Latin) which, in general tort law (and in many cases also in contract law) is an exclusion of liability. However, in case of the strict liability, a fortuitous event is not considered as a general exclusion of liability in Latvia. Otherwise, the strict liability model would be very similar to the fault model.

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<sup>5</sup> Likuma “Par atbildību par precēs un pakalpojuma trūkumiem” 8. panta otrā daļa [Law “On Liability for Defective Goods and Deficient Services”]. *Latvijas Vēstnesis*, 250/251 (2161/2162), 05.07.2000.

Notwithstanding that, a reasonable question must be posed and answered: When a damage is done by the source of increased risk, but the cause of damage is the conduct of third party, is it correct to say that such unlawful conduct of third party is an exclusion of the strict liability or is not?

When describing the concept of the strict liability, the well-known Latvian lawyer Jūlijs Gilmanis, back in 1979, proposed a thesis that, if a person were to push another person onto the street in front of a driving car consequently resulting in a fatal outcome, a driver of the car would be liable for the resulting death<sup>6</sup>.

No doubt, in this case we cannot establish any exclusion of the strict liability included *expressis verbis* under Article 2347 of CL – neither *force majeure*, intent of victim himself nor gross negligence, nor unlawful conduct of third party in relation to deprivation of possession can be established. However, is the idea of strict liability *so strict indeed*, that the subject who cannot avoid such situation even preventively is liable in case of obvious unlawful conduct of third party?

In order to answer this question, we must remember why the idea of the strict liability was introduced in legal systems. Namely, as the technologies evolved, humanity invented devices that were dangerous due to their properties, and it was impossible to lessen this hazard even by paying utmost attention and care in operating these devices<sup>7</sup>. If the fault-based model would be applied in such cases, the liability could not be claimed, because tort would result from the properties of very device instead of negligence of a person, hence – incidentally. Therefore, the strict liability concept was introduced in law. When evaluating this idea of the strict liability in context of cars, it can be concluded that the idea was introduced, because cars move with greater speed than other means of transport, they can accidentally break, even explode etc. It means that the source of increased risk has certain risk that can occur. Beyond doubt, the strict liability in transport area was not introduced because of situations where third parties intentionally pushed people in front of cars on a regular basis to cause their death.

Therefore, it is not correct to say that possessor of the source of increased risk is always liable for every tort where the source of increased risk is involved.

Answer to previously posed question – is the car driver liable for death of a person who was unexpectedly pushed in front of the car – is negative. In other words, third-party's fault – the intent and resulting step to push the person in front of a moving car – excludes the liability of the driver.

<sup>6</sup> Gilmanis J., Grebņickis P., Krauze R., Narkevičs G., Naumovs V., Rozenfelds J., Strautmanis J., Šulcs V., Torgāns K. Latvijas PSR Civilt kodeksa komentāri [Commentaries of the Civil Code of the Latvian SSR]; Vēbers J. (ed.), Rīga. Liesma, 1979. p. 602.

<sup>7</sup> Kubica M.L. Origins of Strict Liability for Abnormally Dangerous Activities in the United States, *Rylands v. Fletchers* a General Clause of Strict Liability in UK. In: World Academy of Science, Engineering, and Technology. *International Journal of Social Behavioural, Educational Economic, Business and Industrial Engineering*, Vol. 10, No. 3, 2016, p. 870. Available at: <http://waset.org/publications/10004037/origins-of-strict-liability-for-abnormally-dangerous-activities-in-the-united-states-rylands-v.-fletchers-and-a-general-clause-of-strict-liability-in-the-uk> [last viewed October: 25, 2019].

In this case, it is not possible to establish a legal causality between possessing a source of increased risk and resulting tort, because the cause of death is rather the unlawful conduct of third party than the risk posed by the source of increased risk, and this absolutely disrupts the causality link between normal use of the car and consequences.

When trying to evaluate, whether an external circumstance excludes the strict liability, one must conclude that this cause is adequate in relation to use of the source of increased risk. Therefore, a driver whose eye was accidentally affected by a fly leading to a traffic accident will be subject to the strict liability, because this situation qualifies for a category of usual risk related to use of such source of increased risk. Quite on the opposite, the usual risk of using the car does not involve an unexpected pushing of a person in front of the car by another person.

Conduct of third party as an exclusion of strict liability is included also in Principles of European Tort Law<sup>8</sup>, Art.7:102, stating that "Defences against strict liability" envisage that strict liability can be excluded or reduced if the injury was caused by an unforeseeable and irresistible:

- a) force of nature (*force majeure*), or
- b) conduct of third party.

When considering the conduct of third party as an exclusion of strict liability model, one must bear in mind that it is not always necessary to establish unlawful conduct of third party. There can be situations where the conduct of third party has caused damage, but that particular conduct in given circumstances is not deemed to be unlawful (for example, self-defence of third party, ultimate need etc.). At the same time, such conduct of third party can be an exclusion of strict liability for the possessor of the source of increased risk.

Taking into consideration the questions analysed in present article, it is possible to make the following conclusion: Exclusions of strict liability under Article 2347 of Latvian Civil Code are not the only ones excluding application of such liability. Without the exclusions mentioned in that article, the judge must also evaluate, whether a tort has been caused by materialisation of the risk inherent in the source of increased risk.

Regulation of strict liability shows that strict liability is a complicated construct, having specific exclusions in each field. According to Dutch legal scientist Cees van Dam, strict liability is an ambiguous and controversial concept, even a kind of fiction, because elements of unlawful conduct and fault (even indirectly) in any case play an important role in application of this concept and it is not possible to differentiate between clear strict liability and fault-based liability<sup>9</sup>.

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<sup>8</sup> European Group on Tort Law, Principles of European Tort Law, Text and Commentary. Springer, Vienna/New York, 2005.

<sup>9</sup> Cees van Dam. European Tort law. Second Edition. Oxford: Oxford University Press, 2013, p. 479.

## Conclusions

1. It is incorrect to state that possessor of the source of increased risk is always liable for every tort where the source of increased risk is involved.
2. When trying to evaluate whether an external circumstance excludes the strict liability, one must conclude that the cause is adequate in relation to use of the source of increased risk.
3. In most cases, strict liability is excluded in cases when a damage is done by the source of increased risk, but its direct cause is purely the conduct of third party.
4. When considering the conduct of third party as an exclusion of strict liability model, one must bear in mind that it is not always necessary to establish an unlawful conduct of third party. There can be situations, where the conduct of third party has caused damage, but that particular conduct in given circumstances is not deemed to be unlawful.
5. Exclusions of strict liability under Article 2347 of Latvian Civil Code are not the only ones excluding application of strict liability.

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## **IMPACT OF LEGAL STATUS OF DATA ON DEVELOPMENT OF DATA-INTENSIVE PRODUCTS: EXAMPLE OF LANGUAGE TECHNOLOGIES<sup>1</sup>**

### **Summary**

The purpose of this article is to explain the extent to which the legal regime applicable to language data affects the development and use of language technology (LT). The main focus of the paper is on EU law. The article also maps possible text and data mining (TDM) issues. The authors focus on TDM for research purposes outlined in the Digital Copyright Directive 2019/790.

The authors follow a process approach of LT development, which starts from raw data collection and leads to LT products such as a refrigerator with a speech interface. Particular attention is given to language models.

The raw data used in LT often include copyright-protected works, objects of related rights (e.g., performances) and personal data in the form of person's voice or other information stored in non-annotated and annotated databases.

The authors' main argument is that the legal regime of language data does not usually affect the use of language models since copyrighted works are not likely to remain in models. In the process of developing a language technology application, language models are the first intermediate result that can be free from legal restrictions affecting language data.

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<sup>1</sup> The article draws on and develops further the authors' previous research. See Kelli A., Tavast A., Lindén K., Vider K., Birstonas R., Labropoulou P., Kull I., Tavits G., Värvi A. The Extent of Legal Control over Language Data: The Case of Language Technologies. Proceedings of CLARIN Annual Conference 2019: CLARIN Annual Conference, Leipzig, Germany, 30 September – 2 October 2019. Simov K., and Eskevich M. (eds.), CLARIN, pp. 69–74. Available at [https://office.clarin.eu/v/CE-2019-1512\\_CLARIN2019\\_ConferenceProceedings.pdf](https://office.clarin.eu/v/CE-2019-1512_CLARIN2019_ConferenceProceedings.pdf) [last viewed October 29, 2019].



The use of a person's voice as identifiable personal data in a language model can create legal challenges. In some cases, developers of language technology must be careful how to address issues of processing of personal data contained in models.

**Keywords:** data, data-intensive product, data protection, algorithm, language technologies

## Introduction

The development of language technologies (LTs) relies on the exploitation of language data (LD). LD are often covered with several tiers of rights (copyright, related rights, personal data rights). The use of LD can be based on a consent or an exemption model.<sup>2</sup>

The issue we explore in this article concerns the impact of the legal regime of data on LTs. The question is whether legal restrictions applicable to data also apply to the LTs that are developed using them. The article aims to reduce the legal uncertainty regarding how far, in the pipeline of developing LTs, the original copyright and personal data (PD) protection<sup>3</sup> regulations apply. If we take a recorded phone call, for instance, it is evident that copyright and PD protection apply to a copy of that recording. At the other extreme, it is equally apparent that they do not apply to the Voice UI (User Interface) of a new fridge, even though the latter was trained on a data-set containing the former. The line where the original rights cease to apply has to be somewhere between these points, and it is vital for researchers and developers to know where.

To place the legal analysis into the technological context, it is essential to understand the process of development of LTs. The development of LTs can be divided into the following phases:

**Collection/Creation of raw data** (written texts, speech recordings, photos, videos, etc.). These often contain copyrighted material and personal data. Their development usually does not involve any other activities than the actual recording, initial cleaning and sanity-checking of the data.

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<sup>2</sup> For further discussion, see Kelli A., Vider K., Lindén K. The Regulatory and Contractual Framework as an Integral Part of the CLARIN Infrastructure. 123: Selected Papers from the CLARIN Annual Conference 2015, October 14–16, 2015, Wrocław, Poland. De Smedt K. (ed.), Linköping University Electronic Press, Linköpings universitet, 2015, pp. 13–24. Available at: <http://www.ep.liu.se/ecp/article.asp?issue=123&article=002> [last viewed November 2, 2019]; Kelli A., Vider K., Pisuke H., Siil T. Constitutional Values as a Basis for the Limitation of Copyright within the Context of Digitalization of the Estonian Language. In: Chair: Prof. Dr. habil. iur. Kalvis Torgans, University of Latvia, Latvia (ed.), Constitutional Values in Contemporary Legal Space II 16–17 November, 2016. Collection of Research Papers in Conjunction with the 6<sup>th</sup> International Scientific Conference of the Faculty of Law of the University of Latvia (pp. 126–139). Riga, Latvia: University of Latvia Press, 2017.

<sup>3</sup> The GDPR defines personal data as “any information relating to an identified or identifiable natural person (‘data subject’)” (Art. 4 (1)).

Dangers with regard to copyright and PD protection can be very real: republication of copyrighted works, surveillance by governments or insurance companies, and so forth.

There is a possibility to identify significant portions of copyrighted works. It is almost impossible to anonymise or pseudonymise completely so that it would become mathematically impossible to identify any persons.

**Compiling of data-sets, or collections of data** (raw text corpora like Google News, Common Crawl or OpenSubtitles, speech corpora like the Prague DaTabase of Spoken Czech, etc.). Data such as the above, but collected and organised with a specific criterion in mind (e.g. speech recordings on a specific topic by residents of a certain region in order to capture the accent of that region); these data-sets usually come in such quantities that any individual piece of data constitutes a negligible part of the whole, and could, in principle, be removed without affecting the usability of the data-set.

For copyright and PD purposes, data-sets are not different from raw data<sup>4</sup>. The main practical difference is that the sheer volume of data may make it technically difficult for individuals to become aware that their data have been included in the data-set.

Creation of a data-set often involves a nontrivial contribution in gathering, organising, indexing, presenting, hosting, etc. of the data.

**Creation of annotated data-sets** (POS-tagged corpus of written texts like the ENC17, syntactically parsed corpora like the Universal Dependencies treebanks, etc.). The above category augmented with some analysis.

Again, annotated data is not different from raw data in terms of copyright and PD, although the copyright holders of the raw data and the annotations may be different. The annotation layers may be stored separately and may even have some use on their own, but the usual practice is to produce copies of the original data together with the annotation layers so that the resulting dataset contains all of the original data.

