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The Concept of Criminal Penalty Policy and the Resulting Criminal Law Amendments

Valentija Liholaja, Dr. iur.
Faculty of Law, University of Latvia
Professor at the Department of Criminal Law
E-mail: *Valentija.Liholaja@lu.lv*; phone: 67034552

The article deals with the issue of the current changes in the Criminal law of our country, which in accordance to the criminal penalty policy concept are to be introduced both in the General and the Special part provisions, essentially affecting the assumptions following from the criminal law doctrine and practice about separate criminal law institutions, as well as determination of punishment for committing a criminal offence. The author of the article will express her evaluation about compliance of some of the planned amendments to the conclusions made in theory and to the practical needs.

Keywords: Criminal law, criminal offence, penalty, criminal penalty policy.

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Introduction

On January 9, 2009 the Cabinet of Ministers of the Republic of Latvia approved the concept of the criminal penalty policy worked out by the Ministry of Justice,[1] which includes conceptual proposals for changes in the system of criminal penalty that "should be used elaborating the necessary amendments in the Criminal law[2] (henceforward also – CL) and in other legal acts whose adoption would facilitate more efficient application of juridical means for achieving the goals of the criminal penalty".[3]

Based on the criminal penalty policy statements the Ministry of Justice has worked out a bulky draft law "Amendments in the Criminal law" which was adopted on December 13, 2012.[4] Those are already the 43th amendments in the Criminal law during its 12 years of its existence.

Elaboration of criminal penalty policy conception and the amendments in the Criminal law following from it is a significant event not only in re-evaluating and reforming of penal policy which in general is to be evaluated as necessary but it also includes essential changes in understanding of several criminal law institutes (for example, classification of criminal offences, multiplicity and its types, penalty and its goal) which requires radical revision of conclusions and assumptions of the criminal law doctrine. Once again carefully analysing the conception of Criminal penalty policy and the draft law elaborated on its basis[6], in which after its reviewing at the meeting of the Cabinet of Ministers committee a number of changes were made, and the report on the initial impact of the draft law (abstract)[7], the present article was written in which its author expresses her evaluation of some of the amendments proposed in the draft law.

1 On classification criteria of criminal offences

In Section 7 of the existing Criminal law criminal offences are divided into criminal violations and crimes while the crimes are subdivided into less serious crimes, serious crimes and especially serious crimes.

As it follows from the provision of the law dividing criminal offences into criminal violations and crimes, the legislator has been guided by the prescribed type of penalty and the maximum length of deprivation of freedom of liberty penalty as stipulated by the specific paragraph of the section in the Special part of the Criminal law providing that there is a criminal violation for which the deprivation of freedom is for no more than two years or a lighter punishment is prescribed. Criminal violation includes both intentional crimes as well as the crimes committed out of negligence yet the legislator does not emphasize it especially.

While subdividing crimes into less serious crimes, serious crimes and especially serious crimes one of the classification criterion is also the type of guilt. Paragraph 3 of Section 7 of the CL defines a less serious crime as an intentional offence for which the law provides for deprivation of liberty for a term exceeding two years but not exceeding five years, or an offence, which has been committed through negligence and for which the law provides for deprivation of liberty for a term exceeding two years, but not exceeding ten years; while a serious crime is an intentional offence for which the law provides for deprivation of liberty for a term exceeding five years but not exceeding ten years, or an offence, which has been committed through negligence and for which the law provides for deprivation of liberty for a term exceeding ten years (paragraph four of Section 7 of the CL). According to paragraph five of Section 7 of the CL an especially serious crime is an intentional offence for which this Law provides for deprivation of liberty for a term exceeding ten years, life imprisonment or the death penalty.

Although in some publications other possible criteria for classification of criminal offences are discussed,[8] learning from the experience of other countries in solving this issue one may conclude that the type of penalty, maximum limit of deprivation of freedom and the type of guilt are those criteria that are used to classify criminal offences.

The draft law intends to revise understanding of the criminal violation stipulating that it is a violation for which no deprivation of liberty is provided for, and it is also planned to revise the elements of crime correspondingly reducing the length of deprivation of liberty. I assume that there should be discussions about the

intention of the authors which is included in paragraph four of Section 7 of the CL to define that *"a serious crime is an intentional offence for which the law provides for deprivation of liberty for a term exceeding three years but not exceeding eight years (..)"*. Further on it is indicated: *"If for an intentional serious crime the law provides for deprivation of liberty not exceeding five years then a* ***lighter penalty may be provided for it****"* (here and henceforward the bold type by the author). Considering the fact that the number of such serious crimes in the Criminal law for committing of which it provides for deprivation of liberty from four to five years will significantly increase and will amount to 124 sanctions[9], which will provide for deprivation of liberty and at the same time will contain stipulations about a short-term deprivation of liberty, community service and a fine, such a formal approach to defining sanctions could hardly be admitted as correct.

Since the draft law intention is to have a separate discussion about defining of sanctions I will merely indicate that a well-motivated solution in regard to the penalty that does not provide for deprivation of liberty and community service for serious crimes has been offered by A. Reigase, indicating that possibly community service should not apply to a serious crime that is linked with violence or a threat of violence, has caused severe consequences, created essential damage and has been committed on a large scale.[10] Yet looking into the draft law one must conclude that all the alternative punishments for deprivation of liberty are provided for, for example, for kidnapping of a person using violence or threats of violance, besides the deprivation of liberty for the above crimes is planned to be reduced from ten to five years (paragraph one of Section 153 of the CL), similar provisions are defined for robbery which by substance is associated with violence or a threat of violence (paragraph one of Section 176 of the CL), with an attack to a representative of an authority or some other public official; the same punishment is applicable to a number of serious crimes whose consequences have been death of a person or some other severe consequences, for example, improper performance of professional duties by a medical practitioner (paragraph two, Section 138 of the CL), violations of labour protection provisions (paragraph two, Section 239 of the CL), using official position in bad faith (paragraph two, Section 318 of the CL) and so on.

An essential damage that in many provisions excluding indication to repetition of a criminal offence during a year, has been provided as a condition for criminal liability or forms its qualified substance, has been evaluated in the draft law in a fairly peculiar way, including it into the substance of criminal violations as well as in the substance of less serious and serious crimes, although this criterion has a uniform legal definition with quite serious criteria. In accordance to Section 23 of the law "On Procedure of Enactment and Application of the Criminal Law"[11] liability for a criminal violation as stipulated in the Criminal law as a result of which a serious damage has been caused sets in if resulting from the criminal violation not only a serious material damage has been caused (it exceeds sum total of five minimum wages as defined in the Republic of Latvia), but if other interests and rights that are protected by law are endangered or such endangerment is considerable. While as it has been explained by Criminal cases department of the Senate of the Supreme Court of the Republic of Latvia, *"Infringement of the rights guaranteed in the Constitution is by all means to be recognized as a considerable infringement of a person's rights and interests in the understanding of Section 23 of the law "On Procedure of Enactment and Application of the Criminal Law"*[12].

Likewise it is necessary to note that it is planned to amend paragraph one of Section 7 of the CL by specifying that criminal offences are dividend into criminal violations and crimes **according to the character and damage of infringement of a person's or society's interests**, explaining in the synopsis of the draft law that at present the Criminal law *"does not correctly indicate the criterion of this classification"*, i.e., *"defining the types of criminal offences the legislator has linked seriousness of the criminal offence with the maximum penalty for the specific criminal offence, namely, the more severe the punishment is provided for in the sanction of the CL, the criminal offence is defined as more serious in the disposition of the Section,"* which follows from a literal interpretation of Section 7 of the Criminal law.

Yet objecting to such an interpretation, it should be indicated that a sanction already is that part of the criminal law provision by which the legislator, taking into account the degree of damage of the criminal offence defines the type and scope of penalty.[13] I can only reiterate what I have previously said that it would be logical to presume that the legislator to whom the state has delegated the task of designing penal policy, by providing for in the sanction of criminal law one or another penalty, has defined it adequately depending on the degree of damage caused by the criminal offence in order to prevent the threat to legally protected interests.[14]

If so, there is no reason to indicate at some incorrectness of classification criteria definition, especially if it has been recognized in the abstract of the draft law that *"The penalty provided for in the sanctions of the CL directly depends on the damage that is caused or may be caused by the specific criminal offence to the interests protected by law"*. In principle not objecting to the new edition of paragraph one of Section 7 of the CL which is to be regarded as merely more accurate definition of the provision, at the same time it should be indicated that, firstly, it already follows from the previously expressed theoretical conclusions about the essence of a sanction, secondly, apart from a literal interpretation there are a number of other interpretation methods to clarify the understanding of the essence of the text, which, as it indicated by E. Meļķisis, "include both the understanding about the will of the legislator, as well as about the aim of the law (provision), its motivation, intent, meaning – everything that in legal scholarship is called *ratio legis*."[15]

I believe one cannot evaluate positively the trend that has been observed over the past few years to include in the provisions of the Criminal law such specifications, even theoretical interpretations that follow from the very contents of the text and whose place is in comments and academic publications. It should also be noted that such a special indication to the character and degree of damage of the criminal offence as a classification criterion can be found only in separate criminal codes of the former USSR republics where like in Article 15 of the Russian Federation Criminal code it is mentioned[16] that the offences listed in the Criminal code are classified depending on their character and degree of threat they cause to society. While the legislator in our neighbouring countries Estonia[17] and Lithuania[18] – like in Austria[19], Switzerland[20], German Federal Republic[21] and other countries indicates only the ways of grouping criminal offences and the maximum penalty for each of the offences.

2 On multiplicity and its forms

The draft law plans to revise the multiplicity forms, excluding from the criminal law of Latvia one of them – repetition of criminal offences that at present is included in more than 40 Sections of the Criminal law as a qualifying element.

Pursuant to the first and the second paragraph of Section 25 of the Criminal law, repetition of criminal offences is the commission by one person of two or more criminal offences, which are provided for in one and the same Section of this Law, or two or more criminal offences which are provided for in various Sections of this Law; if liability for such repetition is provided for in this Law (for example, in Section 181 of the CL in regard to repeated theft, fraud, misappropriation). Repetition of a criminal offence is not constituted by an offence for the commission of which a person is released from criminal liability or for which a limitation period has become applicable, or for which the criminal record has been set aside or extinguished pursuant to procedures set out in the Law.

Since pursuant to the existing legislation repetition sets in irrespective of the fact whether the person has not been brought to criminal liability for the previously committed criminal offence (offences) and all the criminal offences are adjudicated during one criminal procedure or if a court sentence has already been enforced for the previous committed criminal offence as long as legal consequences have been retained, the situations establishing this repetition are to be examined separately, in particular because the proposal to delete from the Criminal law repetition as a form of multiplicity which also means refusing from it as a circumstance that forms qualified substance. Since at present according to the existing provisions, repetition is formed irrespective of the fact whether the person has been called to trial for the committed criminal offence(s) and all the criminal offences are adjudicated within one court proceeding also for the previously committed offences, and this is motivated by different factors some of which must be examined in greater detail.

Both in the synopsis of the draft law and in the above mentioned publication by I. Gratkovska and U. Zemzars[22] as one of the arguments is mentioned the fact that by excluding repetition, just and adequate punishment will be ensured for each committed offence since the existing practice is supposed to have created a situation when quite often for repeatedly committed criminal offences that have the same substance the accused is imposed too light a penalty since the committed acts are evaluated not as several offence but as one criminal offence.

The fact that the practice of determination of punishment quite often does not comply to the general principles of determining punishment as provided for in Section 46 of the Criminal law is confirmed by summary of different categories of cases provided by the Supreme Court of the Republic of Latvia for various years[23] (the author of the given publication has participated in summarizing court cases for several years), but that is not a flaw of the Criminal law. The legislator, taking into consideration repetition as a qualifying circumstance has stipulated in the respective section a more severe penalty for several criminal offences compared to the penalty provided for the same or the same type of criminal offence. For example, paragraph one of Section 175 of the Criminal law for the theft without aggravating circumstances provides for deprivation of liberty till four years, for a repeated theft – up to six years and complying with the provisions of the law it is possible to ensure individualization of punishment and to determine a penalty that would be adequate to the offence.

The position that adequate and fair punishment can be determined by using the existing legal provisions has been expressed also by U. Krastiņš, indicating that *"The sanctions in the Special part of the Criminal law are sufficiently flexible to react with an adequate penalty to a larger number of the same offences (for instance, several thefts) that form a repetition."*[24] Yet instead of explaining the cause of such

practice – inability or unwillingness to comply to the provisions of the law – and improving the punishment determination practice and complying with the prescriptions of the law in this area, another solution has been favoured during the last few years – to amend the Criminal law resulting in repeatedly expressed concerns about stability, or to be more precise instability, of the law.[25]

Referring to the provisions of paragraph one of Section 50 of the CL that if a person has committed several independent criminal offences punishment must be adjudged for each separate offence, it has been indicated that adjudicating one aggregate punishment for several criminal offences in case of their repetition in neither correct, or fair and that it actually undermines the whole system. In fact it should be noted here that the procedure of determining punishment for criminal offences as laid down in Section 50 of the CL in those instances when a person has committed several independent offences for which liability is provided for in different sections of the Criminal law, for example, for theft and hooliganism when punishment is to be determined for each of these offences separately and then the final punishment is to be determined according to aggregation of the criminal offences which is determined including the lesser punishment within the more serious one or also totally or partially adding up the punishments. By adopting the amendments such a procedure will be applied also to several identical criminal offences of the same type which at present form repetition.

Before modulating the situation that will be put in place for determination of punishment in such cases, it is necessary to examine what amendments are planned to be introduced in Section 50 of the CL to determine the final punishment. If at present paragraph one of Section 50 of the CL provides that the aggregate punishment shall not exceed the maximum punishment determined for the respective offence, then the draft law contains a different principle taking into consideration the classification of criminal offences and the person directing the proceedings who decides about the punishment – a prosecutor drawing up the injunction on punishment or the court adjudicating the sentence. Namely, the draft law envisages that in cases when the final aggregate punishment is determined by the court, its scope or term shall not exceed the maximum scope or term provided for **the most serious of the committed criminal offences** but it shall be no more than half of the maximum scope or term stipulated for the most serious of the criminal offences. While the prosecutor drawing up the injunction on punishment for a criminal offence or a less serious crime shall not determine the punishment exceeding the maximum scope or term of punishment that is provided for the most serious of the committed criminal offences.

It follows from the above said that the edition offered by the draft law refers only to those cases when separate and different criminal offences of various degree of seriousness and the inflicted harm or the same type of offence has been committed that qualifies by the same provision or different paragraphs taking into consideration qualifying circumstances on the grounds of which liability is also differentiated, for example, a theft without qualifying circumstances has been committed, it is followed by a theft in a group of persons pursuant to a prior agreement, then a theft by entering an apartment is committed, and finally a firearm has been stolen. Liability for such offences is stipulated in the first, second, third and fourth paragraphs of Section 175 of the CL. In order to determine the final punishment, partly or completely summing up the punishment stipulated for each of these separate crimes, the court, if it will deem necessary to exceed the maximum

term of deprivation of liberty provided for a firearms theft (in the draft law it is deprivation of liberty till ten years), will be bound by the half of punishment as laid down in paragraph four of Section 175 of the CL, i.e., the ultimate punishment can reach fifteen years.

But if a person commits several thefts that correspond to qualifying elements as stipulated in, for example, the first paragraph of Section 175 of the CL (neither a less serious nor more serious criminal offence has been committed, but all the offences have identical degree of seriousness) for which the present edition of the law provides for deprivation of freedom up to four years and all the alternative forms of punishment for deprivation of liberty, but the draft law has the same punishments that are not associated with deprivation of liberty and also deprivation of liberty up to two years, then the solution will be different.

Since the committed thefts are to be classified as a less serious crime, the court after determining punishments for each of them within the framework of the sanction as provided for in paragraph one of Section 175 of the CL, may include the lighter punishment into the more severe punishment or apply the summing up principle yet it is bound by maximum scope of penalty as provided for in the sanction for a theft without qualified circumstances, namely, 280 hours of community service, a fine of a hundred minimum wages, deprivation of freedom for two years. As we can see, in this case the number of committed criminal offences will change nothing – either there would be five, 10, 20 or even more[26], since they are all less serious crimes for which liability is provided for in the same part of the section and there would be no legal grounds to go beyond the sanctions of the paragraph of the given section. In view of the fact that all these thefts will have the same degree of seriousness, the possibility of determining a more severe punishment as provided for by paragraph two of Section 50 will not be applicable.

We can take another example referring to specific criminal procedure practice. With the first instance court K. P. is found guilty of committing 35 robberies; repetition and entry into an apartment are incriminated as qualifying circumstances for which his punishment has been determined – deprivation of liberty till fifteen years that is a maximum punishment provided for at present in paragraph three of Section 176 of the CL.

If a similar situation would occur after adoption of the amendments in the Criminal law the court would qualify for 35 times the committed robbery in accordance to paragraph two of Section 176 of the CL (robbery has been committed by entering an apartment), determining punishment for every time, which according to the draft law provisions can amount to deprivation of liberty up to eight years and then will determine the final penalty, which by summing up 35 punishments will not exceed eight years anyway because, as mentioned before, according to paragraph three of Section 50 of the new edition of the CL a possibility of exceeding the maximum punishment determining the final penalty may exceed the maximum punishment only if one of the committed crimes is more serious and the sanction for it is more severe but in the given case all the robberies have identical degree of seriousness.

Thus it must be concluded that the result essentially does not change – whether the punishment has been determined for repeatedly committed robberies entering an apartment when one punishment is determined or whether 35 punishments are determined and then the final one. The winner is obviously the person who committed criminal offences for whom the total term of punishment will not be associated any more with the maximum penalty prescribed for the respective type of

penalty but I will refrain from making comments on adequacy and fairness of the punishment.

At the same time it must be indicated that it will cause loss of time and a dilemma for the person directing the proceedings to decide what punishment should be determined in each case of the 35 robberies if they are all identical both by their motivation and by the form of their commitment. K. P., pretending to be a tester of a gas metre entered apartments of elderly women by fraud and then in most cases putting round their necks a towel chocked them till they lost consciousness , after that he stole money and property from the victims and left the apartment locking the door. It must be noted that 25 of the 35 victims were found dead. The death was caused mainly by coronary vessel failure or ischemic disease of the heart, according to the conclusion of forensic experts the cause of death could have been psycho-emotional tension, stress, shock, difficulties of breathing and so on.[27]

This same K. P. has been convicted also for 13 murders that involve robbery and were committed in the previously described manner, qualifying them in accordance with paragraph 3 of Section 118 of the CL and sentencing him to life imprisonment. Excluding repetition from the Criminal law these murders will be qualified for 13 times in accordance to paragraph 6 of Section 117 of the CL as a murder associated with robbery, determining also punishment for every case, which, as it follows from paragraph 6 of Section 117 of the CL is a life imprisonment or deprivation of liberty from ten till twenty years.

Determining punishment in accordance to the second and third paragraphs of Section 46 of the draft law, the character of the criminal offence and the inflicted damage must be taken into consideration, the personality of the guilty person, as well as mitigating and aggravating circumstances of the offence must be taken into account. This requirement is well-grounded and is nothing new, except for the emphasis on the fact that evaluation of mitigating and aggravating circumstances will influence the punishment which will be determined by choosing in a motivated way a greater or less severe scope of punishment, taking into consideration the average scope of the applicable penalty.

Although such an approach is to be evaluated positively, it still must be indicated that it will not be suitable for the analysed example because in all the 13 cases of murder the criteria that are to be considered in determining punishment are identical – all the murders committed within four months are especially serious crimes, the consequences caused by them are irrevocable – many persons have been deprived of life. Assessing the personality of the defendant it has been noted that the previous criminal record has been deleted, he was not registered in drug addiction list, mixed disturbances of personality have been identified, which did not essentially influence his behaviour, in the Matīsa prison he was characterized positively. The court did not identify any aggravating circumstances of his liability, as mitigating circumstances were mentioned his partial confession of his guilt, which in fact is erroneous, as well as the fact that the defendant was supposed to have actively facilitated the disclosure and investigation of the offence.

Evaluating it all, the court will have to determine a punishment guided by the average term of deprivation of liberty, which is fifteen years (20 + 10:2), and motivating it in each case. Theoretically it follows that punishment for the first and the last murder cannot differ because the criteria that have to be evaluated are essentially the same and the repetition is not to be taken into account.

Quite strange, to say the least, seems the provision in paragraph three of Section 50 of the CL that in case of committing a particularly serious crime resulting in a loss of the victim's life **the total time of deprivation of liberty may be determined also for the whole life (life imprisonment)**. Perhaps I am mistaken trying to understand the meaning implied in this sentence, but it can be inferred that life imprisonment can be adjudicated also in the case if for the previously analyzed murders deprivation of liberty punishment will be determined for 13 times. Or will it be determined only for one murder? Here comes another question – for which of the murders one can be sentenced to life imprisonment in order to determine it also as the final punishment? This latter option seems to be the most logical one because how is it possible by summing up 13 freedom deprivation punishments to arrive at life imprisonment?

It is even less comprehensible how life imprisonment could be given for several murders as stipulated in Section 116 of the CL which in itself is a particularly serious crime resulting in deprivation of life of several persons, if in the sanction of this provision life sentence is not provided. In such a way the provisions of the third paragraph of Section 38 of the CL would be violated – that deprivation of freedom for life (life sentence) can be given only in the cases provided for in the Special part of the Criminal law whose amendment or repealing is not envisaged in the draft law.

Apparently analysis even of separate situations leads to the conclusion how ambiguous the proposal to refuse from repetition as a qualifying circumstance is. Large segment of the draft law synopsis is devoted to the analysis of legal provisions in other countries, among those mentioning Russian Federation from whose criminal code repetition (multiplicity) was excluded already in 2003 but unfortunately neither in the synopsis nor in the publications devoted to the planned amendments there is a single mention that the Russian legal experts increasingly often express an opinion that such a solution was erroneous. For example, S. Tasakov (*С. В. Тасаков*), evaluating exclusion of repetition in regard to murder, indicates that such a decision is deeply immoral because thus all the declarations about the value of human life are derogated.[28]

It must be noted that in the course of elaborating the criminal penalty concept another option was also proposed, which in its own day was supported also by U. Krastiņš[29], namely, to exclude repetition in the cases if a person has been already brought to criminal justice and convicted for the previously committed criminal offence, recognizing repeated criminal offence as an aggravating circumstance. Obviously this is the proposal that should have been supported which has been repeatedly claimed by the author of the present article[30], this would have eradicateed any grounds for the discussions about violation of the principle *ne bis in idem*, while looking at it from a practical vantage point, the person directing the proceedings would not have to do the effort-consuming and unnecessary work to associate determination of punishment in criminal proceedings with the same kind of criminal offences.

3 On setting of sanctions in the draft law

Describing the draft law "Amendments in the Criminal law" it is emphasized in the part on punishments that:

1) the possibilities of applying alternative punishments to deprivation of liberty – fines and community service – are expanded as much as possible;

2) the minimum and maximum terms of deprivation of liberty for crimes are essentially decreased;
3) for criminal offences and less serious crimes the amount of fines is considerably increased.

It has been calculated that *"the average deprivation of liberty punishment is reduced by two years or 30%. While for material crimes that account for the largest proportion of the convicted persons which is 49%, deprivation of liberty punishment is reduced on the average even by 40%."*[31] It should also be added that the last edition of the draft law aims at refusing from the arrest whose application for the last time was put off till January 1, 2015 envisaging instead of which deprivation of liberty from fifteen days till three months.

While evaluating the social impact the synopsis of the draft law indicates that:

1) the draft law will achieve conceptual changes in the penal system that will influence more efficient use of legal resources for achieving the aims of criminal penal policy;
2) designing the criminal penalty system, defining criminal punishments and other coercive measures and the conditions of their enforcement a legal mechanism will be implemented that can be used to reduce the number of criminal offences, restore justice after committing a criminal offence and to refrain society from their commitment;
3) the amendments planned in the draft law will provide for prosecutors and judges a possibility of choosing such a criminal legal resource and its scope that has maximum efficiency in each specific case, alongside with that ensuring implementation of a homogeneous penal policy in the country preventing ungrounded increase or mitigation of criminal punishments. Another mentioned impact is unburdening of enforcement of liberty deprivation punishments.

Everything that is said is well-worded and sounds optimistic, unfortunately nothing is mentioned about the actual situation in the area of crime and about how security of society will be ensured in future at least in regard of the threat of crimes against property whose number in 2010 reached 34,908.[32] The draft lacks the link between the increase of fines with solvency of the persons committing criminal offences, it has neither been analysed whether and how the rapidly growing need to employ persons who have been sentenced to community service can influence the aspirations to reduce the number of unemployed and the rate of unemployment in the country.

Trying to understand the principles of setting sanctions in the Special part of the Criminal law and the guideline that determined the changes proposed in the draft law in them, one must fully agree to D. Hamkova's view that sanctions are established *"outside any system and sometimes it is impossible to identify the criterion (..), the endangered interests are not taken into account and hence also the damage caused by the criminal offence"*.[33] As a result a short-term deprivation of liberty and punishments that are not associated with deprivation of liberty – community service and fine – are envisaged in the draft law in all the instances when the criminal offence is classified as a less serious offence, providing for an intentional crime deprivation of liberty for no more than three years and for a serious crime if deprivation of liberty for an intentional crime does not exceed five years, deprivation of liberty punishment in many instances has been reduced till this limit. For example, in the second paragraph of Section 82 of the CL the deprivation of freedom punishment for organisational activities directed towards

destruction of the independence of the Republic of Latvia as a state, with a purpose of incorporating Latvia into a unified state structure with some other state, or destruction thereof in some other way has been decreased from six till five years, including into the sanction of the Section apart from the fine also short-term deprivation of liberty and community service.

In future short-term deprivation of liberty and community service will be applicable also for murdering of a new-born infant, for a murder that has been committed under the state of strong psychic agitation and for a murder committed by a public official violating the provisions of apprehension of a person, which all are serious crimes and for which deprivation of liberty punishment as stipulated in the draft law is going to be up to five years.

These crimes against human life were chosen deliberately since they result in deprivation of another person's life and homicide is one of the crimes that have irrevocable consequences. I could be justly objected that the mentioned murders have been committed under mitigating circumstances but the legislator, when defining this privileged *corpus delicti*, has already taken it into consideration and has prescribed punishments that are much smaller than for a murder without mitigating circumstances. In accordance to international legal acts human life is the highest value in democratic societies, as indicated by E. Levits, "*it is the fundamental and natural right of a person*"[34], that has been listed at the top of human rights catalogue. Providing for the threat against this fundamental and natural rights community service the legislator and the state at large will demonstrate their attitude to the value of life, at the same time standing out among other countries. For a comparison one can mention criminal laws of the above referred countries in which only liberty deprivation punishment is provided for a murder under mitigating circumstances. For example, for murdering of a new-born infant the Penal code of Estonia and the Criminal Code of the Republic of Lithuania (similarly to the existing Criminal law of the Republic of Latvia) only deprivation of liberty up to five years is provided for, in the Austrian Criminal code – from one year to five years.

Alternative penalties in sanctions of all the sections in which the crimes are classified as less serious or as serious with the maximum term of deprivation of liberty have been stipulated without any deeper evaluation. This is obvious, for instance, in Section 310 of the CL which provides for liability for escape from a place of short-term detention or prison. In the first part of the present edition a punishment of deprivation of liberty up to three years is provided for. If escape is associated with violence, or threats of violence against the prison guards or other official of a place of short-term detention or prison, or if commission thereof is repeated or by a group of persons, the applicable punishment is deprivation of liberty for a term not exceeding five years. According to the intention of the authors of the draft law the sanctions as laid down on both paragraphs of the given section provide for a short-term deprivation of liberty, community service and fine even if the person escapes from prison where the person serves a liberty deprivation sentence for a previously committed criminal offence. What kind of community service can we talk about in this case?

Especially disputable is the application of community service for persons in military service who are the special subjects in Chapter XXV of the CL "Criminal Offences Committed in Military Service" providing for this type of punishment in sanctions of 19 sections from the 24 sections of the Chapter. What should be objected here?

Firstly, the special status of a soldier must be noted. According to Section 12 of the Military Service law[35] a soldier exercises the right to employment by performing military service and when doing military service the length of a service day of a soldier shall depend on the necessities of service. Because of soldiers' permanent location in the place of the service they cannot be subject to this type of punishment.[36] Incompatibility of military service with community service is confirmed by the experience of other countries. According to Article 122–22 of the Criminal code of France[37] community service time is suspended during performance of military service. In article 69 of the Penal Code of Estonia "Community service" an option is prescribed to replace imprisonment up to two years with community service, but paragraph three of the article stipulates that on the grounds of an application submitted by a probation service official the court may suspend serving of the imprisonment term for the time when the person is called up to military service or military exercise. Article 46 of the Criminal code of the Republic of Latvia "Community Service" does not stipulate the scope of persons to whom this type of punishment is not applicable. But in none of the sanctions laid down in the Chapter "Crimes and Criminal Offences Against Regional Defence Service" community service as a punishment is mentioned at all.

Secondly, in a number of cases criminal liability for a soldier has been provided for in the basic substance or in the qualified substance if the criminal offence has been committed within the time and under circumstances stipulated in the law. For example, liability for being absent without leave (Section 332 of the CL) and desertion (Section 333 of the CL) is provided for if these crimes have been committed during a war or state of emergency, in battle conditions, or during proclaimed emergency situations in the case of public disorders, terrorism or armed conflict during a declared state of emergency for which at present the applicable punishment is deprivation of liberty from three to eight years and from ten to fifteen years correspondingly. In the draft law, by planning to reduce deprivation of liberty punishment in Section 332 to five years and in Section 333 till four years, supplementing sanctions of this Section by short-term deprivation of liberty, community service and fine. Committing of a criminal offence during war or in battle conditions as a qualifying element is stipulated in the second paragraph of Section 334 of the CL (evading active service), in the third paragraph of Section 335 of the CL (insubordination), while in Section 354 (Unauthorised Leaving of a Battlefield and Refusal to Use a Weapon) is stipulated if it has been committed in the battlefield. By essentially reducing the deprivation of liberty punishment as it is now (in the second paragraph of Section 334 – from ten to fifteen years to four years, in the third paragraph of Section 335 and in Section 354 – from ten to fifteen years down to five years), the sanctions of these sections will also include both short-term deprivation of liberty, as well as community service and a fine. The question arises how adequate the punishment in these cases will be and how the community service will be done under these circumstances.

By analyzing the pattern which seems to be used in reducing the limit of minimum and maximum deprivation of freedom it seems quite simple – the maximum limit of punishment most frequently is decreased by three years for the criminal offence in the respective section to be qualified as by one degree less serious crime thus changing the previous classification or by simply decreasing the existing sanction. For example, for activities aimed at overthrowing the State authority of the Republic of Latvia the maximum term of deprivation of liberty is

planned to be reduced from twenty years to fifteen years; deprivation of freedom for kidnapping a person without qualifying elements is planned to be amended to be reduced from ten to five years. For robbery in case only the basic substance of the crime has been identified it is planned to reduce the existing provision of ten years to five years, and besides providing also for arrest, as well as community service and a fine.

It follows from the above said that robbery in its basic substance will not differ by the damage it inflicts from other forms of robbing another person's property because, for example, for theft and also for robbery a person will be able to be punished both by community service and a fine, true by a somewhat bigger one. If robbery has been committed by using firearms or explosives or if it is associated with inflicting heavily bodily harm to the victim or if it has caused other severe consequences, the minimum time of deprivation of liberty has been reduced from ten to five years, thus irrespective of the fact that the robber has threatened not only material interests of the victim but also health or even life, the offender for that will only face deprivation of liberty for five years.

Without continuing the overview of the planned changes in sanctions because the principles of their determination did not include evaluation of the degree of damage caused and can be understood apparently only by the authors of the draft law, still it must be noted that in separate cases the proposed changes seem strange in general. Take, for instance, deprivation of liberty punishment for eleven years as proposed in the fourth paragraph of Section 175 of the CL, in the third paragraph of Section 177 and in the third paragraph of Section 179 and also in some other sections of the CL. Why not ten or twelve?

Quite disputable and ambiguous[38] is setting of such sanctions that include absolutely all basic punishments provided for in the Criminal law, and after adoption of the draft law there will be 300 sanctions of this type. In this sense one has to agree to D. Hamkova who has written that *"the wide scope of alternative punishments for one and the same offence shows inability of the legislator to determine the real damage of the offence"*[39], which can negatively influence formation of a uniform penal policy.

And finally – resulting from the many amendments the Criminal law will lose its lucidity, when more than 300 changes will be introduced in it, nothing will actually remain in it from the initial Criminal law. But the standing working group continues working industriously discussing continuously new possible changes, quite often replacing recently implemented amendments by new ones or excluding them, therefore it is high time to elaborate a new edition of the Criminal law instead of keeping this codification open and amending it several times during one year.

Summary

1. The criminal penalty policy approved by the Cabinet of Ministers of the Republic of Latvia on January 9, 2009 includes conceptual changes in the penal system on the grounds of which the Ministry of Justice has elaborated a large-scale draft law "Amendments to the Criminal law" planning changes both in provisions of the General and Special part.
2. Elaboration of criminal penalty policy and the amendments following from it in the Criminal law are to be evaluated not merely as a reform of penal policy, which in general is to be recognized as necessary, but also as an activity that will essentially influence the assumptions entrenched in the doctrine and practice of

criminal law about understanding of several institutes of criminal law causing the need to radically revise them.

3. The penal policy concept foregrounds the question about criteria of classification of criminal offences, dividing them into criminal violations and crimes, which in their turn are subdivided into less serious, serious and particularly serious crimes. The author of the present publication opposes to the authors of the draft law and its synopsis that the existing edition of Section 7 of the Criminal law does not correctly indicate this classification criterion because defining types of criminal offences the legislator as if supposedly associated seriousness of a criminal offence with the maximum punishment for the criminal offence, namely, the more severe a punishment has been provided for in the sanction of a section in the Criminal law, the criminal offence is defined in the disposition of the sanction as more serious.
4. In principle not objecting to supplementing the first paragraph of Section 7 of the Criminal law with an reference that criminal offences are divided into criminal violations and crimes depending on the character of the threat and damage posed to an individual or society, which in the author's opinion is to be seen as an amendment of a specifying character, it must be pointed out that it actually follows from theory that the sanction is the very part of a provision of criminal law in which the legislator by taking into account the degree of damage caused by the criminal offence, i.e., the damage incurred or that can be incurred to the interests protected by law, determines for it the type and scope of punishment. Therefore one cannot have positive assessment of the trend seen during the last few years to integrate into provisions of the Criminal law such specifications and even theoretical explanations which should have their place in comments and academic publications.
5. Assessing the proposal to revise understanding of multiplicity and to delete one of its forms – repetition of a criminal offence – it has been concluded that it would be more useful to refuse from repetition as a qualifying element only in the case if a person has already been brought to criminal justice for the previously committed criminal offence and has been punished, recognizing repeated crime as an aggravating circumstance.
6. Analyzing the amendments proposed in the draft law that are to be introduced in the sanctions of provisions of the Special part of the Criminal law, it has been concluded that alternative punishments have been included in all the provisions of criminal law in which the criminal offences are classified as a less serious crime and as a serious crime, if deprivation of liberty for them does not exceed five years without evaluating the character of the threatened interests and damage caused by the criminal offence.
7. It seems that application of community service to soldiers who in view of their status and the time and circumstances of the criminal offence incriminated to them this type of punishment cannot be applied and enacted.
8. One has doubts about usefulness about inclusion in them all the types of basic punishments provided for by the penal system which can negatively influence uniform application of punishments in practice.

The article is devoted to the question of routine changes in Criminal Code of our state, which according to a concept of Criminal punishment policy is provided in rules of General part as well as in rules of Special part. They significantly affect both findings of particular institutions of Criminal Law (established in Criminal

Law doctrine and practice) and determination of punishment of a criminal offence. Within the publication the author's opinion about compliance of certain proposed amendments with theoretical conclusions and needs of practice will be expressed.

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The Effect of Court Rulings on the Dynamics of the Latvian Tax Law

Jānis Lazdiņš, Dr. iur.
Faculty of Law, University of Latvia
Professor of legal theory and history
E-mail: *Janis.Lazdins@lu.lv*

Kārlis Ketners, Dr. oec.
Faculty of Engineering Economics and Management, Rīga Technical University
Professor at the Department of Customs and Taxes
E-mail: *Karlis.Ketners@rtu.lv*

This paper is devoted to an important scholarly aspect of law and economics. We refer to the influence of court rulings on the tax law of the Republic of Latvia in relation to the country's integration into the European Union. The authors have proposed the thesis that court rulings can strengthen the foundations of a democratic country in which the rule of law prevails. They also ensure justice, equality, commensurability and other legal principles when it comes to budget and tax laws.

Keywords: nodokļu tiesības, tax law, Steuerrecht, tiešie nodokļi, direct taxes, direkte Steuer, netiešie nodokļi, indirect taxes, indirekte Steuer, nodokļu parāds, tax arrears, Steuerschuld, soda nauda, tax penalties, Geldbuße, nodokļu tiesību iztulkošana, interpretation of tax laws, Interpretation des Steuerrechts, tiesa, court, Gericht.

Contents

Introduction

On May 4, 1990, the Supreme Council of the Latvian SSR approved a declaration on the restoration of the independence of the Republic of Latvia.[1] May 4 became a point of reference in terms of the gradual integration of Latvia into the EU.[2] Latvia signed an association agreement with the EU on June 12, 1995,[3] and it began negotiations on admission to the EU on February 15, 2000.[4] The negotiations were concluded on May 1, 2004, when Latvia became an EU member state.

Integration and joining the EU also meant that Latvia's legal system had to be harmonised with EU requirements. Of significance in this process was (and is) the work of the courts – the field of judicature. Of importance in the improvement of judicature in Latvia were not just local, but also EU and international court rulings. The judicature of the European Court of Human Rights (ECHR) mostly relates to the explanation of fundamental human rights. The European Court of Justice (ECJ) deals with aspects of the unified system of EU law. The Latvian Constitutional Court (ST) and the Senate of the Latvian Supreme Court (ATS) deal with justice, equality, commensurability and other principles in Latvia, not least in terms of aspects of tax law.

Integration into the EU has meant Latvia's participation in new and specific legal relations. In 1963, the ECJ ruled that the European Economic Community would establish a new legal order on the basis of international law. The basic aim was to establish the common market. This was of interest not just to member states, but also to their citizens. In pursuit of this goal, member states have limited their sovereign rights, albeit only in a few areas. Irrespective of the legal acts of member states, the law of the Community creates not just obligations, but also rights for individuals.[5]

EU tax law is based not just on the laws of the EU and its member states, but also on the international obligations of EU member states, as well as the European Convention of Human Rights and Fundamental Freedoms (ECHR).[6]

Unlike accustomed international agreements, the EU's legal system is an inviolable component of the laws of member states. Interpretation of EU law has, in many senses, been left up to the ECJ. In relation to taxes, the ECJ has emphasised this fact several times:

"By contrast with ordinary international treaties, the EEC treaty has created its own legal system which on the entry into force of the treaty became an integral part of the legal systems of the member states and which their courts are bound to apply."[7]

The functions of public authorities, including the courts, cannot be imagined without the accumulation of state and local government budget finances (hereafter in this text, the state and its local governments are included in the concepts of "the state", "the budget" or "the national budget"). In other words, the state must be solvent: "[..] *Taxes are organised by the state as a prerequisite for society and a component of national policy. Tax revenues represent a substantial share of the overall national budget revenues, ensuring that the state can fulfil its functions* [..]".[8] This means that tax issues are also national issues. Tax revenues are the main source of financing for state functions and the coverage of relevant expenditures. The proportion of taxes in the national budget is also seen in the area of Latvian national budget revenues.[9]

Taxes represent mandatory budget payments made by individuals, legal entities or entities established contractually. These payments must be made in accordance with the relevant normative acts. In line with the theory of a public contract that was elaborated by Thomas Hobbes (1588–1679[10]), John Locke (1632–1704[11]), and

their followers in more modern times, the state is the result of an agreement (contract) among its residents, and it focuses on collective security (peace), "friendly" rules on life, the right to enjoy the fruits of one's property, etc.[12]

Because the citizens of Latvia agreed to the establishment and existence of their country, it is their duty to honestly pay the taxes which have been approved by the state. Otherwise the state cannot fulfil its functions (at least to a certain degree), particularly in terms of battling against the shadow economy, corruption, tax evasion, etc. This is particularly important in Latvia, which, after the restoration of independence in 1990 and 1991, chose to join other EU member states in implementing a model of democracy and the rule of law. The existence of a democratic country in which the rule of law prevails cannot be imagined without honest payment of taxes. If taxes are not paid, the state must have ways of collecting back taxes in an effective and legally appropriate way. Of course, tax administration cannot be an arbitrary process which violates the constitutionally guaranteed fundamental rights of individuals[13] or the legal principles which are rooted in the ideas of natural schools of judicial thought.[14]

This paper is devoted to the strengthening of the idea of a democratic country with the rule of law in the area of tax law, including the involvement of court rulings in this process. The authors will focus on an analysis of court rulings which relate to:

1) The legal interests of the national budget in collecting tax debts and fines;
2) The social guarantees of employees irrespective of whether mandatory social payments have or have not been provided to them in the context of constitutional law;
3) Opportunities to waive the application of a part of the individual income tax in the EU;
4) Rules concerning the profits and losses (free capital) of EU parent companies and subsidiaries in the economic arena of the EU.

1 Tax debts and punitive fines cannot be evaluated identically when preparing the national budget

As noted before, taxes are of decisive importance in relation to the financial resources of the state. This means that every country must choose a model of taxation which best corresponds to its needs in terms of the ability not only to levy taxes, but also to collect them. Payment of taxes is voluntary (the desirable form) or in a forced way (the undesirable form), and that is a secondary issue. What is essential is to ensure the ability of the state to fulfil its functions. In this regard the authors agree with the claim by Jean Bodin (1530–1596) that "finances are the nervous system of the state."[15] This suggests that the state has considerable freedom in determining the tax burden. The Latvian Constitutional Court has also ruled several times that the state has considerable freedom in specifying taxes:

"*In determining and implementing tax policies, the state has extensive freedoms. This includes the right to choose the tax rates that are to be applied to categories of persons, as well as the right to specify the details of the relevant regulations. The fundamental property rights of individuals are not violated if the state obliges them to make public and legal payments.*"[16]

Although the state is granted a substantial level of freedom in setting tax rates as emanates from issues such as the aforementioned Constitutional Court ruling, the authors would also like to focus the attention of readers on the fact than when it

comes to tax policies, the state is obliged to observe the principle of commensurability. The court ruling explains that this is the payment of taxes "[..] *which do not represent an excessive burden on this individual and does not have a fundamental effect on his financial situation*."[17] The ban on excessive burdens must be seen as a violation of commensurability. The principle of commensurability when it comes to taxes was also discussed by one of the greatest thinkers of the age of the Enlightenment, Charles Louis Montesquieu (1689–1755):

"[..] *There is nothing which demands that the state demonstrate wisdom and minds which determine the section of* [income] *which is to be taken from the citizenry and the section that is to be left in its hands*."[18]

The issue of commensurability in this case also means that justice must be observed. It is also of essential importance for legislatures to understand the different attitudes which taxpayers have toward the taxation of various properties. Professor Paul Kirchhof has warned of this:

"*The citizen is affected in a fiercer way if the tax takes away just a few square metres of land each year [..], as opposed to a situation in which the tax demands a share of income that has just been earned or makes consumption more expensive because of higher prices*."[19]

Although the obligation of paying taxes is self-evident on the one hand, the fact is that tax evasion is well known not just in Latvia, but throughout the world. There can be different reasons for this, starting with carelessness and ending with organised attempts to evade taxation. In general terms, people who do not pay their taxes are subject not just to tax debt, but also to late fees (interest on arrears) and punitive fines.[20]

For a long time, there were debates about whether the state's attitude toward taxes and late fees on the one hand and the collection of punitive fines in an undisputed procedure on the other hand should be seen as identical matters.

The problem was resolved by the Senate of the Supreme Court in several rulings[21] which made reference to ECHR rulings in cases such as *Öztürk vs. Germany*,[22] *Lauko vs. Slovakia*,[23] *Janosevic vs. Sweden*,[24] as well as to the Constitutional Court's ruling of April 11, 2007, in a case related to whether the second sentence in Section 22.4 of the law on the individual income tax was in line with Section 92 of the Latvian Constitution.[25]

In its ruling of December 20, 2007, the Supreme Court Senate made reference to the aforementioned ECHR rulings:

"*Punitive tax fines can be compared to criminal sanctions in accordance with Section 6 of the European Convention on Human Rights and Fundamental Freedoms (the right to a fair trial). A punitive fine has a different nature and goal than is the case with decisions related to the calculation of tax debt. To wit, it is meant to force taxpayers to fulfil their obligations in the area of taxes and to punish violators of the requirements. The state's financial interests are of fundamental importance in terms of ensuring the effective functioning of the tax system, but they are not as important when it comes to the collection of punitive fines, because even though tax-related fines can involved substantial sums of money, they are not meant to be a separate source of budget revenues*."[26]

On the basis of this, the Senate concluded that "[..] *the possibility to suspend the implementation of an administrative act must be evaluated differently in relation to (..):*

(1) The decision of tax administrators in relation to the duty of paying taxes, and

(2) The issue of obligations to pay punitive fines that have been assigned to taxpayers."[27]

Section 185.1 of the law on administrative procedure defines this procedure:

"*The submission of an application to a court in relation to the repeal, nullification or voidance of an administrative act shall suspend the implementation of the said administrative act from the date upon which the application is received by the court.*"[28]

Exceptions related to tax debts (including punitive fines) have been applied in the interests of the national budget and the country's financing. The exception is that the filing of an appeal related to an administrative act which speaks to uncontested collection of tax debt does not automatically mean that its implementation is halted. The Law on Administrative Procedure was amended on December 18, 2008, to separate opportunities of collecting tax debt from punitive sanctions. Section 185.4.1. was amended to state the following:

"[An] *administrative act obliges one to pay a tax or fee or to make another payment to the state or local government budget, except for punitive payments (cash fines and punitive fines).*"[29]

That does not mean that punitive fines are not to be collected before the relevant court ruling takes final effect. In "*Janosevic vs. Sweden, the European Court of Human Rights took into account the person's argument to say that the collection of a punitive fine before the final court ruling might be in violation of the presumption of innocence, and it has ruled that the presumption of innocence does not fundamentally exclude the possibility of collecting taxes or punitive fines immediately.*"[30]

This suggests that the judicial branch must be sensibly just in providing for a fair trial.[31] For that reason, "*when ruling on a petition seeking the suspension of an administrative act or an actual activity or the restoration of the operation of an administrative act, the court must take into account whether the operation of the appealed administrative act might cause essential harm or losses with respect to which prevention or compensation would be substantially encumbered or would demand incommensurate resources, also considering whether the appealed administrative act is prima facie unlawful.*"[32] "*Therefore justification for suspending the implementation of an administrative act is not the appeal of the administrative act as such, but instead the conclusion that the administrative act might be unlawful (to be nullified or overturned with the expected court ruling.*"[33] Irrespective of whether the legal proceedings lead to a decision that an administrative act or activity is *prima facie* unlawful, the judicature must attach secondary meaning to *prima facie* unlawfulness, and this must be seen as a sensible solution in strengthening the foundations of a democratic state in which the rule of law prevails.

There are several other problems which relate to tax-related punitive fines and their collection in Latvia. Court practice (in cases such as SKK-627/2008[34]) shows that tax debt which is qualified as tax evasion is a crime in accordance with Section 218 of the Criminal Law, and that means that the relevant punishments are criminal sanctions. In the stated case, the appellate court accepted as evidence an audit report from the Rīga regional institution of the State Revenue Service from November 30, 2006, on the subject of unpaid individual income tax in relation to the sale of real estate. Without making any effort to determine the true sum of the tax debt, the subject views of the defendant against the unpaid tax debt, the not yet completed review of the dispute by an administrative court, etc., the appellate court declared to the person to be guilty. Luckily, the Senate of the Supreme Court overturned the appellate court ruling:

"*The sum of the tax to be paid is one of the objective elements of the criminal offence that is enshrined in Section 218.2 of the Criminal Law.*[35] *The appellate court was*

premature in drawing a conclusion about the scope of unpaid taxes, and in arithmetic terms it does not even correspond to the scope indicated in the criminal complaint."[36]

This shows that the tax administration process in Latvia does not strictly separate administrative and criminal procedures. On the one hand, normative regulations instruct taxpayers to work together with the tax administration, but on the other hand, the consequence can be (actual) self-incrimination if one "blindly" follows along with judicial and normative ideas.

Thus, for example, Article 32.[2] of the law on taxes and fees says that taxpayers must, during a specific period of time, informative declarations which are enshrined in that law or in other specific tax laws, or else, at the request of an official from the tax administration, submit additional information which, if not received, makes it impossible or at least hinders the amount of money that is to be contributed to the national budget or the determination of overpaid sums. Such information includes documents which confirm revenues and expenditures related to economic operations, bookkeeping documents, as well as other information that has or could have influenced the calculation and payment of taxes. At first glance, the concept of "other information" can clearly be interpreted very broadly, but that is not the case. The rights of the tax administration are limited, because there are provable links between the (other) information that is demanded and its importance in making tax payments more precise. Of course, f the request for such information or its provision are not directly based on the duties of the taxpayer. It is also true that Article 38 of the Law "On taxes and fees" states that:

"*If the taxpayer does not agree to the amount of taxes calculated by the tax administration, then evidence about the amount of paid taxes must be ensured by the taxpayer.*"

On May 16, 2011, the Senate of the Supreme Court handed down a ruling on Case No. SKA-123/2011[37], arguing that "[..] *there is a situation in which there are two simultaneous processes in the administrative procedure institution in relation to the determination of additional fees and punitive fines and the criminal proceedings in which the handler of the process identifies the violation and files charges related to attempts to evade the payment of the same tax with respect to which criminal liability is applied. The two processes have different principles which mostly involve a conflict between the principle of participation which relates to administrative cases (Article 38 of the law on taxes and fees) and the basic principle of criminal procedure – the presumption of innocence which states that no person can be seen as guilty until such time as guilt has been determined in accordance with criminal procedure; all reasonable doubts about guilt which cannot be prevented must be evaluated in favour of the individual who has the right to a defence. This guarantees the right of the individual not to incriminate himself in relation to the violation* [..]." The same ruling states that "*In practice, there have been cases in which the two processes are separated sufficiently clearly when it comes to audits conducted by the State Revenue Service. In order, however, to declare that a decision on additional taxes or punitive fines is illegal in an administrative case, fundamental violations must be identified. There must be care taken to examine whether the splitting up the processes makes it possible to engage in adequate controls, i.e., to examine fundamental circumstances in the procedure. It is important to ascertain whether the specifications of the person's legal obligations at the conclusion of the procedure is not based on violations of the aforementioned principles and personal rights.*"

ECHR case law is of importance in this regard. In the case of Funke, the court ruled that a person has the right to remain silent and not to contribute toward self-incrimination. "*The special features of customs law cannot justify such an infringement of the right of anyone 'charged with a criminal offence,' within the autonomous meaning of this expression in Article 6 (art. 6) to remain silent and not to contribute to incriminating himself.*"[38] In this specific case, a customs institution had punished the petitioner with the aim of obtaining documents related to the specification of tax payments without being sure that such documents existed and being unwilling or unable to obtain evidence via other resources. That means that the punishment of the individual for tax violations could only be considered as a possibility. Thus the actions of the customs institution forced the petitioner to work with it, thus facilitating his self-incrimination. The ECHR found that this violated Article 6.1 of the European Human Rights Convention.