Creation of an annotated data-set includes analysis of the data, either manual, semi-automatic or automatic.

**Models.** Data products developed from some processing of the above, but not necessarily containing the above, which try to *model*, i.e. represent or describe, language usage<sup>5</sup>. Examples: dictionaries, wordlists, frequency distributions, n-gram

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<sup>4</sup> In fact, it can be argued that datasets qualify for database protection (for further discussion, cf. Eckart de Castilho et al. 2018).

<sup>5</sup> It should be noted that for the legal purposes of this article we use a broad definition of models, while in the literature of Natural Language Processing, the term “model” is usually used for Machine Learning models mainly.

lists like Google ngrams, pre-trained word embeddings like in Grave et al.<sup>6</sup>, pre-trained language models like in Devlin et al.<sup>7</sup>

The creation of a model involves significant amounts of work, expertise and (computational) resources. Steps include, at least, creation and/or selection of the algorithm, implementation of the algorithm in software, hardware setup (which may even include custom hardware development), hyperparameter optimisation, and model validation.

In rare cases, some model types may be consumer products of their own (e.g., dictionaries). Mainly, however, models are used in downstream tasks to create other products.

**Semi-finished products** (text-to-speech engine or a visual object detector) and **finished products** (talking fridge). These are out of scope for the current analysis, because their status as original works should be beyond doubt.

The authors' main argument is that the legal regime of LD does not usually affect the use of language models. LD may be covered with different rights (copyright, related rights, PD protection). However, after language models are developed using the referred data (e.g., relying on research exception), they can be used without copyright and PD law restrictions, unless models contain identifiable material protected by copyright and PD.

To comprehensively address this crucial issue, the international team of researchers consists of experts with different backgrounds covering law and technology. Therefore, it is possible to discuss the latest technological developments and relevant regulatory framework. The main focus is EU law. Particular attention is given to the Directive on Copyright in the Digital Single Market<sup>8</sup> (Digital Copyright Directive, DCD) since it introduces a new regulation on text and data mining (TDM).

## 1. Copyright protection of language data and definition of models

The authors explore the impact of copyright law on LD. The first essential principle, which is well-established in international and national copyright law, is that the mere data are not copyrightable. Here it is appropriate to note, that the concept of "data" can be interpreted in a broad and a narrow way. Interpreted broadly, the concept of data encompasses copyrightable works, data in a narrow

<sup>6</sup> Grave E., Bojanowski P., Gupta P., Joulin A., & Mikolov T. Learning word vectors for 157 languages, 2018. ArXiv Preprint ArXiv:1802.06893.

<sup>7</sup> Devlin J., Chang M.-W., Lee K., & Toutanova K. BERT: Pre-training of Deep Bidirectional Transformers for Language Understanding, 2018. ArXiv:1810.04805 [Cs].

<sup>8</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC. OJ L 130, 17.5.2019, pp. 92–125. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1572352552633&uri=CELEX:32019L0790> [last viewed October 29, 2019].

sense and all kinds of other materials.<sup>9</sup> Data, understood in a narrow sense, means only non-copyrightable pieces of information, such as numbers, names, addresses, single words or sounds, and so forth. Since data in a narrow sense are not protected by copyright, they could be freely used as LD. However, there is a problem. Single pieces of data are not usually found in isolation, but they are in combination with or within the copyrightable materials and their separation in practice can be very complicated or even impossible.

The second long-established requirement is that of **originality**. Work is protected if, and only if, it is original. Therefore, the originality requirement defines the copyright status of the input data. Oddly enough, this general requirement was never defined in international treaties or European *acquis*.<sup>10</sup> The task to define the legal meaning of originality for copyright purposes was mainly taken by the Court of Justice of the European Union (CJEU). As was explained in the seminal decision of the *Infopaq* case<sup>11</sup>, originality means the author's own intellectual creation. In turn, the "author's own intellectual creation" presupposes the expression of the author's creative abilities in the production of the work by making free and creative choices.<sup>12</sup> In one of the last decisions, CJEU has explained, that in order to determine the originality of the textual material, the national court should ascertain whether, in drawing up such materials, the author was able to make free and creative choices capable of conveying to the reader the originality of the subject matter at issue, the originality of which arises from the choice, sequence and combination of the words by which the author expressed his or her creativity in an original manner.

On the contrary, if the materials under consideration constitute purely informative documents, the content of which is primarily determined by the information which they contain, so that such information and the expression of those materials become indissociable and that those materials are thus entirely characterised by their technical function, originality is missing.<sup>13</sup>

Another important statement in the *Infopaq* case was that an extract consisting of eleven words could constitute an original work. The Court has also explained that a single word cannot be regarded as original and protectable work.

In the context of the current research, the originality requirement is important from two different perspectives. First, if originality is missing, the pre-existing text contained in a data-set is not protected and can be used without authorisation. Therefore, even if parts of this text are reproduced in the model, they are not

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<sup>9</sup> Art. 1(2) of the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases defines the database as the collection of independent works, data or other materials.

<sup>10</sup> Although it was defined in several EU directives with regard to specific categories of works, such as computer programs or photographic works.

<sup>11</sup> CJEU judgement of 16 July 2009 in case No. C-5/08. *Infopaq International A/S vs. Danske Dagblades Forening*.

<sup>12</sup> CJEU judgement of 1 December 2011 in case No. C-145/10 *Eva-Maria Painer vs. Standard VerlagsGmbH et al.*

<sup>13</sup> CJEU judgement of 29 July 2019 in case No. C- 469/17 *Funke Medien NRW GmbH vs. Bundesrepublik Deutschland*.

protected as well. Second, even if a text as a whole is original and, therefore, protected, the question remains, whether the fragments used in the model are original on their own. If they are not, then again, they can be used without authorisation. Thus, originality must be established not only concerning the original work but also as regards the parts used.

In addition, in its latest case law CJEU has underlined, that, besides originality, a work also must meet the third requirement in order to be copyright-protected, i.e. it

*must be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in the permanent form.*<sup>14</sup>

Arguably, this requirement in practice will be present in the majority of cases, because the texts (or other materials) used for models typically are expressed in a fixed form.

It should also be borne in mind that the protectability of works is usually presumed. For instance, according to the Copyright Act of Estonia<sup>15</sup>

*The protection of a work by copyright is presumed except if, based on this Act or other copyright legislation, there are apparent circumstances which preclude this. The burden of proof lies on the person who contests the protection of a work by copyright.*<sup>16</sup>

Similarly, the Latvian Copyright Act<sup>17</sup> provides that copyright shall apply to works of literature, science, art and other works referred to in Article 4 of this Act, also unfinished works, regardless of the purpose of the work and the value, form or type of expression.<sup>18</sup> To put it differently, it is up to a person using LT to prove that it is not copyright protected. In practice, this point is very complicated.

LD are used to develop models. Models are the main focus of our study. Language models are a major intermediate result in developing LTs. They aim to describe language, like the models of physics aim at describing physical reality. Like modelling in other research fields, the creation of language models is not possible without extensive data processing, which may often be the last step in creating the model.

Due to their heterogeneous typology and frequent development of new types, models are not easy to define. Broadly, a model is a data product aimed at describing something – like natural language in the case of language models. Traditionally,

<sup>14</sup> CJEU judgement of 13 November 2018 in case No. C-310/17. *Levola Hengelo BV vs. Smilde Foods BV*.

<sup>15</sup> The Copyright Act of Estonia. English translation. Available at: <https://www.riigiteataja.ee/en/eli/504042019001/consolide> [last viewed November 3, 2019].

<sup>16</sup> Copyright Act of Estonia § 4 (6).

<sup>17</sup> Latvian Copyright Act. English translation available at: <https://vvc.gov.lv/image/catalog/dokumenti/Copyright%20Law.doc> [last viewed November 11, 2019].

<sup>18</sup> Art. 2(2) Latvian Copyright Act.

such descriptions as dictionaries and grammars were created using pen and paper, previously with basic tools, like typewriters and text processors, now increasingly using more complex tools like machine learning software. Examples of models used in language technology include the following:

- a) Dictionaries and grammars (both traditional and now increasingly machine-readable) provide information about words in a natural language and how they are used.
- b) Frequency lists and co-occurrence lists contain words or short sequences of words with information about how often they occur in texts, including how often they occur next to each other;
- c) Word embeddings are currently a popular type of model, listing words like above, but providing each with a set of numbers that try to capture the meaning of the word, based on how it has been used in texts. Words with more similar meanings have more similar numbers, and various interesting operations on the embeddings turn out to be possible, like “king” – “man” + “woman” = “queen”;
- d) Speech recognition uses several models, one of which is the acoustic model, providing statistical information that relates pieces of audio signals to phonemes or other linguistic units that make up speech.

Developing a model includes substantial intellectual effort on the part of the developer, including one or more of the following depending on the type of model: choice/creation of the dataset, choice/creation of the algorithm, choice/creation of its software implementation to be used for the training of the model and various cycles of testing and validation by tuning the parameters of the software.

Just like it is possible for a text to be too short or trivial or limited in creative choices to qualify as an original work, some models (like a simple frequency list) may also be too simple or too limited in options.<sup>19</sup> In nontrivial cases, the *de facto* situation is that models are made available together with the research papers describing them and the software tools used in their creation. Standard licenses applied to models by their creators include Creative Commons – Attribution-ShareAlike 4.0

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<sup>19</sup> Cf. De Castilho R. E., Dore G., Margoni T., Labropoulou P. & Gurevych I. A legal perspective on training models for Natural Language Processing. Proceedings of the Eleventh International Conference on Language Resources and Evaluation (LREC 2018), Miyazaki, Japan, ELRA. Available at: <http://www.lrec-conf.org/proceedings/lrec2018/pdf/1006.pdf> [last viewed October 29, 2019.]

International<sup>20</sup>, Apache License 2.0<sup>21</sup> and Public Domain Dedication and License v1.0<sup>22</sup>.

A question might be raised whether models constitute derivative works. There is no clear definition of derivative work in international or European legal acts, and different jurisdictions have a quite different understanding of this concept.<sup>23</sup> It is not clear how much of the original work should remain to categorise a model as a derivative work. Models cannot be considered derivative works, if representations of linguistic units in the model are kept so short (e.g. individual words) that they cannot be considered original parts of the underlying texts.

To give a definite answer, we should have a closer look into all the model types and the processes and resource types and modalities they have been built upon, which is not possible within the limits of this article. It can be argued, though, that models by definition try to capture *generalities* of language use and *abstract* from the original texts as far as possible, producing mainly patterns with statistical measures.

## 2. Legal bases to use copyright-protected language data to develop language models

There are several legal grounds to use copyright-protected LD for the development of LTs. These grounds can be visualised in the following figure:

<sup>20</sup> E.g., Grave E., Bojanowski P., Gupta, P., Joulin A., & Mikolov T. Learning word vectors for 157 languages, 2018. ArXiv Preprint ArXiv:1802.06893; Kondratyuk, D and Straka, M. UDify Pretrained Model, LINDAT/CLARIN digital library at the Institute of Formal and Applied Linguistics (ÚFAL), Faculty of Mathematics and Physics, Charles University, 2019. Available at: <http://hdl.handle.net/11234/1-3042> [last viewed November 3, 2019].

<sup>21</sup> E.g., Devlin J., Chang M.-W., Lee K., & Toutanova K. BERT: Pre-training of Deep Bidirectional Transformers for Language Understanding, 2018. ArXiv:1810.04805 [Cs]; Ulčar, M. ELMO embeddings model, Slovenian language resource repository CLARIN.SI, 2019. Available at: <http://hdl.handle.net/11356/1257> [last viewed November 3, 2019]; Yang Z., Dai Z., Yang Y., Carbonell J., Salakhutdinov R., & Le Q. V. XLNet: Generalized Autoregressive Pretraining for Language Understanding, 2019. ArXiv:1906.08237 [Cs]. Available at: <http://arxiv.org/abs/1906.08237> [last viewed November 3, 2019].

<sup>22</sup> E.g., Pennington J., Socher R, and Manning C. D. GloVe: Global Vectors for Word Representation, 2014. Available at: <https://nlp.stanford.edu/projects/glove/> [last viewed November 3, 2019].

<sup>23</sup> For further discussion, see Birštonas R., Usonienė J. Derivative Works: Some Comparative Remarks from the European Copyright Law. *UWM Law Review*, Vol. 5, 2013; De Castilho R. E., Dore G., Margoni T., Labropoulou P. & Gurevych I. A legal perspective on training models for Natural Language Processing. Proceedings of the Eleventh International Conference on Language Resources and Evaluation (LREC 2018), Miyazaki, Japan, ELRA, 2018. Available at: <http://www.lrec-conf.org/proceedings/lrec2018/pdf/1006.pdf> [last viewed October 29, 2019].



**Figure 1. Legal bases for using language data**

Generally speaking, these grounds can be divided into two main categories: 1) use of copyright-protected LD is based on consent; 2) use of copyright-protected LD is based on a copyright exception.

The acquisition of consent is the most respectful of the interests of the copyright holder. However, it is not always possible (e.g., anonymous blog posts and comments and so forth) or administratively (large number of works) possible to acquire consent. Therefore, the development of language technology is often based on copyright exceptions.<sup>24</sup> The main focus of the article is on the exceptions used to develop language models. Particular attention is given to the new text and data mining (TDM) regulation in the new Digital Copyright Directive.

From a copyright perspective, the development of LTs involves a TDM process. The Digital Copyright Directive defines TDM as

*any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations.*<sup>25</sup>

<sup>24</sup> For further discussion see, See Ilin I., Kelli A. The Use of Human Voice and Speech in Language Technologies: The EU and Russian Intellectual Property Law Perspectives. *Juridica International*, No. 28, 2019, pp. 17–27. Available at: [https://www.juridicainternational.eu/public/pdf/ji\\_2019\\_28\\_17.pdf](https://www.juridicainternational.eu/public/pdf/ji_2019_28_17.pdf) [last viewed October 29, 2019]; Kelli A., Vider K., Pisuke H., Siil T. Constitutional Values as a Basis for the Limitation of Copyright within the Context of Digitalization of the Estonian Language. In: Chair: Prof. Dr. habil. iur. Kalvis Torgans, University of Latvia, Latvia (ed.), *Constitutional Values in Contemporary Legal Space II* 16–17 November, 2016. Collection of Research Papers in Conjunction with the 6<sup>th</sup> International Scientific Conference of the Faculty of Law of the University of Latvia Riga, Latvia: University of Latvia Press, 2017, pp. 126–139; Kelli A., Tavast A., Pisuke H. Copyright and Constitutional Aspects of Digital Language Resources: The Estonian Approach. *Juridica International*, No. 19, 2012, pp. 40–48. Available at: [https://juridicainternational.eu/public/pdf/ji\\_2012\\_1\\_40.pdf](https://juridicainternational.eu/public/pdf/ji_2012_1_40.pdf) [last viewed November 2, 2019]; Kelli A., Vider K., Lindén K. The Regulatory and Contractual Framework as an Integral Part of the CLARIN Infrastructure. 123: Selected Papers from the CLARIN Annual Conference 2015, October 14–16, 2015, Wrocław, Poland. Koenraad De Smedt (ed.), Linköping University Electronic Press, Linköpings universitet, 2015, pp. 13–24. Available at: <http://www.ep.liu.se/ecp/article.asp?issue=123&article=002> [last viewed November 2, 2019].

<sup>25</sup> The Digital Copyright Directive Art. 2 (2).



It should be kept in mind that TDM as such is not a relevant activity from the copyright perspective.<sup>26</sup> Since the performance of TDM requires copying of the content (often copyrighted material), the reproduction right needs to be limited. The following legal grounds are explored for the purpose of limiting reproduction rights for TDM:

### 2.1. Temporary reproduction right

The InfoSoc Directive<sup>27</sup> obliges the EU Member States to limit the reproduction right so that it does not cover temporary technical copies which have no independent technological significance.<sup>28</sup> The use of this legal ground for TDM is also emphasised in the Digital Copyright Directive.<sup>29</sup> The usability of this ground for LT development is also acknowledged by technology experts.<sup>30</sup>

### 2.2. Private use exception

LT development can be based on the private use exception as well. This is relevant in countries with a very limited research exception. The InfoSoc Directive sets forth private use as an optional exception to the reproduction right that the EU Member States can adopt. The exception can be relied on by a natural person for private use without commercial purpose. The rightholders are entitled to fair compensation (Art. 5 (2) (b)), so the exception is rarely applied. If a country has

<sup>26</sup> It is explained in the Digital Copyright Directive that “Text and data mining can also be carried out in relation to mere facts or data that are not protected by copyright, and in such instances no authorisation is required under copyright law” (Recital 9).

<sup>27</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. Official Journal L 167, 22/06/2001 pp. 0010–0019. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1555254956114&uri=CELEX:32001L0029> [last viewed October 29, 2019].

<sup>28</sup> The exact provision in the InfoSoc Directive reads: “Temporary acts of reproduction referred to in Article 2 [reproduction right – the authors’ addition], which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2” (Art. 5 (1)).

<sup>29</sup> According to Digital Copyright Directive “There can also be instances of text and data mining that do not involve acts of reproduction or where the reproductions made fall under the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC, which should continue to apply to text and data mining techniques that do not involve the making of copies beyond the scope of that exception” (Recital 9).

<sup>30</sup> See De Castilho R. E., Dore G., Margoni T., Labropoulou P. & Gurevych I. A legal perspective on training models for Natural Language Processing. Proceedings of the Eleventh International Conference on Language Resources and Evaluation (LREC 2018), Miyazaki, Japan, ELRA, 2018, pp. 1272–1273. Available at: <http://www.lrec-conf.org/proceedings/lrec2018/pdf/1006.pdf> [last viewed October 29, 2019].

enacted a research exception, that is a better ground, since research institutions cannot rely on the private use exception.

### 2.3. Quotation right

The Berne Convention<sup>31</sup> regulates the quotation right at the international level. Article 10 (1) of the Convention allows quotations but requires, among other things, that quotations must be compatible with fair practice, and that they do not exceed the extent justified by the purpose. The InfoSoc Directive allows the EU Member States to introduce the quotation right, but quotations must be limited to criticism or review.<sup>32</sup> The quotation right is differently implemented in national laws. For instance, the Estonian Copyright Act does not require any purpose for quotation (e.g., criticism) but the author of the quoted work needs to be attributed, the quoted work has to be lawfully published, and the quotation should not exceed the justified extent.<sup>33</sup> The Latvian Copyright Act provides similar regulation by adding that right of quotation shall be permitted in works “created and used in the face-to-face teaching and research process in educational and research institutions for non-commercial purposes”.<sup>34</sup> There are jurisdictions where the quotation right has more limitations (e.g., Lithuania). In case the quotation right does not have too restrictive requirements, it can be used to compile data-sets containing LD and use it for the development of LTs.

### 2.4. Research exception

This exception is often used when a legal ground is needed for TDM. The research exception is provided in the InfoSoc Directive as non-mandatory for the EU Member States. According to the wording of the InfoSoc Directive, EU Member States may allow the use of works

*for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved.*<sup>35</sup>

The research exception is not a panacea for TDM. The current framework has several limitations, such as the exclusion of a commercial purposes, which has an adverse impact on industry-academia cooperation.

<sup>31</sup> Berne Convention for the Protection of Literary and Artistic Works. Available at: <https://wipolex.wipo.int/en/text/283698> [last viewed October 29, 2019].

<sup>32</sup> The InfoSoc Directive Art. 5 (3) clause d.

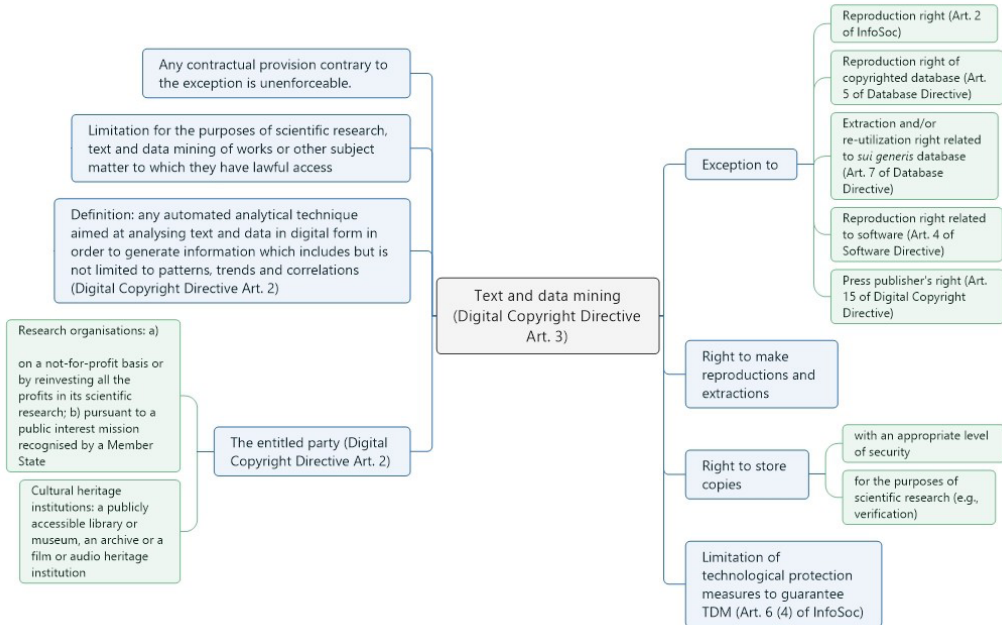
<sup>33</sup> The Copyright Act of Estonia § 19 clause 1.

<sup>34</sup> Art. 21(1) Latvian Copyright Act.

<sup>35</sup> The InfoSoc Directive Art. 5 (3) clause a.

## 2.5. TDM exception

The Digital Copyright Directive has two mandatory TDM exceptions. One is meant for research and cultural heritage institutions (Art. 3) and the other for everyone (Art. 4). Since the focus of the current article is on the research context and due to limited space, the authors concentrate on TDM for research purposes. The TDM regulatory framework is visualised in the following figure:



**Figure 2. Text and data mining for scientific research**

According to the Digital Copyright Directive research, organisations and cultural heritage institutions<sup>36</sup> are entitled to rely on this exception. The Directive defines research organisations extensively. The requirement is that research is conducted

*on a not-for-profit basis or by reinvesting all the profits in its scientific research; or pursuant to a public interest mission recognised by a Member State in such a way that the access to the results generated by such scientific research cannot be enjoyed on a preferential basis.*<sup>37</sup>

<sup>36</sup> The Digital Copyright Directive defines cultural heritage organisations as “a publicly accessible library or museum, an archive or a film or audio heritage institution” (Art. 2 (3)).

<sup>37</sup> The Digital Copyright Directive Art. 2 (1).

The Digital Copyright Directive Art. 3 (1) allows making copies of works, objects of related rights (e.g., performances), press publications<sup>38</sup> and extractions from *sui generis* databases for TDM for scientific research. The key issue here is that access to the material has to be lawful.

There are remedies in case rightholders adopt measures limiting the TDM exception. According to 7 (1) of the Digital Copyright Directive, any contractual provision contrary to the exception is unenforceable. The situation is more nuanced with technological measures.<sup>39</sup> The Digital Copyright Directive Art. 3 (3) allows rightholders

*to apply measures to ensure the security and integrity of the networks and databases where the works or other subject-matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.*

The question is what happens if rightholders go beyond what is allowed by the Directive. According to the InfoSoc Directive Art. 6 (4) Member States

*take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation.*

It should be mentioned that the practical application of this requirement is not so efficient. There are few efficient mechanisms to compel rightholders to adopt technological measures to allow the free use prescribed by law.

A key issue for language research relates to the use of compiled data-sets exploited for TDM. The question is, what can be done with data-sets. The Digital Copyright Directive Art. 3 (2) provides that

*Copies of works or other subject-matter made in compliance with paragraph 1 shall be stored with an appropriate level of security and may be retained for the purposes of scientific research, including for the verification of research results.*

The Directive does not say clearly whether data-sets can be shared among researchers. This is a genuinely crucial issue since research and research infrastructures<sup>40</sup> are based on the ideology of sharing research data. It remains to see how the national legislators implement the provision. The research community should use all possible measures to introduce a regulation which allows at least limited sharing.

<sup>38</sup> The right to press publications is introduced with the Digital Copyright Directive Art. 15.

<sup>39</sup> The InfoSoc Directive Art. 6 (3) defines technological protection measures as “any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder”.