Conceptually close to the aforementioned incident is the case J. B. vs. Switzerland.[39] The ECHR ruled in that case that the first issue is the goal with respect to which information has been demanded – making the payable tax sum more precise may lead to the calculation of additional taxes and related late fees or punitive payments (supplementary-tax proceedings). This may also lead to tax-evasion proceedings. Tax evasion is a criminal issue, and it occurs when the law is violated.[40] An administrative process such as an audit can be transformed into a criminal case. In other words, the final punishment can be compared to a criminal sentence in terms of its weight. Thus, regulations related to Articles 32.[2] and 38 of the law on taxes and fees can violate Article 6 of the ECHR if the punishment is comparable to a criminal sentence or an audit case is utilised as a foundation to launch criminal proceedings.

At the same time, the full transfer of the duty of proof onto the shoulders of the tax administration would mean a threat against the state's fiscal interests, because then the taxpayer would no longer have to calculate his taxes, offer additional evidence, co-operate with the tax administration, etc. The authors believe that this requires a sensible balance and commensurability in relations between the interests of society and the national budget on the one hand and the protection of the fundamental rights of the individual on the other hand. In continuing to think about the different views that there are about tax debt and relevant fines, it is necessary to separate the process of determining the basic sum of taxes (tax audits) and the application of punitive fines in this regard.

2 The employee receives social security when entering a labour contract and doing the relevant work

The need for social guarantees was discussed by the Constitutional Court on March 13, 2001, when it handed down a judgment on the issue of whether the first paragraph of the transitional rules of the law on national social security satisfied the requirements of Articles 1 and 109 of the Latvian Constitution, as well as Article 9 and Article 11.1 of the International Pact on Economic, Social and Cultural Rights.[41]

Parliament adopted the law on State social security on October 1, 1997.[42] Article 5.4 of the law states that "[..] *the individual shall receive social security in terms of labour accident insurance, insurance against unemployment, handicap insurance, maternity and childbirth insurance, and parental insurance, the said individual making mandatory payments in relation to the said insurance from the first date when the said individual has taken on the status referred to in the first section of this*

paragraph, except where the person is self-employed. A person shall receive social insurance for a pension only if the mandatory contributions have been made." The disputed section of the transitional rules said that "[..] *between 1 January 1998 and 1 January 2002, social security shall be received by persons with respect to whom mandatory contributions have been made. This requirement shall not apply to persons who are subject to labour accident insurance. On 25 November 1999, the Saeima amended the law on social security to extend the period referred to in Para. 1 of the transitional rules to 1 January 2004.*"[43]

Even without going into legal detail, it can be said that the transitional rules were illegal. It was peculiar that the law split up those employees with respect to whom mandatory contributions had been made and those with respect to whom it was not done. It was no secret to anyone that this situation was not uncommon, particularly in the private sector. This illegal procedure could not be included in a law that was sanctioned by the state. 20 MPs filed a constitutional complaint to argue that the transitional rules violated Article 1[44] and Article 109[45] of the Latvian Constitution, as well as Article 9 and Article 11.1 of the International Pact on Economic, Social and Cultural Rights. The petitioners argued that there were some 80,000 employees in Latvia in 1999 with respect to whom employers had not made regular social insurance contributions, and that meant that many workers could not enjoy the social rights that are guaranteed in the Constitution.

The Constitutional Court also referred to social rights in its judgment: "[..] *if social rights are included in the fundamental law, then the state may not refuse them. The said rights are not only of a declarative nature.*"[46] The court added that "[..] *the right to social protection in Latvia is of constitutional value*"[47] in relation to Article 109 of the Constitution.

Although social rights are seen as a constitutional value, the fact is that their implementation depends on the country's economic situation and available resources.[48] Social rights cannot be replaced with social aid,[49] because the goals of social insurance[50] and of social aid[51] are not one and the same.

The Constitutional Court went on to rule that the system of social insurance for the employees of domestic employers involves a special situation, because

"1) [..] *employers who are employed by an employer who pays domestic taxes* [..] *are the only persons involved in the state social insurance system who do not have the right to implement their obligations toward the system – making mandatory contributions to the special budget – directly, instead having to rely on the involvement of the employer*;

2) [..] *by doing their work such individuals create material prerequisites for social insurance. The employer is obliged to calculate the employee's wage and to ensure that the wage is paid to the employee, also ensuring that the mandatory social insurance contribution is included in the compensation package. In addition to this, contributions from the employee are withheld from payment by the employer and transferred to the special budget in accordance with the terms of the law. The employee cannot influence this procedure, cannot reject the withholding of the contributions, or make the contributions individually. Neither does the law speak to the duty or the opportunity of an insured party to monitor the employer who makes the relevant contributions*;

3) [..] *where an employer violates the law by not making the mandatory payments, the relevant government institutions are authorised to force the employers to do so. Insured persons who cannot influence the activities of the employer or the*

institution which implements and/or supervises social insurance must not suffer just because other persons have failed to carry out their legal duties or have done so incompletely. Otherwise the mechanism that has been created to pursue constitutional rights would not satisfy its own goal."[52]

On the basis of this, the Constitutional Court found that "*as subjects of social insurance relationships, employees have fully carried out their duties at such time as they have begun an employment relationship and begun their work.*"[53] The state, in turn, has broad authority and a set of opportunities to collect mandatory social insurance contributions via the involvement of special institutions (particularly the State Revenue Service) or the courts, as well as by filing suit in relation to the debtor's halting of job relations or the debtor's insolvency.[54]

The judgment clearly strengthened the legal rights of Latvian employees in regard to social rights, also facilitating a better understanding of the application of the principles of legal reliance and legal security when there are collisions of a legal nature.[55] That is why the final conclusion of the court that the disputed part of the laws' transitional rules was unconstitutional in regard to Article 109 of the Constitution was self-evident. It meant that irrespective of whether a domestic employer has or has not made social insurance contributions, the relevant employee has the right to demand social guarantees from the state in accordance with Article 109 of the Constitution, the law on state social insurance, and other relevant normative acts.

3 Residents of other EU member states have the right to individual income tax relief in the member state in which they earn most of their income

The functions of a tax mechanism are manifested via an interaction between the interests of the state and private interests. This applies to harmonised indirect taxes (customs fees, the value added tax, the excise tax), as well as to direct taxes (income taxes, social insurance contributions). The EU does not regulate direct taxes, but the European Court of Justice has ruled that member states must handle this authority in accordance with the laws of the European Communities.[56] It is also true that the rights and freedoms of taxpayers can be limited on the basis of *significant* public interests.[57]

Given that regulations of direct taxes are possible in the EU, focus must be given to the way in which ideas from the ECJ have been merged into Latvia's normative acts via the discourse of direct taxes. Thus, for instance, in *Finanzamt Köln-Altstadt vs. Roland Schumacker*[58], the ECJ found that without taking into consideration the terms of tax conventions concluded among member states on the subject of applying the income tax to individual income, the fact is that the tax laws of all member states must provide non-residents from other member states with the same right to individual income tax reductions that is enjoyed by residents in relation to untaxed minimums, tax relief and untaxed justified expenditures, this provided that the economic situation of the non-resident is similar to that of a resident. The criterion in Latvia for determining the economic situation of non-residents relates to the issue of whether they earn most of their income in Latvia. This served as a basis to amend the law on the individual income tax to say that residents of other EU member states who earn 75% or more of their total income in Latvia are comparable to Latvian residents.[59] This allows such non-residents to deduct justified expenditures from tax

payments (Article 10 of the law on the individual income tax), ensure the untaxed minimum (Article 12), and receive tax relief (Article 13).

ECJ rulings were also the basis for the creation of a system in the law on the individual income tax which taxes dividends. In *Staatssecretaris van Financiën vs. B.G.M. Verkooijen*, the court ruled that when a shareholder receives dividends from a company registered in another member state, the tax applied to such dividends cannot be higher than is the case with shareholders or holders of capital shares who receive dividends from a company registered in their own country.[60] A new version of Article 9.1.2. of the law on the individual income tax took effect on May 1, 2004[61] to ensure that taxes related to dividends which Latvian residents receive from companies in other EU member states are the same as in the case of dividends received from companies that are registered in Latvia.[62]

In the are of donations to public benefit organisations, of importance is the ECJ ruling in *Hein Persche vs. Finanzamt Lüdenscheid*.[63] The ruling was merged into Article 20.[1] of the law on the individual income tax, with rules related to public benefit organisations in Latvia being compared to similar organisations, associations, religious organisations or other entities that have been declared of public benefit in other EU or European Economic Zone (EEZ) member states.[64]

4 Not just the profits, but also the losses of a company (or group of companies) can be transferred in the economic space of the European Union

One ECJ ruling which has substantially affected tax law in Latvia is the prejudicial ruling in *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes* on December 13, 2005. The ruling had to do with the rights of a parent company to absorb the losses of a subsidiary.[65]

The M&S case is important in that it represents a conflict between the national budget interests of EU member states in relation to the collection of taxes on the one hand and EU law on the other hand. Direct taxes are the competence of member states, but it is also true that "*the duty for EU tax policy is to ensure that tax regulations are in line with stated goals related to the creation of new jobs, the competitiveness of the EU, the common market, and the free circulation of capital*."[66] The ECJ has declared this in several rulings,[67] including the M&S case:

"*In that regard, it must be borne in mind that, according to settled case-law, although direct taxation falls within competence, Member States must nonetheless exercise that competence consistently with Community law.*"[68]

The authors believe that a precise description of the content of the aforementioned ECJ ruling has been produced by Professor Heinrich Weber-Grellet, who has written that this represents the "silent harmonisation" of direct taxes at the EU level.[69]

In accordance with Paragraphs 43 and 48 of the Treaty of the European Communities (EKL),[70] EU citizens have the right to engage in business in any member state. This includes opening offices, affiliates or subsidiaries in other member states with the same rights as those which rest with the citizens of the relevant member states. When such enterprises are established in accordance with the relevant member state's normative acts and have a legal address, management structure or major area of business operations in the EU, their legal status is compared to that of individuals (the exception being non-profit enterprises).[71]

In the M&S case, the ECJ found that UK norms satisfy requirements related to the freedom of business operations, but it also found that the ban against a non-resident subsidiary to transfer losses to a resident parent company violated EU law (at this level of development):

"*The exclusion of such an advantage in respect of the losses incurred by a subsidiary established in another Member States which does not conduct any trading activities in the parent company's Member State is of such a kind as to hinder the exercise by that parent company of its freedom of establishment by deterring it from setting up subsidiaries in other Member States. It thus constitutes a restriction on freedom of establishment within the meaning of Articles 43 EC and 48 EC, in that it applies different treatment for tax purposes to losses incurred by a non-resident subsidiary*" (Para. 33, 34). The court also ruled that lower tax revenues are no excuse for limiting fundamental freedoms (Para. 44).[72]

The transfer of a company's losses from one member state to another clearly reduces the budge revenues of the other country. If companies are allowed to choose the country in which losses are to be taken into account, then that may seriously endanger the separation of competences among member states in terms of direct taxes. Even though the ECJ ruled that bans on such transfers are in violation of Articles 43 and 48 of the EKL (offering such opportunities to subsidiaries in the country of residence), it declared to be legitimate limitations on benefits which bar the non-resident subsidiary from transferring losses to a resident parent company until such time as the non-resident subsidiary in the country of residence can take into account the same losses during the next taxation or fiscal year.

The ECJ's prejudiced decision clearly strengthens the development of integration in the EU, making it easier to circulate profits and losses in the EU economic space, but the truth, according to Webber-Grellet, is that this could also have the opposite effect:

"*Problems in this area of development exist first of all because the European Court of Justice appears to be little interested in national fiscal needs. It does not take territorial principles into account and only supports specifically European practices. Different perspectives (national tax sovereignty on the one hand and a ban on discrimination on the other hand) will inevitably lead to tensions and conflicts. Where the losses of foreigners must be compensated (Marks & Spencer), where foreign shareholders have the right to tax discounts, where national tax advantages are also granted to foreigners, and where the principle of correspondence is not in place, it becomes more difficult for national legislatures to create (implement) a fair tax and social system.*"[73]

The right to transfer business losses to future taxation or fiscal years must be seen as tax relief which allows companies to even out negative results in terms of taxable revenues with taxable revenues from future periods in time.[74]

Frequently, but not always, the mechanism of transferring loses is linked to duties stated in normative acts related to bookkeeping – the obligation to preserve relevant bookkeeping documents,[75] or the right of tax administrators to review tax payments in terms of conducting a tax audit for the relevant period.[76] That is also true in Latvia.

Prior to Latvia's accession to the EU, the law on the corporate income tax said that the transfer of losses within a group of companies was possible if the process involved residents of the Republic of Latvia "*or residents from countries with which the Republic of Latvia has conclude a convention or agreement on preventing double*

taxation and tax evasion." When Latvia joined the EU, major amendments to the law were approved, and they took effect on January 1, 2005. The text was supplemented with the words

"[..] *or residents from European Union member states who, in accordance with the prevailing convention on preventing double taxation, is also not recognised as the resident of another country (which is not a member state of the European Union).*"[77]

The definition of the main company and the subsidiary of the company was also expanded to "[..] *include those companies in European Union member states which, for purposes of income taxes and on the basis of a prevailing convention on preventing double taxation, are not recognised as residents of another country (which is not a member state of the European Union).*"[78]

The law on the corporate income tax was amended on December 19, 2006, to state that residents of other EEZ member states are comparable to residents of the EU, and the amendments took effect on January 1, 2007.[79] The law was also made more precise in terms of the circumstances under which a company is seen as a participant in a group of companies which allow the transfer of losses.[80]

Although in formal terms, Latvian law permits the transfer of losses in a group of companies, the process is considerably cumbersome:

1) Income and losses related to the corporate income tax must be calculated in accordance with the requirements of Latvian law;
2) Losses can be transferred only if they cannot be taken into account during future taxation periods when specifying taxable revenues in the country of residence and the losses cannot be taken over by another taxpayer in the country of residence;[81]
3) Companies are participants in a group of companies throughout the entire taxation period during which losses that are to be transferred have occurred, none of the companies is exempt from the payment of the corporate income tax or a comparable tax, the company is not given a reduced tax rate or a tax exemption in accordance with Latvian laws;[82]
4) The law on the corporate income tax was amended again on August 9, 2010 (taking effect on January 1, 2011),[83] to reflect the new law on micro-enterprise taxes.[84] The amendments state that "*a limited liability company which has become a payer of the micro-enterprise in the post-taxation year shall not have the right to transfer losses from the taxation period to another participant in the group.*"[85] Payers of the micro-enterprise tax pay it on the basis of their revenues, not their profits.

A company's losses also cannot be transferred to future taxation (fiscal) years if ownership of the company has changed.[86] In cognisance on the principle of uninterrupted operations, the possibility to transfer losses is preserved, however, if "[..] *the commercial enterprise or co-operative whose ownership has changed shall, for the first five taxation periods after the change in control, preserve its previous basic area of operations, as complying to the basic area of operations of the commercial enterprise or co-operative during the last two taxation periods before the change in ownership.*"[87]

The conclusion must be that at least in formal terms, Latvian laws in the area of the transfer of losses in a group of companies are based on the Marks & Spencer case at the ECJ.

Summary

1. The state's interest in collecting taxes differs from the collection of punitive fines for tax debt. Tax revenues underpin the performance of the state's functions, while punitive fines are aimed at punishing those who violate the law. Therefore a decision on an undisputed halt to tax collections or a rejection of the halt to tax collections vis-a-vis tax debt and punitive fines can differ, as well;
2. Employees of domestic companies are seen as socially insured people at such time as they have entered a labour relationship and have begun to work;
3. The restriction on transferring the losses of a non-resident company to a resident parent company in an EU member state after the subsidiary in the country of residence has exhausted opportunities to take losses into account during future taxation (fiscal) years is in conflict with the freedom of business operations that has been declared by the Treaty of the European Communities;
4. EU residents have the right to individual tax relief in the member state in which most or all of the income is received. In Latvia, a resident of the EU who receives 75% or more of his or her income in the country is compared to a resident of Latvia;
5. EU residents can also receive tax relief for donations or gifts to public benefit organisations in other EU or EEZ member states, just as is the case with donations to analogous organisations in their own country.

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[17] Ibid.

[18] Quoted in *Налоги и налоговое право* (Taxes and Tax Law). Под редакцией кандидата юридических наук А. В. Бризгалина (Edited by the candidate of legal sciences Brizgalina A.V.). Москва: Аналитика-Пресс (Analytics-Press), 1997, p. 79. ISBN 5-7916-0007-0.

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[21] See, e.g., Department of Administrative Cases of the Supreme Court Senate, Decision in Case No. SKA-0715-07, A42168405, 20 December 2007. Available: *http://juridika.tiesas.lv/template/index.php?type=3&id=425&cat=4* [last viewed 15.07.2011]; Decision in Case No. SKA-105, 18 May 2004 [not published]; Decision in Case No. SKA-172, 3 August 2004 [not published] etc.

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[26] Department of Administrative Cases of the Supreme Court Senate, Case No. SKA-0715-07, theses (p. 2) and Paragraph 10 of the judgment.

[27] Ibid.

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[30] Department of Administrative Cases of the Supreme Court Senate, Case No. SKA-0715-07, Paragraph 10 of the judgment.

[31] See also Article 92 of the Constitution of the Republic of Latvia:
"*Everyone has the right to defend his or her rights and lawful interests in a fair court. Everyone shall be presumed innocent until his or her guilt has been established in accordance with law. Everyone, where his or her rights are violated without basis, has a right to commensurate compensation. Everyone has a right to the assistance of counsel.*".
See also the judgment of the Constitutional Court on Case No. 2006-28-01 "On the compatibility of the second sentence of Section 22.4 of the Law on the individual income tax to Article 92 of the Constitution of the Republic of Latvia". The court ruled that:
"*The principle of justice means that when taking a decision, an institution and a court must focus on achieving a just result, taking into account the rights and judicial interests of parties that are involved in the case*."

[32] Article 185.[1] of the Law on Administrative Procedure.

[33] Department of Administrative Cases of the Supreme Court Senate, Case No. SKA-071-15-07, Paragraph 9.

[34] Department of Criminal Cases of the Supreme Court Senate, Decision in Case No. SKK-627/2008, 2 December 2008. Available: *http://www.at.gov.lv/files/archive/department2/2007/2008/skk%20627_8_dz.doc* [last viewed 15.07.2011].

[35] Article 218.2 of the Criminal Law:
"*(2) For a person who evades taxes and payments imposed along with taxes or who conceals or reduces income, profits and other items subject to tax, if the said evasion causes large-scale losses to the State or local government, the applicable sentence shall be deprivation of liberty for a term not to exceed five years, or a fine not exceeding one hundred and twenty times the minimum monthly wage, without or without confiscation of property, and with or without deprivation of the right to engage in entrepreneurial activity for a term of not less than two years and not exceeding five years*".

[36] Ibid.

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[39] The European Court of Human Rights, *J. B. vs. Switzerland*, No. 31827/96, 3 May 2001. Available: *http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=697326&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649* [last viewed 26.08.2011].

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[41] Constitutional court of the Republic of Latvia, Judgment in Case No. 2000-0109, 13 March 2001. Available: *http://www.satv.tiesa.gov.lv/upload/2000-08-0109.rtf* [last viewed 19.07.2011].

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[43] Constitutional court of the Republic of Latvia, Judgment on Case No. 2000-08-0109, *op. cit*., p. 2.

[44] Article 1 of the Constitution: "*Latvia is an independent and democratic republic*."

[45] Article 109 of the Constitution: "*Everyone shall have the right to social guarantees for old age, work disability, unemployment, and other cases determined by law*."

[46] Constitutional court of the Republic of Latvia, Judgment on Case No. 2000-08-0109, *op. cit*., p. 7.

[47] Ibid., pp. 7, 8.

[48] "*The social rights to which the disputed legal norm applies relate to a specific area of human rights which is formulated in the constitutional laws of countries and in international human rights documents as overall duties for the state. The regulatory mechanism has been left up to the legislature in each country. The implementation of social rights depends on the country's economic situation and*

available resources." See Constitutional court of the Republic of Latvia, Judgment in Case No. 2001-02-0106, 26 June 2011. Available: *http://www.satv.tiesa.gov.lv/upload/2001-02-0106.rtf* [last viewed 02.08.2011].

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[52] Constitutional court of the Republic of Latvia, Judgment on Case No. 2000-08-0109, *op.cit*., pp. 8, 9. See also Latvijas Republikas Saeimas 01.10.1997. likums "Par valsts sociālo apdrošināšanu" (The Latvian law on social insurance, 1 October 1997) – Articles 3.2.2, 12.1, 13.1, 13.2, 21 etc.

[53] Constitutional court of the Republic of Latvia, Judgment on Case No. 2000-08-0109, *op.cit*., p. 11.

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[55] For comparative purposes, e.g., see *Wank, R.* Die Auslegung von Gesetzen. 3., neu bearbeitete Auflage (Interpretation of the Law. 3rd ed.). Köln, Berlin, München: Carl Heymans Verlag KG, 2005, p. 127, 128. ISBN 3-452-25961-7.

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[57] The European Court of Justice, *Futura Participations SA and Singer vs. Administration des contributions*, C-250-95, 15 May 1997, Paragraph 31. Available: *http://eur lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61995CJ0250:EN:HTML* [last viewed 07.08.2011].

[58] The European Court of Justice, Case No. C-279/93.

[59] Latvijas Republikas Saeimas 20.12.2004. likums "Grozījumi likumā "Par iedzīvotāju ienākuma nodokli"" (Amendments to the Latvian law on the individual income tax, 20 December 2004). Available: *http://www.likumi.lv/doc.php?id=98461* [last viewed 17.08.2011].

[60] The European Court of Justice, *Staatssecretaris van Financiën vs. B.G.M Verkooijen*, C-35/98, 6 June 2000. Available: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998CJ0035:EN:HTML* [last viewed 07.08.2011]. For more on the topic, see *Schön, W*. Tax Competition in Europe. Amsterdam: IBFD, 2003. ISBN 90-76078-55-6.

[61] Latvijas Republikas Saeimas 11.12.2003. likums "Grozījumi likumā "Par iedzīvotāju ienākuma nodokli"" (Amendments to the Latvian law on the individual income tax, 11 December 2003). Available: *http://www.likumi.lv/doc.php?id=82463* [last viewed 17.08.2011].

[62] With amendments to the Latvian law on individual income tax dividends abolishing the 2. Paragraph of first part of Article 9 are taxable income (Amendments to the Latvian law on the individual income tax, 1 December 2009. Available: *http://www.likumi.lv/doc.php?id=202351* [last viewed 11.10.2011.]) However this does not constitute any discrimination since resident and non-resident's dividends income is taxable at equal 10 percent rate.

[63] The European Court of Justice, *Hein Persche vs. Finanzamt Lüdenscheid*, C-318/07, 27 January 2009. Available: *http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0318:EN:HTML* [last viewed 15.08.2011].

[64] Latvijas Republikas Saeimas 09.02.1995. likums "Par uzņēmumu ienākuma nodokli" (The Latvian law on the corporate income tax, 9 February 1995). Available: *http://www.likumi.lv/doc.php?id=34094* [last viewed 27.08.2011].

[65] The European Court of Justice, *Marks & Spencer plc vs. David Halsey (Her Majesty's Inspector of Taxes)*, C-446-03, 13 December 2005. Available: *http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0446:EN:HTML* [last viewed 27.07.2011].

[66] *Eberts, D., Freija, I., Jarve, K., Jerņeva, J., Lutere-Timmele L. D., Debora, P., Rone, D., Rūķe, I., Vasariņš, N*. Eiropas Savienības tiesību piemērošana: Rokasgrāmata praktizējošiem juristiem. Zinātniskā redaktore Dace L. Lutere-Timmele (The Application of European Union Law: A Handbook for Practicing Attorneys. Lutere-Timmele, D. (ed.)). Rīga: Courthouse Agency, 2007, p. 247. ISBN

978-9984-790-28-2. For more on the topic, see *Dourado, A. P., da Palma Borges R*. The Acte Clair in EC Direct Tax Law. Amsterdam: IBFD, 2008. ISBN: 978-90-8722-036-5 and *Vanistendael, F.* EU Freedoms and Taxation. Amsterdam: IBFD, 2006. ISBN 978-90-76078-98-4.

[67] See, e.g., The European Court of Justice, *Combined case of Metallgesellschaft Ltd [a.o.],* C-410/98) and *Hoechst AG and Hoechst (UK) Ltd vs. Commissioners of Inland Revenue and HM Attorney General*, 8 March 2001. Available: *http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998J0397:LV:HTML* [last viewed 27.07.2011].

[68] The European Court of Justice, Case No. C-446/03, Paragraph 29.

[69] *Weber-Grellet, H.* Europäisches Steuerrecht (European Tax Law). München: Verlag C.H. Beck, 2005, p. 141. ISBN 3 340650633X.

[70] The relevant articles in the EKL correspond to the treaty before the taking of force of the Lisbon Treaty.

[71] See, e.g., The European Court of Justice, Case No. C-446/03, Paragraph 30, 31.

[72] See also The European Court of Justice, *Petri Manninen*, C-319/02, 7 September 2004, Paragraph 49. Available: *http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0319:LV:PDF* [last viewed 28.07.2011].

[73] "*Problematisch ist die Entwicklung vor allem deshalb, weil der EuGH wenig Rücksicht auf die nationalen fiskalischen Bedürfniss zu nehmen scheint, sich ganz augenscheinlich über das Territorialitätsprinzip hinwegsetzt und spezifisch europäisch agiert. Die unterschiedlichen Perspektiven (nationale Steuersouveränität auf der einen Seiten; Diskriminierungsverbote auf der anderen Seite) müssen unweigerlich zu Konflikten und Spannungen führen. Wenn ausländische Verluste verrechnet werden müssen (Marks&Spencer*), *wenn ausländische Anteilseigner steueranrechnungsberechtig tsind, wenn nationale Steuervergünstigung auch in Auslandsfällen zu gewähren sind, wenn das Korrespondenzprinzip nicht gilt, wird es dem nationalen Gesetzgeber schwer gemacht, seine eigenen Vorstellungen von einem gerechten Steuer- und Sozialsystem durchzusetzen*". See *Weber-Grellet, H.* Europäisches Steuerrecht … – pp. 141, 142.

[74] Taxpayers in Latvia which pay the corporate income tax have the right to cover losses in a chronological order from the taxable revenues of the next eight taxation periods. In some cases, they can take 10 years to do so (Articles 14.1, 14.2 prim and 14.10 of the law). People who pay the individual income tax can cover losses in a chronological order from the taxable revenues of the next three taxation periods, while those who work in specially supported territories can take six years to do so (Article 14.1 of the law on the corporate income tax and Articles 11.9 and 11.10 of the law on the individual income tax). Those who pay the micro-enterprise tax do not have the right to transfer losses to future taxation periods.

For the corporate income tax law, see Latvijas Republikas Saeimas 09.02.1995. likums "Par uzņēmumu ienākuma nodokli" (The Latvian law on the corporate income tax, 9 February 1995).

For the individual income tax law, see Latvijas Republikas Saeimas 11.05.1993. likums "Par iedzīvotāju ienākuma nodokli" (The Latvian law on the individual income tax, 11 May 1993).

For the law on the micro-enterprise tax, see Latvijas Republikas Saeimas 09.08.2010. likums "Mikrouzņēmumu nodokļa likums" (The Latvian law on the micro-enterprise tax, 9 August 2010). Available: *http://www.likumi.lv/doc.php?id=215302* [last viewed 28.07.2011].

[75] Article 10 of the law on bookkeeping says that copies of annual reports must be preserved until such time as the relevant company is reorganised or shut down. Other documents must be preserved for 5 to 75 years, depending on their category. Documents can be stored in electronic form. For the law on bookkeeping, see Latvijas Republikas Saeimas 14.10.1992. likums "Par grāmatvedību" (The Latvian law on bookkeeping, 14 October 1992). Available: *http://www.likumi.lv/doc.php?id=66460* [last viewed 08.03.2011].

[76] Tax audits in Latvia can be conducted within three years after the payment term begins, as defined by law. For the law on taxes and fees, see Latvijas Republikas Saeimas 02.02.1995. likums "Par nodokļiem un nodevām" (The Latvian law on taxes and fees, 2 February 1995), Article 23.2.

[77] For the amendments, see Latvijas Republikas Saeimas 20.12.2004. likums "Grozījumi likumā "Par uzņēmumu ienākuma nodokli" (Amendments to the Latvian law on the corporate income tax, 12 December 2004). Available: *http://www.likumi.lv/doc.php?id=98462* [last viewed 22.07.2011].

[78] *Nodokļu ceļvedis*. 1. sējums. Likumu "Par nodokļiem un nodevām" un "Par uzņēmumu ienākuma nodokli" komentāri. [B.v.]: Dienas bizness, Deloitte, [b.g.] (Commentary on Tax Law, Vol. 1: The Law on Taxes and Fees and the Law on the Corporate Income Tax. Dienas Bizness and Deloitte & Touche) [last viewed 08.03.2011] – p. 10.22.9.

[79] Latvijas Republikas Saeimas 19.12.2006. likums "Grozījumi likumā "Par uzņēmumu ienākuma nodokli" (Amendments to the Latvian law on the corporate income tax, 19 December 2006). Available: *http://www.likumi.lv/doc.php?id=150698* [last viewed 25.07.2011].

[80] Article 14^1.3 (the Latvian law on the corporate income tax):
"*For the purposes of this article, the subsidiary of the main company that is a participant in the group of companies is a domestic company or one that is resident in a country with which the Republic of Latvia has concluded a convention or agreement on preventing double taxation and tax evasion, or a resident in another country in the European Economic Zone which, on the basis of a prevailing convention on preventing double taxation is not recognised as a resident of another country (which is not a member state of the European Economic Zone), in which at least 90% of shares belong to:*
1) The main company;
2) One or more subsidiaries of the main company;
3) The main company and one or more of its subsidiaries in any combination."

[81] Article 14^1.6 prim of the Latvian law on the corporate income tax.

[82] Article 14^1 of the Latvian law on the corporate income tax in whole.

[83] Latvijas Republikas Saeimas 09.08.2010. likums "Grozījumi likumā "Par uzņēmumu ienākuma nodokli"" (Amendments to the Latvian law on the corporate income tax, 9 August 2010). Available: *http://www.likumi.lv/doc.php?id=215306* [last viewed 25.07.2011].

[84] Latvijas Republikas Saeimas 09.08.2010. likums "Mikrouzņēmumu nodokļa likums" (The Latvian law on the micro-enterprise tax, 9 August 2010).

[85] Article 14^1.7 prim of the Latvian law on the corporate income tax.

[86] Article 14.2 of the Latvian law on the corporate income tax.

[87] Article 14.3 of the Latvian law on the corporate income tax.

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The Development of Constitutional and Administrative Law in Latvia after the Restoration of Independence

Ringolds Balodis, Dr. iur.
Faculty of Law, University of Latvia
Professor at the Department of Constitutional and Administrative Law
E-mail: *Ringolds.Balodis@lu.lv*

Annija Kārkliņa, Dr. iur.
Faculty of Law, University of Latvia
Associate professor at the Department of Constitutional and Administrative Law
E-mail: *Annija.Karklina@lu.lv*

Edvīns Danovskis, Dr. iur.
Faculty of Law, University of Latvia
Lecturer at the Department of Constitutional and Administrative Law
E-mail: *Edvins.Danovskis@lu.lv*

The given article presents a retrospective analysis of the most significant events in the area of constitutional and administrative law in the Republic of Latvia during its second period of independence. The authors of the article are experts in state law who have attempted to examine the events of the last 20 years objectively and independently. Separate events examined from the position of the existing legal reality have been viewed with different understanding of their contents. Although the article can be ranked as a survey study, it does not deliberately follow chronologically scrupulous division into specific stages that is a frequent feature in legal literature[1] because it is more important not to perceive certain occurrences *ad litteram* (Lat. – verbatim) but to understand the essence of processes from perspective of their use or *ad usum* (Lat. – for use, application). The present article should not be associated with the official position of the University of Latvia or Faculty of Law of the University of Latvia.

Keywords: the first independence period of Latvia, the second independence period of Latvia, occupation, Constitution, amendments to the Constitution, Constitutional Law of Latvia, Declaration of Independence of Latvia

Abbreviations used in the article:
SC – Supreme Court
CEC – Central Election Commission
EU – European Union
Declaration of Independence – Declaration of the Supreme Council of the Latvian Soviet Socialist Republic "On the Restoration of Independence of the Republic of Latvia"
CC – Constitutional Court
KGB – Committee for State Security
USSR – Union of the Soviet Socialist Republics

LSSR – Latvian Soviet Socialist Republic
Constitution – Constitution of the Republic of Latvia

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1 Restoration and consolidation of the statehood of the Republic of Latvia

At the end of 1980s, the Soviet Union started slowly but inevitably approaching its collapse. Only in 1991 did the Soviet empire disappear from the world map entirely and the three Baltic States became independent again. From today's perspective these events can be easily described in a couple of paragraphs, but on that time

a serious struggle went on for several years from 1986 when the group *Helsinki-86*[2] announced its existence till the moment of the actual freedom, which was gained when the Russian Federation withdrew its armed forces from our country on 31 August 1994. It was a struggle for recognition of not only the independence of Latvia but also the soviet occupation. It was a struggle for recognition of not only the soviet occupation but also the legal continuity with the Republic of Latvia established on 18 November 1918. It was a struggle for restoration of the statehood.

The occupation fact most certainly is not to be regarded as a matter of faith on which it depends whether it is possible to form a governmental coalition with the party "Saskaņas centrs" (Harmony Centre)[3], or even a religious symbol[4], because historians of Latvia[5], as well as experts in law[6], and also the Parliament[7] and the constitutional control institution – the Constitutional Court[8] – have recognized that the soviet power was established in Latvia in 1940 unlawfully and the events that took place are to be evaluated as occupation (occupation of another state's territory with armed force) and annexation[9] (imposing of the administrative system of the USSR on Latvia). Certainly, such an approach is in distinct contradiction to the idea declared during the soviet times about Latvia as a territory inhabited solely by Latvians[10] that has successfully become part of the USSR because imperialist countries were unable to provide military support for the Latvian bourgeoisie to fight against the revolutionary movement[11].

1.1 Decision on the procedure for restoration of independence

Looking back at the events of restoration of the independence of Latvia, we can conclude that apart from the proposal of opponents of this process to organize a referendum in Latvia on declaring its independence, as provided for in the Constitution of the LSSR[12], only two development scenarios were possible – the citizens' congress when restoration of the independence of Latvia would be accomplished not by institutions of occupational power but by the citizens of the Republic of Latvia and their descendants, or the parliamentary way when the independence would be declared by the Supreme Council of the LSSR.

Citizens' Congress. Citizens of the Republic of Latvia and their descendants would have to elect their representatives who would restore the Republic of Latvia, its Constitution and establish basis for subsequent parliamentary procedure in order to eliminate consequences of occupation. This approach was legally correct, yet more difficult to implement and possibly also more confrontational because it would mean existence of parliament and government appointed by it who might not so easily agree to their self-dissolution. It must be said that on the eve of passing the Declaration of Independence all the preliminary work for organizing the Citizens' Congress had been done. At the end of 1989 already about 700,000 citizens of the Republic of Latvia had been registered, out of which 678,862 participated in the elections of 8–23 April, 1990. The total rate of participation was 63% from all the citizens who had voting rights. During the Citizens' Congress elections, 232 delegates were elected who were to restore the independence of Latvia.

Parliamentary way. The Supreme Council, unlike the Citizens' Congress that was established strictly on the principles of citizenship stemming from the times of the first independence period, was a representative institution created by the soviet power. Members of the Council were elected according to a non-democratic election law from single deputy mandate constituencies. The Citizens' Congress way was more complicated from the vantage point of handing over the power, while the

Supreme Council's scenario would not have caused any problems with the government and power transformation would have proceeded more smoothly. An opinion has been expressed that there was no real mechanism of implementing the approach of the Citizens' Congress[13]. Some legal experts have characterized the elections to the Supreme Council as "semi-democratic"[14]. The Latvian Constitutional Court came to a similar conclusion later: "The Supreme Council was elected by partly free elections and was not competent to decide any issue since it represented the political will not only of the citizens of Latvia but also of other inhabitants of the LSSR"[15]. The Supreme Council of Latvia was elected by electorate whose characteristic feature was its legal bond with the USSR. Among the electorate of the Supreme Council there were not only citizens of the Republic of Latvia and their descendants, but also citizens of the occupying state – the Soviet Union, who had arrived in the territory of Latvia during the post-war years, including military persons of the occupying troops and their family members[16]. Similarly to other soviet republics[17], the Supreme Council of the LSSR acted in accordance with the Constitution of the LSSR, and like elsewhere in the USSR and the Soviet Bloc, the Supreme Council's Presidium together with the Council of Ministers partly formed the government of the republic.[18] Certainly, such a model violated the principle of division of power and conceptually differs from functioning of parliaments in democratic states, where the primary task of the parliamentary speaker is to manage the parliament and represent the state. Views of the defendants of the USSR system coincided with the ideas of the extremist representatives of the Citizens' Congress. Leaders of the Constitutional Supervision Department of the KGB considered that the Declaration of Independence is illegal since it conflicts with the Constitution of the USSR and with the decree of the USSR President, thus it is a declaration without any legal force[19]. In 1989–1990 confrontation between the Supreme Council of the LSSR and the Citizens' Congress started threatening the process of independence restoration,[20] because it was still important to regain independence *de facto* instead of looking for theoretically most appropriate legal solution under the conditions of the collapsing soviet empire. For this reason the declaration adopted by the Supreme Council of LSSR on 4 May 1990 "On the Restoration of Independence of the Republic of Latvia" (Declaration of Independence)[21] should be considered as luck and success, since it paved the way to the actual independence. In this sense the ability of the communist elite of the republic to re-orientate was the decisive factor that enabled the Supreme Council to become the Parliament of the transition period[22]. Certainly, the basis of the parliamentary way is the factor that during the Supreme Council's election on 18 March 1990, majority of the deputies voted for the Declaration of Independence[23]. The Citizens' Congress was destined historically to remain as a back-up option. If the independence supporters would have been in minority, the only possible road would be the Citizens' congress. When the Citizens' Congress was convened two weeks after the adoption of the Declaration of Independence on 15 May 1990, it could only conclude that the document adopted by the Supreme Council is legally correct and politically well-formulated and that its basic positions correspond also to the will of the Citizens' Congress[24]. Thus, the Citizens' Congress lost its purpose as a restorer of independence since the task had been fulfilled and the goal – restoration of Latvia's independence – was achieved. The constitutional doctrine of Latvia also recognizes that constitutional functions of the Supreme Council were limited and yet it was competent to ensure that the legitimate statehood of Latvia is fully restored.[25]

1.2 The act of restoration of independence – Declaration of Independence

As far as the Constitutional provisions have not replaced the Declaration of Independence[26] of 4 May 1990, the document remains a constitutional act that is in force and that by its constitutional significance and role is to be ranked among the legal acts constituting the statehood of Latvia along with the act on proclaiming the independence of Latvia of 18 November 1918, political platform of the Latvian Peoples' Council, and the Declaration on the State of Latvia of 27 May 1920, as well as the Constitution. The Declaration of Independence should be compared with the similar documents in other Baltic States. It seems that the Latvian Declaration of Independence is more accurately formulated document than in Lithuania or Estonia[27]. It is clear that the declaration is to be ranked among constitutional laws in accordance to the Constitution of the LSSR[28], because 138 members of the Supreme Council of the LSSR voted for it. To adopt a LSSR constitutional law only 134 member votes out of 201 votes were necessary.

The Declaration of Independence adopted by the Supreme Council on 4 May 1990 is radically different from another declaration of the Supreme Council "On the Sovereignty of the Latvian State" adopted a year earlier on 28 July 1989. The declaration "On the Sovereignty of the Latvian State" is to be evaluated as a rebellious proclamation of a subject of the Soviet Federation on persistent noncompliance to the federation laws and not as a revolutionary act. Only the Declaration of Independence introduced the continuity doctrine[29] to the legal system of Latvia and offered a corresponding legal statement that the republic established on 18 November 1918 still exists and the Supreme Council restores the sovereign power of this state[30]. The state continuity doctrine as a continuity or identity principle of a legal entity as stipulated in the international law[31] served as basis for restoration of the statehood. Independence declaration "tore out" Latvia from the scope of the soviet law and provided a duty during the transition period to comply with the principle of continuity (succession of state) in respect to the legal acts of the first period of independence[32], which is certainly a radical step. With the provision of the Declaration of Independence that no law has revoked the Constitution (Satversme)[33], dismantling of the soviet legal system was started[34], and at the same time the work on creating the new legal system was begun. The decision incorporated in the declaration to restore jurisdiction of the Constitution in the whole territory of Latvia but to suspend the Constitution till adoption of a new edition of the Constitution is to be considered also as revolutionary. Exceptions were Articles 1, 2, 3, and 6 or the constitutional legal basis of the Constitution that can be amended only by way of general referendum. The authors of the Declaration have admitted[35] that the reproach expressed by the Citizens' Congress that the Declaration of Independence did not revoke the Parliament declaration on establishment of soviet power in Latvia of 1940 is well-grounded. Certainly, the Declaration of Independence did repeal the declaration on incorporation of Latvia in the USSR but it did not refer to the establishment of the soviet political regime, according to the authors of the Declaration reason for that were concerns that by revoking the mentioned declaration the Supreme Council would undermine its own legitimacy – in this way it would recognize itself as an illegal occupation institution that has no powers to pass the Declaration of Independence[36]. Whatever the case, the Declaration of Independence proclaims membership in the USSR as illegal from the very beginning and declared occupation as a legal fact[37]. Declaration of Independence is based on the thesis that the state of Latvia and

its Constitution of 1922 have not ceased their power *de iure* which means that the state is not proclaimed but restored.

1.3 Period of dual power (4 May 1990 – 21 August 1991)

It has been concluded in legal sources that the period of restoring the state from 4 May 1990 till 21 August 1991 is a typical period of dual power[38]. It is natural because during this period the Republic of Latvia did not yet possess sufficient resources in order to be able to ensure the state power throughout the entire territory of the country because of the extensive presence of the soviet military contingent. The complicated situation of the given period is also demonstrated by the fact that on 26 September 1990 the Supreme Council adopted the law "On the Public Prosecutor's Supervision in the Republic of Latvia" by which the Public Prosecutor's Office of the Republic of Latvia was established despite the fact that the Public Prosecutor's Office of the LSSR under subordination of the USSR General Prosecutor's Office continued working. While the former was only being established, the latter consistently opposed independence of Latvia while being in a better financial situation[39].

During this period "the transition parliament" – the Supreme Council of the LSSR – carried out systematic replacement of the USSR and other legislation with new legislation. Several laws that cardinally changed the former life were adopted; the catalogue of human rights uncharacteristic for socialism was entrenched. Only during one single year the Supreme Council adopted 140 laws and 349 ordinances to fill the legislative gaps[40]. In 1991 Latvia became party to 51 international human rights documents[41]. Although sometimes serious problems were caused by revoking the old USSR provisions, which was to do with inability to replace them with new efficient legislation,[42] in general the process proceeded with admirable success.

1.4 Refusal to write a new constitution and move towards reinstating the full scope of the Constitution

The authors of the Declaration of Independence considered that the former Constitution is outdated and it is necessary to work out a new constitution of the state that would meet the requirements of the times. The Constitution of 1922 seemed too concise, non-specific, and Article 7 of the Declaration of Independence prescribed setting up of a commission that would have to work out a new edition of the Constitution. The new fundamental law must be compliant to "the political, economic, and social situation". A certain role was played by the fact that the Constitution of 1922 did not contain fundamental rights. One of the authors of the Declaration of Independence has indicated that the proposal to elaborate a new Constitution was defined by the fact that the old Constitution did not have a chapter on human and citizens' rights and freedoms[43]. On 31 July 1990 a special working group including 22 members of the Supreme Council was set up[44] that started elaborating a new Constitution. The transition period's Constitution – the fundamental law of the transition period – was ready on 6 June 1991 and was submitted to the SC Presidium[45]. The draft of the new Constitution consisted of 95 articles and was approved in its first reading[46]. It is possible that the Supreme Council would have reviewed it also in the remaining two readings but the attempt of coup in the USSR on 19 August 1991 put an end to it. The idea about a new Constitution was completely rejected[47] when the constitutional law "On the Statehood of the Republic of Latvia" was adopted on 21 August 1991[48]. The law fully restores the sovereignty of the Republic and

its first Article stipulates that the statehood of the Republic of Latvia is defined by the Constitution of 15 February 1922. As of 21 August 1991, the Constitution of the LSSR was declared void. The constitutional law "On the Statehood of the Republic of Latvia" is a document subordinated to the Declaration of Independence which emphasizes that as a result of the coup on 19 August 1991 the power and administration institutions of the USSR have ceased to exist and that the USSR government has demonstrated its inability to have constructive negotiations about restoration of sovereignty of Latvia's statehood. It should be mentioned that a similar law was adopted in Estonia a day before and apparently the events in Estonia encouraged the parliamentarians of Latvia to act more speedily as well[49].

Summing up this period, it must be concluded that since the authoritarian regime of Kārlis Ulmanis "froze" the Constitution[50] and did not replace it with another one, it provided to Latvia a wonderful opportunity to choose a constitutional solution that was different from Estonia and Lithuania. The other Baltic States had to write and approve new constitutions[51], while Latvia could restore the Constitution of 1922. The Constitution has a value as a component of national identity. Reading this document one can feel the flavour of the past since it was adopted by members of the first elected Parliament of the state of Latvia. There are very few countries whose statehood was terminated violently and who have then restored after half a century. This is the only precedent of the kind in the world. From the perspective of comparative constitutional law, the case of the Constitution of Latvia is unique[52].

2 Development of institutions entrenched in the Constitution after reinstatement of the Constitution

Already before the 5th Saeima was convened, the transition parliament took the first steps in reorganizing the state administration. Several institutions that had existed during the first period of independence were restored and many were created anew. Although according to the theory of continuity of state, Latvia is the same state in 1990s as in 1930s yet in reality, after reinstating the Constitution, it was necessary to establish several institutions mentioned in the Constitution entirely anew (for instance, President's and State Audit Office) or to develop the Constitution on the basis of the soviet structure and to establish new authorities that would be consistent with the new political order[53]. During the specific stage of development, many institutions established during the soviet times were abolished, restructured, and merged. New laws were adopted (on restitution of property of repressed persons, denationalization, in the sphere of establishment of banks and privatization of companies) and the laws from the first independence period were restored (for example, the Civil Law, State Audit Office Law, and the law "On the Structure of the Cabinet of Ministers"). Typical soviet economy type institutions were reorganized or abolished; among those were the Latvian Construction Ministry, Latvian Ministry of Material Resources, Communal Economy Ministry, and Ministry of Agro-Industry. In a couple of years staff replacement at ministries and institutions sometimes reached even the rate of 95%! It is obvious that such rapid reforms could not have been comprehensively weighed out therefore part of the decisions taken during this period had temporary character and restructuring was fragmentary[54]. The main task was to finish privatization process as fast as possible to liberate as many economy sectors as possible from the state monopoly. Ivars Godmanis' government of the transition period parliament considered that by giving over to private ownership as

many sectors, properties, and companies as possible, growth of Latvia would begin. Radical attempts to abolish everything that had to do with the soviet power could be explained but they also caused spontaneous liquidation of collective farms, factories, state farms, and state companies. The state missed a unique opportunity to use the soviet heritage in order to start significant development under the new conditions. Insufficiency of the respective specialists is the reason behind it. The non-systematic character of the process was facilitated by the already mentioned rapid abolishment of soviet time ministries (with a slogan that such ministries do not exist in normal states) which did speed up privatization but to a large extent eliminated public accounting and control. It was a time of national euphoria that actually prevented Latvia from developing competitive economy. The scope of industrial production decreased considerably and Latvia turned into a small consumer state.

2.1 Court

After restoration of the Latvian Constitution, active work was started in order to restore the constitutional bodies. Some had to be created completely anew (State Audit Office, President's institution), but there were also some institutions that were already operational. The restored court system of the Republic of Latvia, Public Prosecutor's Office were also heritage from the LSSR. But restructuring of the soviet court system went on slowly since it was impossible to create judiciary appropriate for a democratic state overnight. The transition period parliament adopted the "Law on Judiciary" in 1992 without waiting for reinstatement of Chapter IV of the Constitution.

2.2 Parliament (the Saeima)

The transition period parliament subordinated its work to the new legislative reality. On 25 August 1992 the Supreme Council passed a decision "On Organizing the Work of the Supreme Council of the Republic of Latvia till Convening of the Parliament". The legislative act was in conflict with the Constitution of the LSSR of 1978 and with the Constitution of 1922[55], yet it was sufficiently good to democratize legislative work. The law passed by the Supreme Council "On Elections of 5th Saeima (Parliament)" was an amended and supplemented law on Parliament elections passed in 1922 that provided for the legislative basis for the parliamentary elections on 5 and 6 June 1993. The fifth Saeima was elected with participation rate 89.9% of all the citizens of Latvia who had voting rights, which is still an unsurpassed record of participation rate in the whole history of elections of democratic legislators. Finally the Parliament was elected in democratic elections which certainly made it essentially different from the previous transition time parliament. The first parliamentary session of the second independence period was convened on 6 July 1993[56] terminating the activities of the transition period parliament. The Constitution of 1922 came into force in full scope. With restoration of jurisdiction of the Constitution in the entire territory of Latvia, democratic state order, parliamentary republic, and division between power, which guarantees balance between and mutual control of branches of power and promotes frugality of power, were recognized on the highest level. The fact of restoration of the Constitution strengthened even more the link with the pre-war legislation continuity. One should agree to the conclusion made in legal sources that despite restoration of the Constitution its status was actually the same as that of a new constitution since the state institutions of the time did not correspond to the model stipulated by the Constitution[57]. But in view of the

fact that the restored state could use also the experience of legislative experience of the first independence period already within the coming months after restoration of the Constitution, all the institutions prescribed in it were established and began functioning, and the process of improvement of a new legal system of the state was started. The Parliament approved the Cabinet of Ministers as prescribed by the Constitution. On 16 July the Law "On Re-enforcement of the Law "On the Structure of the Cabinet of Ministers" of 1 April 1925" was passed[58], that established membership of the Cabinet of Ministers[59]. The law was revoked by the law "On the Council of Ministers of the Republic of Latvia" of 18 March 1992. It was updated and laid down a number of positions and institutions that were not included in the first independence period (for example, parliamentary secretaries, ministers for special assignments, and so on)[60].

Changes in the normative regulation of the Parliament seemed harmonious despite multiple amendments (31 changes!)[61]. The Rules of Order adopted in 1994[62] are in force still now in 2012. The normative regulation of the Parliament of Latvia is perfected every year. The law specifies the basis of the legal provisions enshrined in Chapters II and V of the Constitution. Compared to the first period of independence, the Parliament is elected for a one year longer period[63]. In accordance to modern understanding of lawful age, the voting rights have been granted to persons from the age of 18 prescribing also that henceforward the Parliament elections will take place only during one day on the first Saturday of October. The Constitution also specifies the procedure for giving the Member of Parliament solemn vow (oath) and the contents of the oath[64]. Discussions about changes in the Parliament election law are still topical despite the amendments introduced in 2009 that preclude the use of the so-called "locomotive power" principles in the lists of party MP candidates and also do not permit the candidates to run from more than one constituency[65]. Unfortunately in practice new possibilities to bypass the restrictions have been found. For the extraordinary elections of the 11th Saeima, Zatler's Reform Party and Šlesers' Reform Party LPP/LC were founded. Although the latter one did not get seats at the Parliament, the Zatler's name in the title of the former was the basic "locomotive power". Once again it foregrounded the former discussions[66] about the necessity to improve legislative regulation of elections and one should agree to the academician T. Jundzis who believes that the election system needs to be changed radically[67] since the existing proportionality voting system has explicitly shown that political responsibility equals to zero.