<sup>40</sup> E.g., CLARIN (Common Language Resources and Technology Infrastructure). European Research Infrastructure for Language Resources and Technology. Additional information available at: <https://www.clarin.eu/> [last viewed November 3, 2019].

The TDM exception is not limited to non-commercial activities. The Directive allows for public-private partnerships. This means that research organisations can collaborate with private partners to carry out the TDM.<sup>41</sup>

### 3. Protection of personal data remaining in language models

Personal data issues relating to language technology with a particular emphasis on voice have been previously studied.<sup>42</sup> Therefore, PD protection is covered to the extent needed for this article. The following figure summarises the main aspects of PD processing for research purposes:

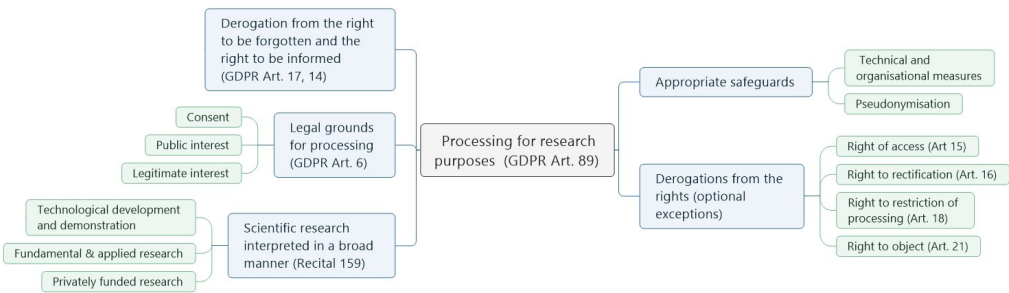


Figure 3. Processing personal data for research purposes

Article 4 (14) of GDPR defines “biometric data” which means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data. The human voice can be considered biometric data as it contains information regarding a person’s physiological characteristics which make that person distinct. Technical means make it possible to distort the voice recording in a way that it is not any more possible to identify the speaker. In such a case, the recording may be considered anonymous information (GDPR, recital 26) to which the GDPR does not apply. Article 4 (1) defining personal data refers not only to “identified” but also to “identifiable” natural person. In deciding over “identifiability”, account should be

<sup>41</sup> Recital 11 of the Digital Copyright Directive.

<sup>42</sup> Kelli A., Lindén K., Vider K., Kamocki P., Birštonas R., Calamai S., Labropoulou P., Gavrilidou M., Straňák P. Processing personal data without the consent of the data subject for the development and use of language resources. In: Inguna Skadina, Maria Eskevich (eds.), Selected papers from the CLARIN Annual Conference 2018 CLARIN Annual Conference 2018, Pisa, 8-10 October 2018, pp. 72–82. Linköping University Electronic Press, Linköpings universitet, 2019. Available at <http://www.ep.liu.se/ecp/article.asp?issue=159&article=008&volume=> [last viewed October 29, 2019]; Klavan J., Tavast A., Kelli A. The Legal Aspects of Using Data from Linguistic Experiments for Creating Language Resources. *Frontiers in Artificial Intelligence and Applications*, No. 307, 2018, pp. 71–78. Available at: <http://ebooks.iospress.nl/volumearticle/S0306> [last viewed October 29, 2019].

taken of all the means reasonably likely to be used, including all objective factors, such as the costs of and the amount of time required for identification, the available technology at the time of the processing and technological developments (recital 26). Thus, it may be concluded that the GDPR does not apply to the recording of the human voice if the recording has been technically processed in a way which makes the speaker's voice unidentifiable and it is not technically possible to reverse the initial voice in the recording.

Regarding PD, it is theoretically possible that small but identifiable bits of information make it to the model. A wordlist might contain a name or e-mail address, for instance. This is easy to avoid using anonymisation or pseudonymisation.

However, it should be kept in mind that for PD, there is no minimum segment in the audio synthesis. Even if the voice is synthesized using neural networks without any remnants of the person's original voice recordings, which, for instance, could be a publicly available radio transmission that has been used for the training of the neural network for research purposes, one is still using the PD of that person if that person can be identified from the synthesized output, despite the fact that there is no single bit in the network which could be attributed to the person's voice.

The main issue here is how to substantiate the processing<sup>43</sup> of PD contained in a model. Generally speaking, the compilation of data-sets containing PD used to create models can be based on the consent, public interest research and legitimate interest (see, GDPR Art. 6 (1) a), e), f)). In case there is consent to process data for research purposes, or processing relies on public interest and the resulting model is used for research purposes as well (i.e., it is not made available to the public or used for commercial purposes), then there is no problem. There is also no problem if consent covers commercial use and public dissemination.

However, the situation becomes complicated when a data-set containing PD is processed based on consent asked for research or on the public interest research exception, but the resulting model (where the PD may remain) is planned to be used for commercial purposes or be made publicly available.<sup>44</sup>

In the described case, there are the following scenarios:

- 1) Use some technical measure to modulate the speech signal so that it no longer resembles the original;
- 2) Ask for consent for commercial use.

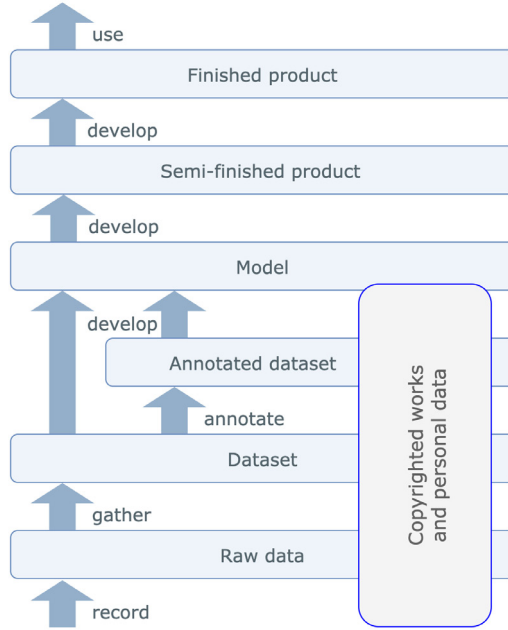
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<sup>43</sup> The GDPR defines processing as "any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction" (Art. 4 (2)).

<sup>44</sup> It is not the voice data which could affect the person negatively, but a speech synthesizer could be used to say all kinds of things which would reflect badly on the person whose voice it is, e.g. if people get the impression that the person said something reprehensible in public.

## Conclusions

The authors' principal findings can be visualised with the following graph:



**Figure 4. Process of developing language technology**

Language data used in language technology may be subject to restrictions arising from copyright and PD protection. In the process of developing a language technology application, language models are the first intermediate result that can be free of such restricted data. This means both that models do not contain any original parts of the data, and that it is not possible to re-create original parts of the data from the model. A potential exception is speech data and the ability of specific models to recreate the voice of a person, in which case PD protection issues need to be addressed.

Our analysis shows that language models cannot be considered derivative works based on the underlying language data. While processing and annotating raw language data is possible only in consent-based or exception-based cases, the use of models as independent scientific results does not presuppose the existence of permission or exception. License terms of the model are at the discretion of the developer of the model, including commercial use and making available to the public.

This result contributes to clarifying the legal aspects of creating language technology applications by specifying a point in the development process where the copyright and PD restrictions of raw language data become no longer applicable.

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## PROPERTY RIGHTS APPLICABLE TO IMMOVABLE PROPERTY

### Summary

The amendment to Section 19 of the law “On Recording of Immovable Property in the Land Registers” was passed in 1997. This proposal by the Ministry of Justice was advanced without any explanation, and it can be easily reversed. The littoral zone shall belong to the State. However, it should be added that this right must be established as the public domain and for the public use.

**Keywords:** pipelines, littoral zone, obligations, right of superficies, adverse possession, registration, Land Register

### Introduction

Latvian Civil Law<sup>1</sup> does not provide a clear definition of immovable property. It could be either a land plot or a building apart from land<sup>2</sup>, and not all of these may be registered as immovable property. Such uncertainty increases probability of litigations which otherwise would be unnecessary.

The littoral zone (in some normative acts named also costal line – see below) shall belong to the State to that point which the highest breakers of the sea reach (Section 1104 of CL). Conception on recording of the costal line of the Baltic Sea and the Gulf of Riga in the name of the State, approved by the Cabinet<sup>3</sup> is one step back from the principle that littoral zone should be exclusively state owned. This approach created a possibility that a part of the state property could be turned into

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<sup>1</sup> The Civil Law (civil code) which was entered into force in 1937, then suspended in 1940 and gradually re-entered again in 1992–1993, hereafter referred to as CL.

<sup>2</sup> Rozenfelds J. Entropy of Physical Unity of property (*ad caelum*) in the Latvian Law. International Scientific Conference “The Quality of Legal Acts and its Importance in Contemporary Legal Space”. 4–5 October, 2012 at the University of Latvia, Faculty of Law, Riga, 2012, pp. 615–625; Rozenfelds J. Superficies *solo cedit* in the Latvian Law. *Journal of the University of Latvia No. 5. Law*, 2013. J. Lazdiņš (ed.-in-chief), Riga: University of Latvia, 2013, pp. 120–136; Rozenfelds J. Reform of Land Registration in Latvia. *Juridica International Law Review*. University of Tartu: Estonia, 22/2014, pp. 43–50.

<sup>3</sup> Par Konceptiju par Baltijas jūras un Rīgas jūras līča piekrastes joslas ierakstīšanu zemesgrāmatā uz valsts vārda. Ministru kabineta rīkojums Nr. 241 Rīgā, 2008. gada 29. aprīlī (prot. Nr. 27 24.§) [Regarding Conception on recording of the costal line of the Baltic Sea and the Gulf of Riga in the name of the State. Cabinet Regulation No. 241]. Available at: <https://likumi.lv/ta/id/174726-par-koncepciju-par-baltijas-juras-un-rigas-juras-lica-piekrastes-joslas-ierakstisanu-zemesgramata-uz-valsts-varda> [last viewed September 4, 2019].

the private one. This in turn could have impact upon the rights of private individuals to enjoy free use of the littoral zone.

Right of superficies<sup>4</sup> as an exclusion from general *superficies solo cedit*<sup>5</sup> principle was included in the CL only in 2017<sup>6</sup> in order to get rid of divided property. However, these amendments are too narrow. They cannot provide solution for the problem of divided or split property rights.

Registration of obligations in the Land Register is an exception to the general principle that only rights *in rem* can be registered in the Land Register. Registration of rights *in personam* is an exception to the rule. There should be an exhaustive list of rights subject to such registration (so-called *numerus clausus*). Our case law has interpreted the above principles differently. The recent practice in dealing with acquisition of immovable property through adverse possession appears to be in conflict with the principle of public reliability of the Land Register.

## 1. Pipelines and subterranean structures

Surface and underground utilities, pipeline routes, roads, streets, parking lots and other similar buildings shall not be recorded in the Land Register as independent objects of property (Section 19 of Law on Recording of Immovable Property in the Land Registers).

This exception has caused numerous disputes as to who owns what. In one of the court disputes over some 110 thousand metric tons of oil between a Belorussian and a Latvian company,<sup>7</sup> the latter claimed the ownership of oil on the basis of owning the pipeline, and claiming that the oil should be regarded as appurtenance to the said pipeline. However, the pipeline in dispute, which is crossing almost

<sup>4</sup> Superficies – the right of superficiarius, i.e., a person other than the owner of the land, to use, pledge and dispose in any other way the improvement (building, utility etc.) that stands on the surface of the ground. See also Black's Law Dictionary 7<sup>th</sup> edition. Garner B. A. (ed.-in-chief). St. Paul, Minn: West Group, 1999, p. 1451.

<sup>5</sup> The rule of *superficies solo cedit*, i.e., that the ownership of a piece of land generally also comprises the ownership of all the buildings erected on the land, applies in all European legal systems. The generally recognised exceptions are building leases (not recognised in Scotland) and apartment ownership. Further exceptions of separate ownership of buildings exist in the Reform States of Middle and Eastern Europe. Cited from: Real Property Law and Procedure in the European Union. General Report. Final Version. Scientific co-ordinators: Dr. habil. Christoph U. Schmid, Ph.D. European Private Law Forum European University Institute, Florence, www.iue.it; Christian Hertel, LL.M. Director DNotI (German Notary Institute), Würzburg, www.dnoti.de with contributions by Dr. Hartmut Wicke, LL.M., DNotI, Würzburg. 31.5.2005 European University Institute (EUI) Florence/European Private Law Forum Deutsches Notarinstitut (DNotI) Würzburg. p. 14. Available at: <https://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/GeneralReport.pdf> [last viewed September 9, 2019].