2.3 Government

At present the operations of the Cabinet of Ministers, apart from the Law "On the Structure of the Cabinet of Ministers", is prescribed by the Rules of Order of the Cabinet of Ministers[68], the functioning of the state administrative institutions subordinated to it are stipulated by the State Administration Structure Law. Restoring the Cabinet of Ministers the legislative regulation of its functions was developed excruciatingly. For example, the work of the government in 1991 was regulated by Regulation of the LSSR on the Council of Ministers of 23 December 1983 which was repeatedly improved till in 1992 the new regulation on the government of Latvia was approved. On 10 August 1993 the aforementioned regulation was revoked and the Internal Rules of Order of the Cabinet of Ministers were adopted that were repealed on 14 June 1994 since new ones were approved, but on 30 April of 1996 they were replaced again[69]. It must be mentioned that on 12 March 2002 the Rules of Order of

the Cabinet of Ministers were adopted which in their turn were substituted by new Cabinet of Ministers Rules of Order that revoked the 1996 regulation which again was replaced in 2009 by new Rules of Order of the Cabinet of Ministers that are still in force today. Since 1993 till the end of 2012 there have been 14 different governments in Latvia.

2.4 President

Guntis Ulmanis, the first President of the state of the second period of independence was elected on 7 July 1993. Although he was unknown by the majority of society, Ulmanis became the head of the state largely due to the nostalgic memories of people about Kārlis Ulmanis with whom he had kinship[70]. During his presidency G. Ulmanis successfully accomplished two big tasks – he organized President's institution from a scratch at the same time filling it with appropriate contents. While the Parliament, Government, and court system were created on the basis of the respective institutions of the soviet times, the institute of the head of the state did not exist till reinstatement of the Constitution of Latvia. Before the Constitution was re-enacted on 20 June 1991, the fundamental law of the State supported in the first reading did not stipulate the State President institute for the transition period but the tasks of the head of the state were entrusted to the chairperson of the Parliament. In this context it is interesting to remember that when the head of the state of Latvia was invited to the current UN session, discussions began whether the chairman of the Supreme Council or the Council of Ministers is to be considered as the head of the state[71]. After lengthy discussions in society, the Saeima adopted the Law on Election of the State President in 2007[72]. Before passing this law there were practically no normative acts regulating election of the President of the state and all the issues concerning elections were decided at the Faction Council of the Parliament[73]. Compared to the first period of independence, the institute of the head of the state of Latvia has not undergone essential changes except for the fact that the term of election was extended from three to four years[74]. A number of committees supporting the work of the presidential functions operate under the auspices of the Presidential institute. One of the most significant is the Commission of Constitutional Law established by the state President V. Zatlers at the end of 2007. It has done several important studies in the area of constitutional law facilitating development of legal thought[75]. Commission members are experts in constitutional law (EU court judge E. Levits, head of the Legal Office of the Parliament G. Kusiņš, and others), whose competence is to provide opinions on interpretation of the Constitution and its improvement, as well as facilitate academic research on constitutional law issues.[76] As for the normative regulation of the President's institution it should be noted that all the former presidents have been criticising the restricted scope of President's authority[77] and also the election procedure considering that changing of both would grant possibilities to perform the presidential tasks more efficiently. It would certainly make the executive power more efficient and should be seen as a positive step but it must be linked also with changes in the parliamentary election model.

2.5 State Audit Office

After reinstating the Constitution it was necessary to establish the State Audit Office institute prescribed by the Constitution, therefore on 28 October 1993 the law of "On State Audit Office" of 1923 was re-enforced[78]. In 2002 this law was replaced

by a new State Audit Office Law that extended the mandate of the constitutional body including in it also auditing of resources granted by the European Union and improvement of audit quality The law did not provide any more for the function of administrative punishment.

3 Setting up of a new Constitutional body – the Constitutional Court – and significance of its judgements in development of legal system

Constitutional courts exist today in most of the democratic countries and their existence is rather self-evident. The situation was quite different at the beginning of 1930s and it was already in 1933 when a proposal was expressed in Latvia to supplement the Constitution with a provision that would prescribe setting up of a special court whose duties would include verification of compliance of laws, ordinances by the government and the president to the provisions of the fundamental law of the state[79]. Although the proposal was not included into the agenda of the Parliament, the very fact of such a discussion slightly more than ten years after the first court of this type was stipulated in constitutional provisions (in the 1920 Constitution of Czechoslovakia) and a few years after the first court of this type began working (1929 amendments to the Constitution of Austria)[80] demonstrated that already in those days constitutional development of Latvia went along the same path as in Western Europe. That in a sense is linked with the high intellectual potential of the German minority in Latvia which brought the latest trends in the world and its newest elements into our country. Unfortunately, Latvia's constitutional development was terminated. The Baltic Germans repatriated to their ethnic homeland and lives of many Latvian state law experts (for example, Professor Kārlis Dišlers') ended in Siberia. The question about the so-called "court of law" became once again topical more than fifty years later – after the World War II and the declaration of Latvia as an independent state. Although the soviet legal school did not recognize constitutional control (in the same way as division of power and other institutes characteristic for a democratic state), the authors of the Declaration of Independence still included establishment of such a court in the document. Article 6 of the declaration prescribed establishment of the Constitutional Court in Latvia whose competence would be to examine "disputable issues on enforcement of legal acts"[81]. The transition period Parliament somehow "forgot" this task of legal policy they had defined by themselves because the law "On Judiciary"[82] prescribed that jurisdiction of the Supreme Court included issues of constitutional monitoring (Article 9), but in view of the fact that the party "Latvijas ceļš" (Latvian Way) had included establishment of the Constitutional Court in their pre-election campaign and it dominated in the 5th Saeima, the Constitutional monitoring chamber was not established at the Supreme Court. In 1993 draft law on Constitutional Court was elaborated, in 1994 the above mentioned Article 9 was deleted from the law "On Judiciary" but a reference was included in the law that the work of the Constitutional Court is regulated by the Law on the Constitutional Court. The law was adopted in 1996[83], and the status of the Constitutional Court was entrenched also constitutionally. Despite the views expressed by some parliamentarians[84] that constitutional control must be delegated to the Supreme Court, the respective amendments were made in Article 85 of the Constitution[85], stipulating that there is a Constitutional Court in Latvia which, in accordance to legal provisions, examines cases on

compliance of laws to the Constitution, as well as other cases in its jurisdiction as provided by law.

The Constitutional Court whose duties include control of compliance to the Constitution began operating on 9 December 1996 when four judges, who had not held judges' office before, gave the judge's oath[86]. There is no doubt that establishment of the Constitutional Court is to be considered as the most significant event in the constitutional development of Latvia since it regained its independence. It marked the beginning of development of legal thought in a new quality. The Constitutional Court examined its first case on 28 April 1997.[87] The active position of the new constitutional institution seemed inconvenient for politicians from the very beginning, and yet, despite confrontation with executive power[88] and different opinions among legal experts about the judgements passed by the court[89], the Constitutional Court has become a respectable institution highly honoured among people. In fact, a mechanism has been created that enables enforcement of the Constitution, turning the seemingly declarative type of provisions into actually enforceable ones[90]. The legislator has granted to the Constitutional Court certain scope of authority and rights to verify the compliance of the legal acts passed by the legislator and the executive power to the Constitution. While general court must deal with private persons' disputes and administrative court reviews state officials' decisions, the Constitutional Court has to arbitrate legal disputes that directly concern legislators both in the political[91] and individual aspect[92]. Certainly, the Constitutional Court as the last authoritative interpreter of the Constitution must be able to draw the line in its rulings between constitutional law and politics[93]. But the Constitutional Court is "court of law" that has been established to prevent flaws in legislator's work, theoretical basis of its work is the division of power and it must prevent trends of usurping power[94]. The latest and biggest scandal that is associated with this constitutional body is the case of the Constitutional Court judge Vineta Muižniece[95]. Already after she was appointed as the Constitutional Court judge, the Prosecutor's Office brought charges against her for forging documents in her former work place. Before being elected as the judge while being the Member of the Parliament she chaired the committee that is the most important one for judiciary – the Legal Committee. The Saeima issued a permit for her criminal prosecution[96] and it is obvious that this event does not enhance authority of the court and the Saeima. Political influence was clear at the initial stage of establishment of the Constitutional Court when only six out of seven judges were elected by the Saeima; therefore, the Chairman of the Court Professor A. Endziņš initially could be elected only as an acting chairperson. Parties were fighting for the Constitutional Court judges when approving the first convocation judges[97], likewise when choosing judges later[98]. It shows that also democracy in Latvia has not been able to avoid political struggle when selecting and assessing judges for the Constitutional Court. Yet during its existence the Constitutional Court has proved itself basically as independent, unbiased modern institution that stands above the political influences of a specific period. The Constitutional Court has not only received praise. Not taking into account constructive criticisms (for example, about the lack of understanding about the borderline of division of power and formalistic approach in augmenting of the conclusions of the rulings)[99], different reproaches have been expressed[100], including political engagement[101], "the interest of the judges in the outcome of a case", and "involvement into discussions on politics and economy which makes the legal quality of the court judgements dubious"[102]. According to the first chairman of the Constitutional Court

A. Endziņš, there have been different collisions around the Constitutional Court, even an attempt to abolish it by delegating its competences to the Supreme Court[103].

In 2001 there was a new turning-point in the competences of the Constitutional Court and in the protection of individual's rights because amendments to the law on the Constitutional Court came into force on 1 July 2002[104] which established in Latvia the institution of constitutional complaint. From that moment the number of cases of the Constitutional Court increased considerably. The number of applications submitted by natural persons surpassed by tens of times the applications submitted by the other subjects (President, State Audit Office, MPs, courts, and others). The number of submitted constitutional complaints has tendency to grow – in 2001 there were 308 complaints, but in 2010 there were already 572 complaints. Legal scholarship has concluded that it is individuals who enhance the constitutional control process; that is understandable because constitutional complaints are significant means for protection of individuals' rights against arbitrariness of the state[105].

Although a considerable contribution to interpretation and enforcement of general legal principles has been made by administrative courts[106], for instance, in promotion of the principle of adherence to the rights of private persons[107], the contribution of the Constitutional Court in enforcement of principles of general rights and their interpretation is invaluable, for example, the rights to good governance. For the first time this principle was mentioned in the ruling by the Constitutional Court of 25 March 2003 in the case No. 2002-12-01, but in the judgement of 18 December 2003, case No. 2003-12-01 it was concluded that the good governance principle follows from the notion of a democratic republic stipulated in Article 1 of the Constitution and hence it has a constitutional scope[108]. Good governance principle has entered legal language entirely due to the Constitutional Court and very few individuals today have doubts about its inclusion into the catalogue of fundamental rights[109]. Apart from the above mentioned good governance principle, the Constitutional Court has examined a number of other principles: the principle of legal certainty[110]. the principle of the rule of law[111], the principle of supremacy of law[112], legality principle[113], the principle of self-governance[114], the principle of prohibition of arbitrariness[115], proportionality principle that requires the necessity to observe reasonable balance between interests of person and the state or society[116], and also many other principles that due to the interpretation by the court have obtained specific substance.

In fact all the judgements passed by the Constitutional Court should be viewed as formative for legal policy but separate judgements are to be emphasized particularly. Firstly, it is the judgement by the Constitutional Court of 18 January 2010 in the case No. 2009-11-01, as it is always referred to in legal literature[117]. This judgement in comparison with others is to be considered as one of the most efficiently motivated judgements and it dealt with independence of judiciary, aspects of judges' status and the rights to fair trial. The second one to be mentioned is the judgement passed by the Constitutional Court on 29 November in the case No. 2007-10-0102 on ratification of the border agreement between Latvia and Russia. The Constitutional Court examined an application submitted by Members of the Saeima from the "Jaunais laiks" (New Time) faction in which they expressed a view that the law by which the Cabinet of Ministers is authorized to initiate the agreement is noncompliant to the Declaration of Independence of 4 May 1990. According to the MPs such an issue could be decided only by citizens of Latvia in a referendum. In this judgement the Constitutional Court strengthened the principle of continuity of the

state of Latvia and provided essential considerations on the notion of the territory of the state as stipulated by Article 3 of the Constitution.

4 Establishment of the institutional system of state administration and its development

Establishment of the institutional system of state administration began a few days after passing the Declaration of Independence. At the time of adopting the Declaration of Independence, the administration system as prescribed by the LSSR Constitution and by other LSSR legal acts was operating. During the transition period till complete reinstatement of the Constitution (Satversme) the state administrative system was regulated by the laws of Supreme Council and ordinances passed by the Cabinet of Ministers. In May 1990 the Supreme Council passed the law "On Composition of the Council of Ministers of the Republic of Latvia"[118], which apart from the structure of the Cabinet of Ministers included also programmatic provisions to set up a commission for working out proposals for the draft law "On the Government of the Republic of Latvia" and to submit proposals on the necessity of forming departments. Article 7 of the law provided that other issues are regulated by the law "On the Council of Ministers" passed by the LSSR SC. The Supreme Council passed a similar law which declared the previous one as nil and void also on 23 November 1991[119].

On 18 March 1992 the Supreme Council passed the law "On the Council of Ministers of the Republic of Latvia"[120]. This law was intended initially as a provisional law – Article 46 of the law stipulated that the Council of Ministers lays down its mandate to the elected Parliament of the Republic of Latvia at its first session. The wording of the law reflects the institutional incertitude of the state administration. Article 1 of the law provided that the Council of Ministers is "the highest state executive and enforcement institution that carries out executive power with the state administration institutions and state officials under its subordination. The Council of Ministers enacts executive power also with assistance of municipalities." Paragraph 4 of Article 4 provided that the Council of Ministers establishes, reorganizes, and abolishes other state administration institutions but Article 35 of the law stipulated that in order to perform state administration functions and to oversee state companies, the Council of Ministers may establish state administration institutions in the regions and cities. The law did not include more detailed rules about the structure of state administration institutions, their subordination and competence. It must be taken into consideration that in the period till the Constitution came into force, the principle of division of power was not recognized in the Republic of Latvia – Article 6 of the law "On The Council of Ministers of the Republic of Latvia" stipulated that the Supreme Council has the authority to revoke regulations passed by the Council of Ministers while in practice the Supreme Council established several institutions subordinated to it by passing laws. Not long before the Constitution came into force a statement of the Legal Board of the Supreme Council about compliance of legislative acts to the Constitution was published. The statement indicated that the rules of association of the Foundation of Privatization of Banks in Latvia does not comply to Article 58 of the Constitution, since the rules of association stipulate that the privatization foundation is an independent state institution; non-compliance was also identified with the law "On the Environmental Protection Committee of the Republic of Latvia" which stipulates that this committee is

subordinated to the Supreme Council, and also the law "On Archives" in accordance to which director general of the State Archives is appointed by the Supreme Council, but his deputy – by the Presidium of the Supreme Council.[121]

During the first years of restoring independence, state administration unity did not exist even terminologically. Professor Ilmārs Bišers has indicated that the term "institution" not used in the soviet times began to be used widely at the times of "the activities of the Supreme Council which favoured this word for some reason so much that started designating with it the most diverse subjects of law. That became the name to designate separate establishments, their structural units, as well as internal decision making structures of organizations and even separate officials. Big confusion was created and also today in separate cases we are unable to find out what the legislator has designated by this term"[122]. During this time the question about legal capacity and acting capacity of the state and its formations was not solved either. Uncertainty in the regulation in the state institutional system during the transition period can be explained with the fact that the task of the Supreme Council as a legislator of the transition period was not to solve conceptual issues of development of the state administration system.

After reinstatement of the Constitution, the first attempt to regulate the state administration institutional structure was made in 1994 when the Cabinet of Ministers adopted regulations that had the force of the law "On the Structure of Ministries"[123], on the grounds of Article 81 of the Constitution. For the first time since the restoration of independence, the given Regulations regulated the following issues:

1) structure of ministries (they consist of departments subdivided into divisions);
2) status of institutions subordinated to ministries;
3) types of subordination.

Paragraph 13 of these Regulations stipulated that "all the state institutions and establishments outside ministries, except for the Saeima Chancery and President's Chancery, are under subordination or supervision of the Cabinet of Ministers, if the law does dot state otherwise." Thus, there still existed institutions that were subordinated to the Saeima or defined by law as independent. Legal status of ministries and authorities was regulated inconsistently. On the one hand, Paragraph 3 of the Regulations stated that a ministry is functioning in the name of the Republic of Latvia and its activities are binding for the Republic of Latvia. On the other hand, the Regulations granted to both ministries (Paragraph 3) and other authorities (Paragraphs 15 and 17) the status of a legal entity.

Regulation of institutions under subordination and supervision of ministries was rather a statement of the existing state of affairs, the main difference between a subordinated and supervised institution was that in the case of supervision injunction on revoking/suspending their decision could be issued only when such a decision was unlawful while for subordinated institutions any injunction issued by a higher institution was binding. But the regulations did not provide for any other classification of institutions and only gave a list of their examples: "inspections, boards, services, funds, and other institutions".

In 1995 the Cabinet of Ministers approved of the plan on the Latvian state administration reform[124], whose main provisions served as basis for the further institutional reform of state administration, which was accomplished by passing of the law on state administration. The conception defined the institutional system of the Cabinet of Ministers formed by the State Chancery, authorities under subordination

and supervision of ministries, cooperation organizations, public organizations authorized by the Cabinet of Ministers, and it was an attempt to include also such subjects of law into the institutional system of the state administration that had been delegated the tasks of state administration but which were not subjects of public law (this term has also been used in the conception for the first time). These subjects eventually were not included normatively in the state administration institutional system.

The conception included clear criteria for distinguishing authorities under subordination and supervision. Subordination institutions were established by the Cabinet of Ministers, but supervision institutions were set up on the basis of law. The Cabinet of Ministers could execute supervision only in three ways:

1) by choosing the head of the establishment (by recommending the Parliament the head of the establishment if the law stipulates that the head of the institution is to be appointed by the Parliament);
2) by recommending to allocate or not to allocate financial resources from the state budget;
3) only by suspending unlawful decisions.

Yet, neither the conception nor the law "On the Structure of Ministries" worked out later had distinct criteria by which to define the status of an institution (as a subordination or supervision institution). Later it was considered[125] that absence of such criteria is a drawback of the conception and the law. It was proposed to grant subordination status to those institutions that form sectorial policy, distribute and control financial resources, create preconditions for enforcement of legislative acts (issues permits and licences). While supervision institutions would be dealing with monitoring of compliance to legislative acts[126]. These intentions were not entrenched as provisions.

Yet, the institutional system defined in the conception remained unclear. Apart from the above mentioned institutional entities it was prescribed that "ministry may have under its supervision also other institutions and organizations which are not state administration institutions. They operate under guidance of the respective ministry and are fully or partly financed from the state budget."

The concept still included a provision that ministries and their bodies are legal entities. Besides, it was indicated that the cooperation organizations listed in the conception are legal entities of public or private law. The conception did not have motivation for the need of status of a legal entity. In 1998 also in legal literature criticism was expressed about the practice of granting the status of a legal entity indicating that legal entities of public law were not distinguished from legal entities of private law, criteria of distinction of these legal entities were ignored (the basis of establishment, competence, and so on)[127].

The institutional system model included in the conception was integrated into the law "On the Structure of Ministries" adopted in 1997[128]. Yet, the idea of inclusion into the institutional system of those subjects that have been delegated administration tasks was not transposed into the law. In general, in the period from 1993 till 1997 the state administration structure inherited from the soviet times was almost completely abolished. The new state administration structures were formed on the basis of democratic, law-based, efficient, and rational administration model[129]. A detailed list of legislative acts influencing state reforms and the description of the process for the period of time from 1993 till 1998 have been indicated in the article "Along the steps of state administration"[130].

Yet, at the beginning of the new millennium it was concluded that regulation of the institutional system of the state administration is insufficient. To solve the problem, in 2000 two draft laws were submitted to the Parliament – the draft law on state administration structure was submitted by the Cabinet of Ministers but after that the Parliamentary committee worked out and submitted for reading the draft law on public institutions[131]. Terminology used in the draft law on public institutions was cumbersome and heavy-handed (associations of public persons existed (state, municipal and local government), public institutions and public establishments that were considered to be derived from persons' associations, authorities – bodies, autonomous authorities, and so on). The draft law reflected lack of conceptual approach to the formation of institutional system of the state administration and lack of understanding about the contents of Article 58 of the Constitution defining the principle of unity of state administration. The draft law was an attempt to describe the existing institutional system of the state administration as stipulated by different contradictory provisions in various legal acts. Similarly, also the draft law on state administration structure attempted mainly to formulate the already existing institutional diversity in legal terms.

An essential turning-point in elaborating the draft law on state administration system took place during its reading at the Parliament; the conceptual provisions included into the draft law during the second reading have been laid out in the conception of the state administration system published later[132].

The State Administrative Structure Law included clear conception of legal entities of public law – the Republic of Latvia as primary legal entity of public law and derived legal persons of public law. State administration institutions (ministries and others) henceforth are only institutional entities within the framework of these legal persons. Derived legal persons of public law are judicially (but not hierarchically) legal persons of public law separated from the Republic of Latvia – they are established by law or on the basis of law, they have their autonomous competence and their own budget. At present typical examples of derived legal entities of public law are municipalities and state-established higher education institutions[133], but such legal entities of public law are prescribed also by other laws (for example, Riga and Ventspils port authorities have such a status)[134]. Legal entity of public law is subject of law but its institution (for instance, municipality school) is not (institution has no legal capacity). Bodies and institutions of legal entities of public law operate on the behalf of the respective legal entity (and not of their own), therefore:

1) during legal proceedings legal entity of public law is party to the proceedings but not the respective institution;
2) legal person of public law is liable with its budget for the operations of the institution[135] (except for public agencies that are state administration institutions but who have their budget).

The State Administration Structure Law exhaustively defines the legal capacity of a legal entity both in private legal and public legal relations[136].

Since reinstatement of the Constitution, topical issues were the scope of Article 58 ("State administration institutions shall be subordinated to the Cabinet of Ministers") and its compatibility with the category of autonomous institutions envisaged in several other legal acts. This problem was analysed and a solution provided by a judgement of the Constitutional Court in 2006 stated that Article 1 of the Constitution permits "in separate cases, when it is impossible to ensure adequate management otherwise, to form independent state institutions. [..] But Article 1 of

the Constitution lays down also strict borderlines. Establishment of such independent state institutions is inadmissible if their functions can be as efficiently performed by an institution under subordination of the Cabinet of Ministers. This constitutional provision defines also those areas in which independent state institutions shall not be established. Parliamentary control is ultimately important n a democratic republic, and it is implemented via accountable government over armed forces and state security institutions."[137] In view of the above said, Paragraph two of Article 2 of the law "On the Structure of the Cabinet of Ministers"[138] stipulates that the Parliament by a law can delegate enforcement of executive power in separate areas also to other institutions that are not subordinated to the Cabinet of Ministers but monitoring of whose activity is prescribed by efficient mechanism in law. An extensive study on the so-called unaffiliated authorities is provided in the Conception of the Cabinet of Ministers of 2005 aimed at regulating the status of the "independent" or unaffiliated authorities[139]. At present, independent authorities are mainly legal entities of public law[140]. It must be emphasised that independent institutions are not to be confused with constitutional bodies that do not fall within the scope of Article 58 of the Constitution – the Parliament (Saeima), State Audit, Supreme Court. Ombudsman's Office, State President's Chancery are not elements of institutional system of the state administration[141], because they have no legal capacity[142] (the activities of these bodies in the area of state administration (for example, not responding to applications) fall within the Republic of Latvia).

The institutional system of state administration has stabilized since the law "On State Administration Structure" came into force. As a result of administrative and territorial reform, essential changes have taken place in municipality structure[143], as well as in the state service system[144]. In 2008 a new law "On the Structure of the Cabinet of Ministers" was adopted and came into force[145] narrowing, among other things, the rights of the Cabinet of Ministers to issue regulations down to cases:

1) when the law provides for direct authorization;
2) of corroborating international agreements (complying to provisions of the law "On International Agreements of the Republic of Latvia"[146]);
3) when that is necessary to implement the European Union legal acts and the respective issues are not regulated by law (see: Paragraph 1 of Article 31 of the law "On International Agreements of the Republic of Latvia").

It is important henceforward to use in legal acts the terms consistent with the State Administration Structure Law (as the "umbrella law" for the institutional system of the state administration). At present there are some exceptions in:

1) some legal acts (for example, in the Constitution, Civil Law) adopted before the State Administrative Structure Law;
2) legal acts in which the terms used in the State Administration Structure Law are used with a different meaning (for example, the term "institution" in the Administrative Procedure Law);
3) legal acts where several subjects mentioned in the State Administration Structure Law are designated by another (common) term (for instance, the term "institution" in the Latvian Administrative Violations Code, the term "budget institution" in the law "On Budget and Financial Management").

Such exceptions (from the perspective of legal technique) are justifiable only if the application of terms used in the State Administration Structure Law or their application in the respective meaning is bothersome or if there are some other essential considerations.

5 Development of Administrative Procedure Law

There was no law in the LSSR that would regulate the process by which state administration passed individual legal acts binding for private persons. Absence of such a law was one of the main reasons for the deficit in rule of law during the first years of restoration of independence. Already in 1992 an appeal was voiced to work out a law that would regulate the administrative procedure. The initiator of this idea was Egils Levits who emphasized the necessity to distinguish between administrative procedure and administrative violations regulation (the latter, as he claimed, is in the area of criminal law). The formulation of the idea of the administrative procedure was as follows – in a law-based state it must be stringently and precisely defined how the state apparatus and each of its components, i.e., each civil servant, function. The central question is who takes decisions (or who shall not take them)[147].

In 1995 the Cabinet of Ministers passed Regulations on Proceedings of Administrative Acts[148], which served as basis for further work on the chapters of General Provisions and on administrative procedure within an institution. The work on draft Administrative Procedure law was started already in 1996. The initial concept of the law prescribed very wide contents of the notion of administrative procedure (including also the internal procedures of the state administration and administrative violation)[149]. Later a new conception was worked out. The motivation for elaborating the law and the process of its elaboration has been reflected in several publications[150].

Since the Administrative Procedure Law came into force on 1 February 2004 administrative courts have been established in Latvia: administrative district court, administrative regional court, and the Department of Administrative Cases as one of the Senate departments at the Supreme Court. The goal of setting up administrative courts is to ensure efficient court control over the operations of executive power and the main means of reaching this goal is specialization of judges. During the selection procedure of judges, the knowledge of candidates to judges' position is tested in the respective area of the work, namely, a judge who has applied for a position of an administrative judge should demonstrate knowledge in the Administrative Procedure Law[151].

Paragraph 3 of Article 104 of the Administrative Procedure Law grants rights to administrative courts not to apply the Cabinet of Ministers regulations and regulations binding for municipalities if the court concludes that they are not in conformity to provisions of the highest rule of law. This competence of administrative courts, which is not possessed by general jurisdiction courts, is motivated by the goal of the Administrative Procedure Law – to ensure court control over the activities of executive power. Since regulations by the Cabinet of Ministers and regulations binding for municipalities are form of state administration operations (and not legislation), administrative courts can control these normative acts if they are applicable in a specific case.

An exhaustive survey about the grounds of establishing administrative courts, process of their establishment, case load of the courts and their procedural solutions, most important judgements, and change of case law from 2004 till the beginning of 2009 have been provided at the 2009 conference "The first five years of administrative courts"[152]. It should be emphasized that administrative court cases have been a significant factor in facilitating understanding and development of the provisions of administrative law. Likewise, it must be indicated that development

of Administrative Procedure Law is inseparable from court cases of the Constitutional Court, in particular, in interpreting and applying general principles of law arising out of the Constitution. For example, an important conclusion made by the Constitutional Court is that when an institution issues an administrative act, the principle of proportionality is to be applied also if legal provision does not stipulate full discretion of the institution (the so-called mandatory administrative act is to be issued)[153]. This judgement by the Constitutional Court now provides for the rights of administrative court to correct the legislator's mistake and to prevent issue of administrative act in non-typical circumstances if it leads to violation of the proportionality principle[154].

Not long before the enactment of the Administrative Procedure Law, the law "On Reparation of Damages Caused by State Administrative Institutions" was adopted[155], which specifies the rights provided by Article 92 of the Constitution on fair compensation for damages caused by administrative procedure.

An essential macro-level problem of the Administrative Procedure Law is the role of it in record-keeping of administrative violations that was first identified in the report of the working group elaborating the Administrative Procedure Law and indicating that the Administrative Procedure Law should not regulate record-keeping of administrative violations because it is a process of imposing punishment[156]. A respective idea was entrenched in Paragraph 2 of Article 2 of the law "On the Coming into Force of the Administrative Procedure Law"[157], which initially stipulated that record-keeping of administrative violations will be regulated by a specific law simultaneously with enactment of the Administrative Procedure Law. Up to now no separate law regulating record-keeping of administrative violations has been adopted therefore sometimes it was considered in court practice that the Administrative Procedure Law is not to be applied at all in the record-keeping of administrative violations. Such a view in November 2009 was rejected by the Senate of the Supreme Court[158], emphasizing that in regard to the issues still not regulated by the Latvian Administrative Violations Code (temporary measures of protection, compensation, and so on), the Administrative Procedure Law is to be applied. Yet, simultaneous application of such two procedural laws is complicated; and this problem can only be solved by exhaustive regulation of administrative violations jurisdiction that the Ministry of Justice has undertaken to elaborate[159]. Since 1 July 2012 all the administrative violations cases are tried by courts of general jurisdiction (formerly the majority were heard by administrative courts). But during the time the present article is being written, amendments in the Administrative Procedure Law are reviewed by the Saeima, at the second reading of the amendments, the proposal that henceforth an administrative act will not be a decision taken by way of administrative procedure, has been supported[160]. It means complete refusal from applying provisions of the Administrative Procedure Law in administrative violations jurisdiction, which was legislator's intent already in 2001. Yet, from the vantage point of doctrine, administrative offence cases are still to be seen as part of administrative law since administrative punishment is one of the tasks of the state administration. Although administrative violations law is similar to criminal law by its substance, the fact that the task is performed by a state administration authority is essential (similarly to administrative law, disciplinary liability of civil servants is examined although it is similar to disciplinary liability by substance).

6 Fundamental rights

In the second decade of the 21st century, the assumption that human rights are to be directly applicable[161] irrespective of how specifically human rights provisions are expounded in legal acts, does not seem to be original but self-evident. It is obvious that any extensive list of freedoms and rights will not be exhaustive in any case, it can be extended[162] or new rights can be derived. In other words, human rights are inherent since birth because a human being is a human being and no state power can either grant them or dispossess of them. Human rights protection as one of the important guarantees of a law-based state determines the obligation of the state to ensure effective protection for anyone whose rights have been infringed[163]. Besides, the rights and freedoms included in the Constitution do not protect only an individual because by protecting the individual they serve also a common good[164]. Democratic state is as stable as its citizens are satisfied by its just attitude to them. Riots of 13 January 2009 in Old Riga called also the Cobblestone Revolution was a spontaneous outburst by population against the attitude of the state which was manifested in mass disorders and clashes between population and the police. Certainly, this indignation to a large extent cannot be associated with fundamental rights in their classical understanding because social insurance of the inhabitants and living standard are often outside of the classical definitions of fundamental rights. Whatever the case, it is clear that the protests by inhabitants was an obvious hint to the state power of Latvia that it is not enough to take formal care of its population but it is necessary to change its attitude from the very root.

6.1 Development of fundamental rights from 1990 till 1998

Adherence to human rights depends on the legal reality because wording of human rights provisions, both national (for instance, the fundamental rights as defined in the Constitution), as well as the international ones (conventions, treaties, and declarations) are only tentative criteria on which the human rights reality is based[165]. Such an understanding exists at present, but the understanding of human rights among the citizens of the restored Republic of Latvia at the beginning of 1990s was opposite to that inherent in democratic and law-based state[166]. Sceptical attitude to human rights notion was wide-spread[167] as well as the conviction that the state has absolute rights to control individuals. This is well-illustrated by disputes about the Latvian Administrative Violations Code which, by the initiative of the President, the Ministry of Justice wanted to supplement with a provision that would prescribe punishment for participation in unregistered religious organizations. The reason for the above mentioned legislative initiative was wish to restrict activities of the unregistered Jehovah's Witnesses activities. In order to prevent adoption of the provisions restricting human rights, the USA ambassador in Latvia and representatives of the Ministry of Foreign Affairs had to arrive at the Parliamentary commission because they considered that the mentioned amendments are in contradiction to international legal provisions[168]. *Sovjetiskaya* or the soviet legal understanding that still dominated in Latvia in 1990s was characterized by an assumption that human rights provisions must be "put in effect" with other normative acts (law, instructions, and so on) since they were considered to be too abstract[169]. Let us remember the Constitution of the USSR and Latvia as a subject of this union. The constitutions incorporated wide range of freedoms and rights (rights to free-of-charge health care, rights to choose a profession, rights to a domicile, free education, freedom of conscience, rights to use cultural achievements, rights to inviolability of

a person, rights to privacy, and so on)[170]. They were often not implemented and several of them already initially were intended only as elevated declarative statements whose goal was to serve the glorification propaganda of socialism. In actual life these rights remained merely slogans. Besides, how can provisions be implemented in practice if they are not filled with contents[171]? There was no constitutional control body in the USSR and for the enforcers of rights the ideological position provided by the Communist Party was of utmost significance. This means that in reality the countless constitutional rights and freedoms were never enacted and were regularly infringed (freedom of speech, freedom of press, freedom of religion, and others). Activists during the so-called Awakening at the beginning of 1990s wanted real and not declarative rights. Refusing from the soviet ideas, the authors of the Declaration of Independence incorporated in Paragraph 8 the commitment of the state to abide by social, economic, cultural rights and political freedoms. The same paragraph included provision about the scope of the aforementioned rights and freedoms that must be observed. They "must conform to the universally recognized international human rights provisions". In order to ensure functioning of democratic system the Parliament of the transition period developed a number of laws that would enforce the fundamental rights in life, in a great hurry as required by those times[172]. The initial laws were deficient because neither the legislator, nor the executive power was able to elaborate detailed legal acts that would conform to the realities of life. The initially adopted laws were later significantly supplemented (the law "On Judicial Power"[173]) or substituted by new ones. The law was adopted hastily which did not conform to law "On Religious Organizations"[174] of 11 September 1990, which was later replaced by law "On Religious Organizations"[175] of 7 September 1995. A separate mention must be made of the Civil Law of 1937 that initially was reinstated in its original edition; exception is the chapter on family law that was significantly amended to comply with fundamental principles of gender equality. Some laws are still being amended to make them compliant to modern realities. For example, the law "On the Press and Other Mass Media"[176] of 1990, which should have clearly defined the principles of establishing mass media, was fairly general and rather declarative than normative. The law was amended only 21 years later to ensure that the enforcers of the law – public notaries – could make entries in mass media register, postpone their entry in the register, and amend the previously made registration entries on the grounds of legal provisions instead of their feelings and precedents. It should be noted that the law "On Trade Unions"[177] has not been yet amended and has remained very incomplete which is detrimental to the trade union movement. As we can see, the new democratic state after the restoration of its independence took rapid first steps in ensuring human rights. From 1990–1993 enshrining of civic freedoms (human rights catalogue) untypical for the socialist law was done[178]. Till the 5th Parliament was convened, a number of laws were passed that guaranteed freedom of speech, freedom of assembly (the law "On Public Organisations and Associations Thereof"[179]), rights to fair trial and rights to legal representation in court ("Advocacy Law of the Republic of Latvia"[180]), as well as other rights and freedoms (for instance, the law "On Free Development of National and Ethnic Groups in Latvia and their Rights to Cultural Autonomy"[181]). The above mentioned legal acts stipulated principles of enforcement for a number of fundamental rights that had been non-functional during the soviet regime. A particular mention among these laws facilitating democracy and liberalization must be made of the constitutional law "Rights and Duties of People and Citizens"[182], which listed fundamental

rights, for example, in Article 3 (individual rights to property), in Article 18 (rights to fair trial), in Article 21 (hereditary rights), in Article 33 (copyright protection), in Article 22 (rights to entrepreneurial activities), in Article 36 (family and marital rights), and so on. It must be added that in elaborating this law the legislator took into account international human rights documents and wanted to grant to this law a special status, constitutional force. Yet, a law that was called "constitutional" could not be formally and legally recognized as such. The law did not comply with the provisions of the Constitution (the Constitution does not prescribe constitutional laws) and was not adopted in compliance to provisions of the LSSR Constitution (insufficient number of votes). The deputies of the Supreme Council were aware of that and during the third reading they discussed constitutionality of the law[183]. Experts have indicated that due to its dubious status the law fulfilled its task poorly[184].

With the change of political regime in Latvia, economy and the individuals' rights to property also changed. The socialist economy was replaced by free market. That meant radical decreasing of the state monopoly, denationalization and restitution of private property. Initially reinstatement of private property was one of the most important tasks[185]. From the perspective of state law, the starting point for securing of these property rights is to be found in Paragraph 8 of the Declaration of Independence, later on in the constitutional law "Rights and Duties of People and Citizens"[186]. It is impossible to mention all the duties that were enacted by the state in order to implement rights to property. It was also important for the state officials to change the frame of thought. It is possible to change constitution, political system and so on but if thinking does not change fundamentally, nothing new happens. An explicit example is the Prime Minister of the time I. Godmanis who attempted to increase the number of those companies that produced and sold bread[187] via administrative methods, because the government was concerned with shortage of bread and wanted to improve the situation. In 1990 the law "On the Enterprise Register of the Republic of Latvia" was adopted[188] and registration of first companies started. In 1992 the government wanted to increase the number of those companies that are linked with production and distribution of bread. The Enterprise Register could provide registration as a service but it did not have the power to increase the number of registered subjects. Gradually, the state power learned to understand the principle of civil rights or private rights that in legal science is called private autonomy. In the area of civil law, the subject decides independently about the use of their rights[189], while in public law officials operate in accordance with those legal provisions from which they derive their competence. Similar examples can be mentioned about implementation into practice of other freedoms.

In 1998 the Constitution was supplemented with Chapter VIII which includes fundamental human rights. A year before this event on 27 June 1997, European Convention for the Protection of Human Rights and Fundamental freedoms of 4 November 1950 and several of its protocols came into force in Latvia[190]. This convention is considered to be the most effective instrument for protection of rights in the world[191]. Along with the convention, the judgements by the European Court of Human Rights and its case law became binding on Latvia and obliged Latvia to interpret its legal system in compliance with this case law and fill up the "gaps" in its laws.

At the end on 1990s, Latvia set a strategic goal – to join the European Union. It also influenced the legal system because one of the major tasks for the government became approximation of legal acts of Latvia to the European standards[192]. In order

to achieve this goal, Latvia firstly had to ensure stable activities of those institutions that had to guarantee compliance to democracy, rule of law, and human standards in the state[193].

6.2 Fundamental rights and the Constitution

There is no doubt that one of the most important amendments to the Constitution since its adoption are the ones passed on 15 October 1998[194], that supplemented the Constitution with a new Chapter VIII that provides for the constitutional force of fundamental rights in Latvia. Adoption of these amendments is particularly significant event from the perspective of constitutional law because the regulation of persons' freedoms was included in the hierarchically highest legal act –the state Constitution – since this moment. Certainly, practitioners of constitutional law in Latvia were aware that absence of fundamental rights in the major law of the state is a serious drawback[195] but undeniably a definite role was played by international experts' reproaches that human rights in Latvia have not been granted constitutional scope and that the fundamental rights catalogue should be incorporated in the Constitution[196]. An important condition was the fact that Estonia and Lithuania had adopted new constitutions which included up-to-date chapters on fundamental rights. Legal experts in Latvia wanted to supplement the Constitution with Chapter VIII hoping that it would reduce the tension between the population and the state apparatus, thus stabilizing the democratic state of Latvia[197].

Although the first seven chapters of the Constitution stipulate the fundamental principles of the Constitution, basically our Constitution is formed by provisions that define the state authorities that enforce the state power, their competences and mutual relations[198]. There was no fundamental rights catalogue in the initial version of the Constitution. Certainly, the fundamental rights would function in a democratic state even if the state had no written constitution. If the Constitution would not have been supplemented with Chapter VIII, the enforcers of rights anyway would have to respect the international human rights documents ratified by Latvia, as well as the conclusions made by the Court of Justice of the European Union and the European Court of Human Rights. Human rights would function in Latvia similarly to United Kingdom, which has no written constitution. In accordance to Article 13 of the law "On International Agreements of the Republic of Latvia" adopted in 1994, provisions of the ratified international agreements are in force even if laws of Latvia have different regulation. In other words, in case of collision of legal provisions the provision from the international agreement is to be applied. Clearly, the result would be the same, only one should take into account that fundamental rights is one of those areas of law where practice to a large extent is connected with activities of courts because the principles expressed in court judgements and legal inferences on human rights issues enable to achieve fair result but judges when adjudicating cases should not always substantiate the specific judgements with international conventions and conclusions made by other courts. The conclusions made by courts, as indicated in legal literature, have the status of guidelines that must serve for the purpose of clarification of the substance of rights laid down in constitutions and laws[199]. Such cases should be rather exceptions and not daily practice. Besides, there would always be a possibility to refer to the legal definition from Article 1 [Latvia is independent and democratic republic] to read the respective rights and freedoms "into it" on the grounds of openness clause of fundamental rights. The democracy notion enshrined in Article 1 of the Constitution is the so-called functional legal

notion which refers both to decision making process and the fundamental values in a democratic state[200]. As testified by the Constitutional Court cases, it follows from Article 1 that duty of the state is to abide by a number of fundamental principles of a law-based state[201]. Yet, it must be noted that in Europe such practice would be rather an exception, and one must agree to the legal doctrine stating that the fundamental rights catalogue is not declarative but guarantees incorporated in it is the most important component of the Constitution of Latvia[202]. The Constitution by its legal power is the highest source of national law and legal act[203] therefore entrenchment of the fundamental rights catalogues in the Constitution is not merely logical but even necessary from the perspective of legal system. Besides, this accomplishes the work started by the creators of the Constitution. As we know, in 1922 when the Constitution went through its second reading the necessary number of votes were not collected[204] for the second part of the Constitution "Fundamental rules of rights and duties of citizens". Now there can be no reproaches that the Constitution is *Rumpfkonstitution*[205] or in translation "body without a head"[206].

With enactment of Chapter VIII, the constitutional law "Rights and Duties of People and Citizens" was declared void, it had been adopted on 12 December 1991 and was in force till 5 November 1998. After the constitutional law (although the law was actually quasi-constitutional) became invalid, on the constitutional level there was not a single directly stipulated duty that would distinguish the Constitution of Latvia from other countries (for example, Poland, Estonia, Lithuania, Bulgaria, Germany, Russia, India, France, Japan, Armenia)[207].

With the same law that supplemented the Constitution with Chapter VIII, amendments were made to Articles 4 and 77 of the Constitution. Article 4 of the Constitution has been supplemented with a sentence that the official language is Latvian while by amendments to Article 77 it has been stipulated that Article 4 can be amended in a referendum. So far there have been no studies made in legal scholarship about the significance of the provision in Article 4 but it must be emphasized that defining of the official language status and the weight of this provision influence also the contents of other Constitution provisions.

During the first period of independence the official language status was not normatively regulated for a long time yet valuable considerations about the official language status have been provided by the Senate in a case about the name of a company concluding that the regulations on the official language of 18 February 1932 "settle only the language issue by ruling that the official language is Latvian and that its use is mandatory in state and municipality institutions and in correspondence with them. [.] The purpose of the regulations was to formally record *de facto* the axiom that had been long ago recognized: that the official language is Latvian."[208]

The article in the Constitution that should contain provision on the official language of the state was discussed at the meeting of the Legal Affairs Committee of the Saeima where the MPs agreed to include the respective provision in Article 4 and not in Chapter VIII[209]. Motives of such a decision have not been indicated in the minutes of the committee meeting. But since Article 4 of the Constitution can be amended only in a referendum pursuant to amendments made to Article 77 of the Constitution, a hypothesis can be put forward that Article 4 of the Constitution includes also the rights to use the official language, i.e., Latvian, which are specified in more detail in the Official Language Law[210]. So far the Constitutional Court has not produced such an interpretation of Article 4 of the Constitution. The judgement about the rights to use the official or state language has practical role in deciding

whether a person can lodge a constitutional complaint on non-compliance of certain legal provisions only by reference to Article 4. This problem needs to be studied additionally but it must be emphasized that Article 4 of the Constitution is significant when interpreting other articles of the Constitution. When in 2002 Articles 18, 21, 102, and 104 of the Constitution were amended[211] entrenching the constitutional values in Article 4, it was emphasized at the Saeima that these amendments are closely linked with Article 4 of the Constitution[212]. Likewise it can be concluded that the aspect of the rights stipulated in Article 90 of the Constitution – to know legal regulation – in conjunction with Article 4 of the Constitution means knowledge of the rights in the official language.

Unlike Chapter II of the draft Constitution of 1922, Chapter VIII of the Constitution does not have as a prototype one single constitution (one should remember that the example for the second part of the Constitution was German Constitution of 1919 which is called Weimar Constitution), but by its substance it relies on the Convention and the UN documents. The Constitution includes a fairly wide catalogue of rights. The Constitution stipulates both civic and political rights, as well as economic, social, and cultural rights, and also "the third generation rights" – rights to favourable environment. As indicated by the Constitutional Court[213], once certain social rights have been entrenched in the fundamental law of the state, the state cannot disclaim them. During the crisis these rights were subject to serious test[214]. The Constitution does not mention the rights to adequate living standard *expressis verbis* but they are protected through instrumentality of other rights mentioned in the Constitution (Articles 93, 111, 109, and others)[215]. Chapter VIII of the Constitution has been written taking into view specificity of the Latvian language at the beginning of the last century and it is characterized by laconic legal language. That clearly leaves a certain impact on interpretation although it has been accepted that human rights are formulated in a fairly abstract way therefore their substance is to be identified by way of reasonable interpretation taking the individual's role in Western democracy as the basis[216]. The elaborators of the fundamental rights chapter of the Constitution who were the best specialists in constitutional law at the time and were aware of the drawbacks[217] were guided by the wish to adhere to the style of the Constitution language and the legal mode of expression[218]. Because of their laconic character, the formulations of Chapter VIII of the Constitution fall behind the wide and specific criteria provided in the Convention[219]. Especially it refers to the restrictions which unlike the Convention are to be found only in Article 116. One has to agree to the scholars studying the Constitution that the existing edition of Article 116 cannot be found in any other country[220], because such a solution cannot be comprehensive. Indeed, this Article which has a complex construction misleads by an illusion that it enumerates all the rights that can be restricted (for example, it does not mention the fundamental rights enumerated in Articles 109–114 of the Constitution), likewise it is not clear why restriction of religious freedom is singled out[221]. It is not explicitly stated which rights are to be linked with the state security interests. There is no clarity about restriction of fundamental rights under conditions of crisis and so on. Another drawback is deletion of the principle of proportionality from the section because as result the section only partly stipulates the mode of restricting fundamental rights[222]. Undeniably, certain solution is court cases of the European Court of Human Rights because by referring to them the Constitutional Court can formulate its judgements more specifically. Likewise, the Constitutional Court has concluded that even if some articles (for example Article 91) of

the Constitution have not been mentioned in Article 116, it may not be considered that the respective rights cannot be restricted since it would lead to contradiction with fundamental rights of other persons guaranteed in other articles of the Constitution, and also with the principle of unity of the Constitution because the Constitution is one unified entity and its provisions are to be interpreted systemically[223]. In this sense significant role is played by court cases of the Constitutional Court because elaboration of the preconditions for restriction of certain rights[224] serve as prerequisites of justifiable restriction[225] and the use of proportionality criteria[226] have been provided by the court in its judgements.

6.3 Establishment of Ombudsman's Office and its impact on the fundamental rights development

Joining the Convention hastened adoption of Chapter VIII of the Constitution and made the state officials consider setting up institutions that would serve as a filter for complaints submitted by the population in Latvia to the European Court of Human Rights. Firstly, establishment of the Constitutional Court must be mentioned which started reviewing constitutional complaints submitted by population from 2000. Secondly, establishing of administrative courts as a specific branch of courts served for the same purpose, their main goal was to decrease the case load of courts of general jurisdiction. Thirdly, in accordance to the National Programme for the Protection and Promotion of Human Rights in Latvia, law "On National Human Rights Office"[227] (NHRO) which became a specific transition model for passing over to Ombudsman's institution and the main agency in the area of fundamental rights protection[228]. Despite the difficult process of selecting and then appointing the director of the NHRO, the Office was not regarded as Ombudsman's Office, because NHRO was collegiate "human rights protection institution", whose ultimate task was to facilitate respect for human rights in Latvia. Thus from the very beginning one general Office was established unlike the countries with several ombudsmen (for example, United Kingdom)[229]. NHRO existed from 1995 till 2007 and then it was transformed into Ombudsman's Office[230]. In 1997 NHRO became a member of the International Ombudsman Association. When NHRO was being formed, several models of human rights institutions and ombudsmen were used, but mostly the Australian one.[231] Similarly to the Australian prototype, the law on NHRO defined its three main areas of activity – receiving and reviewing individual complaints, analysing and researching of human rights situation, and raising of public awareness about human rights issues[232]. Although NHRO was also to act as a mediator and during amending laws in human rights area it was supposed to act as a catalyst, in practice the picture was not as optimistic as that. Besides, one of the main tasks in setting up this organization was reviewing complaints from the population about infringements of human rights. Comparing the number of complaints received by NHRO and the State President's Chancery during the first three years of our century one can conclude that the lion's share was sent by citizens to the President, and not to the office. The State President's Chancery received almost eight times more applications than NHRO in 2002 (President – 8,916, NHRO – 969), but in the subsequent two years five times more (in 2002: President – 9,893, NHRO – 1,151, in 2003: President – 9,973, NHRO – 1,437)[233]. A large part of complaints addressed to the President is about alleged violations committed by public officials, as well as about groundless infringements of the rights of population[234]. State President V. Vīķe-Freiberga, wishing to transfer the burden of reviewing both groups of applications

from the State President's institution, and also taking into view recommendations of the European Union about Ombudsman's Office[235], formed a working-group to elaborate the concept of an ombudsman's institution. The working group included representatives from the Latvian Lawyers Association, the Constitutional Court, NHRO, the Centre for Protection of Children's Rights, and also two professors from the Faculty of Law of the University of Latvia[236]. Professor of political sciences from Brock University in Canada J. Dreifelds was appointed as the head of the group. The initiative was supported also by the UN and OSCE. The work resulted in legislative initiative by the President. In a letter of 16 June 2004, the President proposed the Saeima to adopt a law on ombudsman indicating that the activities of NHRO must be expanded, and an institution must be established whose name would correspond to the scope of the mandate. The intention was that the Ombudsman would alleviate work load of courts by being able to solve problems much faster, not making the population spend money on legal advice and writing claim statements but simply individually examining the circumstances of the case and requiring explanations from public officials about delay of a certain decision, unfavourable and incompetent attitude, and the like[237]. Expectations were also expressed that the Ombudsman could be like a "lightening-rod" who would improve the psychological climate in society[238]. A hope flourished in society that the Ombudsman would strengthen the position of individual in face of the state power and would take care that the state power in Latvia would treat every person with due respect[239]. Yet the politicians did not cherish any illusions that the new institution would guarantee compliance to human standards in the state with a help of "a magic wand" because essentially that is the task of the entire state administration[240]. A law was passed[241] that came into force on 1 January 2007. It can be considered that this was the moment when the Ombudsman's Office of the Republic of Latvia was established. Along with setting up the Ombudsman's Office, the legal mandate of NHRO was expanded and the good governance function was added. Several technical improvements were also made that basically were to do with a thorough analysis of NHRO practice. According to the law, Ombudsman is a public official approved by the Saeima who is independent in his activity. The functions of the Ombudsman of Latvia are ensured by an Office established according to the Paragraph 1 of Article 18 of the Ombudsman Law and it is an independent state organization[242]. The Office is not part of the system of state administration institutions subordinated to the Cabinet of Ministers as stipulated by Article 58 of the Constitution. Unlike the President, courts and the State Audit Office, the status of the Ombudsman's Office for the time being has not been entrenched in the Constitution. Observing independence of the Ombudsman's Office in the area of its budget, the legislator stipulates for the Ombudsman's Office similar rights like for the constitutional institutions (for example, the State Audit Office) as provided by Paragraph 5 of Article 19 of the law "On Budget and Financial Management"[243].