<sup>6</sup> Amendments to the Civil Law. Official Publications No. 2015/56.5. Available at: <https://www.vestnesis.lv/op/2015/56.5> [last viewed September 3, 2019].

<sup>7</sup> Judgement of the Supreme Court Civil law department in the case No. C12307410; SKC-0268/2016 Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi> [last viewed September 3, 2019].

the entire territory of Latvia is not yet registered in the Land Register. Technically, it belongs to numerous owners of land plots, as the said pipeline is firmly attached to the ground following *superficies solo cedit* principle (Section 968 of CL).

As *superficies solo cedit* is not closely followed in Latvian law, one can find all kinds of solutions in the Land Register. Some pipelines are registered as a separate property, while the owners of the said pipelines are paying so-called compulsory rent to the land owners.<sup>8</sup>

Pipelines which are not registered in the Land Register apart from land should be regarded either as a part of land (Section 968 of CL), or they can be regarded as belonging to the same land plot as appurtenances. Appurtenance is described by the CL as auxiliary property (Section 851 of CL).

In the abovementioned court case, over 110 thousand metric tons of oil pipelines were neither regarded as a part of the land, nor appurtenance to the immovable property. The apparent difficulty in defining the nature of this pipeline as the subject of property rights was its enormous size, as well as significance for the national economy.

This case illustrates difficulties challenging the Latvian legislator. The amendment of 1997 to Section 19 of the law “On Recording of Immovable Property in the Land Registers”, which expressly excluded pipelines from registration in the Land Register, has caused unnecessary difficulties.

The Inčukalns underground gas storage facility (Paragraph 22 Section 1 of Energy Law<sup>9</sup>) is an underground or aboveground object, which is used for storage of natural gas and which is located in the municipalities of Krimulda, Inčukalns and Sēja, and is used for gas storage and supply. It is currently owned by a company *Latvijas Gāze* (Latvian Gas).<sup>10</sup> This example concerns so-called linear buildings such as roads, pipelines, sewage systems etc.<sup>11</sup> Linear buildings which, due to their huge longitude<sup>12</sup> or latitude (for instance – Inčukalns underground gas storage facility (Paragraph 22 Section 1 of Energy Law<sup>13</sup>) cover a great number of land plots) cause difficulties in defining as to who owns what, i.e., where the interests of numerous land owners could collide with the interests of the owner of the linear building.

Linear buildings are mainly intended for public use. Elements of public domain usually do not cause disputes over ownership. Consequently, registration of linear buildings in the Land Register is not necessary and such registration may be found

<sup>8</sup> Case No. C33348615 Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi> [last viewed September 3, 2019].

<sup>9</sup> Available at: <https://likumi.lv/ta/en/en/id/49833-energy-law> [last viewed September 3, 2019].

<sup>10</sup> Currently owned by AS “Conexus Baltic Grid” Available at: <https://www.conexus.lv/pazemes-dabaszgazes-kratuve> [last viewed September 3, 2019].

<sup>11</sup> Cabinet Regulations No. 48, adopted in Riga, on January 10, 2012 (prot. No. 2.21.§). Provisions for cadastral measurement of buildings, issued according to Paragraphs 1, 2, 3 and 6 of Section 22 of the National Real Estate Cadastre Law. Available at: <https://likumi.lv/doc.php?id=243153> [last viewed September 2, 2019].

<sup>12</sup> Judgement of the Supreme Court of the Civil law department in the case No. C12307410; SKC-268/2016 (in Latvian, unpublished).

<sup>13</sup> Available at: <https://likumi.lv/ta/en/en/id/49833-energy-law> [last viewed September 3, 2019].

only in exceptional cases. The same, however, cannot be attributed to pipelines, sewage systems and electricity lines, which are often subjects of private property. It would be appropriate, however, to give legal protection for the interests of the persons who are dealing with such kind of objects, utility companies in particular. As an example could serve Article 20, paragraph 2, Book 5 of the Civil Code of the Netherlands: “[...] the ownership of a network consisting of one or more cables or pipelines destined for transporting solid, fluid or gaseous substances, energy or information that is or will be laid on or above land of other persons belongs to the person who rightfully laid such network or their assignee.”<sup>14</sup>

## 2. Littoral zone. Property rights related to the public and private waters

The littoral zone shall belong to the State to that point which the highest breakers of the sea reach (Section 1104 of CL). Apparently the point where the highest breakers of the sea reach to could be found in different places within different time and weather conditions.

Conception on recording of the costal line of the Baltic Sea and the Gulf of Riga in the name of the State approved by the Cabinet regulations No. 241<sup>15</sup> assumed that littoral zone, which happened to belong to the State, has disappeared completely, whereas the private land continued to belong to the previous owners notwithstanding the fact that it had turned into the sea bed. Such approach, firstly, is at odds with well-established foundations of the acquisition and loss of ownership by accession (Section 960–967 CL, secondly, it leads to abandoning of the rightful ownership of part of land which is held by the state in the interests of the public. Proposals, which were worked out by this Conception which was approved by the Cabinet could have negative impact on the public interest. In order to provide adequate protection of the interests of the society it should be established by the law that sea shore (littoral zone) is the public domain and for the public use.

CL does not regard land, which is covered by water as subject to any ownership. Water is regarded as something which extinguishes property rights by permanently flooding land plots or otherwise – the land which has re-emerged from the water either in the form of a newly formed island or in the form of a previous river bed can be acquired by accession (Sections 1105–1108 of CL). There are, however, cadastral

<sup>14</sup> The Civil Code of the Netherlands. Kluwer Law International. Wolters Kluwer. Law & Business. Hans Warendorf. Richard Thomas. Ian Cury-Summer. Kluwer Law International BV, the Netherlands, 2009.

<sup>15</sup> Par Konceptiju par Baltijas jūras un Rīgas jūras līča piekrastes joslas ierakstīšanu zemesgrāmatā uz valsts vārda. Ministru kabineta rīkojums Nr. 241 Rīgā, 2008. gada 29. aprīlī (prot. Nr. 27 24.§) [Regarding Conception on recording of the costal line of the Baltic Sea and the Gulf of Riga in the name of the State. Cabinet Regulation No. 241]. Available at: <https://likumi.lv/ta/id/174726-par-koncepciju-par-baltijas-juras-un-rigas-juras-lica-piekrastes-joslas-ierakstisanu-zemesgramata-uz-valsts-varda> [last viewed September 4, 2019].

data, which show a bed of a private lake as a private land.<sup>16</sup> Such practice contradicts the abovementioned principle established by CL, in that the land covered by water is subject to any ownership.

In a recent case reviewed by the Supreme Court, a reversed decision was adopted by a lower court instance. The court of lower instance had awarded entire territory of the lake Rāzna (also known as the Sea of Latgale) to the claimant. Apparently, the court had wrongly perceived one of the documents presented by the claimant to be the proof of ownership title, while in fact this paper only proved the claimant's fishing rights.<sup>17</sup>

The case demonstrates, *inter alia*, that there is little understanding of principal distinction between private ownership and public domain. Latvian Civil Law does not provide a clear distinction between state-owned property, which does not serve public interests, and it is up to the state to keep such property or to alienate it, whereas the objects which are declared public domain are unalienable. It would be preferable to follow example of other states which declares such state-owned objects unalienable.

Property that forms part of the public domain is inalienable and cannot be an object of rights in favour of third persons (Section 823 Italian Civil Code)<sup>18</sup>.

### 3. Right of superficies

Right of superficies was recommended back in 2008 (Sections 1129<sup>1</sup> – 1129<sup>9</sup> of CL).<sup>19</sup> Right of superficies enacted as amendments and supplements to the Latvian CL in 2017. This was the purpose of the aforementioned amendments, serving as a gradual replacement of existing situation of dual property (i.e., where a building belongs to the owner other than the owner of the land plot) with the right of superficies, i.e., transferring of property rights of the owner of the building into the right of superficies.<sup>20</sup>

<sup>16</sup> No. 88720050031. Available at: <https://www.kadastrs.lv/#result> [last viewed September 2, 2019].

<sup>17</sup> Judgement of the Supreme Court case No. C03026011, SKC-188/2017 ECLI:LV:AT:2017:1005. C03026011.2.S Available at: <http://at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/civillietu-departaments/hronologiska-seciba?year=2017> [last viewed September 2, 2019].

<sup>18</sup> The Italian Civil Code And Complementary Legislation. Translated in 1969 by Mario Beltramo, Giovanni E. Longo, John H. Merryman. Supplemented, translated and edited by Mario Beltramo (from 1970 through 1996). Subsequently supplemented, translated and edited by Susanna Beltramo. Book three. Property Rights. (Articles 810-1172). Release 2007-1 Issued April 2007. Oceana, Book Three, Booklet 5, p. 3.

<sup>19</sup> Rozenfelds J. Pētījums par Civillikuma Lietu tiesību daļas (ceturtais, piektais, sestās un septītās nodaļas) modernizācijas nepieciešamību [Research on necessity of modernization of the fourth, fifth, sixth and seventh subchapter of the Third Chapter of Civil Law]. Available in Latvian: <https://www.tm.gov.lv/lv/nozares-politika/petijumi> [last viewed September 3, 2019].

<sup>20</sup> Bērziņš G. Apbūves tiesība risinās dalītā īpašuma problēmu [Right of superficies will solve the problem of the divided property]. *Jurista Vārds*, October 3, 2014. Available at: <https://juristavards.lv/zinas/265369-gberzins-bapbuvesb-tiesiba-risinas-dalita-ipasuma-problemu/> [last viewed September 2, 2019].

Peculiarity of the right of superficies, as provided by amendments to the CL, which are in force since January 1, 2017 is that specific right to the improvements on the surface of the land, which belongs to another person and which is commonly known as the right of superficiesarius (see footnote No. 4 of this article) could arise only from the contract between the land owner and the superficiesarius.<sup>21</sup> The abovementioned supplement to the CL could be applied only to the buildings other than dwellings. Soon it became clear that it was impossible to apply this newly established mechanism to linear buildings.

## 4. Obligations

Discussion over the obligation as a subject for registration in the Land Register has been ongoing since restoration of the CL. This discussion has been over interpretation of certain rights, which should or should not be registered in the Land Register.

Registration of obligations is allowed only in exceptional cases. For instance, upon registering a lease or rental contract in the Land Register, the lessee or a tenant shall acquire property rights, which are valid also with respect to third persons (Section 2126 of CL).

The registration of management agreements of residential houses of joint ownership used to carry more weight than lease or rent agreements. Neither the CL nor any other Latvian law expands much on the issue. Thus, the arguing parties only have general principles at hand in dealing with this massive problem (given that a significant number of such agreements have been already registered in the Land Register).

There have been numerous arguments in favour, as well as against such registration.<sup>22</sup> This judgement could be regarded as a land mark decision. It was regarded as one which would put an end to the unpredictable case law.

Unfortunately, this decision avoided giving scientific analysis of theoretical arguments, which were put forward in recent publications by several authors against such practice. Not only this decision has avoided examination of all scientific arguments which were in circulation, but it also did not make a clear-cut distinction between the transaction that should be regarded as *iusta causa traditionis* and the delivery (*traditio*). This decision opened flood gates of various obligations registered in the Land Register which should not have found their way there.

<sup>21</sup> Rozenfelds J. Apbūves tiesība [Right of superficies]. *Jurista Vārds*, December 3, No. 49 (800), 2013. Available at: [https://juristavards.lv/arhivs.php?k=viss&d=03/12/13,03/12/13&h\\_fraze=1](https://juristavards.lv/arhivs.php?k=viss&d=03/12/13,03/12/13&h_fraze=1) [last viewed September 2, 2019]; Rozenfelds J. Apbūves tiesības regulējums Latvijā – grozījumi Civillikumā [Regulation of the Right of Superficies in Latvia]. *Jurista Vārds*, January 12, No. 2 (905), 2016. Available at: [https://juristavards.lv/arhivs.php?k=viss&d=12/01/16,12/01/16&h\\_fraze=1&pageset=10&page=3](https://juristavards.lv/arhivs.php?k=viss&d=12/01/16,12/01/16&h_fraze=1&pageset=10&page=3) [last viewed September 2, 2019].