After tense political battles[244], the former Constitutional Court judge and one of the authors of the Declaration of Independence R. Apsītis became the first Ombudsman. It should be indicated that he often expressed his opinions not directly but instead it was done by the staff members of the Ombudsman's Office (for instance, when an employee of a post-office had put out the flag of Russia or the so-called George's ribbon at his office car[245], and others).

There is no doubt that establishing of a universal Ombudsman's Office was based on economic considerations because already in 2001 the working-group set up by

the President had examined an opportunity to organize also a separate Ombudsman's Office that would be responsible only for the municipality issues[246]. Likewise, Latvia would definitely need an ombudsman for children's rights because if previously these issues were dealt with by the Centre for Protection of Children's Rights, whose functions, to a certain extent, were taken over by the Ministry for Family and Children's Affairs, an organization that is non-existent today. There are several institutions in Latvia that have some features of ombudsman. For example, the Centre for Protection of Consumers' Rights which protects interests of a certain social group, there used to be the Board for Religious Affairs whose duties included assistance to religious organizations, for instance, proposals for laws that would improve freedom of religion and would eliminate discrimination, and the like.

Yet, the new structure has also its drawbacks: there are few inspections that have been done on their own initiatives, there are not many applications to the Constitutional Court, and finally the Ombudsman has less authority than NHRO used to have. This institution has not been entrenched in the Constitution, yet it has little to do with its capacity and apparently it cannot be justified by lack of resources. Despite it all, NHRO and the Ombudsman's Office have facilitated fundamental rights protection in the state and attracted public attention also to issues of good governance only by their mere existence and the process of selection of the candidates for their directors' position[247].

Since the adoption of the Ombudsman Law, the amendments of 2008 are still the most important ones[248] that prolonged the term of authority of the Ombudsman from four to five years and opened opportunities for judges and civil servants to become Ombudsman, since it contains a provision (Paragraph 2 of Article 9) that after their Ombudsman's authority expires, the judge or civil servant has the right to return to their previous position. The number of members of the Parliament who have the right to propose dismissal of the Ombudsman was increased (from at least 5 to 1/3). Likewise, the amendments in the law specified the Ombudsman's authority to request documents, their amount, and terms for individuals and institutions within which they are to be submitted, as well as his presence at the government meetings in the status of an adviser.

7 Development of rights of the body of citizens

According to Article 2 of the Constitution, sovereign power of the State of Latvia shall belong to the people of Latvia. People implement their sovereign power both by way of direct and representative democracy. The direct democracy mechanisms are referendums and electors' legislative initiatives. While the basis of representative democracy is principle that people act and take decisions via their representatives. Both these forms of democracy since the restoration of the state of Latvia have undergone essential development.

7.1 Referenda

On 3 March 1991, at the time when the Declaration of Independence of Latvia was adopted but *de facto* independence of Latvia was not yet renewed and the Constitution was not fully reinstated either, all-Latvia poll took place in which all the permanent residents of Latvia from the age 18 could participate. The participants of the poll had to answer to the following question: "Are you for democratic and independent state of the Republic of Latvia?" The results of the poll convincingly showed the support by the population to establish independent state because out of 87.56%

of the people with voting rights participating in the poll, 73.68% said "yes" to the independence of Latvia[249]. That was one of the factors encouraging the legislator of those times – the Supreme Council – to take the next steps towards the restoration of the statehood. In legal terms it was not a referendum and yet by its form the poll had all the characteristic features of a referendum: voting in polling stations, careful monitoring of the process, seriously worked out legal basis[250].

7.1.1 Provisions for referenda stipulated by the Constitution at the moment of its reinstatement

On 6 July 1993 when the Constitution of the Republic of Latvia (1922) was fully reinstated, it stipulated only four cases when referendums are to be organized.

1) **If the Parliament has amended Articles 1, 2, 3, or 6 of the Constitution for such amendments to acquire the force of law referendum must be organized (Article 77 of the Constitution).**

On 15 October 1998 the law "Amendments to the Constitution of Latvia" was passed which, among other things, supplemented Article 77 of the Constitution prescribing that a referendum must be organized also if the Parliament has amended Article 4 of the Constitution, and also Article 77. As indicated by the case law of the Constitutional Court, a referendum on the grounds of Article 77 of the Constitution should be also organized if the Parliament would have amended these articles of the Constitution by substance – without introducing textual modifications in the very Article 77 but by integrating such modifications via other legal acts[251]. Those principles that have been entrenched in Articles 1, 2, 3, 4, and 6 of the Constitution form the conceptual basis of the Constitution, namely, define the fundamental principles of the state order in Latvia, protect independence of the Republic of Latvia and its democratic order[252]. and the Parliament shall not amend these principles without approval of the people.

There has been no such referendum in the history of Latvia so far. There were discussions about people's referendum in Latvia before its accession to the European Union – whether Latvia's membership in the European Union would not influence the notion of independence stipulated in Article 1 of the Constitution and the principle of people's sovereignty as enshrined in Article 2 and whether for this reason it is not necessary to organize a referendum on the grounds of Article 77 of the Constitution. The responsible authorities concluded that by acceding the European Union, sovereignty and independence of Latvia is not infringed therefore there is no need to organize people's referendum on grounds of Article 77 of the Constitution[253].

A new legal type of discussion concerning Article 77 of the Constitution took place when the issue of the treaty between the Republic of Latvia and Russian Federation about the state border between Latvia and Russia was on the agenda. The applicants, parliamentary deputies, turned to the Constitutional Court claiming that by signing the border treaty Article 3 of the Constitution has been violated and hence a referendum on grounds of Article 77 of the Constitution had to be organized. Yet, examining the case, the Constitutional Court ruled that the state border mentioned in the border treaty does not violate the territory of Latvia mentioned in Article 3 of the Constitution, which meant that there was no infringement of Article 3 of the Constitution and the referendum was not to be organized[254]. Similarly, in the judgement of 2009 in the so-called Lisbon case, where the applicants had indicated that the "Treaty of Lisbon amending the Treaty on European Union and the

Treaty establishing the European Community" has by substance modified Article 2 of the Constitution and therefore it was necessary to organize a referendum, the Constitutional Court did not identify such provisions in the Treaty of Lisbon that would infringe upon the people's sovereignty principle entrenched in Article 2 of the Constitution. The court established that in this case the referendum was not to be organized, too[255].

2) **The President has initiated dissolution of the Parliament (Article 48 of the Constitution).**

This legal provision has been enacted since adoption of the Constitution and has not been amended so far. Article 48 of the Constitution is closely correlated with Article 50 of the Constitution that states: "If the dissolution of the Saeima is opposed in the referendum by more than one-half of the votes cast, the President shall be regarded as dismissed and the Saeima shall elect a new President for the remaining period of office of the President who has been dismissed." Foreign legal specialists have characterized this case of a referendum as fairly unusual[256]. In his own day, Professor K. Dišlers already indicated that "President should be granted the rights to initiate dissolution of the Parliament without risking his office".[257] Such a proposal was put forward also in 2008 by the Constitutional Law Committee of the President about improvement of the mechanism of pre-term elections of the Parliament[258], on the basis of which President V. Zatlers, on several occasions[259], submitted to the Parliament legislative initiatives proposing a new edition of Article 48 of the Constitution that would provide for the President the rights to dissolve the Parliament independently without a referendum. Yet, none of these proposals has led to the respective amendments.

In his own time, Professor K. Dišlers, analysing the procedure laid down in Article 48 of the Constitution expressed doubts whether "proposal to dissolve the Parliament would ever become an institution enforced in reality"[260]. Other legal scholars had also expressed similar assumptions. These forecasts were not fulfilled because on May 28, 2011 President V. Zatlers issued the decree No. 2 "On the proposal on dissolution of the Saeima". On the grounds of this decree on 30 May 2011 the Central Election Committee declared a referendum on dissolution of the 10th Saeima which was held on 23 July.

The above mentioned decree by the President caused a number of discussions among legal specialists[261], including an application that was submitted to the Administrative District Court requesting to revoke the decision No. 10 by the Central Election Committee "On declaration of a referendum". The major discussions among lawyers were caused by the question if the President could issue a decree on dissolution of the Parliament so shortly before the end of his presidential office (President V. Zatler's office ended on 7 July 2011), and thus it was actually impossible to enact the mechanism stipulated by Article 50 of the Constitution – if the dissolution of the Saeima is opposed in the referendum by more than one-half of the votes cast, the President shall be regarded as dismissed. The Administrative Court decided to refuse to accept the application since it concluded that the decision by the Central Election Committee (CEC) is not an independent decision that establishes legal relations in the area of state administration but only an organizational executive instrument subordinated to the President's decree. CEC decision in itself is not aimed at creating new legal consequences (even more so – for specific persons), because the possibility for people to vote for dissolution of the Parliament is not granted by the CEC decision but by the decree issued by the State President[262].

As a result, on 23 July 2011 the referendum took place during which the participation rate of electors was 44.73%. A convincing majority – 94.3% of all the votes were cast for dissolution of the Saeima, but only 5.48% were cast against the dissolution[263]. It must be noted that the referendum for dissolution of the Saeima would have been valid even if only some voters would have taken part in it since this is the only type of referendum stipulated in the Constitution that does not need a quorum. As a result of the referendum on 23 July 2011 on the grounds of Article 48 of the Constitution, the Parliament was dissolved and CEC announced new parliamentary elections which, as laid down in Article 48 of the Constitution, must take place no less than two months after the dissolution of the Parliament. The first extraordinary parliamentary elections in the history of Latvia took place on 17 September 2011.

3) **The President has suspended publishing a law for two months and within these two months a request from no less than one tenth of the total number of electors has been received to organize a referendum on this suspended law (Article 72 of the Constitution)[264].**

This is a peculiar two-step provision – first, signatures of at least one tenth of electors must be collected to request a referendum, and after that, if the necessary number of signatures has been collected, the referendum is held. The purpose of this referendum provision entrenched in the Constitution is revoking of a law. In this type of a referendum the people use their veto rights or the rights to reject the law adopted by the Parliament[265].

The President must suspend the law on the request of no less than one third of the MPs (the second sentence in Article 72), yet the President may also act at his own discretion – he has the rights to suspend promulgation of the law for two months (the first sentence in Article 72).

Article 72 of the Constitution lays down a complicated procedure and one has to agree to the opinion expressed by legal scholarship that despite the fact that the Constitution does not stipulate the preconditions when the President is empowered to use these rights, President apparently will decide to suspend promulgation of a law only if the issue stipulated in the law will be decisive and significant for the state of Latvia[266].

So far the Presidents have suspended promulgation of a law by the request of MPs but the largest discussions in the context of Article 72 of the Constitution took place in 2007 when the President V. Vīķe-Freiberga on 10 March 2007 used her rights as laid down in Article 72 of the Constitution suspending the law "Amendments to the National Security Law" and "Amendments to the Law on National Security Authorities" for two months[267]. This was the first case when the President had suspended promulgation of a law on her own initiative. The mentioned case caused series of constitutional discussions, including the question whether such a decree by the President (i.e., when the law is suspended on the initiative of the President) needs co-signature[268]. The President had suspended promulgation of this law without a co-signature and, in view of the fact that objections were not raised; this established a practice that such decisions do not need the co-signature[269]. The second question largely discussed was whether after the announcement about suspension of promulgation of the law was published, it can be revoked. An interesting situation was established in practice because after suspension of these laws the Parliament revoked the previously accepted and critically analysed amendments thus as if correcting its mistake. Hence a legal uncertainty emerged whether a collection of signatures are to be organized and a referendum held. Yet, experts of constitutional

law expressed fairly unanimous views that even if the parliamentary majority after suspension of the law make amendments it neither cancels collection of signatures, nor referendum[270].

4) **The Parliament has not accepted without substantial amendments a draft law or the draft amendments to the Constitution from no less than one-tenth of electors (Article 78 of the Constitution).**

This provision of Article 78 of the Constitution that provides for a referendum if the Parliament does not approve a draft law submitted by electors is unusual and rare in other countries. As indicated by I. Ņikuļceva, from the European countries, such a provision exists only in Switzerland[271].

This case of a referendum is closely linked with the second institution of direct democracy – the electors' legislative initiative and therefore will be discussed in greater detail in the next sub-chapter. Yet, concerning the referendum practice it must be indicated that after restoration of independence referenda were held because the Saeima had not approved of the draft law submitted by electors. The first referendum on the grounds of Article 78 of the Constitution was organized on 2 August 2008 because on 5 June 2008 the Parliament had rejected the draft law submitted by electors which was aimed at amending Articles 78 and 79 of the Constitution stipulating that no less than one tenth of electors have the right to propose dissolution of the Parliament[272]. Therefore on 2 August 2008 a referendum was held. Although during the referendum 608,847 electors voted "for" the adoption of the draft law, it was not approved since according to Article 79 of the Constitution at least half of all the citizens with voting rights, i.e., 757,468 electors, are to vote for the amendments to the Constitution to grant them the force of law[273]. The second referendum took place quite soon afterwards – on 23 August 2008 because the Saeima had rejected the draft law submitted by electors "Amendment to the Law on State Pensions"[274]. This draft law was not approved either because the referendum did not reach quorum[275]. While the third referendum on grounds of Article 78 of the Constitution was held on 18 February 2012 because the Saeima had rejected amendment proposals to the Constitution submitted by no less than one-tenth of electors, the purpose of the amendments was to grant to the Russian language the status of the second official language in Latvia. These amendments were not adopted during the referendum because they were not supported by at least half of all the people with voting rights as stipulated by Article 79 of the Constitution.

7.1.2 Cases of referenda introduced after reinstating the Constitution

After reinstatement of the Constitution three more cases have been entrenched in the Constitution when referenda are to be organized.

1) **The issue on membership of Latvia in the European Union initiated by the Parliament (Article 68 of the Constitution).**

This case of referendum was inscribed in the Constitution in 2003[276], on the basis of the fact that on 13 December 2002 Latvia received in Copenhagen an invitation to accede the European Union after which the question of a referendum became one of the most significant issues in domestic policy.

At the same time in 2003 amendments were made to Article 79 of the Constitution concerning quorum, establishing that the decision put on referendum about Latvia's membership in the European Union or about essential changes in conditions of this membership is adopted if the number of electors is at least half of the number of electors participating in the last Parliamentary elections and if the

majority have voted for membership of Latvia in the European Union or essential changes in provisions of this membership.

The question in what way membership in the European Union is to be decided was an object of extensive polemics both among lawyers and politicians[277]. Three options on what the referendum should be organized were discussed:

1) amendments to the Constitution;
2) a law by which the accession agreement of Latvia in the EU is confirmed;
3) an abstract question.

The working group came to a conclusion that an abstract question is the best option since it would allow for a simpler and more clearly formulated question to be put on vote.

Thus during the referendum held on 20 September 2003 the electors had to answer the question: "Are you for membership of Latvia in the European Union?"[278] 1,010,467 electors participated in the referendum. Since 66.97 % electors responded to the question affirmatively, Latvia became a full-fledged member of the EU on 1 May 2004, and an essential stage in a purposefully implemented foreign policy was finished.

2) **An issue is to be decided on essential changes in provisions about Latvia's membership in the European Union and it is requested by at least half of the MPs (Article 68 of the Constitution).**

This case of referendum was also entrenched in the Constitution in 2003 at the same time with the question about Latvia's membership in the EU.

The working group that worked out amendments to the Constitution concerning the planned membership in the EU substantiated the need for such a referendum by indicating as follows: "since the question about membership in the EU depends on people's choice it would not be correct to confine it merely by accession or secession. Changes in the European Community Law or in the Law on European Union may change very essentially balance between the issues to be decided on the national level and the exclusive EU competence. Therefore, in order to maintain legitimacy for Latvia's membership in the EU, it is necessary to prescribe a possibility of putting issues about changes in the Treaties on a referendum[279]."

Such a referendum is to be organized only about essential issues concerning the EU and the question if these changes are sufficiently essential to be put on a referendum vote would be decided by at least half of the MPs. The fact that the members of the Saeima have the rights but not the duty to put issues connected with the EU integration on a referendum has also been indicated by the Constitutional Court in its case law[280]. The requirement that such a request be voiced by at least half of the MPs is a fairly high threshold and requires a large political consensus, which means that most probably referenda will be organized indeed only about genuinely important European integration issues.

So far no such referenda have been held in Latvia. As mentioned before, in 2008 a constitutional complaint was submitted to the Constitutional Court to dispute the procedure of ratifying the Treaty of Lisbon, indicating at a possible violation of Paragraph 4 of Article 68 of the Constitution because in Latvia no referendum was held on Lisbon treaty by which the Treaty on European Union and the Treaty Establishing the European Community were amended. In Latvia the Treaty of Lisbon was ratified by the Parliament although in other countries its corroboration was decided by way of referenda. Examining the case, the Constitutional Court ruled that the procedure laid down in Article 68 of the Constitution was not infringed[281].

3) **Referendum on recalling the Parliament (Article 14 of the Constitution).**

This type of referendum was introduced in the constitutional law of Latvia only on 8 April 2009 by adopting the last amendments to the Constitution so far[282]. The mentioned amendments were enacted when the 10th Parliament was convened – on 2 November 2010.

In accordance to Article 14 of the Constitution, no less than one-tenth of electors have the right to initiate a referendum on recalling the Parliament. If the majority of electors vote in the referendum for recalling the Parliament and the participation rate has been at least two thirds from the electors during the last Parliament elections, then the Parliament is to be considered as recalled. The rights to propose a referendum on recalling of the Parliament may not be used till a year after the election of the Parliament, a year before the end of the Parliament's mandate, during the last six months of the Office of the President, and no sooner than six months after the previous referendum on recalling the Parliament[283]. The electors' rights to initiate and decide the question on recalling the Parliament are rare in other countries of the world[284].

Thus, after enactment of these amendments, the number of cases when the period of mandate of the Parliament may expire, has been extended because apart from the previous provisions that provided for the rights to **dissolve** the Parliament on the grounds of Article 48 of the Constitution the electors now have also the rights to **recall** the Parliament which means that now people can initiate themselves a referendum on dissolution of the Parliament and it is not necessary that this procedure would be started by the President on the grounds of Article 48 of the Constitution.

Attempts to entrench in the Constitution the rights of people to recall the Parliament had been made also before – on 2 August 2008 a referendum was held on adoption of the law "Amendments to the Constitution of the Republic of Latvia". These draft amendments to the Constitution were initiated by the Free Trade Union Association and the purpose was to amend Articles 78 and 79 of the Constitution stipulating that the electors have the right to propose dissolution of the Parliament. The Parliament rejected these draft amendments therefore in accordance to Article 78 of the Constitution it was to be put on a referendum. During the referendum electors' were not very active, the draft law was not adopted – 42% of electors took part in the referendum from which a convincing majority 96.78 % supported adoption of the amendments[285]. After the unsuccessful referendum, the President V. Zatlers set a task to the Parliament to work out the Constitution amendments, which already on 8 April 2009 were adopted.

Thus, at present the Constitution provides for 7 cases in which referendums are to be held. All the cases when referenda are to be organized and detailed provisions laid down can be found in a special legislative act in the law "On National Referendums and Legislative Initiatives" passed by the Parliament on 31 March 1994[286]. By adopting this law the Parliament has to a large extent retained the provisions that were included in the law "Latvian Law on National Referendums and Legislative Initiative" of 1922.

7.1.3 Referenda held after the restoration of independence

Compared to the pre-war Latvia, referendums now take place comparatively more frequently. During the period from 1922, when the Constitution was enacted, till 1934 when the Constitution was suspended, there were four referendums held (in 1923, 1927, 1931, and in 1933), and they were all organized on the grounds of

Article 78 of the Constitution, i.e., the Saeima had not accepted legislation initiatives submitted by the electors[287]. After the restoration of independence of Latvia, eight referendums have been organized (excluding 3 March 1991 poll of the population on the independence of the Republic of Latvia), and they took place for diverse reasons.

The first referendum in the renewed Latvia took place on 3 October 1998 simultaneously with the elections of the 7th Saeima. During this referendum the electors had to decide whether to revoke or to keep in force the law adopted by the Saeima on 22 June 1998 "Amendments to the Citizenship Law". The referendum was held on the grounds of Article 72 of the Constitution because during the collection of signatures, after the amendments to the law were suspended, more than one tenth of the electors with voting rights participating in the last Parliamentary elections voted for holding a referendum on the law. These amendments stipulated that on the grounds of an application submitted by parents, citizenship is to be granted to the children of non-citizens and stateless persons born after 21 August 1991 without requiring the Latvian language test, likewise the amendments were to nullify naturalization quotas. 69.8% electors participated in this referendum (or 97.14 % of those electors who participated in the elections of the last Parliament). This can be regarded as one of the most active referendums in the history of Latvia. Since the majority of the electors were against revoking the law, the amendments to the Citizenship Law were not repealed and were enacted. The newly adopted provisions complied with the European Union recommendations and improved the status of Latvia's foreign policy.

The second referendum took place on 13 November 1999. During this referendum the electors were to decide whether to revoke the law "Amendments to the law "On State Pensions" which had been suspended by the President on the request of one third of the MPs (on the grounds of Article 72 of the Constitution). The law stipulated a gradual increase of pension age till 62 years and several other changes. Unlike the referendum on citizenship issues, the activity of electors was not sufficient to consider it valid and therefore the suspended law was not revoked in the referendum, although 94.17% of the electors had supported its repealing.

The third referendum was organized on 20 September 2003. During this referendum the electors had to answer the question: "Are you for membership of Latvia in the European Union?" A convincing majority – 66.97 % of the electors – voted for accession of Latvia to the European Union.

The fourth referendum was organized on 7 July 2007. It was held to decide revoking of the laws "Amendments to the National Security Law" and "Amendments to the Law on National Security Authorities" suspended by the President Vaira Vīķe-Freiberga. This was the first case in history of Latvia when the President suspended promulgation of a law on her own initiative (on the grounds of Article 72 of the Constitution). During the signature collection on organizing the referendum, 14% of the electors from the number of electors participating in the last elections of the Parliament supported the referendum, but the number of valid ballot-papers submitted during the referendum about each of the laws was not sufficient to consider the referendum valid and therefore the suspended laws were not revoked.

In the sense of direct democracy, 2008 was particularly active when during one month two referenda were held in the country. On 2 August 2008 a referendum on adopting the law "Amendments to the Constitution of the Republic of Latvia" was held. The rate of participation in this referendum was also insufficient and the draft law was not adopted[288]. Due to the low rate of participation of electors, the referendum on the draft law initiated by electors and rejected in the Parliament

"Amendments to the Law on State Pensions" failed as well. Therefore, in accordance to Article 78 of the Constitution a referendum was to be held. Only 22.9% of electors participated in this referendum therefore it was to be considered as failed.

The seventh referendum took place on 23 July 2011 when a referendum on dissolution of the 10th Saeima was held after the President had issued the ordinance No. 2 "On the proposal on dissolution of the Saeima" on May 28, 2011. Participation rate of electors in this referendum was comparatively low (44.73%), out of which a convincing majority – 94.3% of electors – voted for the dissolution of the Saeima and therefore the Saeima was dissolved.

The eighth referendum since the restoration of Latvia's independence took place on 18 February 2012 about adoption of the draft law "Amendments to the Constitution of the Republic of Latvia". The draft law submitted by electors envisaged changes in several articles of the Constitution enshrining the Russian language as the second official language in Latvia, but the Saeima rejected these amendments which meant that in accordance to Article 78 of the Constitution a referendum had to be held. It can be said with assurance that this referendum caused the biggest discussions among legal scholars, foregrounding as the main question whether the electors can initiate amendments about any issue even if it is possibly in contradiction with the spirit of the Constitution and the principle of a national state. This referendum lead to active discussions about the contents of the so-called nucleus of the Constitution[289] and to the question what the role of the Central Election Committee and the President is within the context of a draft law initiated by electors. A number of unclear issues were caused also by the fact that a month before the referendum the MPs submitted an application to the Constitutional Court requesting to stop the referendum. The Constitutional Court took a decision not to stop the referendum and at the time of preparing this article the case is at its preparatory stage. This referendum excelled with big activity – 71% of the electors participated in it and 74.8% voted against amendments to the Constitution[290], i.e., against the Russian language as the second official language (to adopt amendments to the Constitution they must be supported by at least half of all those who have voting rights).

In the history of Latvia so far referendums have been held for different reasons. Out of the seven cases when a referendum shall be organized, three cases have still not been used in practice – the mechanism enshrined in Article 14 of the rights to propose law (legislative initiatives) that grants the rights to electorate to recall the Saeima, amendments to the Constitution that must be approved on the grounds of Article 77 of the Constitution, and the issues to be decided on the grounds of Article 68 of the Constitution about essential changes in the provisions of Latvia's membership in the European Union.

Although referenda have been held quite often during the last few years, they have not excelled with high participation rates of the electors – several of the referenda did not even reach the necessary quorum. It should be noted though that in the four referenda that were held in the pre-war Latvia quorums were not reached either and these facts sometimes inspire a discussion in legal science whether a lower quorum threshold should not be set for referenda[291].

There are no consultative referenda in Latvia, which means that all the referenda prescribed in the Constitution have a binding result.

Unlike many other countries there are no municipality level referenda in Latvia yet, but it is possible that the municipality inhabitants will be able to express their

opinions in referenda soon since the draft law on local municipality referenda is being worked out at present[292].

7.2 The rights to propose law (legislative initiative)

Since adoption of the Constitution it includes a provision on legislative initiative of the electors. Article 64 of the Constitution stipulates that the right of legislation shall belong to both the Saeima and to the people, within the procedure and extent provided for in this Constitution. Article 65 specifies that draft laws may be submitted to the Saeima by one-tenth of the electors, while Article 78 of the Constitution stipulates the procedure of the legislative initiative of the electors: "Not less than one-tenth of the electors shall have the right to submit to the a fully elaborated draft for the amendments to the Constitution or the draft law, which shall be submitted to the Saeima by the President. If the Saeima does not adopt this draft law without substantial amendments, it shall be submitted to a referendum." The above mentioned provision of the Constitution has remained unchanged until today.

All the citizens of Latvia who have the right to elect Saeima can participate in a referendum and in proposing laws. Electors have the right both to initiate draft laws and draft amendments to the Constitution, and irrespective of the fact what kind of legal act is being initiated, the procedure of proposing them is identical.

Electors' rights to propose laws do not exist in all the democratic states; in the European scale such rights are not too widespread either[293].

The issues concerning legislative initiative rights are regulated by the previously mentioned law "On National Referendums and Legislative Initiatives" of 1994 in which the provisions setting out procedure of proposing laws are quite laconic.

The procedure by which electors may propose laws has several stages.

1) In accordance to Article 22 of the law "On National Referendums and Legislative Initiatives", no fewer than 10,000 Latvian citizens eligible to vote, upon indicating their full name and personal identity number, shall have the right to submit to the Central Election Commission a fully elaborated draft law or a draft amendments to the Constitution. No earlier than 12 months before the submission of the draft law or the draft amendment to the Constitution, each signature must be certified by a sworn notary, public or a local government authority that performs notary functions. This first stage of the electors' legislative initiative is organized by electors without involving in it public institutions.

It should be noted that by adopting the law in 1994, it defined a larger necessary number of draft law initiators because till then these issues were regulated by the law of 1922 which stipulated that no fewer than 1,000 electors have the right to submit a draft law.

Questions related to this stage of legislative initiative have been analysed also in the case law of the Constitutional Court – on the grounds of an application of 20 members of the Saeima, the Constitutional Court had to evaluate whether the second sentence of Article 22 of the law "On National Referendums and Legislative Initiatives", which provides that each signature must be certified by a sworn notary, complies to the principle of good governance following from Article 1 of the Constitution. In its judgement of 19 May 2009 the Constitutional Court indicated that the instruments chosen by the state that require certifying of signatures at a sworn notary or in a custody court are the most efficient means for achieving the legitimate goal because with other instruments the legitimate goal cannot be

achieved in the same quality. In the first stage of legislative initiative, that allows to ensure authenticity and validity of the expression of a person's will in order to decrease a possibility to influence people's legislative process with forged signatures or in some other illegal way and thus to protect the democratic order of the state. The Constitutional Court indicated in its judgement that the prescribed procedure in the disputed provision that includes restrictions of electors' rights is necessary in a democratic state. The Constitutional Court also indicated that the means chosen by the legislator are suitable for achieving the legitimate goal and that such a procedure ensures equal enjoyment of rights and ruled that the disputed provision does not contradict the principle of good governance[294]. During the last few years more often such draft laws are initiated that are to be evaluated in a twofold way and that are aimed against the national identity of the state (for example, attempts to enshrine in the Constitution the Russian language as the second official language and amendments to the Citizenship Law that provide for automatic granting of citizenship of Latvia to non-citizens)[295]. That has promoted the question about increasing the minimum threshold of signatures necessary for submission of draft laws. In 2012 Saeima adopted a draft law which stipulated that 50,000 electors would have such rights, but it was suspended. It is expected that this issue will get into the agenda of Saeima again quite soon because several political parties represented in Saeima have expressed determination to return to this issue[296].

2) If it is established that the necessary amount of valid signatures has been collected – the state undertakes the duty to organize collection of signatures. CEC announces that collection of signatures is started for proposing the particular law, at the same time submitting to the election committees the respective draft law or draft amendments to the Constitution, as well as registration sheets for signature collection (Article 23 of the law). The time-limit of signature collection is 30 days.
3) If the draft law or the draft amendments to the Constitution have been signed by no fewer than one-tenth of the Latvian citizens who were eligible to vote in the previous Saeima elections, the President of Latvia shall submit to the Saeima the draft law or the draft amendments to the Constitution; the Saeima must consider them in the same session during which they have been submitted. If the draft law or the draft amendments to the Constitution have been submitted during a recess or at an extraordinary session, it must be considered at the next regular session or a special extraordinary session which is convened to consider the said draft law or the draft amendments to the Constitution (Article 25 of the law). Saeima has the duty to consider the draft law submitted by electors but it has no duty to accept it.
4) If the Saeima does not adopt the submitted draft or adopts it with substantial alterations, then, in accordance to Article 78 of the Constitution, a national referendum is to be held. At this stage a difference becomes apparent – whether electors have initiated a simple draft law or draft amendments to the Constitution because there are different quorum requirements for the respective amendments – the amendments to the Constitution submitted to the national referendum shall be adopted if at least one-half of those who have the right to vote have declared themselves in their favour, while the draft law shall be adopted if the number of participating electors is at least one-half of those who participated in the previous Saeima elections and if the majority has voted for the adoption of the draft law (Article 79 of the Constitution).

Electors' legislative initiative right is a mechanism that has been used in practice. After the restoration of independent statehood of Latvia, twelve collections of signatures have been organized by the CEC, out of which seven were organized by the legislative initiatives of electors because no fewer than 10,000 electors had submitted a draft law (the other collections of signatures were done on the grounds of Article 72 when the President had suspended a law adopted by the Saeima)[297].

The first collection of signatures initiated by electors after the restoration of independence took place in 1995 when the union "Tēvzemei un Brīvībai" (For Motherland and Freedom) submitted to the Central Election Committee a draft law "Citizenship Law" signed by 11,222 electors. During collection of signatures, the proposal of Citizenship Law was signed by 116,153 electors. Thus together with the signatures submitted to the CEC the proposed Citizenship Law was supported by 126,564 electors which was not enough to submit the draft law to the Saeima.

On 30 March 2000, the Latvian Professional Trade Union "Energy" submitted to the CEC a draft law "Amendments to Energy Law" signed by 12,337 citizens of Latvia. After collection of signatures, the CEC established that the draft law submitted by electors has been signed by 307,330 electors or 22.9% of those who were eligible to participate in the Saeima election. The draft law was submitted to the President who submitted it to the Saeima for review. The Saeima adopted this law submitted by electors without changes of its substance[298].

In 2002 the political union "Centrs" (Centre) attempted to collect signatures for draft amendments to the Constitution on election of the President by the people, on 16 September 2002 the union submitted to the Central Election Committee draft amendments to the Constitution signed by 10,587 electors. After validating the signatures, the CEC concluded that the number of signatures is insufficient to start a nation-wide collection of signatures, because resulting from the validation it was established that 3,995 signatures were invalid[299].

In 2008 other amendments to the Constitution were initiated –Latvian Free Trade Union Association started signature collections and on 1 February submitted to the Central Election Committee a draft law signed by 11,095 electors which was aimed at amending Articles 78 and 79 of the Constitution providing that no fewer than one tenth of electors have the rights to propose dissolution of the Saeima. The number of signatures collected was 14.6% or more than one tenth of the electors eligible to participate in the last Saeima elections and therefore the amendments to the Constitution were submitted to the President, who submitted them to the Saeima. On 5 June 2008 the Saeima rejected the draft amendments to the Constitution submitted by electors and therefore on 2 August 2008 a national referendum was held. Although 608,847 electors voted "for", the draft law "Amendments to the Constitution of the Republic of Latvia" was not adopted during the national referendum, because for the amendments to the Constitution to get the force of law as follows from Article 79 of the Constitution at least 757,468 electors or half of all the citizens eligible to vote had to vote for its adoption[300].

On 18 February 2008 the union "Sabiedrība citai politikai un tiesiskai valstij" (Society for Other Politics and Law-Based State) jointly with the "Pensionāru un senioru partija" (Pensioners' and Senior Citizens' Party) submitted to the Central Election Committee a draft law signed by electors "Amendments to the law "On State Pensions"". The number of the collected signatures was 11.9% or more than one tenth of the citizens with voting rights during the last Saeima elections, therefore the amendments were submitted to the President who submitted them to the

Saeima. The Saeima did not adopt the amendments therefore on 23 August 2008 a national referendum was organized. The draft law was not adopted during the referendum because there was no quorum (only 38.2% of those electors who took part in the last Saeima elections participated in the referendum).[301]

On 29 March 2011 the CEC received a draft law signed by electors "Amendments to the Constitution of the Republic of Latvia". This collection of electors' signatures was organized by the union "Tēvzemei un Brīvībai/LNNK" (For Motherland and Freedom/LNNK). The draft law stipulated amendments to Article 112 of the Constitution supplementing it with a provision that "the State provides free-of-charge primary and secondary education in the official language", it also proposed a transition provision prescribing that "as of 1 September 2012 in all the municipality and state educational establishments starting with form 1, the language of instruction is Latvian". Checking the submitted signatures, the CEC established that 10,140 electors have signed for the proposing of amendments to the Constitution therefore it announced the nation-wide signature collection about the draft law, and yet the necessary number of signatures was not collected (it was necessary to collect signatures of 153,232 electors but only 123,844 signatures were collected)[302].

So far the last collection of signatures organized by the CEC on the grounds of electors' legislative initiative took place in November 2011 with a purpose to propose the draft law "Amendments to the Constitution in the Republic of Latvia" which were aimed at enshrining in the Constitution the provision that the Russian language shall be the second official language. In both stages the support of proposing amendments to the Constitution was given by 12.14% of the citizens who had voting rights during the last Saeima elections. Thus the draft law was submitted to the President who submitted it to the Saeima for reviewing. On 22 December 2011 the Parliament rejected the proposals of amendments to the Constitution submitted by electors and already on 18 February 2012 a national referendum was organized[303].

As seen from the above, so far submission of electors' legislative initiatives has been co-ordinated by political parties, and also trade unions that have the status of public organizations[304]. It must be noted that there are no legal acts in Latvia that would restrict political parties in canvassing electors during the collection of signatures. Out of the seven instances when after the restoration of independence collection of signatures for electors' legislative initiatives has been organized by the CEC in four of them the necessary number of signatures was collected to submit the draft law for reviewing in the Saeima. From the draft proposals submitted by electors only one was adopted in the Saeima without changes in its substance but the others were rejected and submitted to national referendums during which they were not adopted either.

In fact after the restoration of independence the legal provisions regulating electors' legislative initiative have had minimum changes because the law of 1994 regulating this issue is based on the law "On National Referendums and Legislative Initiative" of 1922.

In regard of relations between the body of citizens and the Saeima it must be noted that since 2012 a new mechanism for implementation of the rights of the body of citizens has been enshrined in the legal provisions in Latvia – the rights to submit to the Saeima a collective application or the so-called procedure of "my voice". On 19 January 2012 the Saeima adopted amendments to the rules of order of the Saeima by enshrining in them a new procedure – reviewing of a collective application[305]. This procedure provides that no fewer than 10,000 citizens of Latvia who have

reached the age of 16 on the day of submission of the application have the right to submit to the Saeima a collective application. Signatures in support of such an initiative can be collected in an internet site; neither notary nor any other certification is required. By this procedure it is possible to submit to the agenda of the Saeima any issue that must be reviewed by a legislative procedure, including initiative for elaboration of a draft law in the Saeima, ensuring inclusion of an already elaborated draft law in the Saeima agenda and its evaluation and improvement in the Saeima committees. Quite soon after the new procedure was introduced – in June of 2012 – the first collective application was submitted to the Saeima that proposed to determine liability for breaking the MPs oath[306].

7.3 Voting rights

One of the ways for the people to enjoy its sovereign power is free and democratic elections. In Latvia voting rights are periodically enacted by electing the Saeima, European Parliament, and municipalities. During the last few years there have been several attempts to initiate amendments to the Constitution by which the electors would be entrusted the rights to elect the President but none of these initiatives has so far got the support of the majority in the Saeima therefore it is the Saeima's and not the electors' prerogative to elect the President.

7.3.1 Saeima elections

Since the restoration of independence in Latvia there have been six current elections of the Parliament – in 1993, 1995, 1998, 2002, 2006, and 2010, but on 17 September 2011 extraordinary Saeima elections were held in Latvia for the first time in its history when the 11th Saeima (the seventh Saeima after the restoration of independence in Latvia) was elected.

5 and 6 June 1993 was a historical time for Latvia because after a 62 years break democratic multi-party elections were held in Latvia again – the 5th Saeima elections[307]. The procedure of these elections was laid down in a special law of the Supreme Council adopted on 20 October 1992 "On the Elections of the 5th Saeima"[308]. This legal act in reality was slightly amended law "On the Saeima Elections" of 1922 and complied with requirements of democratic elections. 89.9% of citizens eligible to vote took part in the elections of the 5th Saeima, which remains an unsurpassed rate of participation in the elections that have taken place after the restoration of independence.

On 6 July 1993 the Constitution of Latvia was reinstated in full scope and hence the constitutional provision framework of the elections was re-enacted. On 25 May 1995 a new legal act was adopted the law "On the Saeima Elections[309] which still regulates the procedure of the Saeima elections and had been amended more than 10 times.

The election system in Latvia has undergone a number of changes during the 20 years since the restoration of independence. Within this span of time, a transition from the majority election system used in the LSSR to the proportional election system has been made, the latter was used in the Republic of Latvia in 1920s and 1930s; a multi-party system has been strongly established in Latvia as well, the legislative acts regulating the procedure of elections have been reinstated and improved.

Various significant changes have affected all the most important issues that are to do with elections – the procedure of submission and registration of candidate lists, nomination rights and restrictions, election procedure, calculation of the

results, setting up of election committees and the procedure of appealing the election committee decisions. The legal provisions that are connected with elections have been also amended in the Constitution.

Article 6 of the Constitution stipulates that the Saeima shall be elected in general, equal, direct, and secret ballot elections, on the basis of proportional representation – those are fundamental election principles recognized in democratic states.

In 1994 amendments to the Constitution were adopted that reduced the age of eligibility in elections. Since 1994 the rights of election have been granted to full-fledged citizens of Latvia who have reached the age of 18 (till then the minimum threshold for elections was 21 years)[310]. It should be noted that during the 5th Saeima elections all the citizens of Latvia who had reached the age of 18 had the rights to vote because it was laid down in the special law "On the Elections of the 5th Saeima".

Some months after the adoption of the law on the Saeima elections – on 9 August 1995 the Saeima passed a law that had a significant impact upon the elections – law "On Pre-election Canvassing before the Saeima Elections". In 2004 the scope of the law was slightly extended including into it the issues that are to do with the elections to the European Parliament, therefore the name of the law was also amended – "On Pre-election Canvassing before the Saeima Elections and Elections to the European Parliament"[311].

In 1997 several amendments to the Constitution were adopted that regulate the election procedure, among others Article 10 of the Constitution was amended which stipulates that the Saeima shall be elected for a period of four years instead of three as the case was so far[312]. To reduce the election costs, Article 11 of the Constitution provided that the Saeima elections shall take place on the first Saturday in October and not during two days – on Saturday and Sunday, as before[313]. It is interesting that by adopting these amendments Article 9 was not changed and therefore there still is a provision that a candidate for Saeima must be over twenty-one years of age on the first day of elections.

One of the essential changes in legislative provisions after the restoration of independence is introduction of election threshold. The excessive fragmentation of the first four Saeimas encumbered or even made impossible normal and efficient functioning of the Parliament and caused difficulty in forming government. Therefore, learning from the past mistakes in the 5th Saeima elections election threshold was introduced for the first time in the history of Latvia. During the first reading it was envisaged to introduce only a 2% threshold but eventually the legislator decided to introduce a 4% threshold[314]. In 1995 passing the new Saeima election law, a 5% threshold was enshrined in it – it means that those lists of candidates that have received from all Latvia fewer than 5% votes from the total number of votes cast in the election do not participate in distribution of seats of members of the Saeima. Introduction of election threshold has caused obvious changes in the number of parties represented in the Saeima. In the pre-war Latvia in each Parliament more than 45 candidate lists were elected (in the first Saeima – 46 lists; in the second Saeima – 48; in the third Saeima – 54; in the fourth Saeima – 57)[315], but after the restoration of independence this number has considerably shrunk. In the 5th Saeima MP mandates were acquired by 8 lists; in the 6th Saeima – 9 lists; in the 7th Saeima and the 8th Saeima – 6 lists; in the 9th Saeima – 7 lists; in the 10th Saeima and in the 11th Saeima – only 5 lists[316].

It must be noted that introducing of election threshold gives disadvantage to the smaller parties and therefore representatives of some smaller parties have lodged a

constitutional complaint to the Constitutional Court disputing that Article 38 of the law "On the Saeima Elections" which stipulates 5% threshold, is in contradiction to the Constitution[317]. Reviewing the case, the Constitutional Court analysed several principles that are connected with the election rights and ruled that the opinion of the applicants is not grounded. Among other things the Constitutional Court indicated that the disputed provision regulates the activities of the Central Election Committee when deciding the distribution of the seats among the candidate lists but does not influence the subjective rights of the electors. Likewise, the Constitutional Court indicated in its judgement that defining an election threshold is justified by the necessity of forming such a Parliament that would be able to work in a co-ordinated way, fulfilling its functions as set out in the Constitution, at the same time facilitating also the existence of stable executive power, democracy, and welfare[318].

In 2002 by the initiative of the President V. Vīķe-Freiberga the section in the Saeima election law that stipulated that persons who do not know the state language in the third and highest competence level cannot be nominated as candidates and elected in the Saeima and that the candidate can be crossed out of the list if he or she did not possess the highest language skill, which had to be confirmed at the State Language Centre, was deleted. The OSCE had indicated that this requirement puts part of the citizens in an unequal position and is in contradiction to the principle of equality enshrined in the Constitution. This amendment was positively evaluated also by the international society, EU, and NATO[319].

In the course of time, several restrictions of active voting rights associated with the Saeima elections have been revoked. At present the only restriction laid down in the Saeima election law is the provision that those persons that have been on the grounds of law recognized as incapacitated have no right to vote. Till 2003, Article 2 of the Saeima election law stipulated that such rights cannot be enjoyed by "suspects, the accused persons or persons on trial if arrest has been used against them as a security measure". In 2003 on the grounds of a constitutional complaint, the Constitutional Court ruled that such a restriction is in contradiction to the principle of general elections enshrined in Article 6 of the Constitution and to the notion of "citizens who enjoy all rights" laid down in Article 8 of the Constitution therefore it was decided to announce the restriction stipulated in Paragraph 2 of Article 2 of the Saeima election law as invalid[320]. In 2009 the Saeima adopted amendments to the law which repealed the restriction of election rights for the persons who serve their time in a place "where their liberty is deprived"[321].

In 2009 after lengthy discussions highly approvable amendments were adopted to the Saeima election law, which prohibit the use of the so-called "engine" principle in the party candidate lists and lays down that the same candidate may be included only in one candidate list bearing the same name distributed in one constituency[322].

Although the Saeima election law has numerous amendments, politicians and experts are still discussing other improvements in the legislative election provisions. The competent institutions have expressed their determination to decide about introduction of the so-called "pre-voting" (a possibility to vote before the election day) thus offering a possibility to participate in the elections to those persons who because of work or religious considerations cannot arrive to a polling station on the election day and cast their vote till 20.00. It is interesting that quite shortly before the 11th Saeima elections, respecting religious rights of Jewish people the Saeima passed a decision that during the 11th Saeima elections at least one polling station

in each local authority will be open for 2 hours longer till 22:00 thus granting rights to Jews to participate in the elections after their religious holiday Sabbath[323]. But now one of the most discussed issues already for a longer period of time in regard of improvement of voting legislation is a decision whether Latvia following the technological development should not pass over to electronic voting system, thus reducing election costs and possibly also improving the participation rate which has a tendency to decrease[324].

7.3.2 Elections of European Parliament

After Latvia's accession to the European Union, electors enjoy their voting rights also by electing the European Parliament. On 29 January 2004 the Saeima adopted the Elections to the European Parliament Law[325], and under its provisions the European Parliament elections were held in Latvia for the first time on 12 June 2004. The second European Parliament elections took place in Latvia on 6 June 2009 simultaneously with the local government elections. The fact that the second European Parliament elections were held simultaneously with the local government elections considerably increased the participation rate of electors (in the first elections 41.3% electors took part, but in the second elections – 53.7%). It demonstrates that whenever it is possible it is financially more cost-effective and more efficient to organize national referendums or elections on several issues on one and the same day.

The rights to vote for the European Parliament in Latvia are enjoyed both by citizens of Latvia and European Union citizens who are not citizens of Latvia but who are staying in the Republic of Latvia. Electors of Latvia had to elect eight representatives in the European Parliament. On 1 December 2009 the Lisbon Treaty came into force in accordance to which the subsequent European Parliaments will have a larger number of representatives thus the number of representatives from Latvia will increase to 9 members[326].

Unlike the Saeima elections and the national referendums during the European Parliament and local government elections, the electors register is used which means that each elector is registered in a specific polling station depending on the registered place of residence. Besides, during the European Parliament elections the whole Latvia is one single constituency[327].

7.3.3 Local government elections

On 29 May 1994 the first multi-party and democratic local government elections were held in the restored state of Latvia. The legal basis for the elections was the law "On Elections of City Council, Regional Council and Local Council" passed on 13 January 1994[328].

After the restoration of independence, five local government elections have been held in Latvia – in 1994, 1997, 2001, 2005, and 2009, and in accordance to the existing legal provisions the local government is elected for four years[329].

In 2008 the law "On Administrative Territories and Populated Areas" was adopted and after it was enacted an essential stage of administrative reform was concluded. The new legal act divides Latvia into three types of administrative territories: regions[330], cities, and municipalities[331]. In view of the territorial reform, the title of the 13 January 1994 law was changed and now it is called law "On Elections of the Republic City Council and Municipality Council". On 6 June 2009 in accordance to the new legislative provisions local governments of 109 municipalities and 9 republic cities were elected, and hence in comparison

to the previous administrative structure of the local governments, the number of elected council members as a result of the territorial reform has decreased more than twice[332].

The number of local government council members to be elected depends on the number of the population in the respective administrative territory of the local government on the day of announcing the elections registered in the Population Register. In the legislative act a specific number of council members are provided only for the city of Riga – 60 council members.

Unlike the Saeima and European Parliament elections, during the local elections the administrative territory of each city and municipality government comprises a separate constituency.

The rights to elect the local governments are enjoyed by the citizens of Latvia and in accordance to the amendments adopted to the Constitution in 2004[333] and the amendments to the election law – also by the European Union citizens who are not citizens of Latvia but who have been registered in the Population Register and if they fulfil all the requirements set out by the law. It should be noted that separate political forces more frequently are discussing that also the non-citizens should be granted the rights to elect local governments. Such a position has been also recommended by the OSCE commissioner in 2011[334] but it is not a legal obligation of the state but a political decision.

There have been also attempts in Latvia to get the council member mandates also in an illegal way – in 2005 in the city of Rēzekne repeated elections were organized since the judgement by the Administrative Regional Court came into force which declared the results of elections to Rēzekne City Council null and void, since buying of electors votes had taken place on such a scale that could have influenced the distribution of seats in Rēzekne City Council[335]. Unplanned local government elections had to be organized also because of the changes in the administrative territories, for example, on 18 December 2010 on the grounds of the law "On division of Roja municipality and starting the work of the newly established municipalities" new local government elections took place in these territorial entities[336]. Extraordinary local government elections have been also organized because the decision making body of the local governments had been dissolved[337].

8 Citizenship institute

The question on citizenship was one of the most disputable and legally most complicated issues about which the legislator had to decide after the restoration of independence of Latvia.

Already adopting 4 May 1990 declaration, the Supreme Council was not consistent in regard to the citizenship question because instead of reinstating the law "On Citizenship" of 1919, on July the Supreme Council established a working-group to elaborate the citizenship concept of the Republic of Latvia. The draft law was worked out but it was not supported in the largest Supreme Council faction by the Latvia Popular Front since there were concerns that by adopting a new citizenship law, the Supreme Council would give up the conception about the restoration of the Republic of Latvia as proclaimed in 1918[338].

After the restoration of independence the legislator in Latvia had to make a choice between two models in defining the scope of citizens. The first model – the so-called "zero option" – would have meant that all the inhabitants of non-Latvian

origin would be automatically recognized as citizens. Although initially this model was considered as one of the possibilities in the Supreme Council, still in course of time the conviction crystallized that the second option would be more suitable, namely, the one following from the theory of continuity of the Baltic States. This theory means that the state of Latvia established in 1918 continues to exist and therefore in view of 1940 occupation automatic recognition of citizenship for Russian immigrants was considered to be impossible[339].

After long discussions, on 15 October 1991 the Supreme Council passed a law "On the Renewal of the Rights of Citizens of the Republic of Latvia and Fundamental Principles for Naturalization". The preamble of this law stated that despite the fact that "the Republic of Latvia was occupied on 17 June 1940 and the state lost its sovereign power, the body of citizens in accordance with the law of 23 August 1919 "On Citizenship" continues to exist"[340]. The law laid down a provision that passports of the citizens of the Republic of Latvia will be issued to the persons who had Latvian citizenship and to the descendants of these persons, and it was also stipulated that general naturalization will be started as of 1 July 1992 on the grounds of a special law on citizenship. The legal act also stipulated that a citizen of the Republic of Latvia cannot be a citizen of another country or its national[341].

Taking into account the fact a number of members of the Supreme Council considered that the Council has no right to adopt the Citizenship Law and decide the issues of naturalization, the Supreme Council could not reach a compromise in the citizenship question for a long time because of political disagreements and therefore the decision of these questions came into the competence of the Saeima[342].

The newly elected Saeima adopted the new Citizenship Law on 22 July 1994[343]. The Citizenship Law included a provision that the citizens of Latvia are the persons who were citizens on 17 June 1940 as well as their descendants, Latvians and Livs whose permanent place of residence is Latvia, foundlings, as well as the persons who have naturalized. The other persons, mainly of Russian origin, did not qualify for the status of citizen and got non-citizen's status. The law prescribed gradual naturalization and initially the so-called "window system" was introduced which meant setting quotas for the new citizens. Such a system was harshly criticized by the high commissioner of OSCE and the EU. Taking into consideration recommendations by international organizations, on 22 June 1998 the Saeima adopted significant amendments to the Citizenship Law that stipulated that on the grounds of the parents' application, Latvian citizenship is granted to those children of non-citizens and stateless persons in Latvia who were born after 21 August 1991 without requiring proof of the Latvian language skills and also stipulated revoking of the naturalization quotas. Since these amendments were to introduce quite radical changes they were suspended and submitted to the national referendum on grounds of Article 72 of the Constitution. During the national referendum, the majority voted against revoking of the law therefore the amendments adopted by the Saeima to the Citizenship Law, but subsequently suspended, were not revoked and were enacted. The newly adopted provisions corresponded to the European recommendations and improved Latvia's international policy status since the naturalization process was simplified and the "window" system abolished[344].

Requirements for a person to be granted citizenship by way of naturalization are laid down in the Citizenship Law and essentially it means that the candidate must pass the state language test, must know the basic provisions of the Constitution, the text of the national anthem, and history of Latvia. In the course of time, the

naturalization procedure has been simplified but still 14% of all the population in Latvia are non-citizens[345].

Citizen's status gives a number of advantages – both active and passive voting rights, opportunities to work in civil service, to be a judge, sworn notary, sworn lawyer, bailiff, police officer, a ship captain on a Latvian ship, and the like. Besides, after the accession of Latvia to the European Union only citizens of Latvia become automatically the EU citizens that grants to a person many advantages, too[346].

Non-citizens' status, rights, and duties are defined in the law adopted in 1995 "On the Status of those Former U.S.S.R. Citizens who do not have the Citizenship of Latvia or that of any Other State"[347]. One can agree that this status is unclear[348]. At the beginning of 1990s, a view became widespread that aliens are also non-citizens yet that is an erroneous view. The European Court of Human Rights as well in its judgement of 9 October 2003 in the case *Slivenko v. Latvia*[349] has recognized that non-citizens as a group of persons who lost citizenship of the USSR as a result of collapse of this country and have not accepted citizenship of another country are not to be considered as having the status of aliens or stateless persons. The European Court of Human Rights designates non-citizens as "the former USSR citizens" by that underlining their closer links with the Republic of Latvia that aliens and stateless persons have[350]. As it has been indicated by Professor E. Levits, non-citizen's status is considerably more favourable than the status of aliens and stateless persons because to a large extent it equates non-citizen's economic and social rights to the rights of citizens of Latvia[351].

Questions that are to do with citizenship legislation have been reviewed by the Constitutional Court a number of times. As can be seen from the judgements and rulings of the Constitutional Court, citizenship legislation has a political character which indirectly determines also the scope of control carried out by the Constitutional Court. Likewise, the Constitutional Court has indicated that all the essential issues related to the citizenship institute are firstly the competence of the legislator, but those issues about which the Saeima has not been able to reach consensus, both in 1927, as well as in 1998, are to be submitted to the national referendums[352].

The Citizenship Law was last amended in 1998, yet time and again citizenship issues have attracted the attention of society. Most frequently the discussions are about children's citizenship if only one of the child's parents is a citizen of Latvia, likewise appeals to give up the ban of double citizenship[353]. On 1 February 2011, by using his legislative initiative rights as enshrined in the Constitution, the President sent to the Saeima wording of the suggested amendments to the Citizenship Law, the main idea of which is to do with simplification of the procedure of naturalization of the children born in Latvia and with the aspects of double citizenship[354].

During working on the present article there is a topical discussion about automatic granting of citizenship to all the non-citizens because 12,686 electors have signed a draft law that stipulates that the non-citizens who have not expressed a wish to retain a non-citizen's status would automatically be recognized as citizens as of 1 January 2014[355]. Considering the fact that there are doubts whether the mentioned draft law is to be viewed as fully elaborated, the CEC on grounds of Article 78 of the Constitution has requested opinions of a number of experts before deciding whether to begin collection of signatures about it. Irrespective of the decision about the further movement of the draft law it can be anticipated that citizenship legislation issues might cause wide discussions in the nearest future.

Summary

During the second period of independence the significant events in the state law area in Latvia are the reinstatement of the Constitution, establishing of the Constitutional Court, inclusion of the human rights catalogue in the Constitution, setting up of the institutional system of the state administration, enactment of the Administrative Procedure Law, and establishment of administrative courts, as well as aspirations to improve separate constitutional law institutions – the national referendum and citizenship institution. During the first two decades, these achievements are the main bulwarks of Latvia's state law building. Time and again larger or smaller improvements in this building, strengthening of the foundation, or some other re-building must be made to increase the comfort. The accomplishments so far enable to expect that the subsequent changes will be well-considered and ensure continuity. If the continuity of the legal thinking will be ensured in the further development of state law then the aim of the present article will be achieved.

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[2] Helsinki-86 is a human rights advocacy group established during the Soviet regime which organized several anti-Soviet activities in 1987: in commemoration of victims of the communist terror on 14 June they organized laying of flowers at the Freedom Monument, renouncing the Molotov-Ribbentrop Pact they organized a rally on 23 August and on 18 November they celebrated the anniversary of the Republic of Latvia. Helsinki-86 mapped out the road of the second independence of Latvia.

[3] In autumn of 2011 a wide discussion was held at the Parliament about possibility of forming "Rainbow Coalition" but the nationally minded politicians objected against participation of the party association "Saskaņas centrs" (Harmony Centre) in the government since they did not recognize the fact of occupation.

[4] *Āboliņš, I., Zirnis, E.* Daivaiķe kopā! [an interview with the Chair of the society "Dzimtā valoda" (Native Language) Vladimir Linderman] *SestDiena*. 9–15 July 2011.

[5] Latvijas Vēsturnieku komisijas 2002. gada pētījumi – Okupācijas režīmi Latvijā 1940.–1959. gadā (The study by the Historians' Committee of Latvia in 2002 – Occupation regimes in Latvia 1940–1959). *Latvijas Vēsturnieku komisijas raksti*, Vol. X. Riga: Latvijas vēstures institūta apgāds, 2004, p. 24.

[6] *Ziemele, I*. State Continuity, Human Rights, and Nationality in the Baltic States. The Baltic States at Historical Crossroads (Ed. Jundzis T.). Riga: Latvian Academy of Sciences, 2001, p. 229.

[7] 2005. gada 12.maija Deklarācija par Latvijā īstenotā Padomju Sociālistisko Republiku Savienības totalitārā komunistiskā okupācijas režīma nosodījumu (Declaration of 12 May 2005 renouncing totalitarian communist occupation regime carried out in Latvia by the Union of Soviet Socialist Republics). *Latvijas Vēstnesis*, No. 77 (3235), 17 May 2005.

[8] Judgement by the Constitutional Court of the Republic of Latvia of 17 May 2011 in the case No. 2010-20-0106, Paragraphs 11 and 13 of the Conclusions, see also: judgement by the Constitutional Court of the Republic of Latvia of 29 November 2007 in the case No. 2007-10-0102 Paragraphs 11, 32.3 of the Conclusions.

[9] For example, some foreign professors (e.g., Professor Erwin Oberlender from the University of Mainz) object to the formulation "occupation" because they consider that in the case of Latvia it

would be more correct to use the word "annexation" (Svece A.: an interview with the Professor Erwin Oberlander from the University of Mainz "Between Occupation and Genocide"). *Diena*, 21 May 2004.

[10] LPSR mazā enciklopēdija (The Small encyclopaedia of the LSSR). Riga: Zinātne LPSR zin. akadēmija, Vol. II 1969, p. 261.

[11] *Plaude, E., Kripēns, J., Lielā, E.* Latvijas PSR Vēsture (History of the LSSR). Riga: Latvijas valsts izdevniecība, 1958, p. 183.

[12] No LR AP pirmās sesijas 1990. gada 3. maijs–4. augusts 31. sēdes (1990. gada 10. jūlija) stenogrammas (From the minutes of the 31st session of the Supreme Council of the Republic of Latvia, May 3–4 August 1990). *Latvijas Vēstnesis*, No. 190 (3138), 1 December 2004.

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[14] Ibid.

[15] Judgement by the Constitutional Court of the Republic of Latvia of 13 May 2010 in the case No. 2009-94-01, Paragraph 14.1 of the Conclusions. Available: *http://www.satv.tiesa.gov.lv/uplod/* [last viewed 12 August 2011].

[16] *Mednis, I*. Iezīmes mūsdienu Latvija politiskās elites portretam (Features of contemporary political elite in Latvia). *Latvijas vēsture*, No. 4 (60), 2005, p. 33.

[17] The Supreme Council of the LSSR both by its form of activity and its legal basis was a clone of other Supreme Councils of the USSR republics (for instance, Kazakhstan SSR or Moldavian SSR), as well as of the parliaments of the East European socialist republics of those times. The system, which had already been established in Stalin's times, functioned from its very beginning under administration performed by the Communist Party on the basis of directions given by its Political Bureau. The actual head of the state in the soviet model was Secretary General of the Communist party of the USSR because of the system under which the soviet republics' parliaments, or to put it in more precise terms, pseudo-parliaments worked, because of the election system and the actual possibilities of decision making.

[18] *Balodis, A*. Latvijas un latviešu vēsture (History of Latvia and people of Latvia). Riga: Neatkarīgā Teātra "Kabata" grāmatu apgāds, 1991, 248. lpp.

[19] Likumīgs parlaments, nelikumīgi likumi (Legitimate parliament, illegitimate laws). Intervija ar VDK Konstitucionālās aizsardzības daļas priekšnieku K. Eihmani (An interview with the head of the Department of Constitutional defence of the KGB K. Eihmanis). *Lauku Avīze,* 1990, 25. maijs.

[20] History of Latvia the 20th Century. Bleiere D., Butulis I., Feldmanis I., Stranga A., Zunda A. Riga: Jumava, 2006, 438.

[21] LPSR AP deklarācija "Par Latvijas Republikas neatkarības atjaunošanu" (Declaration of the Supreme Council of the LSSR "On the Restoration of Independence of the Republic of Latvia"). *Latvijas Republikas Saeimas un Valdības Ziņotājs*, No. 20, 1990.

[22] To liberalize state administration based on a single-party system to democratic one can certainly be done and it was done (1990–1993), but to a large extent it was a success because the top Communist party functionaries of the republic became loyal to the idea of an independent state. It was the capacity of the leading communist elite to prevent collisions was the foundation for transformation of the occupation institute into "the parliament of the transition period", which was able adequately to ensure legislator's functions till election of a democratic Saeima (Parliament) and till it became its activities. Although many communists should be mentioned, the first one among them should be pointed out Anatolijs Gorbunovs. He was the secretary of the Central Committee of the Communist party of Latvia and at the same time also the speaker of the Supreme Council of the LSSR (1988–1990). Anatolijs Gorbunovs was the one to become the speaker of the transition period parliament – the chairperson of the Supreme Council of the Republic of Latvia (1990–1993) and the speaker of the first Saeima of the second period of independence (1993–1995).

[23] Initially 122 MPs were elected to the Supreme Council from the list of the Popular Front of Latvia (henceforward PFL) but later 9 more MPs joined the faction – all in all 131 MPs out of 201. Thus an overwhelming majority from the LPF was established – almost two thirds – in the Parliament and it was possible to pass the Declaration of Independence.

[24] 4. maijs. Rakstu, atmiņu un dokumentu krājums par neatkarības deklarāciju (May 4. A collection of articles, memories and documents about the Declaration of Independence). Jundzis T. (zin. red.) Riga: LU žurnāla "Latvijas Vēsture" fonds, 2000, p. 403.

[25] Satversmes tiesas 2010. gada 13.maija spriedums lietā Nr. 2009-94-01 secinājumu daļas 14. punkts (Judgement of the Constitutional Court of 13 May 2010 in the case No. 2009-94-01, Paragraph 14 of the Conclusions).

[26] Satversmes tiesas 2007. gada 29. novembra spriedums lietā Nr. 2007-10-0102. (Judgement of the Constitutional Court of 29 November 2007 in the case No 2007-10-0102); *Levits, E.* 4. maija Deklarācija Latvijas tiesību sistēmā (May 4 Declaration in the context of law in Latvia). In: 4. maijs Rakstu, atmiņu un dokumentu krājums par Neatkarības deklarāciju (May 4. Collection of articles, memories, and documents on the Declaration of Independence). Ed. Jundzis T. Riga: LU žurnāla "Latvijas Vēsture" fonds, 2000, pp. 266–294.; Valsts prezidenta Valda Zatlera 2010. gada 19. janvāra raksts Nr. 19 Saeimas priekšsēdētājam G. Daudzem: Par grozījumiem likumā "Par svētku, atceres un atzīmējamām dienām" (Address of the President Valdis Zatlers to the Chair of the Saeima G. Daudze: On amendments to the law "On Days of Holidays, Commemoration and Celebration"). *Latvijas Vēstnesis*, No. 11 (4203), 21 January, 2010.

[27] *Levits, E.* 4. maija Deklarācija Latvijas tiesību sistēmā (May 4 Declaration in the context of law in Latvia). In: 4. maijs Rakstu, atmiņu un dokumentu krājums par Neatkarības deklarāciju (May 4. Collection of articles, memories, and documents on the Declaration of Independence). Ed. Jundzis T. Riga: LU žurnāla "Latvijas Vēsture" fonds, 2000, p. 53.

[28] *Jelāgins, J.* Latvijas rakstītā konstitūcija (The written Constitution of Latvia). *Jurista Vārds*, Nr. 10(52), 14 May 1997.

[29] Latvijas Republikas Satversmes tiesas spriedums lietā Nr. 2004-15-0106 (Judgement of the Constitutional Court in the case No. 2004-15-0106). Available: *www.satv.tiesa.gov.lv/upload/2004-15-0106.rtf* [last viewed 12 July 2011].

[30] Satversmes tiesas 2007. gada 29. novembra sprieduma lietā Nr. 2007-10-0102. Konstatējošās daļas 64.punkts (Judgement of the Constitutional Court of 29 November 2007 in the case No. 2007-10-0102, Paragraph 64 of the Findings).

[31] Latvijas Republikas Satversmes tiesas 2010. gada 13. maija spriedums lietā Nr. 2009-94-01 secinājumu daļas 11. punkts (Judgement of the Constitutional Court of the Republic of Latvia of 13 May 2010 in the case No. 2009-94-01, Paragraph 11 of the Conclusions). Available: *http://www.satv.tiesa.gov.lv/upload/spriedums_2009_94_01.htm* [last viewed 12 July 2011].

[32] Judgement of the Constitutional Court of 29 November 2007 in the case No. 2007-10-0102 presents an extensive analysis of continuity doctrine of the state of Latvia concluding that the continuity of the state is characterized by continuity or identity in international law. The basis of continuity of a state are also the claims linked with it that have been put forward in compliance with the applicable provisions or procedures of international law and the fact that these claims are accepted by the international community when there are doubts about identity of the state.

[33] *Lēbers, D. A.* Latvijas neatkarības atjaunošanas prasības dažos dokumentos pirms 1990. gada 4. maija (Requirements for independence of Latvia in some documents before 4 May 1990). In: 4. maijs. Rakstu, atmiņu un dokumentu krājums par Neatkarības deklarāciju (May 4. Collection of articles, memories, and documents on the Declaration of Independence). Ed. by Jundzis T. Riga: LU žurnāla "Latvijas Vēsture" fonds, 2000, pp. 28–29.

[34] *Balodis, R., Kārkliņa, A.* Divdesmit gadi kopš Latvijas Neatkarības deklarācijas: valststiesību attīstības tendences un risinājumi (Twenty years since Declaration of Independence of Latvia: trends and solutions of development of state law). *Jurista Vārds*, Nr.17/18, 27 April 2010; *Balodis, R., Kārkliņa, A.* Valsts tiesību attīstība Latvijā: otrais neatkarības laiks (Development of state law in Latvia: the second period of independence). *Journal of the University of Latvia.* No.1. Law. Latvijas Universitāte, 2010, pp. 25–52.

[35] *Avotiņš, V.* Valsts atjaunošanas jēga – pašiem lemt, kā dzīvot savā valstī (The significance of restoration of the state – to decide by ourselves how to live in our country) [interview with T. Jundzis, E. Levits]. *Neatkarīgā*, 29 April 2010.

[36] Ibid.

[37] *Lēbers, D. A.* Latvijas neatkarības atjaunošanas prasības dažos dokumentos pirms 1990. gada 4. maija (Requirements for independence of Latvia in some documents before 4 May 1990). In: 4. maijs. Rakstu, atmiņu un dokumentu krājums par Neatkarības deklarāciju (May 4. Collection of articles, memories, and documents on the Declaration of Independence). Ed. by Jundzis T. Riga: LU žurnāla "Latvijas Vēsture" fonds, 2000, p. 29.

[38] *Jundzis, T.* Tiesību sistēmas reforma valsts atjaunošanas periodā (1990–1993). Latvijas tiesību vēsture (Reform of the system of law in the period of restoration of the state. History of law in Latvia) (1990–1993). Ed. Prof. D. A. Lēbers. Riga: LU žurnāla "Latvijas Vēsture" fonds, 2000, p. 449.

[39] Latvijas Republikas tieslietu sistēma 1918–2008 (Legal system in Latvia 1918–2008). Riga: Tieslietu ministrija, 2008, p. 57.

[40] *Birkavs, V.* (Ievads), *Vītiņš V.* Vispārējs tiesību pārskats (General overview of law). Riga: Verdikts, 1993, p. 8.

[41] Par Latvijas Republikas pievienošanos starptautisko tiesību dokumentiem cilvēktiesību jautājumos: LPSR AP deklarācija (On joining of the Republic of Latvia to international human rights documents: Declaration of the Supreme Council of the LSSR). *Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs*, No. 21, 1990.

[42] *Lēbers, A., Bišers, I.* Komentārs Latvijas Republikas Satversmes IV nodaļai "Ministru kabinets" (Commentary on Chapter IV "Cabinet of Ministers" of the Constitution of the Republic of Latvia). Riga: Privatizējamā valsts SIA "Tiesiskās informācijas centrs", 1998, p. 24.

[43] *Jundzis, T*. Divvaldības periods. 1990. gada 4. maijs – 1991. gada 21. maijs/Latvijas Valsts atjaunošana (Period of dual power. 4 May 1990 – 21 May 1991/Restoration of the state of Latvia). 1986–1993 Latvijas Universitātes žurnāla "Latvijas Vēsture" fonds, Latvijas Zinātņu akadēmijas Baltijas stratēģisko pētījumu centrs. Riga, 1996, p. 250.

[44] Par darba grupas izveidošanu Latvijas Republikas Satversmes jaunās redakcijas un Latvijas Republikas pilsonības koncepcijas projekta izstrādāšanai (On setting up a working group for elaboration of the new wording of the Constitution of the Republic of Latvia and draft concept for the citizenship of the Republic of Latvia). Ordinance of the Supreme Council of the LSSR. *Latvijas Republikas Saeimas un Valdības Ziņotājs*, No. 33, 16 August 1990.

[45] *Endziņš, A*. Piezīmes par Neatkarības deklarāciju (Notes on the Declaration of Independence) In: 4. maijs Rakstu, atmiņu un dokumentu krājums par Neatkarības deklarāciju (May 4. Collection of articles, memories, and documents on the Declaration of Independence). Ed. Jundzis T. Riga: LU žurnāla "Latvijas Vēsture" fonds, 2000, p. 239.

[46] Work on the project was seriously hampered by conceptual uncertainties and ever growing demands by the MPs from the Popular Front of Latvia not to elaborate a new fundamental law but to amend the Constitution of 1922.

[47] *Apsītis, R*. Neatkarības deklarācijas pieņemšanas gadadienā (On the anniversary of adoption of the Declaration of Independence). *Jurista Vārds*, No. 16(371), 3 May 2005.

[48] Par Latvijas Republikas valstisko statusu. LR konstitucionālais likums ("On the Statehood of the Republic of Latvia". Constitutional law of the Republic of Latvia). *Ziņotājs*, No. 42, 24 October 1991.

[49] *Apsītis, R*. Neatkarības deklarācijas pieņemšanas gadadienā (On the anniversary of adoption of the Declaration of Independence). *Jurista Vārds*, No. 16(371), 3 May 2005.

[50] Latvijas Republikas Augstākās padomes (1990–1993) 1. sesijas 13. sēdes 1990. gada 28. maijā stenogramma, 13. burtnīca (The minutes of the first session of the Supreme Council (1990–1993) of the Republic of Latvia, sitting No. 13, volume 13). *Latvijas Vēstnesis*, attachment "Documents", 3 May 2004.

[51] Although the internationally recognized continuity principle doctrine was followed in all the three Baltic States, Latvia was the only one to reinstate its Constitution of 1922. Lithuania initially reinstated its Constitution of 1938 (nullifying some articles of authoritarian nature), then revoked it adopting a transition period Constitution which was enacted till 1992. Afterwards a completely new Constitution was adopted. A similar approach was taken in Estonia where initially the pre-war Constitution was reinstated to replace it in 1992 with a completely new Constitution. It must be noted that the neighbouring countries did not have another option because the last pre-war Constitutions were legitimately adopted (by people's referendum) yet in their substance they were undemocratic and authoritarian. Such Constitutions are sometimes called also "Bonapartean constitutions".

[52] *Balodis, R*. Ievads Latvijas Republikas Satversmes VIII nodaļas komentāriem. Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības (Introduction to Comments on the Chapter VIII of the Constitution of the Republic of Latvia. Comments on the Chapter VIII of the Constitution of the Republic of Latvia. Fundamental human rights). Group of authors, scientific ed. Prof. R. Balodis. *Latvijas Vēstnesis*. Riga, 2011, p. 6.

[53] For example, the structural unit of the USSR religious affairs in Latvia – the Council of Religious Cults of the Council of Ministers of the LSSR, which included also staff from the KGB – was transformed into the Department of Religious Affairs. The last commissioner of the LSSR Religious Affairs Arnolds Kublinskis became the director of the Department of Religious Affairs of the Republic of Latvia. Although the competence of the Council of Religious Cults was maintaining of a register of religious organizations, actually it was an administrative institution of atheist regime. (See: Balodis, R. Baznīcu tiesības (Rights of the Church). Riga: Reliģijas Brīvības Asociācija, 2002, pp. 258–259).

[54] *Jansone, D., Reinholde, I., Ulnicāne, I.* Latvijas publiskā pārvalde (Public administration in Latvia). Riga: EuroFaculty, 2002, p. 45.

[55] *Lēbers, A., Bišers, I.* Komentārs Latvijas Republikas Satversmes IV nodaļai "Ministru kabinets" (Commentary on Chapter IV "Cabinet of Ministers" of the Constitution of the Republic of Latvia). Riga: Privatizējamā valsts SIA "Tiesiskās informācijas centrs", 1998, p. 27.

[56] Available: *www.arhivi.lv/sitedata/./5%20saeimas%201%20sedes%20prot.PDF* [last viewed 12 August 2011].

[57] *Levits, E.* Latvijas tiesību sistēmas attīstības iezīmes uz XXI gadsimta sliekšņa (Features of legal system in Latvia on the verge of the XXI century). In: Latvijas tiesību vēsture (1914–2000) (History of law in Latvia, 1914–2000. Ed. Prof. Dr. iur. D. A. Lēbers. Riga: LU žurnāla "Latvijas Vēsture" fonds, 2000, p. 493.

[58] Ministru kabineta iekārtas likums (Law on the Cabinet of Ministers): Law of the Republic of Latvia. *Latvijas Republikas Saeimas un Ministru Kabineta Ziņotājs*, No. 281, 1993.

[59] Since 1 June 1996 this law is called law "On the Structure of the Cabinet of Ministers"). Available: *http://www.mk.gov.lv/lv/mk/vesture/* [last viewed 9 August 2011].

[60] *Lēbers, A., Bišers, I.* Komentārs Latvijas Republikas Satversmes IV nodaļai "Ministru kabinets" (Commentary on Chapter IV "Cabinet of Ministers" of the Constitution of the Republic of Latvia). Riga: Privatizējamā valsts SIA "Tiesiskās informācijas centrs", 1998, p. 27.

[61] Stringent restrictions concerning the public officials, including also MPs are laid down in the law "On Prevention of Conflict of Interest in Activities of Public Officials". *Latvijas Vēstnesis*, No. 69 (2644), 2002.

[62] Saeimas kārtības rullis (Rules of Order of the Saeima): Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 96, 1994.

[63] Grozījumi Latvijas Republikas Satversmē (Amendments to the Constitution of the Republic of Latvia): Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 331/332 (1046/1047), 1997.

[64] Grozījumi Latvijas Republikas Satversmē (Amendments to the Constitution of the Republic of Latvia): Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 70 (2645), 2002.

[65] Grozījumi Saeimas vēlēšanu likumā (Amendments to the Saeima Elections Law): Law of the Republic of Latvia: *Latvijas Vēstnesis*, No. 43, 2009.

[66] Satversmes grozījumi juristu domās (Amendments to the Constitution as seen by legal specialists). *Jurista Vārds*, No. 17 (570), 2009; *Dambergs, M*. Vēlēšanu sistēmas evolūcija, nevis revolūcija. Intervija ar Vēlēšanu reformas biedrības valdes priekšsēdētāju V. Liepiņu (Evolution and not revolution of the election system. An interview with the Chair of the Board of the Election Reform Society V. Liepiņš). *Jurista Vārds*, No. 6(559), 2009.

[67] Jundzis is convinced that the root of problems is the election system in Latvia. Available: *http://www.apollo.lv/portal/news/articles/246219* [published 8 August 2011; last viewed 9 August 2011].

[68] Ministru kabineta kārtības rullis: MK noteikumi Nr. 300 (Rules of Order of the Cabinet of Ministers: Cabinet of Ministers Regulations No. 300). *Latvijas Vēstnesis*, No. 58 (4044), 2009.

[69] *Lēbers, A., Bišers, I.* Komentārs Latvijas Republikas Satversmes IV nodaļai "Ministru kabinets" (Commentary on Chapter IV "Cabinet of Ministers" of the Constitution of the Republic of Latvia). Riga: Privatizējamā valsts SIA "Tiesiskās informācijas centrs", 1998, p. 28.

[70] *Daukšte, A.* Cīņa par prezidenta amatu tikai sākas (The fight for President's post only begins). *Rīgas Balss*, 14 February 1996.

[71] *Jundzis, T.* Tiesību sistēmas reforma valsts atjaunošanas periodā (1990–1993). Latvijas tiesību vēsture (Reform of the system of law in the period of restoration of the state. History of law in Latvia) (1990–1993). Ed. Prof. D. A. Lēbers. Riga: LU žurnāla "Latvijas Vēsture" fonds, 2000, p. 460.

[72] Valsts prezidenta ievēlēšanas likums (Presidential Election Law): Law of the Republic of Latvia. *Latvijas Vēstnesis,* No. 79, 2007.

[73] Par Valsts prezidenta vēlēšanu regulējumu līdz Valsts prezidenta ievēlēšanas likuma pieņemšanai (On regulation of election of the President till adoption of the Presidential Election Law), see: *Kukule, S.* Valsts prezidenta vēlēšanas: tiesiskais regulējums (Elections of the President: legal regulation). *Jurista Vārds*, No. 41(444), 17 October 2006.

[74] Amendments to the Constitution of Latvia: Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 331/332 (1046/1047), 1997.

[75] For example, in September 2012 the Commission declared its opinion about the fundamentals of the Constitution of the Republic of Latvia and its inviolable nucleus. The opinions of the Commission are available at: *http://www.president.lv/pk/ content/?cat_id=2896* [last viewed 1 November 2012].

[76] On 30 April 2008 the Constitutional Law Committee published a large-scale study on improvements of the mechanism of extraordinary elections of the Parliament. See: Viedoklis par Saeimas priekšlaicīgu vēlēšanu mehānisma pilnveidošanu (An opinion about improving the mechanism of extraordinary elections of the Saeima). Available: *http://www.president.lv/images/modules/items/PDF/item_1680_KTK_30042008_Viedoklis_par_Saeimas_priekslaicigu_velesanu_mehanisma_pilnveidosanu.pdf* [last viewed 11 August 2011].

[77] See, for example, *Serdāns, V., Mūrniece, I.* Latvijai laiks ievākt ražu (Time to reap harvest in Latvia) [interview with the President]. *Latvijas Avīze*, 30 December 2006.

[78] Till 1993 the State Audit Office operated in accordance to 17.12.1991 law of the Supreme Council of the Republic of Latvia "On State Audit Office", which stipulated that the State Audit Office is formed by the Supreme Council and the State Audit Office reports directly to it. See on history of State Audit Office: *http://www.lrvk. gov.lv/index.php?id=1715*.

[79] An idea about the need of an institution that would safeguard the Constitution was voiced in Latvia for the first time by the Saeima member Pauls Šīmanis in 1930 in his article "Eight years of the Constitution of Latvia". Taking up this idea, on 8 May 1934 the Saeima member Hermanis Štegmanis submitted a proposal to supplement the Constitution with Article 86.1 that would provide for setting up a special state court. Yet, this proposal did not receive the necessary majority of votes. See homepage of the Constitutional Court: *http://www.satv.tiesa.gov.lv/?lang=1&mid=3* [last viewed 1 August 2011].

[80] *Rodiņa, A*. Konstitucionālās sūdzības teorija un prakse Latvijā (Theory and practice of constitutional complaint in Latvia). *Latvijas Vēstnesis*, 2009, p. 46.

[81] Par Latvijas Republikas neatkarības atjaunošanu (On the Restoration of independence of the Republic of Latvia). Declaration of the Supreme Council of LSSR. *LR Saeimas un MK Ziņotājs*. No. 20, 1990.

[82] Par tiesu varu (law "On Judiciary"). Law of the Supreme Council. *Ziņotājs*. No. 1, 1993.

[83] Satversmes tiesas likums (Constitutional Court Law). Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 103 (588), 1996.

[84] *Tihonovs, I.* Satversmes tiesa nevar tikt Satversmē (The Constitutional Court cannot get into the Constitution). *Diena*, 9 August 1995.

[85] Grozījums Latvijas Republikas Satversmē (Amendments to the Constitution of the Republic of Latvia): Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 100 (585/586), 1996.

[86] Homepage of the Constitutional Court: *http://www.satv.tiesa.gov.lv/?lang=1&mid=3* [last viewed 1 August 2011].

[87] *Endziņš, A*. Latvijas Republikas Satversmes tiesas loma Latvijas Republikas Satversmē noteikto vērtību aizsardzībā. Konstitucionālās tiesas loma valsts konstitūcijā nostiprināto vērtību aizsardzībā. (The role of the Constitutional Court of the Republic of Latvia in protecting the values enshrined in the Constitution. The role of the Constitutional Court in protection of values enshrined in the Constitution). Collection of materials from the Constitutional Court conference in 2006. Riga: Tiesu namu aģentūra, 2007, p. 9.

[88] *Benfelde, S.* Pāris trušādiņu un politiska tiesa (A couple of rabbit skins and a political trial). *Neatkarīgā Rīta Avīze*, 26 January 2000.

[89] *Zīle, L*. Visu varu Satversmes tiesai (All power to the Constitutional Court). *Diena,* 27 March 2002; Feldhūne, G. Smaga ir Satversmes tiesas roka (Heavy is the hand of the Constitutional Court). *Diena*, 14 April 2002.

[90] *Ziemele,* I. Satversmes tiesa – līdzeklis integrācijai vai pašizolācijai jeb atsevišķas pārdomas Satversmes tiesas sakarā (The Constitutional Court – means for integration or self-isolation, or some considerations about the Constitutional Court). *Latvijas Vēstnesis*, 15 June 1996. Quoted by: *Meikališa, Ā*. Tiesu vara Latvijā (Judiciary in Latvia). Riga: Avots, 1997, p. 114.

[91] See, for example: the judgement of the Constitutional Court of 1 October 1999 in the case No. 03-05 (99), Paragraph 1 of the Conclusions). Available: *http://www.satv.tiesa.gov.lv/upload/03-05(99).rtf* [last viewed 1 August 2011].

[92] See: the judgement of the Constitutional Court of 22 February 2002 in the case No. 2001-06-03, Paragraphs 5.1 and 6.1 of the Conclusions; the Constitutional Court takes a decision on reimbursements for MPs. *Jurista Vārds*, No. 2 (235), 29 January 2002.

[93] *Ušacka, A*. Satversmes 8. nodaļas "Cilvēka pamattiesības" interpretācija Satversmes tiesas spriedumos (Interpretation of Chapter VIII "Fundamental Human Rights" of the Constitution in judgements of the Constitutional Court). *Latvijas Vēstnesis*, 27 November 2001.

[94] Judgement of the Constitutional Court of 24 March 2000 in the case No. 04-07 (99), Paragraph 3 of the Conclusions. Available: *http://www.satv.tiesa.gov.lv/upload/04-07(99).rtf* [last viewed 1 August 2011].

[95] *Fririhsone, M., Pankovska, E.* Satversmes tiesas tiesnesei pārmet dokumenta viltošanu (A judge of the Constitutional Court is alleged in forging documents). *Dienas Bizness*, 24 February 2011.

[96] ST aptur Muižnieces pilnvaras (The Constitutional Court suspends Muižniece's mandate). Available: *http://www.diena.lv/sabiedriba/zinas/st-aptur-muiznieces-pilnvaras-13886976*.

[97] *Gailīte, D.* Satversmes tiesas priekšsēdētājs Aivars Endziņš intervijā "Jurista Vārdam" (An interview with the president of the Constitutional Court Aivars Endziņš). *Jurista Vārds*, No. 49 (452), 12 December 2006.

[98] *Gertners, E.* Osipovu tomēr virzīs ST tiesneses amatam (Osipova will still be nominated for the Constitutional Court). *Neatkarīgā*, 29 June 2011.

[99] *Pleps, J., Pastars, E.* Satversmes lasīšana Satversmes tiesā (Reading of the Constitution at the Constitutional Court). *Jurista Vārds*, No. 47, 20 November 2007.

[100] *Feldhune, G.* Smaga ir Satversmes tiesas roka (Heavy is the hand of the Constitutional Court). *Diena,* 17 April 2002; *Zīle, Z. L.* Visu varu Satversmes tiesai (All power to the Constitutional Court). *Diena, 27* March 2002.

[101] *Ozoliņš, A.* Kūtra kārtība (Order of Kūtris). *Ir*, 3-9 March, 2011.

[102] Available: *http://www.citadiena.lv/2010/01/20/budzeta-lemsana-satversmes-tiesa/* [last viewed 18 September 2011].

[103] *Gailīte, D.* Satversmes tiesas priekšsēdētājs Aivars Endziņš intervijā "Jurista Vārdam" (An interview with the president of the Constitutional Court Aivars Endziņš). *Jurista Vārds*, No. 49 (452), 12 December 2006.

[104] Grozījumi Satversmes tiesas likumā (Amendments to the Law on the Constitutional Court): Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 460/464 (2371/2375), 2000.

[105] *Rodiņa, A.* Konstitucionālās sūdzības teorija un prakse Latvijā (Theory and practice of constitutional complaint in Latvia). *Latvijas Vēstnesis*, 2009, p. 69, 17.

[106] There are many examples, one of the last ones is the judgement by the Administrative Cases Department of the Senate of the Supreme Court in the case No. SA-5/2006 in which the aspects of the Saeima election campaign were evaluated. See: Par 9. Saeimas vēlēšanu norises tiesiskumu un pamatu vēlēšanu atzīšanai par prettiesiskām (On legitimacy of the 9th Saeima elections and the grounds for recognizing the elections as illegitimate). *Jurista Vārds*, No. 50 (453), 19 December 2006.

[107] The judgement by the Administrative Cases Department of the Senate of the Supreme Court of the Republic of Latvia in the case No. SKA-474 of 10 December 2007.

[108] In a number of its judgements the Constitutional Court has ruled that number of the principles of law arises from Article 1 of the Constitution – from the notion of a democratic republic. See, for example, the judgement by the Constitutional Court in the case No. 03-05(99) of 1 October 1999 and the judgement of 24 March 2000 in the case No. 04-07(99), the judgement of 21 January 2002 in the case No. 2001-09-01 and others.

[109] *Kovaļevska, A.* Tiesības uz labu pārvaldību: salīdzinošs skatījums uz Eiropas Savienības valstu praksi Latvijas kontekstā (I) (Rights to good governance: comparative analysis of the practice of the Member States of the European Union). *Likums un Tiesības*, Vol. 8, No. 8(84), 2006.

[110] Judgement of the Constitutional Court of 26 November 2009, in the case No. 2009-08-01, judgement in the case No. 2002-12-01 of 25 March 2003.

[111] Judgement of the Constitutional Court of 25 October 2004 in the case No. 2004-03-01, Paragraph 9.2 of the Conclusions.

[112] Judgement of the Constitutional Court of 24 March 2000 in the case No. 04-07(99), Paragraph 3.

[113] Judgement of the Constitutional Court of 18 January 2010 in the case No. 2009-11-01, Paragraph 7.2).

[114] Decision of the Constitutional Court of 16 April 2008 on terminating court proceedings in the case No. 2007-21-01.

[115] Judgement of the Constitutional Court of 1 October 1999 in the case No. 03-05(99), Paragraph 1 of the Conclusions.

[116] See, for example, judgement of the Constitutional Court of 19 March 2002 in the case No. 2001-12-01, Paragraph 3.1 of the Conclusions, and the judgement of 25 March 2003 in the case No. 2002-12-01, Paragraph 5 of the Conclusions).

[117] *Švarcs, L.* Satversmes tiesa: konceptuāli par tiesneša statusu (Constitutional Court in Latvia: conceptually about the status of judges). *Jurista Vārds*, No. 4, 26 January 2010.

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[168] *Balodis, R.* Valsts un Baznīca (The State and the Church). Riga: Nordik, 2000, p. 203.

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[197] *Levits, E.* Piezīmes par Satversmes 8. nodaļu – Cilvēka pamattiesības (Notes on Chapter 8 of the Constitution – Fundamental human rights). Satversme un cilvēktiesības: gadagrāmata 1999 (The Constitution and human rights: yearbook 1999). *Cilvēktiesību žurnāls*, 9–12. Riga: Latvijas Universitāte, 1999, p. 17.

[198] According to the legal scholar Dr. iur. J. Pleps the Constitution consists of: "(1) Fundamental principles of the Constitution (Articles 1, 2, 3, 4, 6, and 77) as formulated by Article 77 of the Constitution and the principles of rights derived from these provisions; (2) Provisions that define the state power and the state power institutions implementing the state power, as well as their competences and mutual relations (instrumental part); (3) Fundamental rights catalogues – provisions that stipulate relations between person and state." (From Pleps' Doctoral Thesis "Satversmes iztulkošanas konstitucionāli tiesiskie un metodoloģijas problēmjautājumi (Constitutionally legal and methodological issues of interpretation of the Constitution) 2011, p. 141.)

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[200] *Levits, E.* Tiesību normu interpretācija un Satversmes 1. panta demokrātijas jēdziens (Interpretation of legal provisions and the notion of democracy in Article 1 of the Constitution). *Cilvēktiesību žurnāls*, No. 4, 1997.

[201] Judgement by the Constitutional Court of 13 May 2010 in the case No. 2009-94-01, Paragraph 16.1 of the Conclusions, see also judgement by the Constitutional Court of 10 June 1998 in the case No. 04-03(98) the Conclusions, and judgement of 24 March 2000 in the case No. 04-07(99).

[202] *Pleps, J.* Pamattiesību katalogs starpkaru periodā (Fundamental rights catalogue in the period between the wars). *Jurista Vārds*, No. 48 (553), 23 December 2008.

[203] *Neimanis, J.* Ievads tiesībās (Introduction to law). Riga: zv.adv. J. Neimanis, 2004, p. 80.

[204] Examining Chapter 2 of the Constitution in the third reading, the draft did not get the necessary support at the Constitutional Assembly of the representatives of people – 62 voted "for", 6 were "against", but 62 members of the Constitutional assembly abstained.

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[207] The constitutions of these countries contain provisions that lay down the following duties as constitutional: to respect the constitutional basis of the country; to protect the country, to maintain the country (to pay taxes), as well as specific constitutional duties. The duty to maintain the country as

a constitutional duty of citizens has been recognized in very many countries because every citizen must participate in covering expenses of the state and municipalities, by paying taxes and duties as set by the law. Even if it has not been stipulated by the Constitution for various reasons it is an essential provision in constitutional laws (for example, in France). Sometimes the duty to pay taxes is set down as a constitutional duty of all the individuals residing in the country (e.g., Article 46 of the Constitution of Armenia, Article 30 of the Constitution of Japan, Article 56 of the Constitution of China, Article 84 of the Constitution of Poland) or as a duty only of citizens (e.g., Article 60 of the Constitution of Bulgaria). To protect the state from foreign armed attacks is manifested as a duty in compulsory military or alternative service for male citizens. Such provisions exist, for example, in the Constitution of Lithuania (Article 139), in the Constitution of Russia (Article 59), in the Constitution of China in Article 53, in the Constitution of Estonia (Article 124), in the fundamental law of Germany (12a §), in the Constitution of Poland (Article 60), and in the Constitution of Armenia (Article 47). Women are not drafted in the army during the times of peace but by way of an exception under conditions of war (for example, in Russia and Germany) those women who have obtained special military education may be subject to call-up in the army. Respect of constitutional basis of the state. This duty may be manifested as "loyalty to the state" (e.g., Article 82 of the Constitution of Poland), while the Constitution of India stipulates that "the duty of citizens of the state is to cherish and live by noble ideas that inspired the people to fight for independence and to protect sovereignty, unity and integrity of the state". Constitutional duties, as well as the rights and freedoms may be granted also to citizens from other states (for example, Articles 9 and 55 of the Constitution of Estonia) providing that the rights enshrined in the Constitution are equally guaranteed to all the persons residing in Estonia – not only to citizens of Estonia but also to citizens from other countries and to stateless persons who, while being in Estonia, must respect its constitutional system. As specific provisions one should mention the family duty laid down in Article 27 of the Constitution of Estonia to bring up and take care of children and for those members of the family who needs assistance, or the provision in the Constitution of Japan (Article 26) for parents and guardians to ensure schooling of children.

[208] Senāta Apvienotās sapulces 1937. gada 25. septembra spriedums Nr. 17 (Judgement No. 17 of the Joint Meeting of the Senate of 25 September 1937). Latvijas Senāta spriedumi (1918–1940) (Judgements by the Senate of Latvia, 1918-1940). Vol. 1, Senāta Apvienotās sapulces spriedumi (Judgements by the Joint Meeting of the Senate). Latvijas Republikas Augstākā tiesa (the Supreme Court of the Republic of Latvia). Senatora Augusta Lēbera fonds (Fund of Senator Augusts Lēbers). By: *Šmite A., Poriete A.; Ed. Krūmiņa L.* Riga: Latvijas Republikas Augstākā tiesa; Senatora Augusta Lēbera fonds, 1997, p. 354.

[209] Latvijas Republikas 6. Saeimas Juridiskās komisijas 1998. gada 27. aprīļa sēdes protocols (Minutes of the Legal Committee of the 6th Saeima of the Republic of Latvia, 27 April 1998) [not published].

[210] Valsts valodas likums (Official Language Law). Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 428/433 (1888/1893), 1999.

[211] Grozījumi Latvijas Republikas Satversmē (Amendments to the Constitution of Latvia): Law of the Republic of Latvia. *Latvijas Vēstnesis,* No. 70 (2645), 2002.

[212] See: debates at the sitting of the Saeima of 20 March 2002 where the mentioned amendments to the Constitution were adopted in the first reading. Available: *http://www.Saeima.lv/steno/2002/st_2003/st2003.htm* [last viewed 4 August 2011]

[213] Judgement of the Constitutional Court of 13 March 2001 in the case No. 2000-08-01-09).

[214] See: for example, judgement of the Constitutional Court of 10 June 2011 in the case No. 2010-69-01, Judgement of the Constitutional Court of 15 March 2010 in the case No. 2009-44-01, and others).

[215] *Kovaļevska, A*. Tiesības uz atbilstošu dzīves līmeni (Rights to adequate standard of living). *Jurista Vārds*, No. 51/52, 22 December 2009.

[216] *Levits, E*. Cilvēktiesību normas un to juridiskais rangs Latvijas tiesību sistēmā (Human rights provisions and their legal scope in the system of law in Latvia). *Juristu žurnāls*, No. 5, Cilvēktiesību Žurnāls, No. 6, 1997, p. 32–53.

[217] Satversme un cilvēktiesības: gadagrāmata 1999 (The Constitution and human rights: yearbook 1999). Cilvēktiesību žurnāls, 9–12. Riga: Latvijas Universitāte, 1999, p. 64–65.

[218] Ibid., p. 51.

[219] *Vildbergs, H. J., Feldhūne, G*. Atsauces Satversmei: mācību līdzeklis (References to the Constitution: a study aid). Riga: Latvijas Universitāte, 2003, p. 125.

[220] *Pleps, J., Pastars, E., Plakane, I.* Konstitucionālās tiesības (Constitutional law). Riga: *Latvijas Vēstnesis*, 2004, p. 719.

[221] Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības (Comments on the Constitution of the Republic of Latvia. Chapter VIII. Fundamental human rights). Group of authors, scientific ed. Prof. R. Balodis. *Latvijas Vēstnesis*. Riga, 2011, p. 746.

[222] *Pleps, J., Pastars, E.* Satversmes lasīšana Satversmes tiesā (Reading of the Constitution at the Constitutional Court). *Jurista Vārds*, No. 47, 20 November 2007.

[223] Judgement by the Constitutional Court of 18 February 2011 in the case No. 2010-29-011, Paragraph 15 of the Conclusions.

[224] Judgement by the Constitutional Court of 10 February 2011 in the case No. 2009-74-01, Paragraph 17 of the Conclusions.

[225] Judgement by the Constitutional Court of 16 May 2007 in the case No. 2006-42-01, Paragraph 10 of the Conclusions.

[226] Judgement by the Constitutional Court of 30 March 2011 in the case No. 2010-60-01, Paragraph 23 of the Conclusions.

[227] Likums par Valsts cilvēktiesību biroju (law "On State Human Rights Office"). Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 221, 1996 (not effective).

[228] Ed. Ziemele I. Cilvēktiesības Latvijā un pasaulē (Human rights in Latvia and in the world). Riga: SIA "Izglītības soļi", 2000. p. 305.

[229] *Balodis, R.* Konstitucionālo tradīciju īpatnības Apvienotajā Karalistē (Peculiarities of constitutional traditions in the UK). Rakstu kopas "Apvienotās Karalistes konstitucionālās tiesības" 1. raksts (The 1st article from the series "Constitutional law in the UK). *Likums un Tiesības*, Vol. 6, No. 5(57), 2004.

[230] The English name used is "Ombudsman" but following the proposal of the State Terminology Commission the Latvian equivalent "Tiesībsargs" (guardian of law) has been adopted. "Ombudsman" in translation from the Swedish *ombud* is *authorized agent*; thus it means "people's authorized agent". The proposal to use the Latvian version perhaps is more correct from the linguistic point of view but not from a practical position because prosecutors, police officers and even the personnel of the Ministry of Justice are often called "guardians/enforcers of law" in mass media thus making the institute of Ombudsman less recognizable in the Latvian language.

[231] *Brūveris, O., Biksiniece, L.* Tiesībsarga pilnvaras ir jāpaplašina (The Ombudsman's authority must be expanded). *Jurista Vārds*, No. 32 (290), 9 September 2004.

[232] Available: *http://www.tiesibsargs.lv/lat/tiesibsargs/vesture/* [last viewed 1 August 2011].

[233] *Kukule, S.* Vai Latvijai nepieciešams tautas tiesībsargs (Does Latvia need an Ombudsman for the nation). *Jurista Vārds*, No. 44(349), 16 November 2004.

[234] It is worth mentioning that 2/3 of complaints submitted to the State Human Rights Office according to the office itself do not relate to the mandate of the Office. Thus, for example, 20-25% of the correspondence between the Office and the population are to do with the problems of the population, with solving of issues related to flats (From the report by experts on functions of the State Human Rights Office and Ombudsman in Latvia. *Jurista Vārds,* No. 19 (212), 19 June 2001.

[235] Recommendation of the Committee of Ministers of the Council of Europe 9 (2001) appeals to the states to facilitate and use alternative dispute resolution means between institutions and private persons, Recommendation 1615 (2003) proposes the states to establish autonomous institution independent of the government, whose task would be to protect person from governance mistakes or injustices committed by them. EU proposes to entrench this institution constitutionally and to stipulate its functions in law. The institution should be provided the rights to submit to the government recommendations for elimination of mistakes and no governmental structure or institution should be indicating how and what it must do.

[236] Projekts par Ombuda institūciju (Project on the Ombudsman's institution). *Latvijas Vēstnesis*, No. 39 (2426), 9 March 2001.

[237] *Kukule, S.* Vai Latvijai nepieciešams tautas tiesībsargs (Does Latvia need an Ombudsman for the nation?). *Jurista Vārds*, No. 44(349), 16 November 2004.

[238] *Barladjana, M.* Ombudsmeņa institūts: vēsture, teorija un tiesiskie aspekti (Ombudsman's institution: history, theory, and legislative aspects). *Jurista Vārds*, No. (427), 20 June 2006.

[239] *Gobiņš, M.* Kāpēc Latvijai ir vajadzīgs tiesībsargs? (Why does Latvia need an Ombudsman?) *Diena,* 13 December 2006.

[240] *Arāja, D.* Tiesībsargs – bez naudas un jaudas (Ombudsman – without money and capacity). *Diena,* 13 November 2006.

[241] Tiesībsarga likums (Law on ombudsman): Law of the Republic of Latvia. *Latvijas Vēstnesis*, Nr. 65(3433), 2006.

[242] The judgement of the Constitutional Court of 25 November 2010 in the case No. 2010-06-01), Paragraph 14.4 of the Conclusions.

[243] Ibid.

[244] *Egle, I.* Tiesībsargam divi pretendenti (Two candidates for Ombudsman's Office). Diena, 6 December 2006; *Mūrniece, I.* Tiesībsarga amatam divi pretendenti (Two candidates for Ombudsman's Office). *Latvijas Avīze*, 7 December 2006; *Antonēvičs, M.* Jautājums atlikts (The issue has been postponed). *Latvijas Avīze*, 13 January 2007; *Kuzmina, I.* Jāmeklē jauni kandidāti (New candidates must be looked for). *Latvijas Avīze*, 12 January 2007; *Kuzmina I.* Tiesībsarga meklēšanā – pīppauze (Looking for an Ombudsman – taking a break). *Latvijas Avīze*, 16 January 2007; *Lulle, B.* Dramaturģija nevietā (Drama out of place). *Neatkarīgā*, 13 January 2007.

[245] The Ombudsman's Office: the employer can restrict expression of national views. Available: *http://www.delfi.lv/archive/print.php?id=29787097* [last viewed 9 August 2011].

[246] Koncepcija ombuda institūcijas ieviešanai Latvijā (Concept for introducing the Ombudsman's institution in Latvia). *Likums un Tiesības*, January 2001.

[247] *Lulle, B.* Circenes lāča pakalpojums (Circene's ill office). *Neatkarīgā*, 23 February 2011; *Kārkliņš, K.* Uzklausa, bet viedokli nemaina. *Neatkarīgā*, 23 February 2011.

[248] Grozījumi Tiesībsarga likumā (Amendments to the Ombudsman Law): Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 82 (3866), 2008.

[249] Iedzīvotāju aptauja par Latvijas Republikas neatkarību (Population survey on independence of the Republic of Latvia). Available: *http://www.cvk.lv* [last viewed 1 May 2011].

[250] *Taurēns J.* 1991. gada 3. marta referendums un tā nozīme Latvijas neatkarības atjaunošanā (Referendum of 3 March 1991 and its significance in the restoration of independence of Latvia). Available: *http://web.cvk.lv/pub/upload_file/Konference_J_Taurens_1991_gada_3_marta_referendums.pdf* [last viewed 1 October, 2012].

[251] Judgement of the Constitutional Court of 29 November 2007 in the case No. 2007-10-0102; judgement of 7 April 2009 in the case No. 2008-35-01.