<sup>22</sup> Judgement of the Supreme Court case No. SKC-1800/2012 Available at: <http://at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/civillietu-departaments/hronologiska-seciba?year=2012> [last viewed September 3, 2019].

## 5. Adverse possession

Possession apart from property cannot create title.<sup>23</sup> Still, there is a tendency to defend rights of an emptor who has acquired possession of immovable property, even if this person was hesitant to register the acquired immovable property in the Land Register. Reasons for such procrastination are unclear. The most common explanation is that both parties consider registration to be mere formality; the relatively high stamp duty could also aggravate the problem, as could a delay in payments by the purchaser. The time gap between stepping into the purchase agreement and registration of the acquired immovable property in the Land Register may exceed ten years, which is also the statute of limitation under Latvian law.

In one of the recent cases,<sup>24</sup> a purchaser who stepped into a purchase agreement dated 24 September 2001, filed a counter-claim over property rights to the purchased immovable property (an apartment in a dwelling house) on August 15, 2016. As the Supreme Court reversed judgment adopted by a court of the lower instances, one cannot learn about the outcome of this case.

However, it is already clear that Latvia is not following the pattern adopted by other countries. Usually, mandatory registration of land in the Land Register excludes any possibility whatsoever to acquire land which is already registered in the name of somebody else (i.e., law precluded so-called *usucaipio contra tabulas*).

This would signal about return to the practice, which was common during the inter-war period, i.e., before introduction of the current CL of 1937, when this issue was governed by its predecessor – the Local Civil Laws (CLL) of 1864.<sup>25</sup>

The time gap between January 28, 1937, when the CL was passed by the Cabinet, and the Soviet occupation, was far too brief to accumulate case law regarding new preconditions for acquisition of immovable property through adverse possession. There are only few publications on the subject, and a single publication addresses this amendment by paying attention to the changes in the wording of the law.<sup>26</sup> It is worth mentioning that the author of this little-known publication has underlined the significance of the last phrase in Section 1024 of CL as compared to the previous one (Section 855 of CLL). He claimed that by adding this additional

<sup>23</sup> However, case law has not always been in line with this rule, see: Rozenfelds J. Ownership Claim. *Journal of the University of Latvia, Law*, No. 6, Lazdiņš J. (ed.-in-chief), Riga: University of Latvia, 2014, pp. 91–107; see also: Rozenfelds J. Ownership Acquired in Good Faith. *Journal of the University of Latvia, Law*, No. 10. J. Lazdiņš (ed.-in-chief). Riga: University of Latvia, 2017, pp. 58–74.

<sup>24</sup> Case No. SKC-195/2019. Available at: <http://www.at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/civillietu-departaments/hronologiska-seciba?year=2019> [last viewed September 2, 2019].

<sup>25</sup> Digitalized version of the original of the Civil laws (in Russian) of 1864 (Part III of the Codification of Local Laws). Available at: <https://www.lndb.lv/Search/Search?FreeFormQuery=1864&PageIndex=2&PageSize=12&SearchEndpointID=0&SearchResultViewMode=List&IsCustomViewMode=False&SortingField=Relevance&IsStopwordRemovalDisabled=False&IsDuplicateCollapsingDisabled=False&SelectedDocumentSets=DOM> [last viewed September 2, 2019].

<sup>26</sup> Publication of unknown date included in the collection of works by this author: Vinzarājs N. Ieilguma nozīme civiltiesību sistēmā. Civiltiesību problēmas [Significance of the prescription in the system of civil law]. Kalniņš E. (ed.), publishers: Erlena Kalniņa un Viktora Tihonova izdevums, Riga, 2000, pp. 83–94.



phrase, the legislator had aimed at precluding acquisition through adverse possession of immovable property *ipso iure*.<sup>27</sup> The abovementioned author also stated that the amendments to the CL precluded usucaption<sup>28</sup> of the immovable through prescription, even if the said immovable was registered in the Land Register under the name of another person (so-called *usucapio contra tabulas*).

However, the court in the case No. SKC-195/2019 has cited the inter-war case without paying attention to the fact that wording of the relevant law has been changed. In doing so, the court can reverse case law, which the legislator tried to avoid back in 1937.

## Conclusions

A simple answer to the question why such structures as a pipeline or Inčukalns underground gas storage, albeit privatized, have never been registered in the Land Register, but are nevertheless regarded as subject of separate ownership, is that they are too big to be ignored. None of the several thousand proprietors has ever bothered to ask whether they would have some piece from the gigantic structure that is spoiling a significant part of their land, as does the abovementioned pipeline, or puts their underground space under certain strain, as does the Inčukalns gas storage. No one has ever doubted property rights of the said “appurtenances” – owners of the soil have never disputed that certain rights belong to another person. This extra-legal status of the said constructions makes them unique phenomena of law.

Comparing of the described phenomena with the situations similar in their legal shape but significantly smaller in physical measures, one could find that usually such structures are either dealt with as split property (with compulsory rent as consideration for the use of the land plot in the ownership of the landlord)<sup>29</sup>, real servitude (without any remuneration for the owner of a servient (i.e. property burdened by said servitude), immovable property<sup>30</sup> or (since 2017) – the right of superficies. This solution resembles regulation of a similar situation by the Swiss Civil law: “Conduits of water, gas, electricity and such like, even where they pass beyond the land for which they have been laid, are, in the absence of a contrary provision, held to be accessory to the works from which they run and to the property of the owner of these works [...] Where the conduit is not visible from the outside,

<sup>27</sup> *Ipso iure* [Latin “by the law itself”], i.e. By the operation of the law itself despite the parties’ actions the property will revert to another person – Black’s Law Dictionary Seventh Edition. Editor in Chief Bryan A. Garner. St. Paul, Minn : West Group, 1999, p. 834.

<sup>28</sup> Usucaption – the acquisition of ownership by prescription - Black’s Law Dictionary Seventh Edition. Editor in Chief Bryan A. Garner. St. Paul, Minn : West Group, 1999, p. 1542.

<sup>29</sup> Judgement of the Riga Regional court of March 5, 2018. No. CA-0504-18/37 (in Latvian) Available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi> [last viewed September 3, 2019].

<sup>30</sup> Judgement of the Supreme Court of the Republic of Latvia. No. SKC – 304/2006. Available at: <http://at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/civillietu-departaments/hronologiskaseciba?year=2006> [last viewed September 2, 2019].

the servitude is constituted by entry in the land register, in other cases by the laying of the conduit itself" (Section 676 of Swiss Civil Code).<sup>31</sup>

Another, quite similar solution could be found in more contemporary Article 20, paragraph 2, Book 5 of the Civil Code of the Netherlands: the ownership of a network consisting of one or more cables or pipelines destined for transporting solid, fluid or gaseous substances, energy or information that is or will be laid on or above land of other persons belongs to the person who rightfully laid such network or their assignee.<sup>32</sup>

It becomes evident that there is no cure fit for all. It seems that pipelines, which are crossing the country and thus serving national interests, must be evaluated by their strategic importance and, if necessary, the land plots, which are physically connected to the said pipelines – nationalised (as their restitution to the previous owners was misplaced<sup>33</sup>).

The problem of underground gas storage is different. Use of naturally formed underground caverns for gas storage does not have any practical interference with the interests of the proprietor of the land plot. It is not an interference with the owner of the underground cavern. Their interests are limited by surface of the land plot up to 20 metres under the ground for extraction of subterranean water or minerals (Section 4, Section 11 of Law On Subterranean Depths<sup>34</sup>).

The problem does not arise with the underground caverns but instead with regulation of real property rights which are too wide. Latvia is probably the only country in Europe which has imposed unlimited *ad caelum*<sup>35</sup> rights upon the owner. Owners of land own not only the surface thereof, but also the airspace above it, as well as the land strata below it and all minerals which are found in it (Section 1042 of CL). This unlimited access to the underground must be redrafted on the model of rights which are applied all around Europe, i.e., the right of the owner of a plot of land extends to the space above the surface and to the subsoil under the surface.

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<sup>31</sup> Cited from the Swiss Civil Code. English version by Ivy Williams published by Oxford University Press, 1925 reprinted by Remark Verlag Zurich, 1976 completely reset, revised and up-dated edition with Notes, Vocabularies, Index and a Synopsis of all changes of the law since 1912 by Siegfried Wyler, Barbara Wiler, Vol. II, Remark Verlag Zurich.

<sup>32</sup> The Civil Code of the Netherlands. Kluwer Law International. Wolters Kluwer. Law & Business. Hans Warendorf. Richard Thomas. Ian Cury-Summer. 2009 Kluwer Law International BV, the Netherlands.

<sup>33</sup> Law On Land Reform in the Cities of the Republic of Latvia. Available at: <https://likumi.lv/doc.php?id=70467> (in Latvian); law "On Land Privatisation in Rural Areas". Available at: <https://likumi.lv/doc.php?id=70467> (in Latvian) [last viewed September 2, 2019].

<sup>34</sup> Available at: <https://likumi.lv/ta/en/en/id/40249-law-on-subterranean-depths> [last viewed September 2, 2019].

<sup>35</sup> Rozenfelds J. Entropy of Physical Unity of property (*ad caelum*) in the Latvian Law. International Scientific Conference "The Quality of Legal Acts and its Importance in Contemporary Legal Space". 4–5 October, Riga: University of Latvia, 2012, pp. 615–625.

However, the owner may not prohibit influences that are exercised at such a height or depth that he has no interest in excluding them.<sup>36</sup>

Considering the ill-advised development of the concept of registration of the littoral zone of the Baltic Sea in the Land Register, it seems apparent that there is a lack of understanding of the concept of public domain in perception of property law in Latvia. A public domain is unalienable. The above mentioned concept on littoral zone of Baltic sea reflects directly the opposite view, i.e., as if the state could deal with the littoral zone as it pleases, even as a result of such reckless attitude the littoral zone becomes private property.

There is an urgent need not only to develop but also to amend the current law in order to corroborate the principle that land in the public domain can be subject to particular rules for achievement of public interest purposes and shall be exempt from the transfer. Property that forms a part of the public domain is inalienable and cannot be object of rights in favour of third persons (Section 82,3 Italian Civil Code).<sup>37</sup>

Right of superficies should be applied to the whole range of immovable property wherever there is a need to get rid of divided or split property.

Amendment should be made in the Section 1070 CL establishing rule that the agreement on divided use of a joint property if registered in the Land Register should become binding to the third parties.

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<sup>36</sup> Section 905 of the German Civil Code, BGB. Available at: <http://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Codigo-Civil-Alemao-BGB-German-Civil-Code-BGB-english-version.pdf> [last viewed September 2, 2019].

<sup>37</sup> The Italian Civil Code and Complementary Legislation. Translated in 1969 by Mario Beltramo, Giovanni E. Longo, John H. Merryman. Supplemented, translated and edited by Mario Beltramo (from 1970 through 1996). Subsequently supplemented, translated and edited by Susanna Beltramo. Book three. Property Rights. (Articles 810-1172), Booklet 5, Oceana, Release 2007-1 Issued April 2007, p. 3.

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## COLLECTIVE LABOUR RELATIONS AND DIGITAL ECONOMY – DO THEY CO-EXIST?

### Summary

The world of work has changed rapidly. New forms of employment (platform employment, crowd-working, fulfilling small gigs) are on the increase. Different views are voiced about the application of individual employment law to the new forms of employment. On that topic, uncertainty prevails. At the same time, the new-workers are unionising and they are organising collective actions against the platform-owners, while the legal grounds of such collective actions remain unclear. Do these collective actions constitute a part of collective labour law or they are outside of the scope of application? The recent case law of the European Committee of Social Rights shows that the self-employed and the new-workers also could have an opportunity to profit from the legal regulation of collective labour relations.

The article examines the importance of collective labour relations for the new forms of employment (new workers) and the possible applicability of collective labour law to the new forms of employment.

**Keywords:** new forms of employment, platform-employment, collective labour relations, self-employed, collective agreement

### Introduction

The changing nature of labour relations leaves no option that the legal regulation of labour relations remains unchanged. There have always been two levels in the legal regulation of labour relations: on the one hand, individual labour relations are important, while on the other hand, the collective labour relations also matter, including the right to conduct collective negotiations, to establish trade unions and other representative organisations for the protection of the rights. Collective labour relations have always played an important role in the regulation of labour relations. A social dialogue has always been relevant in the development of labour relations and also the socio-political relations on the level of the European Union in general.<sup>1</sup>

Whereas the discussion about the regulation of individual work performance comprises different viewpoints (whether including employees or not)<sup>2</sup>, meanwhile,

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<sup>1</sup> About the social dialogue and consultations with trade unions and employers associations, see: <https://ec.europa.eu/social/main.jsp?catId=329&langId=en> [last viewed November 1, 2019].

<sup>2</sup> Davidov G. Who is a Worker? Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=783465](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=783465) [last viewed October 31, 2019]; see also: Tavits G. Scope of Application of Estonian Labour Legislation. *Juridica International*, No. 1, 1996, pp. 114–125. Available at: <https://www.juridicainternational.eu/index.php?id=12431> [last viewed October 31, 2019].

no legal discussion with regard to the interests of a collective of the new employees has so far gained focus. Concurrently, certain forms of work performance have been consolidated in the collective protection of interests (e.g., ride-sharing service via a corresponding platform), but one question has not been solved yet: whether and in which range is it possible to discuss the collective protection of interests and the collective regulation of these interests?

This article is divided into three parts. The first chapter of the article handles the new forms of work performance and the options for legal regulation of such new forms of work performance. The second chapter addresses particular matters, including who can form collective in the meaning of the contemporary labour law and who is entitled to the right to organise collective actions among other things. The third chapter analyses the legal rights of new workers (e.g. workers of the platform) to organise collective activities and conduct negotiations for the conclusion of the collective agreement.

## 1. New forms of work performance – what is new in those?

The development of new forms of work performance is related to a variety of different developments in the society. An important role is played by the development of different digital devices accompanied by options of faster data communication.<sup>3</sup> Whereas the earlier new digital solutions were implemented in the military industry and households, today the new digital solutions have become an integral part of work and daily life. Digital options form the basis for and create possibilities for the simplification of work performance. For example, let us take the performance of distant work and its legal regulation. Distance work has become possible, as the worker does not have to be present at a certain workplace and the employer does not have to check on the employee's presence all the time. It is important that the worker is reachable for the job-related communication and all the necessary assignments are completed. Also, in connection with the development of digital devices new forms of work performance have been invented, including crowdworking (cloudworking) or working via the platform. In case of all these forms of work performance, the main question is: on which contractual basis is the work performed – whether, in the meaning of labour law, it comprises an employee and an employment contract or is it another kind of contractual relation in case of which the regulation of employment contract cannot be adopted.

Work performance via a platform (e.g. *Uber*, *Yandex*, etc.) also plays a notable role here. Hereby, the most important question is whether the platform can be an employer or not,<sup>4</sup> and whether the worker, who gains a chance of employment and

<sup>3</sup> Data Storage History and Future. Available at: <https://www.datarecoverygroup.com/articles/data-storage-history-and-future> [last viewed November 1, 2019].

<sup>4</sup> Prassl J., Risak M. Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2733003](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733003) [last viewed November 11, 2019].

earning income, has to be handled in the meaning of the labour law as an employee, being a subject of all rights and obligations thereof.

On the level of the European Union, attention should be paid to the new forms of work performance based on two documents adopted by the EU: digital single market strategy<sup>5</sup> and the importance of sharing economy.<sup>6</sup> The impact of both documents also allows discussing new forms of work performance and their possible development.

In respect to the new forms of work performance, the main problem seems to be the legal regulation of the work performance – must it definitely be a relation subject to the employment contract or is it another kind of contractual relation? The legal literature and the available court practice shows controversy. Workers of different platforms have been regarded as employees;<sup>7</sup> however, there have also been judicial decisions, in which the workers have not been regarded as employees.<sup>8</sup> Hereby, it is also possible to refer to a legal act, e.g. California Act (Bill 5)<sup>9</sup>, which lists the criteria forming the basis according to which it is possible to identify the employee. According to the aforementioned act, all workers engaged in the new form of work performance have to be entitled to the status of an employee. The statements in the corresponding literature do not overlap. It has been stated that also according to this document it is possible to exclude the employee's status in the new forms of work performance.<sup>10</sup>

The new forms of work performance have practically been discussed for quite some time, attempting to establish who is an employee and who is not. Therefore, there is nothing new or unprecedented in the approach. However, the ways how the work is done and also the working conditions have significantly changed. In case of new forms of work performance, the use of working time has become substantially more flexible, so that practically no restrictions are imposed on the working time. The term of the employment contract has also changed, because in addition to the employment contract concluded for an indefinite term, numerous options of

<sup>5</sup> A Digital Single Market Strategy for Europe, COM(2015) 192 final, European Commission. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447773803386&uri=CELEX:52015DC0192> [last viewed October 28, 2019].

<sup>6</sup> A European agenda for the collaborative economy, COM(2016) 356 final, European Commission. Available at: <http://ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations> [last viewed October 28, 2019].

<sup>7</sup> See e.g., Uber loses appeal over driver employment rights, 20 December 2018. Available at: <https://www.theguardian.com/technology/2018/dec/19/uber-loses-appeal-over-driver-employment-rights> [last viewed October 28, 2019]; Madrid court rules Deliveroo couriers are employees and not freelancers, 24 July 2019. Available at: <https://www.euronews.com/2019/07/23/madrid-court-rules-deliveroo-couriers-are-employees-and-not-freelancers> [last viewed October 28, 2019].

<sup>8</sup> See e.g. Russian gig economy violates worker rights with society's tacit acceptance. Available at: <https://ohrh.law.ox.ac.uk/russian-gig-economy-violates-worker-rights-with-societys-tacit-acceptance/> [last viewed November 11, 2019].

<sup>9</sup> AB-5 Worker status: employees and independent contractors. Available at: [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB5](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5) [last viewed November 11, 2019].

<sup>10</sup> See <https://techcrunch.com/2019/09/10/gig-worker-bill-ab-5-passes-in-california/> [last viewed November 11, 2019].

short-term work performance have been added, concurrently, it may be observed that the so-called gigs have gained an increasing importance. Consequently, the nature of labour relation has changed considerably – the labour relations are no longer established for an indefinite term, and at the same time it cannot be assumed that the work is performed for 40 hours a week, at the time precisely appointed by the employer.

## 2. Who may form the collective in the meaning of collective labour law?

Collective labour relations have always played an eminent role. The corresponding conventions of ILO<sup>11</sup> and the Social Charter of the Council of Europe,<sup>12</sup> and the Charter of Fundamental Rights of the European Union<sup>13</sup> foresee several different options for the formation of collective labour relations; however, these documents do not specify by whom the collective may be formed. The abovementioned documents do not directly indicate that collective labour relations and their legal regulation must be ensured to employees working on the basis of an employment contract. Taking into account the time, when, e.g., the corresponding ILO conventions were adopted, and then considering the implementation practice of ILO conventions and the Social Charter of the Council of Europe, the so-called regular labour relations characterised by existing employment contract is kept in mind. Hence, considering the historical and teleological interpretation, the collective of employees can be formed by people who are working on the basis of an employment contract. All the other workers could not be regarded as a party in collective labour relations because it is not possible to handle them as a “collective”, which can obtain the right to participate in negotiations for the conclusion of a collective agreement and for the application of rights accompanying it.

### Situation in Estonia

The legal regulation of collective labour relations in Estonia is based on the fact that employees and employers may be parties in collective labour relations and may form a collective of workers in its legal meaning. According to § 29 of

<sup>11</sup> C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). Available at: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C087](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C087) [last viewed October 31, 2019]; C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Available at: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C098](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C098) [last viewed October 31, 2019].

<sup>12</sup> Art. 5 and 6 of the European Social Charter (revised) [in the wording 02.01.2019]. Available at: <https://rm.coe.int/168007cf93> [last viewed October 31, 2019].

<sup>13</sup> Art. 28 of the Charter of the Fundamental Rights of the European Union [in the wording 02.01.2019]. Available at: [https://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](https://www.europarl.europa.eu/charter/pdf/text_en.pdf) [last viewed October 31, 2019].



the Constitution of the Republic of Estonia<sup>14</sup>, collective labour relations are entitled to both the employees and the employers. Hereby, in the meaning of the Estonian constitution, subjects to an employment contract are kept in mind, because only the existence of an employment contract ensures the employee's and the employer's legal status.

According to the Collective Agreements' Act<sup>15</sup>, the collective agreement is concluded by the collective of employees and the employer or the federations of employees and the federations of the employers.

According to the Collective Labour Dispute Resolution Act,<sup>16</sup> a collective labour dispute is a disagreement between the employees and the employer, which may occur upon concluding the collective agreement or be connected with the performance of the collective agreement.

According to the Employees' Trustee Act<sup>17</sup>, the trustee is elected by those employees, who do not belong to a trade union. At the same time the trustee can be elected by those employees who are employed on the basis of an employment contract. Other workers, who do not work on the basis of the employment contract, cannot elect a trustee for the purpose that the person would represent their rights collectively.

Hence, according to the legal regulation of the collective labour relations in Estonia it may be stated that a party of collective labour relations has to be an employee and an employer. Collective labour relations can be formed only then, when an employment contract is concluded. Without an employment contract no collective labour relations are possible.

The terms – the employee and the employer have not been unanimously defined in the Estonian legislation today. The aforementioned terms may be derived from the definition of the employment contract. According to § 1 of the Employment Contracts Act<sup>18</sup>, one party – the employee undertakes to perform work while being subject to another party's (employer) management and supervision. The employer undertakes to pay the employee wages for that.

Therefore, the term of the employment contract comprises three relevant features:

- 1) the employee works while being dependent from the employer's orders
- 2) the employer pays the employee wages for such activity

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<sup>14</sup> S 29. The Constitution of the Republic of Estonia. Available at: <https://www.riigiteataja.ee/en/eli/521052015001/consolide> [last viewed October 28, 2019].

<sup>15</sup> Collective Agreements' Act. Available at: <https://www.riigiteataja.ee/en/eli/518062018002/consolide> [last viewed October 31, 2019].

<sup>16</sup> Collective Labour Disputes Resolution Act. Available at: <https://www.riigiteataja.ee/en/eli/526062018001/consolide> [last viewed October 31, 2019].

<sup>17</sup> Employees' Trustee Act. Available at: <https://www.riigiteataja.ee/en/eli/505052017006/consolide> [last viewed October 28, 2019].

<sup>18</sup> Employment Contracts' Act. Available at: <https://www.riigiteataja.ee/en/eli/509052019005/consolide> [last viewed November 1, 2019].

- 3) the legal status of the employee and the employer can be created on the basis of the employment contract only.

Other legal acts regulating labour relations also proceed from the terms of § 1 of the Employment Contracts Act and the legal acts regulating the right to social protection. Hereby, it can be concluded that according to the contemporary collective labour law a collective can be formed only by employees, whose employer has concluded an employment contract. If no employment contract is concluded with the person performing work, the persons providing work do not form a collective and the need for the legal regulation of collective labour relations (the right to carry out collective negotiations, the right to organise collective activities) is absent.

### 3. Collective employment relationships and new forms of work

#### 3.1. Position of the European Committee of Social Rights

Particular attention in the new forms of employment has been paid to the characteristics of individual labour law and the need for regulation. Case law that varies from state to state have, for example, led to different treatment of ride-sharers who work through mediation of platforms. They have been sometimes recognized as employees,<sup>19</sup> while in some cases people working on the platform cannot be considered as employees.<sup>20</sup> Similarly, the Court of Justice of the European Union has not treated *Uber* as a new service provider, but as an ordinary taxi company.<sup>21</sup>

Although there is an ambiguity in the definition of worker in individual labour law, it does not interfere with the organization of collective action by workers who do not work under an employment contract. Thus, in January 2018, there was a service stoppage<sup>22</sup> by platform *Taxify* drivers in Estonia. The reason for the stoppage was that drivers were dissatisfied with the change in pricing policy that would have reduced driver fees. As a result of the service disruption, the *Taxify* (now *Bolt*) platform

<sup>19</sup> See e.g., *Uber loses appeal over driver employment rights*, 20 December 2018. Available at: <https://www.theguardian.com/technology/2018/dec/19/uber-loses-appeal-over-driver-employment-rights> [last viewed October 21, 2019]; Madrid court rules Deliveroo couriers are employees and not freelancers, 24 July 2019. Available at: <https://www.euronews.com/2019/07/23/madrid-court-rules-deliveroo-couriers-are-employees-and-not-freelancers> [last viewed October 28, 2019].