[252] *Dišlers, K.* Ievads Latvijas valststiesību zinātnē (Introduction to state law of Latvia). Riga: A. Gulbis, 1930, p. 110.

[253] The issues concerning accession to the EU were evaluated by a working group set up by order of the Prime Minister. See ordinance by the Prime Minister of 20 April 2011 No. 147 "On the working group for elaboration of the draft law ensuring compatibility of the constitutional system of Latvia with the European Community law"). *Latvijas Vēstnesis*, No. 63, 24 April 2001.

[254] Judgement by the Constitutional Court of 29 November 2007 in the case No. 2007-10-0102.

[255] Judgement by the Constitutional Court of 7 April 2009 in the case No. 2008-36-01.

[256] *Сахаров, А.Н.* Институт президенства в современном мире (Presidential institute in modern world). Moscow: Юридическая литература, 1994, p. 129.

[257] *Dišlers, K.* Ievads Latvijas valststiesību zinātnē (Introduction to state law of Latvia). Riga: A. Gulbis, 1930, p. 177.

[258] Valsts prezidenta Konstitucionālo tiesību komisija. Viedoklis par Saeimas priekšlaicīgu vēlēšanu mehānisma pilnveidošanu (Constitutional Law Committee of the President. An opinion about improving the mechanism of extraordinary elections of the Saeima). *Latvijas Vēstnesis*, No. 69, 7 May 2008.

[259] Initiatives of this kind were sent to the Saeima on 3 June 2008, on 6 August 2008, on 21 January 2009, and on 16 March 2011. The last one submitted on 16 March 2011 was the most specific one and it proposed to stipulate in Article 48 specific preconditions when the President would have the rights to initiate dissolution of the Saeima. See: *http://www.president.lv/pk/content/?cat_id=6387* [last viewed 12 June 2011]; See the initiative sent on 16 March in: Proposal on amendments to the Constitution by the President). *Jurista Vārds*, No.12 (659), 2011.

[260] *Dišlers, K.* Ievads Latvijas valststiesību zinātnē (Introduction to state law of Latvia). Riga: A. Gulbis, 1930, p. 177.

[261] Saeimas atlaišana: Satversme un neskaidrie jautājumi (Dissolution of the Saeima: the Constitution and the unclear issues). *Jurista Vārds*, No. 23 (670), 7 June 2011.

[262] Decision of Administrative Court on refusal to accept application. *Jurista Vārds*, No. 28 (675), 12 July 2011.

[263] Available: *http://web.cvk.lv/pub/public/29957.html* [last viewed 17 June 2011].

[264] Referendum is not held if the Saeima once again votes on this issue and if no less than ¾ of all the MPs participate in the debate (Article 72 of the Constitution).

[265] *Dišlers, K.* Referendumu veidi Latvijas Republikas Satversmē (Types of referendums in the Constitution of the Republic of Latvia). *Jurists*, No. 3, 1930.

[266] *Pleps, J.* Satversmes 72. pants (Article 72 of the Constitution). *Jurista Vārds*, No. 12 (465), 20 March, 2007.

[267] The disputable amendments to the law on security institutions envisaged to extend the competence of the Cabinet of Ministers in issues related with the state security providing that the Council of the

State Security is led not by professionals of security issues but by the Prime Minister. Heads of law enforcement agencies expressed concerns about these amendments because the scope of people who would receive operative information would widen.

[268] Juristi analizē Valsts prezidentes rīcību un Satversmes 81. pantu (Lawyers analysing the activities of the President and Article 81 of the Constitution). *Jurista Vārds*, No. 12(465), 20 March 2007.

[269] *Pleps, J.* Satversmes 72. pants (Article 72 of the Constitution). *Jurista Vārds*, No. 12 (465), 20 March, 2007.

[270] Ibid.

[271] *Ņikuļceva, I.* Vēlētāju likumdošanas iniciatīva Latvijā (Electors' legislative initiative in Latvia). *Jurista Vārds*, No. 49, 8 December 2009.

[272] 1414.6% of the citizens with voting rights or more than 19% from those who had participated in the last Saeima elections had signed this draft law, therefore the amendments to the Constitution were submitted to the President who submitted them to the Saeima. See: *http://web.cvk.lv/pub/public/29005.html* [last viewed 11 July 2011].

[273] Available: *http://web.cvk.lv/pub/public/29005.html* [last viewed 11 July 2011].

[274] The number of signatures collected was 11.9% or more than 10% of the citizens with voting rights participating in the last Saeima elections therefore the amendments proposed by electors to the law "On State Pensions" were submitted to the President who submitted them to the Saeima.

[275] Available: *http://web.cvk.lv/pub/public/29052.html* [last viewed 11 July 2011].

[276] Grozījumi Latvijas Republikas Satversmē (Amendments to the Constitution of the Republic of Latvia): Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 76 (2841), 2003.

[277] Kādēļ Latvijas konstitūcijā nepieciešami labojumi? Darba grupas Satversmes grozījumu izstrādāšanai piedāvātā projekta teorētiskais pamatojums (See: Why does the Constitution in Latvia need amendments? Theoretical motivation proposed by the working group developing the draft amendments to the Constitution). *Jurista Vārds*, No. 14, 5 May 2001.

[278] Available: *www.cvk.lv/cgi-bin/./sae8dev.bals_rez03e* [last viewed 28 July 2011].

[279] Kādēļ Latvijas konstitūcijā nepieciešami labojumi? Darba grupas Satversmes grozījumu izstrādāšanai piedāvātā projekta teorētiskais pamatojums (Why does the Constitution of Latvia need amendments? Theoretical motivation proposed by the working group elaborating the draft amendments to the Constitution). *Jurista Vārds*, No. 14, 5 May 2001.

[280] Judgement of the Constitutional Court of 7 April 2009 in the case No. 2008-35-01.

[281] Ibid.

[282] 85 MPs voted for the amendments, 3 voted against and no one abstained. Available: *http://www.saeima.lv/steno/Saeima9/090408/st090408.htm* [last viewed 10 April 2011].

[283] Grozījumi Latvijas Republikas Satversmē (Amendments to the Constitution of the Republic of Latvia): Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 66 (4052), 2009.

[284] *Ņikuļceva, I.* Tiešā demokrātija Eiropā (Direct democracy in Europe). *Jurista Vārds*, No. 43 (638), 26 October 2010.

[285] Tautas nobalsošana par likumprojektu "Grozījumi Latvijas Republikas Satversmē" (People's referendum on the draft law "Amendments to the Constitution of the Republic of Latvia"). Available: *http://web.cvk.lv/pub/ public/29108.html* [last viewed 11 August 2011].

[286] Par tautas nobalsošanu un likumu ierosināšanu (law "On National Referendums and Legislative Initiatives"). Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 47, 1994 (It must be noted that this law in fact does not contain the latest one – the case adopted in 2009 about the rights of people to recall the Saeima).

[287] *Ņikuļceva, I.* Tiešā demokrātija Eiropā (Direct democracy in Europe). *Jurista Vārds*, No. 43 (638), 26 October 2010; Par tautas nobalsošanu un likumu ierosināšanu (law "On National Referendums and Legislative Initiatives"). Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 47, 1994, pp. 432–433; Dišlers, K. Ievads Latvijas valststiesību zinātnē (Introduction to state law of Latvia). Riga: A. Gulbis, 1930, p. 112.

[288] Tautas nobalsošana par likumprojektu "Grozījumi Latvijas Republikas Satversmē" (People's referendum on the draft law "Amendments to the Constitution of the Republic of Latvia"). Available: *http://web.cvk.lv/pub/ public/29108.html* [last viewed 11 August 2011].

[289] Latvijas valsts kodolu meklējot (Looking for the nucleus of the state of Latvia). *Jurista Vārds*, No. 6 (705), 7 February 2012; Konstitucionālās tiesību komisijas viedoklis par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu (Opinion of the Constitutional Law Committee on the constitutional foundations of Latvia and the inviolable nucleus of the Constitution). Available: *http://www.president.lv/pk/content/?cat_id=2896* [last viewed 7 October 2012].

[290] Available: *http://www.tn2012.cvk.lv/* [last viewed 6 September 2012].

[291] *Ņikuļceva, I.* Tiešā demokrātija Eiropā (Direct democracy in Europe). *Jurista Vārds*, No. 43 (638), 26 October 2010.

[292] Available: *www.mk.gov.lv/doc/2005/VARAManot_101011_referendumi.1139.doc* [last viewed 12 September 2012].

[293] As indicated by Ņikuļceva, from the European states it is so in Albania, Andora, Georgia, Italy, Lithuania, Lichtenstein, Poland, Romania, Slovenia, Spain, Switzerland, and Hungary. See: *Ņikuļceva, I.* Vēlētāju likumdošanas iniciatīva Latvijā (Electors' legislative initiative in Latvia). *Jurista Vārds*, No. 49, 8 December 2009.

[294] Judgement by the Constitutional Court of 19 May 2009 in the case No. 2008-40-01.

[295] Vladimir Linderman, the leader of the party "For the native language!" is the initiator of these initiatives.

[296] President supports the intention that the initiators of referendums should collect 30.000 signatures. www.delfi.lv. Published 8 October 2012 [last viewed 8 October 2012].

[297] Available: *http://www.cvk.lv* [last viewed 11 September 2012].

[298] Available: *http://web.cvk.lv/pub/public/27593.html* [last viewed 11 July 2011].

[299] Available: *http://web.cvk.lv/pub/public/28740.html* [last viewed 11 July 2011].

[300] Available: *http://web.cvk.lv/pub/public/29005.html* [last viewed 11 July 2011].

[301] Available: *http://web.cvk.lv/pub/public/29052.html* [last viewed 11 July 2011].

[302] Available: *http://web.cvk.lv/pub/public/29863.html* [last viewed 20 August 2011].

[303] Available: *http://web.cvk.lv/pub/public/30187.html* [last viewed 10 September 2012].

[304] Par arodbiedrībām (law "On Trade Unions"). Law of the Republic of Latvia. *Latvijas Republikas Augstākās Padomes un Valdības ziņotājs*, No. 3/4, 1991.

[305] Grozījumi Saeimas kārtības rullī (Amendments to the Rules of Order of the Saeima): Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 18 (4621).

[306] Available: *http://www. Saeima.lv/lv/aktualitates/saeimas-zinas/19988-saeima-uzdod-tieslietu-ministrijai-petit-deputatu-zveresta-regulejumu-es-dalibvalstis* [last viewed 12 September 2012].

[307] The previous Saeima elections were held on 3 and 4 October 1936.

[308] Par 5. Saeimas vēlēšanām (law "On the Election of 5th Saeima). Law of the Supreme Council of the Republic of Latvia. *Ziņotājs*, No. 46, 1992 (not effective).

[309] Saeimas vēlēšanu likums (The Saeima Election Law). Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 86 (369), 1995.

[310] Grozījums Latvijas Republikas Satversmē (Amendments to the Constitution of the Republic of Latvia): Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 19 (150), 1994.

[311] Par priekšvēlēšanu aģitāciju pirms Saeimas vēlēšanām (On Pre-election Canvassing before the Saeima Elections). Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 120(403), 1995; More on pre-election canvassing see the judgement of the Constitutional Court of 22 February, 2010 in the case No. 2009-45-01.

[312] According to 4 December 1997 edition of the law that was enacted on 31 December 1997.

[313] This amendment was related with wish to increase the electors' trust in the election results because sometimes the electors have expressed concerns that possibly during the night between both election days the election results are misconstrued (forged).

[314] Saeimas vēlēšanu likums (The Saeima Election Law). Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 86 (369), 1995.

[315] Available: *http://www.Saeima.lv/lv/par-saeimu/likumdeveju-vesture* [last viewed 11 August 2011].

[316] Available: *http://www.Saeima.lv/lv/par-saeimu/likumdeveju-vesture* [last viewed 11 August 2011].

[317] Judgement of the Constitutional Court of September 23, 2002 in the case No. 2002-08-01.

[318] Issues of election rights have been analyzed in several judgements of the Constitutional Court, e.g., in the judgement of 30 August 2000 in the case No. 2000-03-01; in the judgement of 15 June 2006 in the case No. 2005-13-0106. Essential contribution to case law is also the judgement of 3 November 2006 by the Administrative Cases Department of the Supreme Court in the case No. SA-5/2006, which is connected with the process of the Saeima elections campaign and its validation in court. More on this judgement also in: Levits, E. Nozīmīgs spriedums par vēlēšanām (A significant judgement on elections). *Jurista Vārds*, No. 50(453), 19 December 2006.

[319] Grozījumi Saeimas vēlēšanu likumā (Amendments to the Saeima Election Law): Law of the Republic of Latvia. *Latvijas Vēstnesis,* No. 76 (2651), 2002.; See also: *Lejiņš, A*. Valodas dēļ Latvija iedzīta stūrī (Latvia has been cornered because of language). Available: *http://www.politika.lv/temas/cilvektiesibas/6350* [last viewed 12 June 2011]. More on language requirements for MPs also in the judgement of the European Court of Human Rights in the case Podkolzina vs. Latvia (No. 46726/99). Available: *http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Podkolzina&sessionid=78662816&skin=hudoc-en* [last viewed 12 June 2011].

[320] Judgement of the Constitutional Court of 5 March, 2003 in the case No. 2002-18-01.
[321] Grozījumi Saeimas vēlēšanu likumā (Amendments to the Saeima Election Law): Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 43 (4029), 2009.
[322] Ibid.
[323] Available: *http://www.Saeima.lv/lv/aktualitates/saeimas-zinas/18845-atseviski-velesanu-iecirkni-saeimas-arkartas-velesanas-bus-atverti-lidz-desmitiem-vakara* [last viewed 16 September 2011].
[324] For example, the highest activity of electors was in the 5th Saeima elections, in which 89.9% of all those who have voting rights participated, but the lowest participation was during the 11th Saeima elections when only 59.48% of those citizens with voting rights participated. See: *www.cvk.lv* [last viewed 16 September 2011].
[325] Eiropas Parlamenta vēlēšanu likums (Elections to the European Parliament Law). Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 22 (2970), 2004.
[326] Available: *http://www.mfa. gov.lv/lv/eu/3863/3872/* [last viewed 17 August 2011].
[327] Available: *http://web.cvk.lv/pub/public/27611.html* [last viewed 17 August 2011].
[328] Pilsētas domes, rajona padomes un pagasta padomes vēlēšanu likums (law "On Elections of City Council, Regional Council and Local Council"). Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 10 (141), 1994.
[329] Available: *http://web.cvk.lv/pub/public/27484.html* [last viewed 11 June 2001].
[330] Districts have not yet been formed. In accordance to the Article 24 of the transitional provisions of the law "On Administrative Territories and Populated Areas", the Cabinet of Ministers must elaborate and submit to the Saeima the draft law on formation of districts by 31 December 2013.
[331] Administratīvo teritoriju un apdzīvoto vietu likums (law "On Administrative Territories and Populated Areas"). Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 202, 2008. Till July 1, 2009 Latvia had 26 regional authorities and 522 local authorities, including 50 regional cities and 7 republic cities, 41 districts with territorial units, 424 local authorities. See: *http://www.raplm.gov.lv/pub/index. php?id=1733* [last viewed 11 August. 2011].
[332] See the homepage of the Ministry of Regional Development and Local Governments *http://www. raplm.gov.lv/pub/index. php?id=1738* [last viewed August 01, 2011].
[333] On 1 May 2004 the amendments to Article 101 of the Constitution came into force providing that every citizen of the European Union who permanently resides in Latvia has the right, as provided by law, to elect local governments and participate in the work of local governments.
[334] OSCE commissar again makes an appeal to grant to non-citizens the rights to elect local governments. Available: *www.bns.lv.* [published 16 February 2011, last viewed 17 August 2011].
[335] Judgement of the Administrative Court of 22 March 2005 about the application on nullifying the results of Rēzekne City Council election results and holding of repeated elections. Case No. A42241405. Available: *http://www.tiesas.lv/index.php?id=1477* [last viewed 1 June 2011].
[336] Available: *http://web.cvk.lv/pub/public/29828.html* [last viewed 1 June 2011].
[337] Extraordinary local government elections have taken place in 2003 in Renda district, in view of the fact that Renda local council elected on 11 March 2001 was dissoluted. Available: *http://web.cvk.lv/ pub/public/27183.html* [last viewed 1 June 2011].
[338] Latvijas tiesību vēsture (1914–2000) (History of law in Latvia, 1914–2000). Ed. Prof. Dr. iur. D. A. Lēbers. Riga: Fonds Latvijas Vēsture, 2000, p. 461.
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[340] Par Latvijas Republikas pilsoņu tiesību atjaunošanu un naturalizācijas pamatnoteikumiem (Law "On the Renewal of the Rights of Citizens of the Republic of Latvia and Fundamental Principles of Naturalization"). Decision of the Supreme Council of the Republic of Latvia. *Ziņotājs*, 1991. (not effective).
[341] The mentioned legal act was in force till 25 August 1994.
[342] Latvijas tiesību vēsture (1914–2000) (History of law in Latvia, 1914–2000). Ed. Prof. Dr. iur. D. A. Lēbers. Riga: Fonds Latvijas Vēsture, 2000, p. 462.
[343] Pilsonības likums (Citizenship Law): Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 93 (224), 1994.
[344] People's referendum on revoking the law "Amendments to the Citizenship Law". Available: *http:// web.cvk.lv/pub/ public/27532.html*. See also Raihs, N. Pilsonības institūta problēmjautājumi jaunajās Eiropas Savienības dalībvalstīs (Problematic issues of the citizenship institution in the new EU Member States). *Likums un Tiesības*. 2004, No. 5, p. 149.

[345] According to the data of Citizenship and Migration Affairs Office, the number of non-citizens on 1 July 2011 was 319,267 or 14.35% from all the population of Latvia. Although part of the non-citizens arrived during the soviet times, many have been born in the territory of Latvia, including about 15,000 who were born after the restoration of the independence. It should be noted that this number tends to decrease. For example, in 2003 there were more than 500,000 non-citizens. The decrease of the number of non-citizens is mainly associated with mortality and emigration. See: Muižnieks, N. Vai viss kārtībā ar naturalizāciju un nepilsoņiem? (Is everything alright with naturalization and non-citizens?). Available: *http://www.ir.lv/2011/8/31/vai-viss-kartiba-ar-naturalizaciju-un-nepilsoniem* [last viewed 28 August 2011].

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[347] Par to bijušās PSRS pilsoņu statusu, kuriem nav Latvijas vai citas valsts pilsonības (law "On the Status of those Former U.S.S.R. Citizens who do not have the Citizenship of Latvia or that of any Other State"). Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 63 (346), 1995. More on the issue of non-citizens: Judgement of the Constitutional Court of 7 March 2005 in the case No. 2004-15-0106.

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Superficies Solo Cedit in the Latvian Law

Jānis Rozenfelds, Dr. iur.
Faculty of Law, University of Latvia
Professor of the Faculty of Law
E-mail: *law@rozenfelds.lv*

The article is dedicated to the so-called problem of divided property, focusing upon the fact that in difference to the legal regulation, which existed in pre-war Latvia, the divided property in the current legal situation manifests itself as the existence of two independent and unrelated ownership rights regarding two different objects – building and land – within one and the same plot of land.

Keywords: *superficies*, superficiary, construction, land, legal technique, principle, construing transactions, divided property, servitude, *emphyteusis*, fiction, dualistic system of property, enforced lease, *dominium directum*, *Ober-Eigentum*, *dominium utile*, *Unter-Eigentum*, farmsteads of collective farmers, nationalisation.

Contents

Introduction

Recognition of constructions, gardens and other moveable property attached to land as part of the land (*superficies solo cedit*) means the landowner's ownership right to the objects attached to the land, which the owner of the materials used for construction, respectively, loses. *Superficies* is understood as the existence of separate, other person's right on the land (*ius in re aliena*), for example, the building leasehold. In such a context the existence of various rights and interests is discussed,

contrary to *superficies solo cedit*. In assessing various systems of law, it has been noted that *superficies solo cedit* is typical of the East European block countries, since during the period of communism the ownership right to land did not exist or existed only formally.[1] This, apparently, does not mean *superficies* as a sub-type of ownership rights to other person's property, but a situation, when the ownership rights to land and to buildings are divided because of the suspicious attitude by the communist system of law towards property in general and land property in particular.

Latvia's legal system continues to contain elements, which, intermittently, can point to one, another or a third manifestation of *superficies solo cedit*.

Superficies solo cedit has been enshrined in Section 968 of Latvian Civil Law (CL): "A building erected on land and firmly attached to it shall be recognised as part thereof." Section 14 of "Law On Time and Procedures for Coming into Force of Introduction, Inheritance Law and Property Law Part of the Renewed Civil Law of the Republic of Latvia of 1937" envisages a number of cases, when the ownership right to buildings has been transferred to another person, independently of the landowner. The laws on land reform, apartment ownership and privatisation envisage similar exceptions. Thus, since the reinstatement of CL in 1993 a dualistic system of property has developed.[2] This system can be called dualistic both because of the aforementioned division of property rights and because it is impossible to link this legal regulation with a uniform, principal solution, but rather to one, based upon several mutually exclusive principles.

1 Genesis of *superficies solo cedit*

Historically, as the Latin name suggests, the origins of *superficies solo cedit* are linked with Roman law. In Roman law sources *superficies solo cedit* is linked with the origins and expiry of ownership right. *Superficies solo cedit* denotes the unavoidable fact that by attaching a moveable property to land, the right to these properties is transformed – the moveable property permanently attached to land becomes the property of the landowner (simultaneously ceasing to be moveable property).

The respective description of the situation has been indicated as the source for the predecessor of Section 968 of CL, currently in force, – Section 771 of the Private Law Code (PLC).[3] It follows from the respective excerpt (D. 41, 1, 7, 10)[4], that the materials used for construction belong to the builder, who, building upon his own land, has used other's materials. At the same time the previous owner does not lose his ownership right to the materials, such used, however, cannot claim ownership right to them, because the Law of the Twelve Tables (ancient original source of Roman law) do not allow claiming such materials back, however, the Law of the Twelve Tables envisages that the user of these have to repay to the owner of materials double value of these materials. "Thus, [Gaius, the author of the fragment, concludes rather unexpectedly – J.R] if the building collapse, the owner of the materials has the claim to ownership right (*vindication*) to these materials." Thus, we can conclude that starting from the very origins *superficies solo cedit* contained inconsistency (since the ownership right to property is acquired by the builder, even though the previous owner does not completely lose his right, he just loses "claim", while the building exists).

Section 968 of CL, just like its predecessor Section 771 of PLC, does not envisage a mechanism for compensating for losses – obviously, not because liability for using materials owned by another in construction were excluded, but rather because

the authors of PLC in truly pandectic spirit did not deem it necessary to make references to such obvious matters in an inappropriate place, i.e., to discuss issues linked with contract law in a chapter on property law. The situation described in the second fragment, which is noted as the original source of Section 968 of CL, Section 771 of PLC, (D. 41, 1, 7, 12), leads to an absolutely opposite result, namely, if the owner of materials has used them for construction, building on land owned by another. In this situation the builder, who was aware that the construction takes place on land not owned by him, irrevocably loses his ownership right to materials utilised in this manner. I.e., in this case the mechanism of fiction, favoured in Roman law, is offered as a solution to the situation, as it is assumed that the owner of materials, by building the materials into another person's property, has simultaneously agreed that by this action he waves his right to the used materials, therefore he cannot reclaim ownership rights to the used materials, even if the building were to collapse later. The author of the aforementioned fragments has not made the effort to explain, why in the first case the owner of the materials, in addition to the right to receive the double value of the used materials retains the claim, the implementation of which fully depends upon a chance occurrence – collapse of a building, but in the second case the owner of the materials has neither the claim to materials, nor compensation for losses.

As we see, this situation rather reminds of the one envisaged in Section 970 of CL, however, contrary to what might be expected, several other excerpts, not this one, are indicated as the primary source of Section 773 of PLC, the predecessor of Section 970 of CL.

An excursus into the past, even though allows explaining the origins of *superficies solo cedit,* shows that it is useless to search there for features of scientific classification, which would allow understanding the essence of *superficies solo cedit*. An attempt to define the concept of *superficies solo cedit*, encountered in Roman law, would lead to the conclusion that in these cases we do not encounter a theoretical principle, but, rather, reliance upon unavoidable fact that the objects that are inseparably attached to land should be treated as part of the land. Had the lawyers of ancient Rome perceived *superficies solo cedit* as a principle, they would not have envisaged parallel to s*uperficies solo cedit* also *superficies*, which is to be understood as the right to buildings, as the result of which the one who is building, quite on the contrary to the rule of *superficies solo cedit,* acquires independent ownership right to this construction. As the result we obtain *superficies solo cedit* as a means of legal technique – it is customary to recognise buildings as part of the land, unless stipulations to the contrary exist. The regulation envisaged by a number of legal acts, still in force, points to the fact that in modern law *superficies solo cedit* might be assessed as a means of legal technique.

French Civil Code (FCC) is a vivid example of this, containing a number of *expresis verbis* rules on what should be recognised as immoveable property "by their nature" – buildings (Section 518), wind or watermills (Section 519). In addition to these also property, which is recognised as being immoveable property by law (in the absence of conviction that these objects should be recognised as immoveable "by their nature", this remark is not used), i.e., harvest not yet gathered (Section 520), growing trees (Section 521), live stock given to the farmer (Section 522), water pipes (Section 523), articles, which the proprietor has placed on his land for the service and management of it, including stock (Section 524). A detailed enumeration of

articles for furnishing premises follows – sculptures, mirrors and the like, which the owner has "attached for ever with plaster, lime or cement" (Section 525).

This rich enumeration further strengthens the perception of *superficies solo cedit* as a means of legal technique, used to denote the civil law circulation of some articles, first of all, because the detailed enumeration prevents ambiguity, secondly, because the FCC regulation in some instances differs from the one found in Roman law, thus proving that this division is an artificial construct, i.e., one, which is rather disconnected with "the nature of things". For example, agricultural inventory, which FCC recognises as part of immoveable property, Roman law did not recognise as even equipment of an agricultural farm as a company.[5] Moreover, the experimenting with casuistic descriptions of *superficies solo cedit,* manifested in FCC, shows that this method of regulation most probably further complicates the task instead of simplifying it, which is much more effectively dealt with by the general reference found in Roman law, with the disclaimer concerning the possibility to amend it in compliance with the owner's will, i.e., the inventory shall not be recognised as part of the farm, unless the farm has been bequeathed in the will together with the inventory, namely, as an "equipped" (*instructa)* farm (D. 33, 7, 2, 1).

The Roman law, as well as the legal regulation of FCC, highlights the problem of the parts of immoveable property not as an objective distinction, i.e., unconnected with the will of subjects, but as a means, which is directly connected with construing transactions, for example, wills. The disclaimer "unless stipulations to the contrary exist …" can be added to any of the aforementioned norms. I.e., this reference serves as an explanation to the lack of the manifestation of owner's will, which solely determines the fate of articles more or less connected with the immoveable property.

To sum up – *superficies solo cedit* originally was neither a principle, nor a rule of law, but a means of legal technique, which not only allowed, but directly envisaged exceptions. This regulation had evolved to prevent misunderstandings, when the subject of a transaction (most frequently – a will) had not expressed his will with sufficient clarity.

2 Latvian legal doctrine – the theory of presumption and principle

Latvian legal science has dealt with this problem in an entirely different way. One of the most popular views, also the one most consistently supported by case law, is that *superficies solo cedit* is a presumption (theory of presumption). In accordance with this theory, a presumption exists that the building belongs to the person, who owns the respective plot of land.[6] Some judgements contain similar conclusions[7], however, others contain references to "the principle of unity of land and building" (theory of principle)[8].

The theory of presumption is closer to the understanding of *superficies solo cedit* as a means of legal technique than the theory of principle. The presumption means a supposition, which may be overturned by proving the opposite. For example, in case SKC-77/2005 the Court concludes that in accordance with Section 14(5) of "Law On Time and Procedures for Coming into Force of Introduction, Inheritance Law and Property Law Part of the Renewed Civil Law of the Republic of Latvia of 1937" the buildings (structures), which have not been registered at the Land Registry Department, the State Land Service or the local government as independent objects

of property, shall be considered the property of landowner, but other persons may acquire ownership right to such buildings (structures), if the court has satisfied the claim of such persons to recognise the ownership right to such objects. I. e., according to the theory of presumption, the unity of land and building is only an assumption, which can be overturned by facts proving the opposite. Obviously, this outcome in the case would be impossible if the theory of the principle of unity of land and building were applied, because it is impossible to overturn or doubt principles using evidence on violations of these principles.

In difference to the theory of presumption, which is also based upon concession that divided title to property as regards buildings and land can be established by an agreement between the parties to civil law relations, the theory of principle, even if not excluding completely such an impact of the sovereign will of the subjects of civil law circulation upon establishment of divided property, restricts it significantly. For example, a court noted that the unity of land and building is a fact, which cannot be amended by the will of the parties to the transaction (Judgement of 9 January 2002 by the Senate in Civil Case No. SKC-32).

The existence of the theory of presumption and the theory of principle is a proof of dual attitude towards the principle of divided property not only in practice, but also in legal science; moreover, this dual treatment of the problem of building and land is rooted in the very origins of divided property in Latvian law. On the one hand, the pre-conditions for divided property were created intentionally, when CL was restored, by envisaging exceptions to the regulation set out in this act. At the time the grounds for these exceptions was the need to constitute the situation, which had actually developed and was taken over from the previous system, which did not recognize the right to own land. On the other hand, the numerous additions and amendments to this norm of the law prove that this is rather intentional move towards dividing immoveable property. It is significant that several later studies put the main emphasis upon voluntary establishment of divided ownership rights to property.[9]

Neither the theory of presumption, nor the theory of principle assesses *superficies solo cedit* as a means of legal technique or analyses it as a problem of interpretation of transactions (of the two, the theory of presumption is closer to the idea of legal technique). Latvian legal literature rather tends to perceive every case, when the land and the building does not belong to one and the same person as an undesirable exception to the general rule. Since exception is a category, which can be used to explain and justify various anomalies, also in this case we encounter attribution of such properties, which are impossible, simply because they contradict the nature of things. For example, irrespective of the obvious fact that the existence of a building, owned by another person, on the land makes utilisation of land practically impossible, the rights of the landowner and the owner of the building are treated as totally sovereign, moreover, as unlimited rights. Rights, which essentially are limited by the rights of another person, are still viewed as unlimited, absolute. It is impossible to characterise this system otherwise, but as dualistic, based upon the idea that simultaneous existence of two, mutually exclusive facts is possible.

3 Dualistic and divided system of property

It is important to distinguish between the system of dualistic property and the system of divided property both as to terminology and in reality. This should

be done because frequently the first one is erroneously identified with the latter. The system of divided property means the existence of separate rights on the land owned by another person. This is the right to the property of another (*ius in re aliena*), which may manifest itself as a servitude, hereditary leasehold (*emphyteusis*), the right to build (*superficies*), yet retaining a united property. Thus, the system of divided property is restriction of the ownership right in favour of another person's right. The dualistic system of property allows parallel existence of ownership right – to the building and the land, i.e., the dualistic system is based upon presumption that two sovereign ownership rights with regard to one and the same spatially delimitated object are possible. One can assume that initially (i.e., following the reinstatement of the Law on Land Registers on 5 April 1993) this dualistic approach evolved by applying the exception to Section 968 of the CL, which was envisaged in the course of restoring the CL part on property law, as envisaged by Section 14 of "Law On Time and Procedures for Coming into Force of Introduction, Inheritance Law and Property Law Part of the Renewed Civil Law of the Republic of Latvia of 1937", registering into Land Registers the structures and buildings, with regard to which independent right to property had evolved. Section 29 of the Law on Land Registers envisages that a separate Land Register division shall be opened with regard to each independent immoveable property.

The dualistic system is based upon fiction. The system of divided property, which to a greater or lesser extent is allowed in many systems of law, can exist, without colluding with *superficies solo cedit*. The dualistic system excludes *superficies solo cedit*. This is exactly what the term "exception" denotes with regard to *superficies solo cedit*, which should not be mistaken for the system of divided property, which does not contradict *superficies solo cedit*, but supplements it.

Within the system of divided property a united object of property still exists, irrespectively of the landowners' and builders' opposite interests. Thus, the interests of one person are subordinated to the interests of another. Usually it follows from the special value of buildings that the landowners' rights are subordinated to those of the owner of buildings. The practical result of terminating divided property is the total loss of the landowner's rights in favour of the builder. In such cases legislation predominantly constitutes a fact that has already happened – the loss of the ownership right to land in favour of the builder. This trend is typical of the United States of America 19th century legislation. Even though it, at least during its initial stage, colluded with *superficies solo cedit*, finally this contradiction was solved in the way that ownership right to land was voluntarily or by forced sell alienated in favour of the builder or manager of land.[10] A similar procedure took place in the United Kingdom in the mid-20th century. This is reflected in the Judgement by the European Court of Human Rights in the case *James and Others*.[11]

The opposite situations are possible. For example, in Japan the land is incomparably more valuable than buildings, since the building seldom exists for more than 30 years, thus the secondary market of buildings is virtually non-existent. Hence, the building as an independent value causes no interest.[12] In the case of a divided property the property remains united, even though "divided". Even though the rights of one subject – usually, the landowners', are reduced to a symbolic minimum, the latter is always left the hope that the encumbrance upon his land property will end and the ownership right will be restored in full scope (principle of flexibility of property).[13]

The situation is completely different in the dual system of ownership, based upon the fiction of existing two sovereign ownership rights. In these cases there is even no mechanism (except for the right of first refusal envisaged by law), which would make the termination of such a system possible (collapse of buildings in the case of *superficies* or servitude; prolonged failure to pay the rent in the case of *emphyteusis*). Under the dualistic system, even if both properties have ended up in the ownership of one and the same person, such unification is possible only upon the initiative of the owner himself, moreover, the terms for such initiative envisaged by law (fees, expenditure linked with drawing up the inventory of the building) might rather demotivate the owner to do it.

The common feature of the divided property and the dual system of property is the fact that in practice they both lead to very similar results – one of the subjects enjoys the right to use the land, the other, however, has only nominal right to land, not including its actual use. However, these shared features should not delude as to the principally different nature of these two systems.

Within the system of divided property the different interests are always realised in one property, however, the dualistic system envisages the existence of two completely sovereign rights to property. Within the system of divided property the scope of both subjects' rights is accurately described. Thus, these rights can be realised within the accurately described limits, as the rights of one person start only where the rights of the other person end. For example, the heritable leasehold (*vectigal, emphyteusis*) reflects the essence of a divided property – the right to receive rent payments, as well as the right to use the land belonging to another subject, which follows from it. The right to build (*superficies*), in its turn, emphasizes the right of the builder to use the land, owned by another person, for construction or other purposes.

Contrary to this, the dualistic system envisages establishment of forced lease relations only as an ancillary product to the separate ownership right to buildings, which the landowner has to claim especially. But the existence of a building on another person's land is not described as a right, but as a fact, i.e., the building does not arise from the exercise of right to build, but, on the contrary, the fact that the building is located on land owned by another person gives rise to the special right. In the case of right to build the actual construction follows from the right, which has been established before the construction has been actually realised. Thus, there are no doubts concerning the issue that the right to build does not cease to exist if the building actually collapses. The dualistic system, however, hides the fact that one person's right is subordinated to another person's right. Therefore one of the most ambiguous issues is, whether the right to build is or is not dependant upon actual existence of the buildings.

The dualistic system of property has the peculiarity that the formal description of rights does not reflect at all or reflects very inaccurately the actual content of right. Like any exception the dualistic system is a description of a phenomenon, which cannot be explained by analysing this very description ("exception confirms the rule", which might as well be expressed as the denial of this causality). Thus, in difference to the system of divided property, which retains *superficies solo cedit*, the dual system is incompatible with *superficies solo cedit*. This is exactly the reason why it is a dualistic system, in which alongside the immoveable property subject to the postulate or principle of *superficies solo cedit* exists within a system of property, being exception to this system.

4 *Superficies solo cedit* in the inter-war period – the differences and similarities with the current regulation

The legal regulation of immoveable property in the inter-war period is characterised by a radical transition from the legislation, which existed at the moment when independence was declared (legislation of the initial period) to legislation, which existed at the moment, when Latvia *de facto* lost its independence (legislation of the final period). The divided property in the pre-war Latvia in accordance with the concept, which was taken over in PLC from the pandect law, consisted of dominant property, called by V. Bukovskis[14], as well as F. Konradi and A. Valters[15] *dominium directum*, *Ober-Eigentum*, and the superficies (*dominium utile*, *Unter-Eigentum*), defined by Section 945 of PLC (not taken over into CL).

It should be taken into consideration that the intention was to terminate some rights to buildings and structures, not envisaged by CL, but which had evolved as dominant property rights prior CL came into force, in accordance with the procedure set out by the law "On revoking divided property rights"[16]. However, this had to happen in a longer period of time, with the owners of the buildings gradually pre-emptying the property rights to land.

The existence of the concept of *dominium directum* (*Ober-Eigenthum*) and *dominium utile* (*Unter-Eigenthum*) or the divided property (*dominium divisum*), which dates back to the Middle Ages, is typical of the initial stage legislation. The literature on pandect law emphasizes the link between the right to build (*superficies*) and the right to heritable leasehold (*emphytheusis*) regulated in the Roman law.[17] Likewise in Roman law, the rights enjoyed by the builder, who has the right to build to the structure erected on land owned by another (*superficiarius*), the subject of the right to use, based upon the heritable leaseholder (*ager emphytheuticarius*) in relation to the landowner are so extensive that the landowner has only the nominal title of the owner left.

Thus, the concept of divided property in the initial stage of Latvia's legislation totally complied with the principle of *superficies solo cedit* and did not contradict it, granting the title of the owner *dominium utile* to the subject or the superficiary (PLC 942).[18] Notwithstanding the deceptive terminology, in the practice the use of divided property also within this period ensured the priority of one concrete owner (superficiary) over the nominal owner (dominant owner).

However, when PLC was codified, the norms on divided property (PLC Section 942–952) were not included in the Civil Law of 1937. In view of the fact that neither PLC, nor its successor CL envisages the right to building and the right to hereditary leasehold, since these, as we see, were included in the peculiarly synthesised form of regulation on divided property included in PLC Section 942–952, but by discarding these norms the traditional instruments for ensuring the specific separate rights to buildings were excluded from CL. Thus, the coming into force of CL created the first pre-conditions for the situation, when the legal regulation no more fully coincided with the reality, since by excluding from codification the very concept of divided property, the preconditions for eliminating divided property were created, but, in fact, this divided property continued to exist. It is obvious that CL as an act codifying law could not eliminate, establish or change the existing legal relationships. A special act had to be adopted for this purpose, envisaging elimination of the right to divided property by pre-emption.[19]

Since the majority of PLC norms were included into CL mechanically, without systematization, contradictions are typical of these changes – on the one hand, by denying the existence of the divided property rights in principle, occasionally the terminology, which was based upon the concept of divided property, was retained. For example, references to the fact that in some cases "building is the leading immoveable property" (CL Section 1143); as regards personal servitudes, the term "the user of the building" is still retained (CL Section 1209). Even though the authors of CL had been, obviously, in favour of the concept of undivided property ("If a superficiary erects a building on servient land, upon the termination of the superficies neither he or she nor his or her heirs may demolish it, unless the superficiary has specifically acquired such right" (CL Section 1210), however, it does not follow absolutely from this norm that the parties may not agree otherwise. But it is not stipulated either that the construction conducted in the framework of servitude would be the grounds to have right to the constructed, as the legislations of some other countries provide.

Thus, Section 675 of the Swiss Civil Law[20] envisages that buildings and other structures, which are located on the ground or underground in such a way as to be permanently attached to land, may be the property of a person, who is not the landowner, if this right is registered in the land register as servitude. At this point a critically minded reader might object that Section 675 of the Swiss Civil Law also contains features of the dualistic system. However, the aforementioned norm describes the rights of both parties with sufficient precision. Moreover, the fact that the division of land register, which reflects these "constructions belonging to another person", is that of the immoveable property, which these structures encumber. In difference to SCL, Latvian CL does not allow the existence of such separate ownership right at all, but envisages only compensation of costs or demolishing the building (CL Section 969, 970). Neither did CL accept any other form of legal regulation for the divided property – neither the right to build (*superficies*), which is envisaged for example, in 1943 Civil Code of Italy (ICC)[21], Section 952–956, nor the right to hereditary leasehold (*emphyteusis*), envisaged by Section 957–977 of ICC. I.e., by giving up the "right of dominant property" of the Middle Ages, CL did not envisage any other replacement legal instruments for regulating divided property rights, which were typical of the legislative systems of other countries at the beginning of the 20th century. On the one hand, such legal regulation at least apparently is aimed at intensifying *superficies solo cedit*, on the other hand, as this legal regime neither at the time it was established, nor later meant giving up the divided property, but rather ignored the legal reality, in which the divided property continued to exist, and in practice promoted cultivation of fiction, which is always the inevitable result of ignoring the legal reality.

Giving up the construction of "dominant property" and "superficiary" would be justified, if the law had introduced instead of it *ius in re aliena* forms appropriate for the existing divided property – the right to build, the hereditary leasehold – or to transform the institute of servitude in accordance with these needs. However, this did not happen.

It can be concluded that giving up the construction of divided property was not a well-considered measure. Firstly, the mechanism for its actual termination was created, without taking into consideration things related to the expenditure and effort of the owners themselves, which, in contemporary world, would inevitably lead to complaints about human rights violations, which manifest themselves

as the violation of Article 1(1) of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; secondly, as the further development of Latvian law shows, it was inconsiderate to give up the mechanism, which envisaged deviations from *superficies solo cedit* (the right to build, hereditary leasehold).

5 *Superficies solo cedit* legal regime during the period of de facto loss of independence

Latvian civil law underwent even more radical changes leading towards dualistic system following occupation.[22] It is interesting to note that also The Civil Code of the Russian Soviet Federative Socialist Republic, which in Latvia entered into force on 26 November 1940, envisaged a special Chapter on the right to build (Section 71–84 -c).[23]

During this period, at least formally, there was no grounds for discussing *superficies solo cedit*, since, when land was nationalised, the buildings were not entirely nationalised at the same time. However, during this period of time the attachment of building to land of a completely opposite nature evolved. The ownership right to buildings could become a pre-condition for the so-called right to use land. Usually the area of land allocated for using or constructing a building was within the range of 0.06–0.12 ha. It is noteworthy that literature of the period describing the rights of a natural person to a residential house does not refer to the right to use land. It is only noted that "Section 91 of LC [Land Code of Latvian SSR – J. R.] envisages that in case the building perishes because of natural disaster or because of age, the user of the land retains the right to use the land if he within two years with the permission of the Executive Committee of the local council [i.e., the local government – J. R.] and in accordance with a design approved in due procedure starts restoring the demolished buildings or constructing new ones".[24]

Alongside the right to use the land, connected with the property right to buildings owned by natural persons, there was the plot of land in personal use of a collective farmer's family (collective farmer's farmstead) for setting up a vegetable garden and an orchard up to 0.50 hectares.[25]

6 Return to *superficies solo cedit* following the restoration of independence

As regards the consequences of occupation period, this is the paradoxical co-existence of two antagonisms:

1) in accordance with the principle of Latvia's *de jure* continuity, the legislation that concerns the period of occupation has no impact upon the existing legal regime;
2) the existence of the dualistic system of property, allowing separate ownership right to a building located on a land owned by another person, is being explained as a temporary situation, caused by the consequences of occupation.

In practice the dualistic construction of property exists alongside legislation, from which even the system of divided property, which was tolerated until 1937, has been excluded. Apparently, mechanical restoration of CL property law was not advantageous for dealing with the problem. The system of 1864–1937 PLC

would have been closer to the existing one, compared to the CL system of 1937. The next conclusion, which follows from the aforesaid, is that at the time when CL was restored, a sufficiently comprehensive analysis of the situation, which had evolved, was not conducted. As the result of all this, return to *superficies solo cedit*, alien to the Soviet law system, could not occur otherwise as only in the form of the dualist system, described above, i.e., as the co-existence of two mutually exclusive approaches.

The further development of dualistic system was totally opposite to the forecasted one: instead of the system of exceptions, caused during restoration of CL, to be gradually replaced with a system restoring the unity of land and building, the situation developed in the opposite direction – over time the list of so-called exceptions increased instead of decreasing. To verify this, it is sufficient to compare the initial and the current wording of Section 14 of the law "Law On Time and Procedures for Coming into Force of Introduction, Inheritance Law and Property Law Part of the Renewed Civil Law of the Republic of Latvia of 1937".

"Section 14

The regulations of Section 968 and Section 973 shall not be applicable and the buildings (structures) or orchards (trees), until the merging into one property with land, shall be regarded as an independent object of property, if one of the following conditions exists:

1) *the buildings have been built and the orchard (trees) has been planted on land, which has been allocated for this purpose by law, acquired through a transaction or on the other legal grounds before the Part on Property Law of the Civil Law came into force (1 September 1992), but the property right to land has been restored or is to be restored to the former owner or his heir (successor in rights) or if the land is cognizable to or belongs to the state or local government;*
2) *the buildings have been acquired by privatising state or local government companies (business companies) or separate objects of immoveable property belonging to the state or local government;*
3) *the buildings have been built or the orchard (trees) has been planted on a land belonging to or cognizable to the state or local government, which n accordance to law has been allocated for permanent use during the period of land reform;*
4) *the buildings (structures), through the exercise of right to building leasehold, have been built, as the ancillary property of privatised companies, this buildings (structures) shall be considered an independent object of property together with the buildings to be privatised;*
5) *the buildings (structures) have been built on leased land, if the contract on land lease has been concluded for a period of at least ten years, and the contract between the landowner and lessee envisages the lessee's rights to build upon the leased land buildings (structures) as independent objects of property. Such buildings (structures) shall be regarded as independent object of property only as long as the land lease contract is effective.*

If the buildings (structures) or the orchard (trees) are the object of independent property, then the landowner has the right of first refusal or the right to pre-emption. The owner of the buildings (structures) or the orchard (trees) shall have the same right of first refusal or the right to pre-emption in case the land plot is alienated.

The former owner and his heirs have the right of first refusal as regards land, buildings (structures) and orchards (trees) in accordance with the laws regulating the restoration of property rights and privatisation.

The buildings (structures), which have not been registered at the Department of Land Registers, the State Land Service or the local government as independent objects of property, shall be regarded as the landowner's property in accordance with Section 968 of the Civil Law. Other persons may acquire the ownership right to such buildings (structures), if the court has satisfied the claim of such persons to recognise the property right to the respective objects.

(in the wording of 24 April 1997 of the Law, which entered into force on 21.05.97.)"

The initial wording of this Section was aimed only at defining the legal status of structures erected during the Soviet period:

"Section 14

The regulation of Section 968 and Section 973 of the Civil Law shall not be applicable in cases, when the building has been built (acquired by other legal means) or the orchard (trees) have been planted on a plot of land allocated for this purpose in compliance with the laws valid at the time, but the property right to this plot of land has been restored to its former owner or his heirs (successors in rights).

In those cases when in accordance with the special laws of the Republic of Latvia, which envisage the restoration of the property (inheritance) right, the legal relationship of lease shall be established between the owner of the land plot and the owner of the building or the orchard (trees), but the owner of the building or orchard (trees) intentionally fails to comply with the terms of lease, the owner of the land has the right to claim termination of the lease relationship, applying the regulation of Section 970 and 978 of the Civil Law.

The former landowner (unless he has received an equivalent plot of land in his ownership or compensation) has the right of first refusal to acquire in his ownership the building and the orchard (trees). The owner of the buildings and the orchard (trees) has the same right of first refusal if the plot of land is alienated."

The following text has been added to Section 14(1) of this Law, following the words "former owner or his heir (successor in rights):

"as well as in cases, when state and local government enterprises, state and local government business companies or separate buildings or structures owned by the state or local government are privatised in accordance with special laws that regulate their privatisation" (wording as of 25.11.1994).

Thus, within five years following the restoration of the CL Part on property law, substantial changes were introduced, attributing exceptions to Section 968 of CL not only to objects erected in the period between nationalisation of land and revoking of CL until restoration of independence, but also to objects acquired through privatisation or even built after privatisation (Para 4 of Section 14), or buildings built by the lessee upon leased land (Para 5 of Section 14). The latter has provided grounds for introducing such concept as "voluntarily divided property" alongside the concept of "forcibly divided property", covered by Para 1–4 of Section 14.[26]

Apparently, the Law on Land Registers understands the words "immoveable property" as the property together with buildings and structures, irrespectively of the fact, whether there were separate rights to buildings and structures. Hence, the terminology of the Law on Land Registers was not suitable for the system of property envisaged by CL, as well Section 14 of "Law On Time and Procedures for Coming into Force of Introduction, Inheritance Law and Property Law Part

of the Renewed Civil Law of the Republic of Latvia of 1937". The judges, applying the Law on Land Registers in the new situation, had no choice. Abiding by the requirement of the Law on Land Registers, on every occasion when separate right to a building was identified, a new division was opened especially for it. Likewise, a new division was opened for the plot of land. Further on the legal fates of these in reality connected properties were separated, and they, continuing to be physically inseparably attached, started their legal existence as totally separated immoveable properties.

This is the process, i.e., by making the initial entries on immoveable properties into the land registers, the dual system of immoveable properties evolved. It is of interest to consider, whether it could have been possible to avoid this dualistic system. The legal regulation and the experience of institutions applying the respective legislation exclude this possibility. Firstly, there were various subjects (persons submitting the corroboration requests), upon whose initiative entries into the land registers were made. The judge of the Land Registers, making the entry (like the person submitting the corroboration request) had no way of knowing that parallel to the submitter's of corroboration request right to the immoveable property (land) another person's right to the same immoveable property (building) existed. Secondly, even if the owner of the building, who could not have not known that he had no and could not have the owner's property right to land, were the first to submit the corroboration request, the Law on Land Registers contained an explicit requirement to open a new division for each immoveable property.

7 *Superficies solo cedit* and the problems of integrating the legal regulation on immovable property in the EU

Since Latvia's system of immoveable properties should be aligned with the majority of the "old" member states' systems, to which the dualistic approach, typical of Latvia, is alien, the prevention of the dualistic system of immoveable property gains relevance. It is clear that the existing mechanisms, which envisage the path of voluntary agreement, predominantly – using the right of first refusal, as the only solution to the problem, cannot transform the system radically. The previous experience both in Latvia (1938) and other countries (the USA in 19th century, the UK in the 20th century) shows that most effective solution to the problem is nationalisation, which, however, does not seem to be appropriate for Latvia, especially in view of the historical experience, which might have developed radically negative attitude towards nationalisation as the method for reforming any property.

The proposal made by G. Bērziņš during a discussion organised by the Ministry of Justice, dedicated to this issue, seems to be promising.[27] One of his proposals is linked to changes in taxation policy, which might serve as an incentive for the owners of land plots, encumbered by buildings, to alienate this land in favour of the owners of buildings (apartments).

An opinion has been expressed in literature that the dualistic system will cease to exist, so to say, automatically, by the owner of the building acquiring the land in his possession and by the landowner acquiring the building. *"If later the owner of the building (structure) acquires the ownership of the land, the land plot shall be joined to the division of the building (structure) and the former division of the land plot shall be closed"*[28]. The judge of the Land Register Department may perform such activities only upon the request of the person, who has been registered as the owner

of immoveable property. Moreover, there are several reasons (costs, additional activities), which might rather be an incentive not to do it.

Summary

1. In difference to the present legal regulation, the pre-war regulation, which was in force until January 1, 1938 and which also envisaged existence of separate rights to buildings, was still manifested as the rights within one and the same immovable property – the so called *superficies*.
2. In difference to the present legal regulation, where neither the owner of the land, nor of the building enjoys privileges of ownership rights with respect to the other subject of law, the pre-war legal regulation provided that the right to buildings had the decisive meaning, respectively – the so-called legal usage of the property. Only the hereditary leasehold (*emphyteusis*) as equivalent to Latin dominium utile and German *Unter-Eigentum* could exercise the ownership claim while the subject of the so-called superficies did not have such rights.
3. The publication also discusses origins of *superficies solo cedit* in the Roman law and its different legal regulations in the modern system of law. It is proposed to call the present legal regulation as the dualistic property system in contrast to the divided property system of the pre-war period.

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The Development of and Prospects for Commercial Law in Latvia since Accession to the European Union

Kaspars Balodis, Dr. iur.
Faculty of Law, University of Latvia
Associate Professor at the Department of Civil Law
E-mail: *kaspars.balodis@lu.lv*

This paper discusses the development of commercial law in Latvia since the country's accession to the European Union. Commercial law existed in Latvia in advance of World War II, but since the restoration of independence it has achieved a new level of development with the adoption of the Commercial Law. Latvia's desire to join the EU was an important stimulus for establishing commercial law, and the accession in 2004 is, therefore, a good point of reference in evaluating the development of such law. European Union law continues to have a substantial influence on Latvian commercial law. The author also has reviewed prospects for the future of commercial law in Latvia.

Keywords: Commercial law, European Union, merchants, companies, commercial transactions, improvements to commercial law.

Contents

Introduction

Commercial law in the current sense of the concept emerged in Latvia during the two decades of independence which followed the establishment of the state in 1918. The doctrine of commercial law which was developed during the period of independence in the 1920s and 1930s has been of significant importance in the development of commercial law in Latvia today. At the same time, however, commercial law in Latvia has also been influenced by European Union law and the national commercial laws of individual European Union member states, particularly Germany. The Commercial Law of Latvia (*Komerclikums* or *KCL* in Latvian) was

drafted not only to establish legal regulations related to this area of law, but also to deal with the fact that the law related to entrepreneurship which were approved during the first half of the 1990s were not in line with the legal norms of the European Communities. In 1995, when concluding an association agreement with the European Communities and their member states, Latvia promised to gradually ensure that its laws, including those which apply to business and company law, become compatible with the law of the communities. Plans for accession to the EU helped to stimulate the drafting and approval of the Commercial Law.

When Latvia joined the EU on May 1, 2004, harmonisation of commercial law with EU law was almost complete. By 2004, an implementation practice of the Commercial Law had been established, and there was a significant set of theoretical ideas in relation to commercial law. Latvia joined the EU only two years after the Commercial Law was adopted, and this market out the conclusion of the establishment of modern commercial law in our country. May 1, 2004, can also be seen as a certain starting point for the further development of commercial law here. The aim of this paper is to evaluate the development of commercial law in Latvia since the country's accession to the European Union, as well as to sketch out prospects for further improvements to this branch of law.

1 Improvements to commercial law since Latvia's accession to the EU

Since Latvia's accession to the European Union, the Parliament (*Saeima*) has gradually amended and supplemented normative regulations so as to improve and modernise commercial law in our country.

1.1 Amendments to the Commercial Law and other laws

Most of the changes to commercial law regulations since 2004 have related to company law. Quite a few of the amendments to the Commercial Law in terms of commercial companies were implemented to satisfy the directives of the EU. A major supplement to the Commercial Law was the adoption of provisions related to commercial transactions. The aim of several of these changes was to enshrine administrative procedures that are binding to entrepreneurs. Some aspects of commercial law have been regulated by amending not the Commercial Law, but other laws. Parliament adopted several special laws to regulate the rules which are enshrined in EU regulations vis-a-vis commercial companies which have a cross-border element in their operations.

When Latvia joined the European Union, country's commercial law was almost completely harmonised with the requirements of the EU, but several directives related to company law remained outside of the purview of the Latvian legislature. These mostly had to do with the protection of third parties.[1] Latvia had not implemented certain requirements of the Third Council Directive concerning mergers of public limited liability companies (78/855/EEC)[2] and the Sixth Council Directive on the division of public limited liability companies (82/891/EEC).[3] These requirements related to the publication of rules concerning the merger or division of public limited liability companies. The directives say that each company that is involved in a merger or division must publish draft terms for the process at least one month in advance of the general meeting at which the relevant decision is to be taken. Prior to 2005, Article 343[5] of the KCL only said that each company that is involved in reorganisation

must submit an announcement of the process to the commercial register institution, also adding a copy of the relevant agreement. Latvia's Parliament supplemented the law on June 2005 to say that the date of registration of the draft agreement or any amendments to it must be published in the official newspaper *Latvijas Vēstnesis*, along with the commercial register case number of the draft agreement.[4]

It can be said that this supplementation in the context of norms from Article 273 of the KCL about the procedure and schedule for convening shareholder meetings ensures the implementation of requirements from the EU directives about the disclosure of information about the merger or division of public limited liability companies.

Latvian laws in 2004 only partly satisfied the requirements of the European Communities' First Company Law Directive (68/151/EEC)[5] related to the publication of the annual reports of commercial companies. The Saeima implemented the relevant requirements into the country's laws only four years after Latvia's accession to the EU. Provisions of the Annual Reports Law regulating the disclosure of annual reports of commercial companies were deficient until 2008. Article 66 paragraph 5 of this law stated that copies of annual reports filed with the Register of Enterprises must be kept by the registration and made available to anyone who pays a fee for the right to view them.[6] In violation of Article 4 of the First Company Law Directive, the law did not state that the annual report or information about its contents must be published in the official newspaper of the country. The legislature amended Article 66 of the Annual Reports Law to address this issue. Articles 66 paragraph 4 and 66 paragraph 5 of the KCL now state that the Register of Enterprises must ensure the public availability of annual reports and documents related to their confirmation, not least in terms of publishing an announcement in the official newspaper *Latvijas Vēstnesis* to the effect that the information is available at the Register of Enterprises.[7]

The Saeima approved major amendments to the Commercial Law in April 2008.[8] One reason for this was the need to implement a requirement from Directive 2003/58/EC of the European Parliament and Council[9] to say that as of January 1, 2007, member states had to ensure the ability of companies to submit documents to a register institution electronically, as well as to release information and documents in the same way. The legislature amended Article 7 paragraph 2 of the KCL to say that upon written request and payment of a fee, any person may receive information about records in the Commercial Register, as well as printed or electronic copies of the relevant documents. Article 9 paragraph 1 of the KCL was amended to state that documents can be submitted to the commercial register institution (which is the Register of Enterprises of the Republic of Latvia) on paper or electronically.

The legislature also implemented a requirement found in Article 2(b) of the Second Council Directive of the Council of the European Communities (77/91/EEC)[10] – that the statutes or founding documents of public limited liability companies must include information about the goal of the relevant company. This refers to the main areas of operations of the company. In the English version of the directive, the phrase that is utilised is "the objects of the company," while in German it reads "Gegenstand des Unternehmens." In accordance with the directive, Article 144 paragraph 2 of the KCL was supplemented with the requirement that public limited liability companies state their main areas of commercial activities in their statutes. Initially the law said that the statutes of any limited company must state the areas of commercial activity, but the norm was stricken from the Commercial Law in April

2004. While the norm was still in effect, scholars argued that the listing or limitation of areas of activity in company statutes would not apply to third parties.[11] The same applies to the current regulation adopted in 2008. When public limited liability companies state their main areas of commercial operations in their statutes, this is only of an informational nature when it comes to the protection of third parties. Article 144 paragraph 2 of the KCL does not exempt the company or any third party from obligations in relation to the concluded transaction, even if the transaction is beyound the scope of main areas of commercial activity.

In amending the Commercial Law, the Saeima also supplemented Article 75 paragraph 1 of the KCL, declaring that individuals must register themselves as individual merchants in the Commercial Register if their economic activities relate to those of a commercial agent or broker. This was mostly necessary so as to ensure that real estate brokers would be registered in the Commercial Register, thus facilitating legal protection of their clients.[12]

Several of the amendments to the Commercial Law that were implemented in April 2008 deal with the competence of the boards of public limited liability companies. Article 249 of the KCL was supplemented to say that public limited liability companies, in their statutes, can authorise the board to increase equity capital for a period of up to five years, doing so in accordance with the sum determined in the statutes or by a shareholder meeting, but never to a larger extent than 30 per cent of the company's equity capital at the time when the authorisation is given. Previously equity capital could only be increased by a meeting of shareholders. The Commercial Law also included new Articles 310^1, 310^2, and 310^3 on the nullification of a board decision on increasing equity capital.

Section C of the Commercial Law, "Reorganisation of Commercial Companies," was supplemented in April 2008 with rules related to the cross-border merger of limited liability companies, as dictated in EU Directive 2005/56/EC.[13] Article $335.^1$ paragraph 1 of the KCL states that cross-border mergers involve the merger of two or more limited liability companies among which at least one has been registered in Latvia, while the others have been established in accordance with the laws of other EU member states. Special norms on the cross-border merger of limited liability companies are included in Subsection XIX of Section C, "Special Regulations on Cross-Border Mergers." The legislature thus implemented a mechanism which ensures that a Latvian-registered limited liability company can merge with a company registered in another EU member state without unnecessary legal or administrative difficulties.[14]

The most important reform to the Commercial Law since Latvia's accession to the EU, it must be said, involves norms related to commercial transactions. Section D of the Commercial Law, "Commercial Transactions", was adopted by the Saeima on December 18, 2008, and took effect on January 1, 2010.[15] Regulations concerning commercial transactions were also included in a draft Commercial Law which Parliament approved on first reading in 1999. However, the initial version did not correspond to the essence of commercial law as a special branch of private law. The draft commercial transactions section addressed numerous issues already regulated by the Civil Law of Latvia, e. g. conclusion and execution of transactions. The legislature postponed the adoption of the section on commercial transactions, and it was drafted anew. In 2005, the Cabinet of Ministers approved a conceptual document on the legal regulation of commercial transactions.[16] The document said that the Commercial Law must be supplemented with a section of commercial transactions

in accordance with Latvia's existing system of private law. The regulations would be seen as special norms in relation to the rules of the Civil Law. This was done by creating Section D to the Commercial Law, including general rules on commercial transactions, as well as special rules for specific types of commercial operations. Section D includes 93 Articles, namely Articles 388–480 of the KCL.

Article 388 of the KCL declares that commercial transactions are merchant's legal transactions which relate to commercial operations. Thus a legal transaction must be classified as a commercial transaction in accordance with the subjective system that is at the foundation of the Commercial Law. The point is that commercial law applies when the participant of the specific legal relationship is a merchant.[17] General rules concerning commercial transactions also regulate the importance of commercial customs in the interpretation of commercial transactions and the legal consequences of a merchants's silence. They instruct merchants to observe a duty of care, create prerequisites for a joint and several liability, speak to the remuneration principle and the duty to pay interest, regulate the time and kind of performance, regulate the merchant's right of retention, regulate the right to statutory possessory pledge and the acquisition of movable property in good-faith, and set the prescription period for the claims following from commercial transactions. The general rules also cover norms related to securities that are of importance to the conclusion and implementation of commercial transactions – bills of lading, consignment note and warehouse warrant. These provisions are quite short-spoken and comparatively few in number.

The special rules in the section on commercial transactions refer to contracts of commercial sale, commercial commission, freight forwarder, commercial bailment, leasing, factoring and franchising. With good reason, the legislature believed that these contracts, which are of major economic importance, require special regulations in the Commercial Law. The list of is not exhaustive. For instance, the Commercial Law does not directly regulate legal transactions such as carriage or construction agreements. These, however, are commercial transactions if they satisfy the requirements referred to in Article 388 and subsequent articles of the KCL in terms of what a commercial transaction is.[18] Regulations concerning commercial transactions can be seen as successful, even though they do have a few small shortcomings. For instance, freight forwarding agreements are regulated in excessive detail, stepping back from the laconic and concrete style of most of the regulations in the section on commercial transactions. The version that took effect on January 1, 2010, wrongly defined the most important commercial transactions of all – a contract of commercial sale. The first sentence of Article 407 paragraph 1 of the KCL said that a contract of commercial sale is one under the auspices of which the seller undertakes to sell goods and the buyer undertakes to buy it and to pay the relevant price. The second sentence in the same article, however, says that goods is a movable object which is meant to be sold and can be legally sold. This suggests that a contract must be seen as a commercial sale on the basis of the objective criterion of the characteristics of the thing that is to be sold. The problem was addressed by the legislature in April 2010, when it supplemented the Article 407 of the KCL with the statement that at least one of the parties in the transaction must be a merchant.[19]

In June 2011, in turn, the Saeima amended the Commercial Law to regulate the reorganisation of commercial companies.[20] The aim was to adapt the law to Directive 2009/109/EC, which sets out requirements related to reports and documentation in the merger and dividing of companies.[21] The purpose of the amendments was to

simplify the reorganisation of companies by reducing the relevant administrative burdens.[22] Mandatory reporting requirements were eased up. The legislature first added Article 343[1] to the Commercial Law with respect to the availability of documents related to a reorganisation. Article 343 of the KCL says that the draft reorganisation agreement, the relevant prospectus, auditor reports, the annual reports of the companies that are involved in the process for the past three years, as well as reports on their economic operations, must be available at the legal address of each company that is involved in the reorganisation so that shareholders can examine them. Article 343[1], for its part, says that a company does not have to provide access to the aforementioned documents at its legal address if they are available on the company's Internet page.

The Commercial Law was also supplemented with Articles 354[1] to 354[5]. These include special rules on taking over a company if the firm that is doing so owns at least 90 per cent of the public shares in that company. The takeover process must be simpler in such cases, because the economic effects of the reorganisation on shareholders and creditors are negligible if the company that is conducting the takeover has largely controlled the target company even before the reorganisation. These special rules say that the decision on the reorganisation must be approved by the boards of both companies. True, shareholders in the company which is conducting the takeover who represent no less than one-twentieth of the company's equity capital have the right to demand a meeting of shareholders to decide on the reorganisation. The right of the board to decide on a reorganisation is an exception in relation Article 343 of the KCL, which says that the decision on reorganisation must be taken by a meeting of shareholders at each company which is involved in the process. Protection of the interests of the company that is being taken over is addressed in Article 354[5], which says that a shareholder who owns no more than 10 per cent of shares in the relevant company has the right to demand during the course of two months after the reorganisation is in place that the company which is taking over buy back his shares.

Very stable in comparison to the Commercial Law has been the Groups of Companies Law (*Koncernu likums* in Latvian) that is a part of Latvia's commercial law system. It regulates mutual influence and dependency among commercial companies. Parliament adopted the Groups of Companies Law on February 23, 2000, or three weeks before approval of the Commercial Law. The Groups of Companies Law took effect on April 27, 2000, and it has been amended only once and to a small degree in March 2006.[23] The amendments replaced several out-of-date concepts from entrepreneurship laws adopted in the 1990s with terminology from the Commercial Law. This applied to issues such as meetings of shareholders, and in place of the concept of a "corporate enterprise," the legislature implemented the term "commercial company"

1.2 Implementation of EU regulations concerning cross-border companies

A country's right to adopt laws which regulate commercial operations is an element of sovereignty, and such laws are justified and necessary. Commercial operations ensure profits for the owners of the relevant companies, but they must also serve the interests of the country and its people. Countries define the meaning of a merchant and the way in which merchants are registered. At the same time, however, business operations have long since moved past the borders of individual countries, and internationalism is a one commercial law principles.[24]

The 27 European Union member states have different levels of economic development, but they also have much in common, starting with the existence of EU treaties. In geographic terms, they are all in the same part of the world. They all belong to Western civilisation and have democratic political systems and market economies. Efforts by entrepreneurs in EU member states to consolidate their economic potential and to launch operations in other member states are logical and understandable. To facilitate such operations in the EU's common market, the Council of the European Union has issued regulations to create a legal framework for cross-border companies. Latvia's legislature has approved special laws on the operations of such companies in Latvia.

The most important cross-border company in the EU is the so-called European Company (*Societas Europaea, or SE*). On October 8, 2011, the Council of the European Union approved Regulation 2157/2001 on the statutes of an SE.[25] It is a public limited liability company that is registered in a member state, has equity capital of at least EUR 120,000, and has a legal address which can freely be transferred to another member state without suspending operations or establishing a new company in another member states. The legal address of a European company must be in the same member state as its main headquarters. Although the terms of regulations are to be implemented directly in member states, this one is more like a directive in that it leaves a number of relevant issues up to member states.[26] On March 10, 2005, Latvia's parliament approved a European Companies Law, and it took effect on April 7 of the same year. Article 2 paragraph 1 says that European companies must accept normative acts which relate to public limited liability companies and Commercial Register insofar as Regulation 2157/2001 or the law on European companies does not state otherwise.

In comparison to the structure of public limited liability companies that are regulated by the Commercial Law in Latvia, the specific nature of the European company is that in addition to a meeting of shareholders, it can have a management system at two levels or even just one level. Article 12 paragraph 1 of the Law on European Companies says that a two-level management system can involve a board to run operations and a council to oversee them. Article 13 paragraph 1, however, permits a one-level management system with only a board. Another innovation is that Regulation 2157/2001 and the law on the European company both require employees to be involved in the taking of decisions at the relevant enterprise. Here it must be noted that on January 21, 2010, Parliament approved a law on involving employees in the taking of decisions at the European company, the European cooperative society, and the cross-border merger of limited liability companies.

Regulation 2157/2001 and the related European Companies Law make the establishment of a *Societas Europaea* in Latvia quite complex.[27] Obstacles include substantial amounts of equity capital and the demand to involve employees in the taking of decisions at the relevant company – something that is atypical in Latvia. More advantageous in expanding cross-border commercial operations is not the establishment of a European company, but instead the cross-border merger of commercial companies. As of April 2012, the Latvian Register of Enterprises had registered only five European companies.[28] In the EU as such, the number of *Societas Europaea* enterprises has increased quite slowly, though the process has gradually sped up from year to year. In 2010, the European Commission reported on approximately 650 registered companies.[29]

Of lesser importance in commercial operations are European co-operative societies (*Societas Cooperativa Europae*) and the European Economic Interest Grouping. On July 22, 2003, the Council of the European Union approved Regulation 1435/2003 on the statutes of a European co-operative society (SCE).[30] The main goal of an SCE is not to earn profits, but instead to support the economic and social needs of its members. To introduce the regulation into Latvian law, the legislature voted on October 26, 2006, to accept a Law on European Co-operative Societies. Founders must come from at least two EU member states, and equity capital must amount to at least EUR 30,000. The legal address of an SCE can be transferred to another member state without its liquidation or the establishment of a new society.

The legal framework for the European Economic Interest Grouping, in turn, is Regulation 2137/85 from the Council of the European Union (July 25, 1985) on that subject. Latvia's Parliament adopted the relevant law on April 17, 2004, and it took effect on July 21 of the same year. The goal of the EEIG is to facilitate partnerships among small and medium companies in various EU member states, doing so under the auspices of the common market. From the perspective of company law, an EEIG is a general partnership with a management structure that is similar to the board of a private limited liability company. An EEIG is subject to the law but is not a legal entity. It is essentially an organisation which helps its members in that its goal, again, is to support the economic activities of members, as opposed to earning a profit for itself.

2 Commercial law and the economic crisis

The duty for commercial law is to simplify and speed up economic activity, and that is of equal importance during periods of economic growth and during a crisis. Latvia experienced economic decline in late 2008, and due to unfavourable circumstances, the crisis proved to be worse in Latvia than in most other countries of the EU. It turned out that our commercial law fulfilled their functions at a good level during the new economic situation. Economic difficulties spurred the legislature to amend the Commercial Law in ways that perhaps would not have occurred if the crisis had not begun. For that reason, it is worth evaluating these changes separately, separating them from amendments that have been made as the Commercial Law has evolved over the course of time. In 2010, Parliament amended Commercial Law provisions on the equity capital of private limited liability companies, and in 2011 the law was supplemented with new regulations on the disclosure of the true beneficiary of limited liability companies.

Amendments approved on April 15, 2010,[31] altered previous special regulations related to the equity capital of private limited liability companies, as defined in Article 185^1 of the KCL. The law said that the equity capital of a limited liability company could be below the level of LVL 2,000 that is enshrined in Article 185 of the KCL if the company has been founded by no more than five individuals, there are no more than five individual shareholders, the board of the company has one or more members, all of whom are shareholders, and each shareholder is a shareholder in only one company which has equity capital below the level specified in Article 185. Accordingly, such a company could have equity capital of no more than LVL 1. These are known as "small" private limited liability companies, and this represents a substantial modification of the definition of such companies.[32] The aim of the law was to facilitate the establishment of new companies so as to stimulate economic

development, increase the availability of goods and services, increase employment numbers, and allow more people to earn a living.[33] It is difficult at this time to know how real and sustainable are the economic contributions of private limited liability companies with reduced equity capital, though a great many companies of this type have been registered in recent years (20,557 since May 2010, according to the Latvian Register of Enterprises).[34]

Atypical in the world of commercial law is Article 17^1 of the KCL, which regulates the duty of shareholders in limited liabilty companies to disclose the true beneficiaries of the relevant company, as well as the duty of the Register of Enterprises as the commercial register institution to store such information. These new rules were adopted in July 2011.[35] The need to disclose true beneficiaries is based only on a recommendation from the International Monetary Fund in 2006, after the IMF evaluated Latvia's legal system.[36] According to Article 17^1 paragraph 1, a shareholder in a limited liability company who is an individual is seen as the true beneficiary of the company unless someone else is seen as the true beneficiary in accordance with Latvian laws aimed at preventing money laundering and terrorism. Article 17^1 paragraph 2 of the KCL states that a shareholder who controls shares in his name, but actually on behalf of someone else, must report any acquirement of 25 per cent or more of shares to the company within 14 days' time, stating the person on whose behalf the shares are being held. Article 17^1 paragraph 3 of the KCL, in turn, says that a shareholder which is not an individual and controls at least 25 per cent of the limited liability company that has not been established in accordance with the laws of EU member states, must submit a report to the company in 14 days' time about persons who are founders or shareholders of the shareholder, and are receiving benefits from the existence of the shareholder at the time when the report is submitted. The limited liability company, in turn, is obliged by law to forward the information related to the aforementioned reports to the Commercial Register. The obvious goal here is to identify people who do not want to be identified as shareholders in companies. From the perspective of private law, fiduciary and trust relationships are legitimate civil relationships. If the legislature believes that "true beneficiaries" may have hostile intent which leads them to avoid identification, then it is not the Commercial Law, but instead the Law on Prevention of Money Laundering and Terrorism Financing that must be amended. Article 17^1 is a misplaced addition to the Commercial Law.

3 Future prospects for commercial law in Latvia

Implementation of the Commercial Law has always been successful, both because it has helped to enhance commercial activity and because its structure is optimal. It can be expected that implementation of the law will not create any major complications in future, either. It is still a fairly new law in that only 10 years have passed since its approval. Section D, which speaks to commercial transactions, is only two years old. The main focus now must be on qualitative improvements to commercial law. Inter alia, that can be achieved by developing supplementary sources such as court jurisprudence and legal research in the field of commercial law. Expansion of jurisprudence of the courts and the writing of new scholarly papers will facilitate correct understandings about how the provisions of commercial law are to be applied.

The Commercial Law consists of a complex system of legal provisions. If there is a need for amendments, then the changes must be carefully considered and truly

necessary. The Commercial Law can be improved only through gradual evolution, with care being taken not to mess up the system of the law and avoiding the adoption of norms which are atypical to commercial law. One can predict that as has been the case in the past, amendments to the Commercial Law will largely relate to commercial companies.

Back when the Commercial Law was adopted, thought was given to supplementing it with regulations for groups of companies. The legislature did not do so because, as noted above, the Groups of Companies Law was adopted before the Commercial Law. On second and third reading of the Commercial Law, sections on groups of companies and commercial pledge were removed from the draft Commercial Law. Rules about commercial pledges, indeed, are not appropriate for the Commercial Law in that commercial pledge is a collateral that is available not just to merchants, but also to other individuals. Integration of rules related to groups of companies into the Commercial Law, in turn, could be desirable from the perspective of the system of commercial law. Legal regulations of groups of companies are directly linked to commercial law, because they address situations in which a dominant company is of decisive influence in the dependent company. It can be expected that the Commercial Law will be supplemented with a new Section E on groups of companies. That will return the law to its initially intended shape. It is expected that rules in the new section will not, in general terms, be different than those which are currently in the Groups of Companies Law.

It must be added here that the Latvian legislature has never adopted a law about trade work which is harmonised with the Commercial Law. Trade work is any paid independent work done by entrepreneurs who are not merchants. Article 1 of the KCL says that commercial activity is a form of economic activity. Article 3 paragraph 4 of the KCL says that the Commercial Law does not apply to agricultural production and other trade work done by individuals and regulated by other laws, provided that the relevant individual is not registered in the Commercial Register as an individual merchant. Although the Commercial Law does not apply to non-merchants, in a broader sense it can be said that commercial law, as a branch of the law, also relates to trade work. At this time the area is still regulated by the outdated Law on Individual (Family) Enterprises, Farms and Individual Work adopted in 1992. It is out of line with the economic operations system that is addressed in the Commercial Law. There were plans during the first few years after the adoption of the Commercial Law to adopt a separate law on trade work. The government prepared a draft Law on the Economic Activities of Individuals, but nothing more was done. Adoption of such a law remains a task for the legislature in future.

Summary

Modern commercial law appeared in Latvia during the period of independence between the two world wars, and the doctrine which existed at that time was related to a successful melding of national laws with those of Western Europe and particularly Germany. The continuity of commercial law has been maintained since the restoration of the country's independence. The pre-war doctrine on commercial law continues to influence this area even today. Since the restoration of independence, commercial law has risen to a hew level of quality in terms of its development specifically because the Commercial Law was adopted in 2000. Latvia's accession to the European Union in 2004 offered a substantial stimulus and new point of reference

for improving commercial laws. Prior to access, Latvia had nearly completed harmonisation of its commercial laws with the norms of the EU.

Since 2004, the legislature has amended the Commercial Law quite often, and many of those amendments have related to commercial companies so as to satisfy the requirements of EU directives. The most substantial amendment since Latvia's accession to the EU has been the addition of Section D on commercial transactions in 2008. There have also been changes to relevant regulations outside of the Commercial Law. Parliament has approved several laws to ensure the work of cross-border commercial companies, particularly European Companies (Societas Europaea) in Latvia. The Commercial Law must be seen as a success story, but as it has been implemented, certain improvements have become evident over the course of time. It is likely that the Commercial Law will be supplemented with Section E on groups of companies. The norms related to groups of companies are in a separate law at this time. This means that the Commercial Law will return to its initially intended shape and structure.

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The Development of the General Latvian Contract Law after the Renewal of Independence and Future Perspectives in the Context of European Commission`s Solutions for Developing Unified European Contract Law

Jānis Kārkliņš, Dr. iur.
Faculty of Law, University of Latvia
Associate Professor at the Department of Civil Law
E-mail: *Janis@karklins.lv*

Abstract

The given publication presents a review of historical development of Latvian contract law after renewal of independence, the analysis enables not only to identify those improvements in contract law provisions that have been implemented as of today but to define more specifically the directions of development of Latvian contract law provisions in future. By analysing different legal terms, the article provides an insight into the improvements that have to be made putting emphasis, among other things, upon the role of the European Union in elaborating unified contract law. Although several amendments have been made in the Civil law during the last few years, thus improving legal regulation in the area of contract law, there are still some juridical problems that have not been solved by the law and that create not only problems in the theoretical but also in the practical work. Especial attention has been paid to the analysis of legal remedies, as, for, example, change of circumstances clause whose regulation is not provided in the Civil law.

Keywords: European contract law, European Union contract law, harmonization of contract law, EU Common frame of references, change of circumstances (hardship) clause, *pacta sunt servanda* principle, force majeure, exemptions from the binding force of contract, modernizing of the Civil law and contract law.

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Introduction

After renewal of Latvia's independence that marked a transition to a democratic state and market based economy a topical issue was the need for a corresponding regulation of contract law. In any free market economy a contract is the most frequent mode how people regulate their mutual property relations[1], and its aim is not only to achieve a certain specific and practical result in the interests of the contracting parties, but also to ensure clear-cut administering of civil justice, which after all has an essential macroeconomic role in development of the state economy.

1 Development of Latvian general contract law after renewal of independence

After regaining of independence of Latvia the opinions of legal scholars were uniform, namely, that 1964 Civil code of the Latvia SSR[2] will not be able to ensure those required needs that are determined by laws of free market[3], therefore the work was begun to reinstate the regulation of civil justice of the pre-was Latvia[4]. On September 1, 1992[5] the Civil law was partly reinstated but starting from September 1, 1993 it was reinstated fully before that passing separate laws that regulate the procedure of enacting the Civil law[6].

Although the Civil law was reinstated, it had been adopted in 1937 based on the understanding of those times about regulation of the contract law. Besides, looking from a historical perspective, one should take into account that the Civil law that was reinstated and is in force now is not a new set of civil provisions that was created in 1937 but a set of improved civil legal provisions dating back to the 19th century[7]. Almost a 50 year break in operation of the Civil law that had to do with the loss of independence of Latvia, terminated development of this law and prevented it from improving it to correspond to the needs of the times. Also during the period of time from 1992–1993 when the Civil law was re-enacted, the provisions of this law were not actually either supplemented or improved. After reinstatement of the Civil law a continuous work of elaboration and enactment of special civil law was done, because such legal regulations as commercial activity law, competition law, safety of commodities and other areas related to contract law had to be developed completely anew.

Although the special contract law was designed in compliance to the latest scientific assumptions and understanding, regulation of general contract law was neglected[8]. 15 years after the Chapter on Obligation Rights of the reinstated Civil law came into force[9], which to a large extent regulates general civil legal issues, one must admit that the world is changing and even good laws cannot be everlasting[10]. Civil law as a branch is incessantly supplemented with important acts that reflect new trends and problems.

The events of the last decade in view of updating and unification of contract law of the world and Europe[11] as well as the fact that the Civil law of Latvia to a large extent is a reflection of legal thought of the 19th century and even of earlier times, makes the legal scholars of Latvia foreground the question: whether Latvian contract law complies to the latest demands and changes of contract law?

A big contribution in modernizing of contract law can be made by adoption of Part D of the Commercial law which will regulate commercial transactions. Although provisions of commercial activities will be improved and updated, these innovations will refer only to one part of society – to individual merchants. Besides,

many issues that are regulated by the Civil law of the Republic of Latvia will not be included in the new part of the Commercial law[12].

At the age of harmonization of Commercial law when in a comparatively short period of time several documents systemically unifying principles of commercial law have been developed (UNIDROIT Principles[13], European commercial law principles[14], European Contract Code[15], Draft of common frame of references[16] henceforward – DCFR) and others), a particularly topical is the issue about improvement of contract law in Latvia taking into account unified understanding of European contract law and contents.

Taking into account integration of Latvia in the European Union and hence also in the system of common understanding of European law, development of Latvian contract law in future cannot take place ignoring common activities in improvement of European contract law.

The beginning of a purposeful elaboration of unified European contract law dates back to 1982 when European Contract Law Commission was established whose work resulted in Principles of European Contract Law (henceforward – PECL), finding a compromise among conceptually different legal systems – the legal system of continental Europe that includes most of the EU members states and the Anglo-Saxon legal system based on case law that dominates in Great Britain. European Contract Law Commission continued its work till 2003 when all the three parts of PECL were finished. To continue the work of the European Contract Law Commission the Study Group on a European Civil Code was set up (henceforward SGECC)[17], taking as its basis PECL. It must be noted that during its activities SGECC has expanded its initial tasks and works out much more extensive ECC that includes not only the contract law principles but also regulation of separate contracts and even regulation of separate sectors, as for instance, family law[18], Principles of European Sales Law[19], which regulates all the legal issues concerning purchaser and seller including the duties of purchaser and seller, civil legal remedies, adequacy of goods, risk transfer and others. As the last novelty in working out unified European contract law one should mention DCFR that has been elaborated by renowned civil law scholars. Although DCFR is still at a draft stage and has been delivered to public discussion only in January 2008 (with supplements in 2010), yet their elaboration is an additional step in creating unified understanding of contract law which ultimately can lead to working out unified and modern provisions regulating contract law both in each individual European state including Latvia and in the whole of the European Union as well.

The above mentioned documents are a considerable step towards formation of unified understanding about European contract law but it should be noted that for the time being it is only an academic type of material which in the legal relations between the parties as a source of law is applicable only if the parties have agreed on that in their contract. Thus the uncertain status of the mentioned documents is not a secure help in successful implementation of the four EU freedoms – freedom of movement of goods, services, capital and persons. Yet taking into consideration the European Union role in improvement and harmonization of contract law, DCFR is to be considered as the most serious achievement for reaching this goal. Participation of official institutions in its elaboration places it on a higher level than all the previous attempts to create unified European contract law that were based only on academic initiatives.

2 Historical background for elaborating DCFR

The first official appeal to create unified European contract law was expressed in the 1989 resolution of the European Parliament (henceforward – EP)[20], as well as later in the resolution of 1994[21]. It was indicated in the resolutions that harmonization of separate areas of private law is essential for ensuring functioning of internal EU market. Since the mentioned appeal was not supported by the European Commission, the European Parliament started a research about the given issue and submitted to the European Commission in 1999 a report on necessity of harmonization of private law. The mentioned document served as the basis for the resolution adopted by the EP in 2000[22], in which the EP appealed to the European Commission to start a study about the question of European contract law harmonization.

Referring to this appeal in 2001 the European Commission presented a document under the title "Communication of European contract law"[23] that started so far the largest discussion on development of unified contract law principles with participation of governments, professional organizations, practitioners and legal scholars.

To ensure a successful operation of a large economic organization, unified principles are needed whose concord refers not only to their contents and form but also to their application. The existing differences among legal systems of EU member states may be a considerable obstacle for successful functioning of the internal market. That is to be associated not only with the condition that existence of different legal systems in different countries may not only decrease the wish of individual merchants to start cross-border trade[24] but also with the fact that parallel activities in different legal environments requires larger resources – the national imperative provisions must be brought in compliance with those that may differ in different countries (restrictions of the principle of freedom of contract); different provisions of concluding, fulfilling, terminating and other provisions must be observed. The United Kingdom Parliament elaborating a report on development of the European contract law has indicated that "lack of knowledge about other countries' legal systems is an essential obstacle especially for small and medium small enterprises and for consumers"[25]. Evidence for that can be found in the existing differences among EU member state contract law[26]. For example, if in France, Belgium, Spain and Luxemburg the debtors' domicile is considered to be the place for making of payments, then in some other member states it is the creditor's domicile. While in Latvia the mentioned issue has a third solution because Section 1820 of the Civil law of the Republic of Latvia[27] provides that if nothing has been agreed regarding the place of performance then the performance may be requested or offered at any place where it can be provided without hardship or inconvenience to the other party. Likewise differences can be identified in concluding the contract between the parties who are not present.[28]

Since such differences hamper creation of unified understanding about contract law in the European space, the aim of "The European Contract Law Communication" is to resolve the above mentioned problems, creating unified basis of European contract law[29].

To find the best solution for achieving the set goal, the European Commission proposed four options of action and submitted them for public discussion: (a) not to do anything, thus leaving it all for market economy, (b) to elaborate unified contract law principles thus decreasing the differences among national legal systems, (c) to improve quality and harmonization of the existing EU legal acts, (d) to adopt

a new legal act on the level of the EU which would regulate contract law of all the member states[30].

Option number 1 of the action that was to leave the resolution of the mentioned issue in the competence of enterprises and merchants without participation of the EU institutions did not receive support and was rejected motivating it by the fact that the merchants and enterprises do not have the capacity of resolving the contradictions that are caused by the differences among national laws (see the reference of the International Chamber of Commerce to "Communication on European Contract Law"[31]). European Contract Law Commission and the SGECC had similar arguments indicating that cross-border market economy cannot create unified principles of European contract law on which further progress depends[32].

Much wider support was gained by options 2 and 3 of the action plan. Option No. 2 proposed to identify the common elements of national contract laws taking as a basis four points of reference:

1) to the national legislators when elaborating new legal acts;
2) to the national courts in cases of resolution cross-border disputes;
3) to merchants when cross-border contracts are concluded.

In legal science the above mentioned approach is called a Restatement option whose designation has been borrowed from interpretation of the USA Laws[33]. The second option of activity envisages to elaborate a document similar to Interpretations of the USA Laws and even though they would not be binding and would not apply to a specific legal system they would still classify common legal frameworks, language and terminology, which would considerably make it easier for merchants to draw up cross-border contracts and for the EU institutions to work out new directives.

As the basis of the second option of activity PECL was mentioned, although it was indicated that it is necessary to move on from general formulations to identification of specific regulations of contracts[34], and even to creation of common European civil law[35]. The criticism of the second option was directed at its goal to create non-binding principles of European contract law. Since they would have a recommending character they could be ignored, which would mean that working out of unified commercial law would be considerably encumbered.

The third option of action proposed revision and improvement of the binding EU normative regulations making them simpler and improving their quality. It was pointed out that that the most essential obstacle in for the future harmonization of the European contract law are the existing incompatibilities on the level of EU directives[36], which are manifested in two ways:

1) member states have integrated the EU directives into their legal acts differently;
2) there are contradictions and ambiguities within the EU directives themselves.

In the first instance differences have originated because the EU directives stipulate the minimum standard that must be fulfilled by a member state. In the area of consumers' law separate EU member states have provided for a higher degree of consumer protection. For example, Article 6 of the Distance contract directive[37] stipulates that the minimum time during which the consumer may use the rights of refusal is seven days while Article 14 of the Directive grants to the member states the rights to define a longer period. This is the reason why different EU member states have different regulation: in Belgium, England, Spain and the Netherlands

this period is 7 days but, for example, in Italy it is 10 days[38], while in Latvia as well as in Germany these rights can be used within 14 days[39].

In the second case there are differences and incompatibilities in the EU directives themselves. Firstly, lack of harmonization is found in the directives regulating one field. For example, if Article 6 of the Distance contract directive provides for a consumer the rights of refusal within 7 days, then Article 5 of the Directive on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis[40] stipulates that rights of refusal may be used within 10 days from the moment of signing the contract (in Latvia a different period has been stipulated – 14 days[41]).

Secondly, incompatibilities refer to the legal terminology used in the directives, for instance "damage". In accordance to Article 5(2) of the Directive on shipment of goods[42] the carrier has the duty to be responsible for the damage caused to the consigner but the Directive does not define if moral damage is also included. Majority of the EU member states by implementing the provisions of this Directive in their national legislative acts have been guided by the national contract law regulation, as a result the consigner can also claim compensation for moral damage[43].

Such a discrepancy creates several problems. The first is that in different EU member states the directives entail different legal effects or looking from the opposite perspective in different EU member states different civil legal remedies and mechanisms of their application can be used. On the one hand one may say that the aim of the directives is to set minimum standard that must be implemented by the member states but on the other hand different legal effects can hardly facilitate creating a unified market which in its turn impedes free movement of goods in the broadest sense of the word.

Because of the different regulation of the directives there are problems in their application. If a dispute arises on application of a directive then its implied meaning and aim can be clarified guided by the specific directive or by the EU law at large. By logic there should be no differences because the specific directive is part of EU law. But since the specific directive and the dispute about it always concerns an EU member state then by interpreting the directive the national legal system of the EU member state in which this directive has been transposed must be taken into account.

The 4th option was a proposal to elaborate a new legal act on the EU level which would regulate the mutual contract law in cross-border relations of the parties. The basis for this legal act could be the legal provisions developed in future by PECL, CECL as well as SGECC transforming the mentioned documents into unified European civil law and granting to this new legal act normative force in the entire EU. This variant of action stipulated direct impact by the EU institutions upon the national legal systems.

Summarizing all the opinions about "Communication on European Contract Law" the European Commission published in 2003 the next document "A more coherent European contract law. An action plan"[44], in which it offered the subsequent action plan to elaborate unified European contract law[45].

The basis of the action plan was a further development of action options 2 and 3 which consisted of three tasks:

1) the improvement of the existing EU normative acts in the field of contract law;
2) activate elaboration of standard provisions for EU contracts;

3) further support of elaboration of unofficial documents of European contract law.

Although elaboration of a new European Civil Code is rejected for the time being and the Commission has even characterized it as "an unrealistic goal"[46], still activities in this sphere are to be expected because it would help to implement the tasks of the 2nd and 3rd activities in a better way.

In order to achieve the tasks set in the action plan the Commission undertook to develop the above mentioned Common frame of reference[47], whose goal will be establishing of unified legal terminology and the basic concepts (principles) of jurisprudence, as, for example, definition of loss, legal consequences in case of breach of a contract and so on. The second goal of the Common frame of reference is to create a basis for future European contract law.

In the meetings of the working group on elaboration of the Common frame of reference in 2003 their contents was expanded, including such issues as conclusion of a contract, conditions under which an expression of will is regarded as binding, provisions about the form of the contract, use of rights of refusal, prescriptive period, regulation on breach of contract and compensation of losses, the scope of authority of representatives, determination of liability and its scope as well as the methods by which acceptance of standard agreement is established. After the work of several years the Common frame of reference or DCFR is available for discussion and anyone can evaluate its adequacy and necessity for developing unified European contact law. But the public discussion has not been planned for long because approval of the final text has been planned already for 2009.[48]

As indicated by the legal scholar O. Lando, the Common frame of reference must provide solutions in those instances when the EU directives or some other EU legal acts create uncertainties[49]. One should agree that in case of inadequacy of the EU legal acts an additional source is needed but given the unclear status of the Common frame of reference (for the time being, it has not been planned that it would be binding to the member states), one must conclude that the task put forward by the European Commission may not reach the expected goal.

3 The most essential contract law innovations of DCFR

DCFR submitted for public discussion regulates the main issues of contract law paying especial attention to regulation of separate special types of contracts.

The authors of DCFR or Common Frame of Reference finished the work at it only at the end of 2008 while the full text of their work that includes examples of legal acts and practical materials from member states was published only in 2010. The authors of DCFR Project emphasize that one of the aims of developing the frame of reference is "to serve as a draft sample for developing "political" Common Model"[50]

Despite the fact that the provisions included in the DCFR to a large extent originate from the guiding principles of the European contract law[51] that have also been included in the DCFR project in a revised form[52], one cannot deny that the DCFR project's scope is to be considered wider. Mainly because the DCFR draft includes rules concerning specific types of contracts, which according to the authors of the DCFR "expand and make more detailed also the general rules"[53]. Thus it is important to emphasize the topicality of the rules included in the DCFR draft, taking into view not only the fact they were developed recently but also the included changes within the context of the guiding principles of the European contract law[54].

In view of the fact that DCFR will be to a large extent the basic document for development of unified contract law, which is confirmed, among other things, by the Green paper of the European Commission[55] "On policy options for progress towards a European Contract Law for consumers and businesses"[56], it is essential to examine the innovations of DCFR in the area of contract law. A large part of the most progressive innovations in the area of contract law have been summarized in the Principles of the European contract law and many of these innovations have been analyzed previously in the legal literature[57], hence the attention in the context of the present article will be focused more on the most topical and innovative principles of contract law thus providing an insight into the development of contract law theory during the last few years.

As one of the most significant differences compared to the Civil law of Latvia and DCFR, the setting in of in the case of absence of will at the moment of concluding the contract must be mentioned. Chapter 7:101 of the DCFR Book II indicates two separate grounds for considering the contract invalid. Similarly to the Civil law they are as follows:

1) absence of will (duress, mistake or fraud) and unjust use;
2) violation of imperative principles.

The first one of the grounds reflects a situation that in the understanding of the Civil law is to be classified as lack of will and is regulated in the third sub-chapter of Chapter 1 on the obligation rights of the Civil law, while the question on unjust use is not to be found in the Civil law.

Unlike the Civil law DCFR provides that a transaction is in force till the moment when the injured party uses its rights of reversal (see Chapter II.7:212), which means that the contract does not terminate by itself but relative validity applies to it.

The second case of exception of validity of the contract relates to unlawfulness of the contract if the imperative provisions of the contract are not complied to. In this case deficiencies in expressing the will by the parties may not be identified but despite that it is unlawful for some other reasons. As also indicated by Professor K. Torgāns, the General Model in addition to the already known grounds of lack of validity stipulates also the use of dishonest circumstances[58].

In accordance to the provisions of the Civil law in those cases when elements of duress and mistake are identified, there arises a solution when in one case the contract would be invalid already initially, while in another one it is contestable[59]. Concerning duress Sections 1445, 1447, 1452 of the Civil law provide for cases when duress eliminates all the force of the transaction, namely, they are invalid transactions. Also in the case of physical force in accordance to Section 1463 of the Civil law the transaction is to be considered as invalid if the person's intent cannot be identified[60]. In the case of mistake and fraud Sections 1461 and 1468 of the Civil law provide that the transaction is contestable.

In DCFR, unlike the Civil law in regard to lack of intent invalid and contestable transactions are not singled out separately. The same approach can be seen in the Principles of European contract law where the lack of intent is one of the grounds to grant the rights to the injured party to recognize the contract as invalid by sending the corresponding notice to the other party (Section 4:112)[61]. DCFR regulation (Section 7:209) provides for an identical regulation. The procedure of sending such a notice is regulated by the general rules on notice in DCFR (Section 1:109). In accordance to these rules the moment when the notice comes into force is stipulated similarly in the Civil law[62], with the so-called "mail box principle", whose essence

is not the moment of expression of intent but the moment when it reaches the addressee (an exception is sending of notice to a merchant when there are special regulations)[63].

Thus, for the contract to become invalid in case of absence of expressed intent, in accordance to DCFR the court ruling is not necessary, the very fact of sending a notice is the grounds for the rights to consider the contract nullified and not to honour the contract. Such a solution can be found also in contract law of several European Union member states, for example, in German law the force of a transaction is eliminated by a unilateral expression of the empowered person[64], in Netherlands' law the transaction validity is revoked with an out-of-court notice or a court judgement[65], according to Polish law it is possible to avoid the transaction with a unilateral written notice[66], also Estonian Civil code of 2002[67] provides for avoidance by submitting a unilateral notice to the other party.

According to the Civil law in those cases when a transaction is contestable (mistake, fraud) contesting of the transaction takes place when the authorized person brings action in the court and the contested transaction can be recognized as invalid only by a court judgement[68]. Till passing of the judgement such a contract must be formally honoured[69]. A similar approach exists, for example, in Greece[70], France, Belgium and Luxemburg[71], where, in case such a notice is not accepted by the opposite party, intervention of court is necessary in order to nullify the transaction[72].

DCFR stipulates that the notice on loss of validity/non-acquisition of force of the contract must be notified to the opposite party in a reasonable time when in view of the specific circumstances the party that avoids the contract found out or it would be reasonable to believe that it should have found out about the respective circumstances or after it got a possibility to act freely (II. Section 7:210)[73]. In order to ensure confidence in transaction security[74], a restriction is necessary that the rights to avoid the contracts are granted to the parties after a reasonable period of time after they have found out or they could have found out about the respective circumstances (and not that merely existence of such circumstances grant the rights to avoid from the contract) or have got free from the other party's fraud or unfair impact[75].

The approach defined in DCFR when legal effects, irrespective of classification of lack of intent, are more well-founded compared to the provisions of the Civil law. Also Prof. K. Balodis, commenting the regulation in the Civil law, has indicated that a more suitable solution would be a solution according to which in the case of duress, mistake or fraud the transaction is contestable[76]. Such an opinion is well-grounded because the parties to the transaction are granted rights of choice – to challenge the transaction or not, at the same time entrenching the principle of freedom of contract. The interests of society cannot be the grounds for intervening into the mutual private relations of the parties, dogmatically recognizing the transaction to be invalid already initially. It is opposite in those cases when the circumstances of concluding the contract and its substance are incompatible with the fundamental principles of a legal system[77].

As an additional innovation in modern contract law one must mention the rights to derogate from the principle of the validity of the binding contract in those cases when the term of agreements has not been set.

In accordance to Book III of DCFR III, the second part of Section 1:109 in case of contracts that are associated with long-term or periodic execution, the parties are granted the rights to step back from the contract by submitting a unilateral notice.

It follows from the principle that contractual relations even if they are stipulated as termless can be terminated if neither of the parties can be bound with the other one for infinite time[78]. To terminate such relations the party must submit a reasonable notice about it[79]. Such a situation is possible only if the contract does not stipulate the period of its validity or it has been regulated as termless[80]. Correspondingly such rights cannot arise in the cases when the contract stipulates a fixed period of its validity or a specific term for its termination, for example, a six month period for submitting a notice. In case the contract prescribes a period for submission of a notice, the contract itself can be considered as termless, and yet it contains solutions how to forestall it. Thus if it has been prescribed not only when the contract terminates but also how the termination process is executed, from the position of the above mentioned provision it is to be considered as a terminated contract. This refers also to the cases when the contract has been concluded for a period of time, for example, till a certain events occur or a certain other goal is achieved. Thus in every instance when the end of validity of such a contract is associated with a certain event that can occur in reality, the contract is to be considered as nullified and cannot be terminated on the grounds of the above commented provision[81].

The authors of DCFR indicate that also in the cases when the contract has been concluded for "reasonable time" it can be interpreted in the context of the corresponding circumstances[82] and can be considered for a specific period of time, as a result it will not refer to the regulation of the above commented provision.

Also in this case, similarly to the rights of refusal from the contract if there is a lack of intent, by sending to the other contracting party a notice if the term of validity of the contract has not been specified, the expression of the will to step back from the contract must be sent in the form of a notice that acquires validity according to the "mail box principle".

As the next essential regulation in the future European contract law must be mentioned a change of circumstances clause which is based on the doctrine according to which the civil legal liability does not set in for a person for non-fulfilment of the contract. Two principles are confronted at the basis of such a doctrine. One principle stipulates the binding force of the contract (*pacta sunt servanda*), according to which contractual obligations must be fulfilled irrespective of any changes of circumstances after concluding the contract, while the other one is the principle of the goal of the contract, i.e., that by concluding the contract the parties have entered legal relations given the circumstances that existed at the moment of concluding the contract and not the subsequent circumstances (*rebus sic stantibus*)[83]. Legal theory recognizes that in separate instances there exist exemptions from the duty of honouring the contract. Yet certain circumstances must exist for the party to refer to this doctrine and not to fulfil the obligations undertaken by signing the contract.

Looking from a historical perspective it must be concluded that the Roman law did not include the clause *rebus stic stantibus*, yet its motivation was found by the lawyer Afrikan (*L.38.pr.D. de Solution; Ius et libertionibus 46.3*), who pointed out that if "*someone gets a promise that something will be given to him, it would be right to decide, that the third persons have to pay him, when the latter would be in the same state as he was when the stipulation (conclusion of the contract) happened*"[84].

In contract Law of Latvia similarly, for example, to Czech Republic but unlike the neighbouring countries Lithuania and Estonia and a number of West European

countries there is no legal regulation of unexpected circumstances clause, taking into consideration that in Czech Republic this issue could be solved via the good faith principle[85].

The clause that under certain circumstances gives rights to step back from the principle of the absolute force of the contract historically was not recognized, it was associated with the school of natural law that maintained that the clause encumbers both the legal system as well as the economic life because any contract could be contested with its help. Changes in this view were caused only by World War I, after it began the so-called *Loi faillot* principle was adopted which provided that in regard the trade transactions concluded before August 1, 1914 the contracting party can postpone execution of the contract or to refuse from it if it can prove that a subsequent fulfilment of the contract will lose sense. A similar view existed also in Russia. Article 92 of Part II of the Civil Code draft determined that "the change of circumstances was even so important that the contracting parties would not have entered into the contract, if they had known about it, in conformity with the general law it can not serve as a basis to terminate the contract."[86]

In the course of time when industrial society developed and an increasing role was played by scientific achievements, situations emerged when a contracting party could not refer to *force majeure* (obstacle) in fulfilling obligations of the contract because science reduced the number of those obstacles that could not be overcome. For example, if earlier a thunderbolt would have been considered to be *force majeure* then today in most cases this obstacle can be overcome with the help of a lightning conductor. If in the past floods were *force majeure* then today there are technologies that allow theoretically protecting specific regions with ramparts. Thus due to science there are fewer obstacles that are unsurpassable. In view of the fact that one of the elements that defines *force majeure* is that the obstacle cannot be overcome[87], then in all the cases when the obstacle can be overcome, reference to the *force majeure* clause is impossible, even if the encumbrance for the contracting party to fulfil the contract is as large as in the case of *force majeure*.