<sup>20</sup> See e.g. *Russian gig economy violates worker rights with society's tacit acceptance*. Available at: <https://ohrh.law.ox.ac.uk/russian-gig-economy-violates-worker-rights-with-societys-tacit-acceptance/> [last viewed November 11, 2019].

<sup>21</sup> European Court of Justice case No. C-434/15, *Asociación Profesional Elite Taxi v. Uber Systems Spain SL*. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CJ0434> [last viewed November 11, 2019].

<sup>22</sup> *Hundred Taxify drivers are striking against new price policy: we are like taxi-monkeys, who work themselves every week in minus, that Taxify will win the price-war!* 26 January 2018. Available at: <https://arileht.delfi.ee/news/uudised/fotod-ja-video-sadakond-taxify-juhti-streigivad-uee-hinnapoliitika-vastu-me-oleme-nagu-taksoahvid-kes-tootavad-end-iga-nadal-miinusesse-et-taxify-void?id=80920773&fbclid=IwAR1RxcFKdqNK3e4WCO2MtgBZpp3QAKzVyFzZRDQjyYEvPNqDdLa7xyUwvg> [last viewed October 28, 2019].

operator withdrew its pricing policy changes. In October 2019, the platform *Bolt* drivers participated in demonstrations in London<sup>23</sup> to further develop price policy elements, as well as to stop platform manipulation with algorithms. Both of the aforementioned actions clearly show that new workers have started to assert their rights collectively and have also realized that, if it is possible to take collective action against platform managers, it can also entail legal consequences.

However, the questions regarding the nature of such outages remain legally unanswered. Is it a strike in terms of collective labour law or is it just a public meeting, for example<sup>24</sup>? As we have seen above, the legal regulation of employment relationships applies when it comes to an employment contract. Similarly, the legal regulation of collective employment relationships is related to the legal protection of employees under employment contracts. Therefore, workers who work on the platforms and who do not have a contract of employment are not considered as subjects to whom collective labour rights apply.

Although platform employees have emerged as the first associations<sup>25</sup> to defend their interests, the existing legal framework does not allow them to be guaranteed the rules governing collective labour regulation.

Given the current understanding of the regulation of collective employment relationships, it can be argued that the regulation of collective employment relationships is excluded for those working on the platform. Nevertheless, in the light of the case law of the European Committee of Social Rights, this situation seems to be coming to an end. This assertion is supported by the decision of the European Social Rights Committee of 12.12.2018, in which the European Social Rights Committee had to formulate its position on whether freelance musicians (self-employed) wishing to enter into a service agreement can do so on the basis of Art. 6 of the European Social Charter.<sup>26</sup> In other words, the European Committee of Social Rights had to formulate a position on whether any economic activity and the collective agreements concluded within it were to be regarded as a collective agreement with all the respective consequences.

In that particular case, it was a collective complaint allowed by the European Social Charter. That collective complaint was brought by the Irish Congress of Trade Unions against the Republic of Ireland. The complaint was supported by the fact

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<sup>23</sup> Bolt minicab drivers to protest 'unjust' working conditions. Available at: <https://www.taxi-point.co.uk/post/bolt-minicab-drivers-to-protest-unjust-working-conditions> [last viewed November 2, 2019].

<sup>24</sup> Tavits G. The Right to Collective Action in Labour Relations in Estonia: Is the Right to Organise a Strike Guaranteed? *Juridica International*, No. 1, 2014, p. 218. Available at: <https://www.juridicainternational.eu/index.php?id=15417> [last viewed October 28, 2019].

<sup>25</sup> International Rideshare Drivers Association. Available at: <https://www.internationalridesharedriversassociation.com/> [last viewed October 1, 2019], see also Rideshares United, <https://drivers-united.org/about> [last viewed October 31, 2019].

<sup>26</sup> European Committee of Social Rights, Decision on Merits, 12.12.2018, case: Complaint No. 123/2016. Available at: [https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset\\_publisher/5GEFkJmH2bYG/content/no-123-2016-irish-congress-of-trade-unions-v-ireland?inheritRedirect=false](https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH2bYG/content/no-123-2016-irish-congress-of-trade-unions-v-ireland?inheritRedirect=false) [last viewed October 1, 2019].

that the Irish Competition Act does not provide for the possibility of collective agreements for self-employed persons, since under that law such agreements would be contrary to the provisions of the Competition Act. Although the Republic of Ireland amended its competition law and in certain cases allowed self-employed to enter into collective agreements, the Irish Congress of Trade Unions found that the restrictions imposed by competition law were too restrictive and that not all individual entrepreneurs could enter into collective agreements. In its ruling, the European Committee of Social Rights concluded that the Irish Competition Act does not, however, infringe the right of self-employed to conclude a collective agreement. At the same time, the European Committee of Social Rights formulated one important principle for the future. According to the European Committee of Social Rights:

*The Committee considers that self-employed workers having no substantial influence on the content of their contractual conditions, if they were to bargain individually, must therefore be given the right to bargain collectively.*<sup>27</sup>

The Committee also has stated:

*Moreover, the Committee emphasises that collective mechanisms in the field of work are justified by the comparably weak position of an individual supplier of labour in establishing the terms and conditions of their contract. This contrasts with competition law where the grouping of interests of suppliers endanger fair prices for consumers.*

The Committee continued:

*In establishing the type of collective bargaining that is protected by the Charter, it is not sufficient to rely on distinctions between worker and self-employed, the decisive criterion is rather whether there is an imbalance of power between the providers and engagers of labour. Where providers of labour have no substantial influence on the content of contractual conditions, they must be given the possibility of improving the power imbalance through collective bargaining.*

(p. 38 of the Decision).<sup>28</sup>

According to that decision, the European Committee on Social Rights endorses the view that it does not matter whether it is a contract of employment or not, but rather whether or not the worker (in this case, the individual entrepreneur) has the opportunity to influence the content of the contract. In the absence of such an opportunity, a self-employed or a group of self-employed must also be able to

<sup>27</sup> European Committee of Social Rights, Decision on Merits, 12.12.2018, case: Complaint No. 123/2016. Available at: [https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset\\_publisher/SGEFkJmH2bYG/content/no-123-2016-irish-congress-of-trade-unions-v-ireland?inheritRedirect=false](https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/SGEFkJmH2bYG/content/no-123-2016-irish-congress-of-trade-unions-v-ireland?inheritRedirect=false) [last viewed October 1, 2019].

<sup>28</sup> European Committee of Social Rights, Decision on Merits, 12.12.2018, case: Complaint No. 123/2016. Available at: [https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset\\_publisher/SGEFkJmH2bYG/content/no-123-2016-irish-congress-of-trade-unions-v-ireland?inheritRedirect=false](https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/SGEFkJmH2bYG/content/no-123-2016-irish-congress-of-trade-unions-v-ireland?inheritRedirect=false) [last viewed October 1, 2019].

conclude collective agreements, and such agreements do not infringe the relevant provisions of competition law. By that decision, the European Committee of Social Rights essentially extended the scope of collective labour law and allowed collective agreements to be concluded for non-employees too. This is a rather landmark decision that will significantly change the perceptions that so far have prevailed in collective labour relations. The decision above, as a whole, forces the Member States which have ratified the European Social Charter to review their national law in order to preclude situations where national competition law would preclude the conclusion of such agreements and restrict the ability of self-employed to bargain collectively on the terms of service.

In addition to being able to negotiate the terms of service collectively, it must also be accompanied by the opportunity of collective action (the right to strike). Although the position of the European Social Rights Committee has not been formulated on the right to organize strikes, the right to organize strikes is an important part of collective bargaining. Thus, opening up the legal opportunity to conclude collective agreements also entails the right to organize collective actions.

### 3.2. Legal situation in Estonia

Under Estonian law, a collective agreement can be concluded by a collective of employees or an association of employees. Similarly, the right to organize collective actions – strikes and lock-outs – is vested in the collective of employees or employers. In both cases, it is a prerequisite that there is an employment relationship and that relationship also forms the basis for the collective of workers who must be provided with the relevant rights.

According to Estonian law, the difference in collective labour relationships remains for civil servants. Under the Civil Service Act<sup>29</sup>, officials cannot organize strikes. However, the Civil Service Act does not provide for any exceptions – everyone who is appointed as an official, is not entitled to strike. Nevertheless, it is not prohibited for officials to negotiate collectively with a view to concluding a collective agreement. If the negotiating parties that are officials (or trade unions representing the interests of officials) fail to reach the necessary agreement, the officials will not be able to use retaliation measures.

Under Estonian competition law<sup>30</sup>, agreements between undertakings, coordinated practices and decisions of associations of undertakings are prohibited, including:

- 1) the direct or indirect determination of prices and other trading conditions in relation to third parties, including fixing of prices, tariffs, charges,

<sup>29</sup> Civil Service Act. Available at: <https://www.riigiteataja.ee/en/eli/525032019003/consolide> [last viewed November 1, 2019].

<sup>30</sup> Competition Act. Available at: <https://www.riigiteataja.ee/en/eli/510042019001/consolide> [last viewed October 31, 2019].

- mark-ups, discounts or rebates, subscriptions, surcharges, interest rates, rent or rental fees;
- 2) restriction of production, service, goods market, technical development or investment;
  - 3) sharing of goods market or source of supply, including foreclosure of, or attempt to foreclose, third party goods market;
  - 4) exchange of information which is harmful to competition;
  - 5) agreeing to apply dissimilar conditions to equivalent agreements, thereby placing business partners at a competitive disadvantage;
  - 6) imposing upon a third party a condition for entering into an additional obligation not related to the object of the agreement.

Although the Competition Act imposes restrictions on the conclusion of certain types of agreements, the Competition Act also exempts the cases, in which agreements can be concluded and these agreements do not distort competition or the market situation. Pursuant to Section 4 of the Competition Act,<sup>31</sup> the above restrictions do not apply in the following cases:

- 1) the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress or to protecting the environment by allowing consumers a fair share of the resulting benefit;
- 2) does not impose on the undertakings concluding the agreement, acting in concert or taking a decision, the restrictions which are not indispensable to the attainment of the above objectives; does not impose on undertakings which conclude, coordinate or take decisions restrictions which are not indispensable to the attainment of the objectives referred to above;
- 3) does not allow undertakings which conclude, coordinate or take decisions to eliminate competition in respect of a substantial part of the product market.

The above exceptions do not foresee that self-employed workers can enter into collective agreements with the aim of jointly agreeing, for example, on the cost (price) of service. Rather, under Estonian law, the self-employed person can be presumed to be subject to the aforementioned price restriction and other trading conditions. It means that if the self-employed wish to negotiate these terms collectively and conclude a collective agreement, this is a situation where the agreement significantly reduces the conditions of competition. Since such collective agreement significantly impairs the conditions of competition, such agreements are not permissible. In addition, the Competition Act provides for a financial penalty if a legal person infringes the terms of the Competition Act. In the event of an infringement of free competition, a fine of up to EUR 400 000 may be imposed.<sup>32</sup>

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<sup>31</sup> Competition Act. Available at: <https://www.riigiteataja.ee/en/eli/510042019001/consolide> [last viewed October 31, 2019].

<sup>32</sup> Competition Act. Available at: <https://www.riigiteataja.ee/en/eli/510042019001/consolide> [last viewed October 31, 2019].

Current legislation in Estonia does not support the possibility for self-employed persons, or other non-employed workers to enter into collective agreements in order to determine the prices and conditions for the provision of the service. Such agreements harm the market situation and violate the requirements of competition law. According to this principle, platform-based employees fall into the same category. These workers are also legally precluded from entering into collective agreements to negotiate or amend the terms of service.

The collective actions that have taken place so far, though not leading to agreements, have resulted in the platform manager refusing to set new prices or change the terms of service. Such collective actions are not excluded under Estonian law and do not violate competition law or other statutory requirements.

## Conclusions

The new forms of employment entail the need for review of the existing labour law. So, the context of individual labour law does not provide for any clarity for the status of new worker – for instance, do workers who use platforms to find work and to do work need the same protection as regular employees?

With regard to collective labour relations, the development seems to be different. Persons who work by means of platforms have formed associations to represent their interests, and the first collective actions to protect rights have taken place. Although those who work through platforms may not necessarily be working under an employment contract, the European Committee on Social Rights considers that it is possible to view them collectively and to assert rights arising from collective employment relationships. This option implies that the Member States have to start analysing competition laws, since collective agreements not concluded by trade unions may be contrary to competition law and therefore become unacceptable.

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