In view of this situation the change of circumstances clause was introduced in the European contract law that in separate cases mitigates the principle *pacta sunt servanda*. This is demonstrated also by the latest academic studies that include contract law principles, as, for example, the Principles of European Contract Law[88], UNIDROIT principles[89], DCFR[90] and others.

In accordance to regulation of Article 1:110 Book III of DCFR performance of a contractual obligation becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation. In such a case the court is granted rights to vary the obligation in order to make it reasonable and equitable in the new circumstances or terminate the obligation at a date and on terms to be determined by the court.

The reason to define such an exception (clause) is associated with the circumstance that in contract law the mutual relations between the parties are not to go beyond the borders of fairness[91], i.e., a formal theory on the binding force of the contract irrespective of consequences is not to be more important than ensuring fairness because as mentioned before, the purpose of law is to protect person's interests in their equal relations with other persons[92]. While the other argument in favour of this clause in legal theory[93] is the fact that it is impossible to take the risk (risk of change of circumstances) that is impossible to predict.

Change of circumstances clause is similar to the clause of forecast of losses, they both have the same fundamental principle – a person cannot be required to fulfil obligations whose substance could not have been foreseen at the time of concluding the contract.

Proceeding form this basic position, it must be noted that the person will not be able to refer to the change of circumstances clause if the change of circumstances is caused by the activities of the person or subjective impossibility[94]. This is determined with a test during which the judge verifies if the changes of circumstances that have occurred are objective, i.e., whether by placing instead of the transgressor any other member of society, the impact of the change of circumstances would be the same as for the transgressor, i.e., that the contents of the contract to be fulfilled has objectively changed irrespective of the subject of the contracting party. Yet it must be noted that impossibility in the understanding of this clause is not equal to impossibility of fulfilling obligations (insurmountable obstacle). The difference between the two impossibilities lies in the fact that in the case of an insurmountable obstacle the obligations cannot be fulfilled at all, while in the second case fulfilment of the duty is possible but it is too cumbersome and unjust. The borderline between a situation when fulfilment of obligations is impossible due to an objective obstacle (insurmountable obstacle) and when it is impossible because it would require too big resources from the debtor, can be determined only by a court[95].

It is important to add that the clause of change of circumstance is not applicable when the person undertakes the natural contract advantageousness risk. For example, a person cannot ask to begin negotiations about changes in the contract if the goods purchased by the importer have no demand in the local market or competition has increased in the market that could have not been foreseen.

DCFR regulation provides for a somewhat different approach from the one stipulated in Section 6:111 in the Principles of European Contract Law. The Principles of European Contract Law stipulate first of all the duty for the parties to hold negotiations with an aim to adjust the contract or to terminate it. As a result of non-fulfilment of this duty the party that has refused to enter negotiations or terminated negotiations contrary to good faith, could have the duty of compensating the loss that the other party suffered resulting from it. The authors of DCFR have taken into account criticism voiced by the interested parties that such a procedure is to be considered as undesirably complicated and cumbersome. Mainly the argument was taken into consideration that the creditor in his obligations can act as a fiduciary and therefore be placed in a complicated conflict of interests situation if there is a provision imposing on him the duty to agree to refuse from a certain benefit[96]. Therefore DCFR does not provide the duty to both parties to get involved in negotiations process any more, it merely provides for the debtor the duty to try to achieve reasonable and just adjustment of obligations by way of agreement in good faith[97]. The possibilities of application of circumstance clause in such a narrower sense must be evaluated ambiguously because by discarding the duty to enter negotiations on changes of substance of the contract and compensation of loss resulting from it and if such a duty is not fulfilled the preventive force of civil legal remedy is reduced. Namely, the person loses motivation to continue negotiations about changes in the contract if the law does not provide for negative legal effects. On the other hand, the argument that formal holding/non-holding of negotiations in itself cannot be a precondition for defining the activities of a party as lawful or unlawful.

The necessity for inclusion of the change of circumstances cause in the Civil law is not changed by the condition that the legislator has rejected the planned amendments in the Civil law in their initial edition because non-adoption of the amendments does not change the regulation of the Obligations part of the Civil law, and neither does it revoke the good faith principle laid down in Section 1 of the law. It must also be noted that the process of discussing the draft law shows that the legislator did not agree about an acceptable edition of the provision – the proposal to amend Section 1587 of the Civil law by supplementing it with provisions of Section 6:111 of PECL was conceptually supported in the first reading, it was considerably modified in the second reading and eventually in the final reading it was deleted from the draft law. Thus even though unlike the initial draft the change of circumstances clause was not included in the final edition of the amendments of the Civil law approved by the Saeima it is necessary to return to this question in future as fast as possible once again, setting inclusion of change of circumstance clause and other modern contractual obligations principles as the nearest task of the legislator and legal scholars, by that ensuring compliance of Latvian contract law to the latest trends of European contract law, which ensures just application of the *pacta sunt servanda* principle.

4 Future development of DCFR and European contract law

Although DCFR has not yet been granted an official status it is expected that in cooperation with legal scholars the European Commission will arrive at a final edition of the text of the document in the nearest future establishing its status legally. It is yet not known in what way DCFR or the Common framework will function but an approximate direction of its development can be inferred from the Green Paper of the European Commission[98] "On Policy Options for Progress Towards a European Contract Law for Consumers and Businesses" and from the comments received from public. The aim of the Green Paper is to start public discussion, to collect opinions on policy options in the area of European contract law. Differences among contract law of states incur additional costs of transactions and facilitate legal uncertainty for businesses and consumers therefore the European Commission has defined and is offering in the Green Paper for evaluation several solutions in regard to the future of legal character of the European contract law instrument, its scope of application and its scope of substance. As for the legal nature of the contract law instrument it is indicated in the Green Paper that the European Contract Law instrument could be both a non-binding instrument whose aim is to improve consistency and quality of legal acts of the European Union, as well as a binding instrument as an alternative to the existing diversity of contract law regimes in various states offering one set of provisions for contract law.

319 comments about the future ways of harmonization of the European contract law proposed in the Green Book were received from the European Union states, institutions and private persons[99]. The Cabinet of Ministers of the Republic of Latvia on February 8, 2011 also expressed its position about future improvement and harmonization of the European contract law[100].

Latvia considers as the most suitable from the different solutions of problems of contract law mentioned in the Green Paper the Regulation by which the Optional Instrument of the European Contract Law is created *("the2nd regime"*), which would exist in each member state along with the national regulation. Latvia emphasizes

that by developing such an instrument it will ensure a high degree of protection of rights, it must be sufficiently clear to an average user and it must be as independent as possible so that when it is applied the probability that the national regulation would have to be applied in regard of a certain issue would be excluded to a maximum degree. Latvia also holds a position that the choice of the instrument to be applied is left to the consumer and not to the supplier of goods or services. It is additionally emphasized that it is necessary to continue discussions on interaction of the Optional Instrument of the European Contract Law with other instruments of European private law.

Latvia does not see a significant added value of the different solutions of contract law mentioned in the Green Paper by developing an official set of set of instruments for the legislator or in the proposal of the European Commission on European contract law.

Latvia holds the view that developing of a directive on the European contract law in regard to all the contract law (B2B, B2C or C2C) is not to be supported because harmonization of all the areas of contract law in the member states is not a proportional solution to achieve the goal defined in the Green Paper. While application of the directive on European Contract Law on relations between enterprises and consumers (B2C) would not ensure a significant added value because a number of directives have already been adopted in this area which still do not entail unified enforcement and interpretation of provisions set out in them.

Regulations by way of which European contract law adoption might be achieved, could be considered by Latvia only in regard the regulation between enterprises and consumers (B2C).

Likewise Latvia does not support the Regulation with which European Civil Code is established, because harmonization in all the member states of all the areas of contract law, of delict and relations that follow from unjust enrichment is not a proportional solution to reach the goal set in the Green Paper.

As for the scope of application of European contract law the government of Latvia has expressed an opinion that in case the Optional Instrument of European Contract Law is going to be developed as a Regulation, Latvia is inclined to support its application both to contracts between enterprises, as well as to contracts between enterprises and consumers because the problems caused by differences in contract law as identified in the Green Paper are observed in both these areas therefore are to be solved in a complex way. Yet the Optional Instrument of European Contract Law should be applied only to cross-border transactions (including transactions concluded online) because an instrument that would be applicable both to cross-border and domestic consumer contracts could cause problems both for consumers and the transactions between enterprises.

As for the material sphere of application of European law, the official position of Latvia is that the material scope of application of the Optional Instrument of European Contract Law must be sufficiently wide – embracing all the aspects of contractual relations – starting from the pre-contractual relations and ending with liability for breach of the contract. Thus by developing the Optional Instrument of European Contract Law the legal environment would not be made complicated and no problems in its application would be generated because by applying a wide instrument a probability would be excluded to the maximum that the national regulation would have to be applied to some issues[101].

A similar position is held by the EU European Economic and Social Committee (plenary session 468 on January 19 and 20, 2022, promulgated on March 17). From different solutions proposed by the European Committee, the Committee gives preference to a mixed solution which provides for reduction of costs and for legal certainty by setting up

1) "a set of instruments", i.e., the unified model offered to the parties for elaboration of transnational contracts and that are consistently updated;
2) optional legal regulation by which the most favourable foundation is developed for the parties using "new, progressive optional regulation" to which they can refer in transnational contractual relations instead of referring to the national provisions as long as the "set of instruments" and the Regulation are available in all the languages of the Community, and on the basis of more progressive methods of legal remedy ensure legal certainty to population and enterprises.

Such a regulation does not prohibit member states to enforce more stringent activities of consumer protection.

Despite the long-lasting efforts of the European Union developing unified contract law, apart from public discussion of DCFR, the work is being done to develop the basic positions of European contract law. On April 1, 2010 the European Commission established an expert group whose task is to develop the fundamental principles of European contract law taking as the basis DCFR[102]. The materials developed by the above mentioned expert group will be used as the basis for beginning harmonization process already on a political level[103].

Although as of today a decision has not been made on the European Union level about a clear direction in developing unified European contract law, further harmonization processes of law are to be expected in the nearest future which in future will have a direct effect upon regulation of contract law in Latvia. The task of legal scholars in Latvia is to follow the latest trends of development of European contract law and to participate actively in further development of unified European contract law.

Summary

The article presents an analysis of historical development of contract law in Latvia providing an insight into not only reinstatement the Civil law after renewal of independence but also identifying the most essential innovations in regulation that have been adopted to improve regulation of contract law in Latvia. Particular attention has been devoted to activities of the European Union in order to develop common and unified contract law, including the analysis of the most significant achievement in developing unified contract law – the Common frame of reference. The mentioned non-binding regulation of contract law has been analysed in the context of the substance of contract law in Latvia providing an insight into state of affairs in contract law in our country and at the same time putting forward proposals about the areas where contract law in Latvia should be still modernized.

An approximate trend of harmonization of European contract law can be inferred from the European Commission Green Paper "Policy Options for progress Towards a European Contract Law for Consumers and Businesses" whose aim is to begin a public discussion to gather opinions on possible policy solutions in the area of European contract law.

Despite the long-lasting efforts of the European Union to develop unified contract law, it must be noted that apart from elaboration of the Common frame of reference or DCFR, the work is being done to develop the basic positions of European contract law which is done by a group of experts established by the European Commission with an aim to develop the fundamental principles of European contract law using DCFR as the basis.

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[94] The person will not be able to refer to the clause of change of circumstances as the reason for non-fulfilment of the contractual obligations motivating it by the fact that the commercial performance is not as good as planned and therefore the person was not able to foresee that there will be shortage of financial resources to honour the contract. Reference to this clause is not possible even if fulfilment of obligations become excessively burdensome.

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[96] *Von Bar, C., Clive, E.* (ed.). Principles, definitions and model rules of European private law: Draft common frame of reference (DCFR). Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). New York: Oxford University Press, 2010, Vol. 1, p. 712.

[97] *Buls, L.* Līguma saistošā spēka izņēmumi Kopējā modeļa projektā, kopīgais un atšķirīgais Latvijas Republikas Civillikumā. Maģistra darbs (Exemptions from binding force of contract in the Common model Project, the common and the different in the Civil Law of the Republic of Latvia. MA thesis). Rīga: LU, 2011, p. 42.

[98] Eiropas Komisijas Zaļā grāmata "par politikas risinājumiem virzībā uz Eiropas līgumtiesību izstrādi patērētājiem un uzņēmumiem", adopted on 1st July 2010, COM(2010) 348 (The European Commission Green Paper "On Policy Options for Progress Towards a European Contract Law for Consumers and Businesses", adopted in Brussels on July 1, 2010, COM(2010) 348). Available: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:lv:PDF* [last viewed 11.12.2010].

[99] Available: *http://ec.europa.eu/justice/news/consulting_public/news_consulting_0052_en.htm* [last viewed 18.08.2011].

[100] Available: *http://www.mk.gov.lv/mk/tap/?pid=40206405* [last viewed 18.08.2011].

[101] Ibid.

[102] EC Decision No. 2010/233/EU of 26.04.2010. *Official Journal of the European Union,* L 105, 27.04.2010, pp. 109–111.

[103] Available: *http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf* [last viewed 23.08.2011].

The European Union`s Framework Decision on the Use of Criminal Law to Combat Specific Types and Manifestations of Racism and Xenophobia and the Implementation of the Decision in the Latvian Law

Artūrs Kučs, Dr. iur.
Faculty of Law, University of Latvia
Docent at the Department of International and European Law
E-mail: *arturs.kucs@lu.lv*

The fundamental issue that is addressed in this paper relates to so-called "memory laws," which ban any interpretation of essential events in the history of a country and society in a way that is different from the officially accepted version. The author has looked at the necessity for such laws, as well as at the issue of how they correspond to the right to freedom of speech. The European Union's Framework Decision on Combating Racism and Xenophobia, which was approved on November 28, 2008, is a vivid example of this issue, because it declares that member states are obliged to punish people who publicly deny, justify or grossly trivialise the Holocaust that was committed by the Nazi regime, as well as genocide, war crimes or crimes against humanity committed by other regimes. There were long debates among EU member states about the text of the decision, and this market out different priorities in the various countries. One issue was protection of human dignity in comparison to the freedom of speech. Diametrically opposed views about bans against the denial of international crimes also illustrate other factors which relate to each country's history, political culture and traditions, and that gives reason to doubt whether a unified solution is appropriate in this regard. Member states initially proposed that the ban be applied only to the crimes of the Nazis, and that demonstrates the gap which still exists between Western and Eastern European countries when it comes to the identification and appropriate evaluation of crimes that were committed by the Communist regime.

The author has also reviewed the extent to which the ban against specific activities is in line with other international obligations such as the duty to guarantee a free exchange of views and academic freedom in relation to issues of history. The aforementioned issues will be analysed via a study of the way in which the framework decision was implemented in Latvia's legal system, also looking at relevant amendments to Latvia's Criminal Law and the initial practices of law enforcement institutions in applying these norms.

Keywords: European Union law, human rights, freedom of speech, bans against fomenting of hatred, implementation of EU laws in national laws.

Contents

Introduction

On November 28, 2008, after seven years of debate, the Council of the European Union approved the Framework Decision on Combating Racism and Xenophobia. The purpose has been to reduce the manifestation of racism and xenophobia, calling on member states to criminalise activities such as calls for hostility or violence on the basis of race, ethnicity, region or other characteristics cited in the decision. There are also to be punishments for any public denial, justification or gross trivialisation of genocide, war crimes, or crimes against humanity. This involved extensive debates among member states as to whether the new rules would correspond to other obligations in the area of human rights,[1] including constitutional rules related to the guaranteeing of the free exchange of views. Central and Eastern European countries also objected to the fact that the initial draft of the decision was not sufficiently all-encompassing, because it only applied to crimes that were committed by the Nazi regime. Though the framework decision is not applied directly by national courts, member states are obliged to introduce legal regulations that will ensure the implementation of the relevant goals. Latvia's Criminal Law has been amended for this purpose, but there is still the question as to whether the application of the new legal norms might violate the right to freedom of speech that is enshrined in Latvia's Constitution and in the international human rights documents that are mandatory for the country.

The framework decision also brings up the broader question of whether the officially accepted explanations which countries have about major historical aspects of the history of the relevant societies and countries require the protection and defence of laws, including criminal law so as to prevent the opportunity to publicise varying interpretations. Given this broader context of the issue that is to be analysed, the purpose of this paper is to determine whether the unified solutions that are defined in the framework decision in terms of banning any denial of the crimes that are committed by totalitarian regimes as an instrument aimed at eliminating racial and ethnic intolerance are appropriate for the situation of all EU member states. As an example, the author will review the extent to which the framework decision might affect legal regulations and the practices of law enforcement institutions when it comes to applying the relevant norms. First the author will offer a more detailed analysis of the obligations which are placed upon the shoulders of member states by the framework decision, also looking at the leitmotifs of how it was adopted, as well as the polemics which existed among member states in discussing the necessity, content and framework of the decision. From there, the author will review legal regulations in Latvia and the practice of law

enforcement institutions in the application of the relevant criminal norms. Finally, the author will correlate the main arguments in support of or against the application of a unified solution in all EU member states when it comes to the issues that are addressed in the framework Council decision.

1 The framework Council decision on the use of criminal law in the battle against specific types of racism and xenophobia, its contents, and discussions among member states

The origins to the Council's framework decision can be traced back to 2011, when several member states asked the European Commission to bring criminal law from the various member states closer together so as to ensure a more effective battle against racism and xenophobia in all EU member states. The preamble of the framework decision states that "racism and xenophobia constitute a threat against groups of persons which are the target of such behaviour. It is necessary to define a common criminal law approach in the European Union to this phenomenon in order to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive penalties are provided for natural and legal persons having committee or being liable for such offences."[2] The draft decision submitted by the Commission led to fierce battles among member states, and this caused questions about whether the framework decision could be taken in the first place. Although the process was a long one, the fact is that after bitter debates at the Council of the European Union and the European Parliament, as well as after substantial amendments to the original text, a final version was approved on March 28, 2008.

Before reviewing the different views of member states about the text of the framework decision, it is necessary to look at the obligations which are placed upon the shoulders of member states by the decision. When it comes to the obligations of member states, Paragraph 1 of Section 1 of the framework decision is most important, because it defines crimes related to racism and xenophobia which must be banned by member states:

"Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:

(a) publicly inciting the violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;

(b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;

(c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Article 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;

(d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or

national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group."

The fewest differences of opinion among member states related to Section 1.1(a) of the framework decision, which calls for the criminalisation of public calls for ethnic or religious violence or hatred. Countries face similar obligations in the context of the United Nations convention on the elimination of all types of racial discrimination,[3] as well as the UN pact on civil and political rights,[4] which all European Union member states have ratified.[5] It is also true that the European Court of Human Rights has handed down several rulings[6] which confirm that member states have the right to limit such types of statements.[7]

At the same time, however, there were fundamentally different viewpoints about the need to criminalise the public justification, denial or gross trivialisation of genocide, war crimes and crimes against humanity. These disputes illustrated the different attitudes that are taken in various European Union member states when it comes to the role of freedom of speech on the one hand and the protection of human dignity on the other.[8] There is also the fact that different European countries have had different historical experiences, and so people in some member states could not understand why the initial text of the framework decision only spoke to crimes referred to by the International Criminal Tribunal at Nuremberg, as opposed to the crimes which were committed by communist regimes.

Representatives of Great Britain in particular insisted that the framework decision could have a deleterious effect on the free exchange of viewpoints about history. The initial text of the decision was proposed by Germany, France and Luxembourg, and it spoke to the *per se* criminalisation of any denial or trivialisation of genocide, war crimes and crimes against humanity without any additional conditions.[9] The fact that this proposal was doomed to fail was soon quite evident, because a number of countries had objected to the inclusion of a similar norm in a protocol which the Council of Europe sought to attach to its 2003 convention on cybercrime – one which spoke to racism, xenophobia and similar processes in the use of computer systems.[10] The additional protocol did allow member states to partly or fully exempt themselves from the application of the norm which limited the freedom of speech, but many Council of Europe member states declined to sign up to it, arguing that the obligations enshrined in the supplementary protocol could be in conflict with free speech rights enshrined in the constitutions of the relevant countries.[11]

The result of all of this is that the final version of the framework decision includes a whole series of departures from the original draft, this done in order to win the agreement of all member states. The most important element in striking a balance between the bans in the framework decision on the one hand and the right to free speech on the other is the application of the ban only to purposeful activities. Punishments would apply not to the justification, denial or gross trivialisation of genocide, war crimes and crimes against humanity *per se*, but only to a situation in which such activities have been aimed at creating violence or hatred toward a group that is cited in the text of the framework decision or toward a member of such a group. Despite this attempt to place some balancing elements into the text of the framework decision, there are authors who express criticism about the idea that concepts such as "gross trivialisation" are very unclear,[12] which means that they might restrict discussions among historians whose goal is to find out the truth. In France, for instance, several historians published a manifesto in reaction to legal acts which do not allow anyone to question the military crimes which were identified by the

Nuremberg Tribunal[13] or deny that the mass murders which were committed by the Ottoman Empire against Armenians must be classified as genocide.[14] In the manifesto, the historians harshly criticised the fact that the state's official version about specific historical events is being enshrined in the law, adding that such legal acts endanger the research freedom of historians by threatening them with criminal sanctions and having the state pre-determine the results which historians must arrive at in their research.[15]

The initial draft of the framework decision which was proposed by the Commission led to debates which were no less harsh than the ones which focused on the possible threats which the decision could create for freedom of speech and research. The initial draft only spoke to crimes recognised by the military tribunal at Nuremberg. This means that the text initially applied most directly to statements which justify, deny or grossly trivialise the Holocaust. This proposal probably had to do with ever-increasing anti-Semitism in Western Europe and a movement of revisionists who denied or trivialised the Holocaust so as to facilitate hatred and violence against Jewish people.[16] In order to prohibit the rebirth of totalitarian ideas and to protect the security of members of the Jewish community, norms which ban the denial or trivialisation of the Holocaust were approved during the mid-1990s in European countries such as Germany,[17] Austria,[18] and France.[19]

The focus only on Nazi crimes in the text of the framework decision led to objections from Eastern European countries which had suffered under the rule of both totalitarian regimes. In the Baltic States, for instance, there were mass murders, torture and civilian deportations during the first year of the Soviet occupation, and that year is still known by Latvians as "the year of terror."[20] In those Eastern European countries which had similar legal acts, the rules were applied to the justification or denial of crimes committed both by the Nazi and the Communist regime.[21] In addition, a series of non-governmental organisations called for the framework decision to apply the ban to any justification or denial of genocide, war crimes or crimes against humanity.[22]

The final version of the framework decision was supplemented with various new elements, and the final version illustrates the many compromises which allowed all of the parties to achieve their interests at least in part in this controversial area. In order to yield before the demands of Eastern European countries which wanted a universal ban, the text of the framework decision is applied to any justification or denial of genocide, war crimes or crimes against humanity. It is also true that although countries from the former Soviet bloc did not succeed in getting the authors of the framework decision to make a direct reference to a ban on the denial or justification of crimes committed by the Communist regime, a declaration from the Council of the European Union which denounced all totalitarian regimes was attached to the framework decision.[23, 24] Of great importance to the Baltic States was the decision to include text in the preamble of the agreement which allows countries to expand its framework. Article 10 of the preamble:

"*This Framework Decision does not prevent a Member State from adopting provisions in national law which extend Article 1(1)(c) and (d) to crimes directed against a group of persons defined by other criteria than race, colour, religion, descent or national or ethnic origin, such as social status or political convictions.*"[25]

It must be added that the deportations which were carried out by the Communist regime in the Baltic States were mostly aimed at the regime's political enemies and wealthier people; they were not based on ethnic factors. Without the

opportunity to add criteria such as "social status" or "political convictions," therefore, the principles of the framework decision could not be applied to such Soviet crimes.

At the same time, the framework decision also includes a separate norm related to the ban on justifying or denying war crimes, as defined by the international military tribunal at Nuremberg, thus reflecting the interests of Germany and other countries which wanted to emphasise these crimes in specific in the decision. The framework decision also allows those countries to apply the ban only on Nazi crimes. Article 1.4:

"Any Member State may, on adoption of this Framework Decision or later, make a statement that it will make punishable the act of denying or grossly trivialising the crimes referred to in paragraph 1(c) and/or (d) only if the crimes referred to in these paragraphs have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only."[26]

Communist crimes have not been legally examined or recognised by an international tribunal, and that means that the application of the framework decision to these crimes is only possible in those countries in which national courts have recognised the crimes. In several Central and Eastern European countries, this is reflected in criminal bans on the denial of crimes committed not just by the Nazis, but also by the Communists.[27]

In the next sub-chapters, the author will analyse the changes that were implemented in Latvian criminal law when the text of the framework decision was implemented and how these changes can influence other international obligations faced by Latvian in the area of human rights and freedom of speech in particular. First, however, the author will review legal regulations and court practices in the area that is regulated by the framework decision before it was approved and the relevant amendments to Latvian criminal law were implemented. This makes it possible to conclude the extent to which the criminal law covered the crimes referred to in the framework decision before it was implemented into Latvian law.

2 Legal acts and court practices in Latvia before the implementation of the framework decision

Even before the implementation of the Council's framework decision, Latvia's Criminal Law included several legal norms which spoke to criminal liability for those who engaged in the activities that are listed in the decision. Most directly applicable here was Article 78 of the Criminal Law which, like the framework decision, bans knowing public calls for violence or hatred:

"(1) For a person who knowingly commits acts directed towards instigating national or racial hatred or enmity, or who knowingly commits the restriction, directly or indirectly, of the economic, political, or social rights of individuals or the creation, directly or indirectly, of privileges for individuals based on their racial or national origin, the applicable sentence shall be deprivation of liberty for a term not exceeding three years or a fine not exceeding sixty times the minimum monthly wage.

(2) For a person who commits the same acts if they are associated with violence, fraud or threats, or if they are committed by a group of persons, a state official, or a responsible employee of an undertaking (company) or organisation, or if they are

committed with the assistance of an automated data processing system, the applicable sentence shall be deprivation of liberty for a term not exceeding ten years."[28]

In addition to Article 78 of the Criminal Law, government officials and some researchers[29] have argued that when activities libel an ethnic or religious group, the relevant criminal norms can be applied.[30] Here, however, me must recall that amendments to the Criminal Law which were adopted in 2009 decriminalised libel.[31]

Victims, however, can still file civil suits in response to libel[32] or seek compensation for moral damages caused by illegal activities.[33] The framework decision also says that criminal liability is not always necessary or appropriate in response to activities cited therein. Article 6 of the preamble:

"Member States acknowledge that combating racism and xenophobia requires various kinds of measures in a comprehensive framework and may not be limited to criminal matters. This Framework Decision is limited to combating particularly serious forms of racism and xenophobia by means of criminal law."[34]

As far as the author knows, there have only been two cases in Latvian legal history in which the relevant norms from civil law were applied to statements seeking to instigate racial or ethnic hatred or discrimination.[35] The basic problem in applying the relevant norms rests in the fact that legal practice in Latvia does not recognise the concept of so-called "group or collective demands" at a time when must statements aimed at fomenting hatred are focused not on an individual, but instead on a racial, ethnic or religious group as such. This means that it is not clear whether each individual in such a group can use Article 2352(1) of the Civil Law if libel has occurred or Article 1635 of the law if the individual believes that he has suffered moral damages as a result of the activities that have occurred.[36] In one of the aforementioned cases, the Rīga Regional Court ruled that "the petitioners are correct in arguing that the advertisement included an idea which discriminates against black people, among whom the petitioners are, thus libelling them."[37] Existing court practice, however is insufficient to confirm that in similar cases, courts will identify links between illegal activities related to the fomenting of racial discrimination on the one hand and the libelling of people from the relevant racial group on the other hand.

Another obstacle against the successful use of civil norms in protection of rights existed for a long time – the anonymity of people who make offensive statements on the Internet. A civil lawsuit requires identification of the defendant, but those data were not available. It was only in June 2011 that the law on electronic communications was amended to state that the courts could demand such data from the relevant electronic communications company.[38]

The practices of law enforcement institutions in interpreting and applying the aforementioned criminal norms were initially fairly indistinct.[39] Irrespective of theoretical claims made by representatives of the government and various experts, the author is not aware of a single case in which the libelling of an ethnic or religious group has led to the application of the relevant norms form the Civil Law. After the adoption of the Criminal Law, the number of cases related to activities knowingly aimed at instigating national, ethnic or racial hatred or tolerance was between one and three a year,[40] and few of them ever came to trial.[41] Most cases, including ones related to activities which the framework decision obliges countries to ban, were ended during the pre-trial stage. Several human rights experts have criticised this.[42]

Possible reasons for why law enforcement institutions have been passive about this process include the heritage of the past and a lack of experience in investigating such cases. The ban against inciting national or ethnic hatred was nothing new in the Criminal Law; the ban existed in the criminal code of the Latvian SSR, as well.[43] The Soviet Union, however, was a country in which there was censorship, and crimes of this nature stood in opposition to the official ideology of the system. This meant that there was no way of expressing statements which fomented national or ethnic hatred or to discuss such crimes in public. Law enforcement institutions inherited from the Soviet era the belief that this norm of law is unimportant, as well as a lack of experience in dealing with such issues, and that remained true even after the restoration of Latvia's independence.

Another explanation for the small number of cases relates to the practices of law enforcement institutions in proving hate crimes. Article 68 of the Criminal Law states that the relevant criminal offences can be conducted only with full intention, and in practice, prosecutors have set up a very high threshold of evidence in this regard.[44] In the 2008 report from the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, it is stated that *"(..) criminal prosecution of incitement to hatred has formally demanded overly high thresholds of proof to show explicit intent to incite violence. This provision has meant, in practice, that the accused must individually confess to showing intent, while other relevant indicators have not been taken into account."*[45]

One of the first cases of incitement to hatred to be received by the Latvian courts is the so-called Landmanis case. In January 2011, a court in Liepāja held a trial in which Guntars Landmanis, publisher of the monthly journal *Patriots*, was charged under the auspices of Article 78.1 of the Latvian Criminal Law. The court found that "*between October 199 and January 2000, Landmanis distributed the first, second and third edition of the Latvian monthly Patriots, as well as the satirical magazine "Jokes About the Holocaust." Publications in these, particularly the article "On Ticks, Jews and the Repeal of the Death Penalty in Latvia" (3rd ed.), contained an offensive and scornful attitude toward the Jewish nation."*[46]

The defendant denied distributing the magazine, claiming that *"the monthly was just a form of correspondence with pen pals and acquaintances, and each month approximately 30 copies of each edition were sent or present to such people."*[47] Landmanis also said this was merely an exchange of thought, arguing that *"there was no intention to foment racial intolerance, because I only published the personal views of others with whom I corresponded."*[48] He told the court that there was nothing anti-Semitic about the articles, and there was no intention to publish anything anti-Semitic. He also made reference to Article 100 of the Latvian Constitution, which speaks to the freedom of speech.[49]

After hearing the evidence, the court ruled that the monthly *Patriots* was meant for distribution, pointing to evidence such as a call for subscriptions and the fact that sometimes the journal was sent to persons who did not know the publisher and had never corresponded with him. In terms of the subjective aspects of the criminal offence, it has to be noted that the defendant denied any intent to incite national or racial intolerance or hatred." The court, however, ruled that "*the collection, classification and laying out of specific articles in the journal could be performed only with knowing intent, i.e., Landmanis had to understand the dangerous nature of what he was doing.*"[50] The court's decision that there was knowing intent in the process was also based on the fact that the defendant engaged in the relevant activities

systematically and repeatedly. The court pointed to testimony and material evidence to confirm that the defendant was aware of the dangerous nature of what he was doing. The ruling that *Patriots* and the satirical magazine about the Holocaust contained negative, offensive and scornful attitudes toward the Jewish people and were aimed at fomenting national hatred and intolerance was based on linguistic expertise, eyewitness testimony, and other case materials.

In future years, law enforcement institutions began to devote increased attention to hate crimes, as was seen in a radical increase in the number of cases.[51] The groups in society which faced the most attacks in relation to hate crimes were foreigners with a different skin colour, Roma people and Jews. Later the attacks also focused on people with a non-traditional sexual orientation.[52] Possible reasons as to why investigatory institutions changed their practices include explanations given by the non-governmental sector about the threats which hate crimes create in relation to the peaceful functioning of society, training for law enforcement specialists in relation to the investigation of such cases, as well as criticism from foreign and international human rights organisations about the fact that Latvia's government was not doing enough to battle hate crimes.[53]

One of the few cases in which the circumstances included not just a classic example of inciting hatred, but also the ban against justification of Nazi crimes that is included in the framework decision, involved a person identified as A. J. On February 22, 2007, he and several supporters attended a conference that had been organised by the Latvian Anti-Fascist Committee at the Reiterns House in Rīga – "Problems with Nazism, Neo-Nazism and Xenophobia in Latvia." Toward the end of the discussion, A. J. answered questions that had been posed to him: "A. J. stood up, presented himself as a neo-Nazi, and was asked how many Jews and Roma people were in his organisation. There were several dozen people in the room, and he responded in Russian: *"Jews and Gypsies are not human beings, and that is why they are not members of our organisation."*[54] He went on to express support for neo-Nazi activities in Russia and for ethnic cleansing, metaphorically comparing Jews and Roma people to gangrene which endangers other nations.

A. J. denied any intention to foment national hatred, arguing that he was just trying to exchange views with people who disagreed with him. This argument was rejected by the Rīga Regional Court, which held the first trial of the man, and by the Department of Criminal Cases of the Latvian Supreme Court, which heard an appeal of his verdict.[55] The high court ruled that *"(..) there was sufficient evidence in the case to show that A. J. knowingly tried to do things which were knowingly aimed at inciting national hatred and intolerance. The case files show that the defendant and a fairly large range of supporters arrived at a discussion without any invitation – one which had not been advertised in the public arena. He understood that the event was organised by his ideological and political opponents, as stated in the defendant's appeal. He openly positioned himself as a neo-fascist, and he was self-confident in expressing the ideas of national hatred and intolerance, including the destruction of Roma people and Jews because of their ethnicity. He was aware of the fact that representatives of those ethnic groups were in the audience."*[56]

The high court's ruling offers an important explanation of the objective aspects of the crimes referred to in Article 78 of the Criminal Law. It rejected the defence's claim that the objective aspects of a crime can only be manifested through actual activities or calls to engage in same. The court ruled that *"the disposition of Article 78.1 of the Criminal Law shows that the objective aspect of the crime referred to*

therein is manifested through any activity which is knowingly aimed at fomenting national hatred or intolerance. Although the statements made by A. J. cannot be seen as a call to immediately act in pursuit of the stated goals, they must be seen as propaganda in support of national hatred and intolerance, with the defendant expressing public views about limiting the fundamental rights of individuals, including the right to live, so as to convince and obtain supporters."[57]

The Department of Criminal Cases also rejected a much-criticised[58] prerequisite which law enforcement institutions insisted upon when it comes to criminal liability – the need for harmful consequences in relation to the things which are done: *"The fact that after A. J.'s statement, no other person in the audience attacked representatives of the Jewish and Roma people is of no importance in the presentation of a just ruling in this case, because the criminal offence referred to in Article 78.1 of the Criminal Law is a formal crime which is seen as being completed when the criminal offence is committed, without any requirement for harmful consequences in relation to same."*[59]

These rulings show that when the relevant norms of the Criminal law are interpreted and applied appropriately, they cover the requirement in the framework decision that those who seek to incite racial or ethnic hatred or violence must be punished. Unlike the framework decision, however, the Criminal Law does not speak to criminal liability for those who call for violence or hatred against an individual or a group of people on the basis of their "origin" or "skin colour," but in practice, the concept of "race" has been utilised in relation to hate crimes which are based on "skin colour." This means that when it comes to the ban on inciting hatred on the basis of "skin colour," the situation can be resolved on the basis of an interpretation of national law in the context of international legal acts which are binding to the Republic of Latvia.

In parallel to the ban on inciting hatred, however, the framework decision also obliges countries to take other steps against racism and xenophobia. The next subchapter is focused on the way in which these obligations have been added to Latvian laws and on the problems which may occur when these norms from the Criminal Law are applied in practice.

3 Discussions about the implementation of the framework decision of the Council of the European Union in Latvia`s legal system

Several new legal norms were implemented in Latvia's Criminal Law so as to ensure criminal liability for those who violate the terms referred to in the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. Of essential importance here are amendments to Article 48.14 of the Criminal Law, which says that a criminal offence that is based on racial motivation is an exacerbating factor in determining criminal liability. This means that when deciding on a sentence, judges must take into account the fact that racial intolerance was the specific motivation for the crime. Because the term "racial discrimination," as defined by international human rights institutions,[60] also includes ethnic differences, this norm can be applied in cases in which an individual's ethnic origins have been the motivation for the criminal offence.

The most important innovation in the Criminal Law is the addition of Article 74.[1], which refers to justification of genocide, crimes against humanity,

crimes against peace and the crime of war. The text states *"persons found guilty of the public denial or justification of genocide, crimes against humanity, crimes against peace or the crime of war shall be sentenced to a period of incarceration up to five years or to forced labour."*[61]

True there are some differences between the framework decision and this norm in the Criminal Law. The objective side of Article 74.[1] means that a person faces criminal liability if the stated crime of publicly denying, praising or justifying a crime in and of itself. A similar version of the text, it must be added, was included in the first draft of the European Commission's decision,[62] but it was stricken after several member states categorically insisted that the framework decision would violate the principle of freedom of expression. In *Faurisson vs. France*,[63] the UN Human Rights Committee ruled that criminal liability related to nothing other than questioning of genocide, war crimes or crimes against humanity, as defined by international or national courts, may be in violation of the right of free expression.

The petitioner in the case, Robert Faurisson, was an academic who publicly disputed the policy of slaughtering Jews and the existence of gas ovens in Nazi concentration camps. He declared that this was a dishonest and imagined myth. Faurisson was tried and convicted on the basis of a French law which banned questioning of crimes against humanity. The UN committee declared that the so-called Gayssot Act in France, which declared as a criminal offence any questioning of the judgments and conclusions of the international military tribunal at Nuremberg, could lead to decisions or steps in violation of the Pact in cases other than the one which was being heard by the committee. With respect to the Faurisson case, however, the committee ruled that the limitations on freedom of expression that were applied to him were legal for two reasons. First of all, the committee accepted the French government's argument that the Gayssot Act was implemented with the purpose of battling against racism and anti-Semitism, adding that Holocaust denial had become one of the primary instruments for anti-Semitism in France. The committee also discussed the way in which French courts interpreted and applied the Gayssot Act in relation to Faurisson, but comments from the panel also suggest that it would object against limitations on the freedom of speech which are abstract and relate only to the content of statements – ones which could not be subject to an individual evaluation of the disputed statements.

It may be that these practices of the UN Human Rights Committee[64] and the objections from member states were the factors which led to the final version of the European Council's Framework Decision. The finalised text says that limitations on freedom of speech may be applied only if a denial of genocide, for instance, involves attacks against an individual or a group of people in relation to race, skin colour, religion, origin, national or ethnic belonging. Denial of genocide, war crimes or crimes against humanity must involve an attempt to incite violence or hatred against the relevant group or individual. Article 74.[1] of the Criminal Law is formulated more broadly in that it does not include such requirements before a person can be brought to criminal liability. That means that when the norm is implemented in practice, law enforcement must analyse the motivation of the person who made the relevant statements so as to avoid a situation, for instance, in which criminal sanctions are applied in relation to academic debates about the

interpretation of historical events that are a sensitive matter for various groups in society. This is different than the position that was taken previously.

Other elements in Article 74.[1], however, are formulated in accordance with the framework decision when it comes to the composition of a criminal offense. In subjective terms, the formal composition of the offence is manifested as direct intent, i.e., the person knows that he or she is denying the relevant crimes and wishes to do so. This is similar to the framework decision's requirement that such activities be punished only if they have been intentional.[65] The Criminal Law also speaks to liability for praising, denying or justifying genocide and other criminal offences referred to in the law only if such activities are conducted publicly. This prerequisite for criminal charges is meant to ensure that government institutions do not interfere in the private lives of individuals to an excessive extent, nor do them limit the right of individuals to freedom of speech.

Because this new norm in the Criminal Law only took force on July 1, 2009, law enforcement institutions have not had much practice in applying and interpreting it.

Three have been two cases in which a person has been charged with violating the requirements of Article 74.[1] in terms of statements which justify the deportations which the Soviet regime implemented on June 14, 1941. One defendant, defined only as "R", published a comment on the *www.gorod.lv* news portal in Daugavpils under the title "Deportations: An Excessive Expression of the Humanism of the Soviet Regime." The author expressed support for and justification of the Soviet deportations, "*describing the deportation itself as an expression of excessive humanism on the part of the Soviet regime and the way in which it was carried out as being too soft and incomplete.*"[66] The author went on the write that *"(..) the thing is that the deportation of June 14, 1941, was not organised so as to launch 'genocide against the Latvian nation,' as is claimed today. The Kremlin had a different goal. The deportation was a way of battling the 'fifth column' of Baltic nationalists who were linked to the Nazi special services.*"[67] Prosecutors concluded that "*in his article, R made statements which must be seen as ones which justify the deportation of civilians, thus justifying crimes against humanity, also making claims and interpreting historical processes in a manner which does not relate to the historical sources and known facts which are at the disposal of historians; R's conclusions are based on positions which do not relate to historical sources and justify the mass deportation of June 14, 1941, thus denying the crimes which the totalitarian regime of the USSR committed against the people of Latvia.*"[68] Evidence of guilt, the prosecutors declared, included conclusions drawn by experts who were asked to evaluate the facts of history in relation to the case. Interestingly, the defendant rejected the views of the experts, arguing that he "*did not write the text, which was just a quote from contemporary historians in Russia and, to some extent, in Latvia.*"[69] Prosecutors did not evaluate this argument, but even if we assume that some of the statements of the article really were based on the work of historians from the Soviet era or in present-day Russia, that cannot serve as any excuse for justifying the crimes which the Soviet regime implemented against the people of Latvia.

There can, however, be criticism about the prosecutorial decision to launch criminal proceedings against R. The decision states that he *"(..) publicly justified genocide and crimes against humanity.*"[70] The deportations which the Soviet regime implemented on June 14, 1941, have often been described as "genocide,"[71] but the fact is that in legal terms they were a crime against humanity[72] in that the deportations

were aimed against all of the people of Latvia, as opposed to just ethnic Latvians or some other ethnic group.

Summary

Arguments among member states in relation to the European Council's framework decision led to a situation in which the text was amended on the basis of countless compromises. This means that there can be doubts about whether there is a need for a unified solution in all EU member states when it comes to criminalising the denial or justification of the Holocaust or crimes against humanity. The fact is that there are too many differences among member states when it comes to legal traditions, the issue of freedom of speech versus other fundamental rights, historical experience, and even understandings of history. There are also different goals which member states hoped to achieve in relation to the framework decision. The history of Germany and other countries which were allies of the Nazi regime, for instance, explains why the denial or trivialisation of the Holocaust is denied in the interests of national security and of protecting the rights of the victims of the Sho'ah. People in Eastern Europe suffered equally at the hands of the Nazi and Soviet totalitarian regimes in terms of the crimes that were committed. There, the primary aim in relation to the framework decision is to protect the honour of victims, to commemorate them, and to ensure international recognition of the crimes which were committed by the Soviet regime. In Britain, freedom of speech and press are of enormous importance in legal culture, and there are no historical experiences which would justify any ban against the denial of the Holocaust or other international crimes. People in the UK criticised the limitations that were included in the text of the framework decision.

The obligations which member states face in relation to the framework decision are also problematic for other reasons, including the fact that this process can violate the obligations of member states in terms of several international human rights treaties. The UN Human Rights Committee, which supervises the International Pact on Civic and Political Rights, has, as noted above, concluded that legal norms which only criminalise denial of crimes identified by the international military tribunal at Nuremberg or another international court may be a violation of the freedom of speech. It is also true that with the support of a majority of the public, politicians may be broadly tempted to expand the ban to include interpretations of sensitive historical issues which are not in line with official doctrine. Thus the limitations in the framework decision create questions about the interaction between historical research and the law. The question is whether legal norms should set limits on historical debate and research. The view that courts and judges are not the best elements in evaluating historical events that are viewed in contradictory terms among historians is fairly universal, but at the same time, international human rights institutions support those countries which seek to limit attempts by pseudo-historians and extremists to deny documented and universally recognised historical facts with the aim of fomenting intolerance toward a group in society. As has been seen in Latvia and other countries, however, such statements can in most cases be limited efficiently by applying international human rights agreements and national criminal norms which ban incitement to hatred or discrimination.

The Council's framework decision was probably based more on political factors than on any legal need, and that means that the legal consequences of the decision

can be difficult to predict in the various member states. It is also true that unified legal regulations will not be enough to achieve the main goal of the framework decision – to establish a unified position among all member states vis-a-vis denials of the Holocaust and other types of genocide and crimes against humanity. No less important in pursuit of this goal is increasing the knowledge and understanding of citizens in the European Union about not just the crimes which the Nazis committed, but also the ones which were committed by the Communist regime.

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The Implications of the EU Labour Law in Latvia

Kristīne Dupate, Dr. iur.
Faculty of Law, University of Latvia
Assistant professor at the Department of International and European Law
E-mail: *kristine.dupate@lu.lv*

The aim of this article is to describe and provide analysis on the implementation, enforcement and application of the EU labour law norms implemented by the Labour Law regarding certain fields, particularly, gender equality, non-discrimination, working time, obligation to inform and consult workers' representatives and protection of young people at work. The article elaborates only on certain aspects of the mentioned fields of the EU labour law, mainly from the perspective of national courts' rulings with an aim to provide an insight on the legal developments arising from judicial application of the EU law norms and interpretation of national law in the light of the EU law.

Keywords: EU labour law, implementation and enforcement, application by national courts, gender equality, non-discrimination, working time, information and consultation, transfer of undertakings, young people at work.

Contents

Introduction

Latvia become the Member State of the European Union (EU) on 1 May 2004 while the new Labour Law, which implemented the most considerable part of the EU labour law *acquis,* was adopted in 2001[1] and came into effect on 1 June 2002.

The Labour Law is the main implementing measure for core EU labour law directives such as on information of employees on the conditions applicable to the employment relationship,[2] information and consultation,[3] equal treatment of part-time and fixed time workers,[4] gender equality,[5] and non-discrimination,[6] protection of young people at work,[7] safeguarding of employees' rights in event of transfers of undertakings,[8] working time,[9] temporary agency work,[10] and collective redundancies.[11]

The aim of this article is to describe and provide analysis on the implementation, enforcement, and application of the EU labour law norms implemented by the Labour Law regarding certain fields, particularly, gender equality, non-discrimination, working time, obligation to inform and consult workers' representatives, and protection of young people at work. The article elaborates only on certain aspects of the mentioned fields of the EU labour law, mainly from the perspective of national courts' rulings with an aim to provide an insight into the legal developments arising from judicial application of the EU law norms and interpretation of national law in the light of the EU law. The article also elaborates on developments of the EU labour law arising from preliminary rulings from Latvia, in particular, in *Danosa* case.

The set of Latvian court judgements used in this article is selective on account of lack of publicly available data base of all national judgements in civil matters. Article mainly elaborates on the decisions of the Supreme Court of Latvia which are published on selective basis at the home page of the court.[12]

1 Gender Equality

1.1 Principle of equal pay and definition of pay within the meaning of equal pay

In the light of gender equality and, in particular, from the perspective of the principle of equal pay between men and women, the Supreme Court had to introduce new approach to the interpretation of national legal norm on calculation of average pay and overrule its pervious judgement.

On 3 June 2009 the Supreme Court issued a decision in a case concerning unlawful dismissal after child-care leave and on calculation of the amount of compensation for work stoppage arising from such context.[13] The court decided such aspect on the basis of Section 75 of the Labour Law stipulating how the average pay has to be calculated for various purposes, such as paid annual leave and compensation for work stoppage. Normally in calculation of average wage employer must take into account all income from work during the preceding 6 months and according to this formula average wage corresponds to the average monthly income over the previous period of 6 months. However, Section 75(3) of the Labour Law stipulates that, if a person has not received any salary during the previous 12 months, the average salary must be calculated not on the basis of the salary provided by an employment agreement but on the basis of the statutory minimum wage. In the current case latter provision was formally applicable, because the claimant was on child-care leave which lasted longer than 12 months, before unlawful dismissal. The Supreme Court in its first decision failed taking into account the aspect of indirect discrimination against women in connection with child-care leave on the basis of the fact that those are women who predominantly use the right to child-care

leave, thus they are more exposed to risk that their average income is calculated on the basis of statutory minimum salary than on the basis of their normal wage.

On 15 December 2010 the Grand Chamber of the Supreme Court,[14] however, overruled its previous (incorrect) decision of 3 June 2009.[15] First, the Supreme Court took into account the aspect of indirect discrimination against women in connection with child-care leave. Second, the Grand Chamber took into account provisions of the EU law, in particular, Article 157 (former Article 141) of the Treaty on the Functioning of the European Union (TFEU),[16] Directive 75/117,[17] and judgment of the Court of Justice of the European Union (CJEU) in case *Seymour-Smith* stating that the concept of pay within the meaning of equal pay comprises compensation for work stoppage on account of unfair dismissal.[18] On the basis of this the court derived the conclusion that compensation for a work stoppage on account of unfair dismissal also constitutes pay within the meaning of the equal pay principle and that in situation of indirect discrimination on the grounds of sex, like in the present case, a compensation for work stoppage is to be calculated on the basis of normal salary of the claimant.

Such decision of the court is important from two aspects. First, the court identified indirect discrimination which is not an easy task for a court belonging to the continental law system, because such concept in the EU law originated from preliminary rulings given by the CJEU in cases coming from the common-law system.[19] Second, the national court acknowledged that there might be a difference in concepts used under the national and the EU law, in particular, concept of pay within the meaning of principle of equal pay is concept defined by the EU law and national concept of pay is inapplicable here.[20]

1.2 Protection against dismissal during pregnancy

Initial approach by the Latvian courts regarding dismissal on the grounds of pregnancy and protection against such dismissal seemed to be very formal thus not providing effective protection and remedies against such unlawful action by employer.

For example, on 26 January 2006[21] Riga City District Court decided that it is lawful to dismiss pregnant worker during probation period if she has failed to inform employer on her pregnancy before reception of notice of dismissal and did it only on the last day before the end to employment relationship. The court considered that the dismissal is lawful also because the claimant could not prove that she had informed employer and it was aware of her pregnancy before giving of notice of dismissal. Besides Section 109 of the Labour Law precludes giving of notice of dismissal to pregnant worker but does not precludes dismissal of such employee. In this case the court failed to take into account Directive 92/85 which unlike Section 109 of the Labour Law precludes termination of employment relationship irrespective of the date of notification of pregnancy. The court also failed to identify the possible discrimination on the grounds of sex, according to Directive 76/207 and 2002/73[22] implemented by Section 29 of the Labour Law. That time the Labour Law did not provide explicitly that less favourable treatment on the grounds of pregnancy constitutes direct discrimination based on sex.[23] The court also did not apply reversed burden of proof according to Section 29(3) of the Labour Law implementing requirements of Directive 97/80.[24]

However, on 8 December 2010 the Supreme Court delivered decision in another case regarding the same subject matter, namely, on the prohibition to dismiss pregnant worker during probation period. Such decision took into account the EU law.[25]

The facts of the case were following. Claimant was recruited by SIA EuroPark Latvia on 25 November 2008 with probation period of 3 months. This is the maximum probation period according to Section 46(2) of the Labour Law. On 11 February 2009 employer gave dismissal notice providing termination of employment relationship from 13 February 2009. On 12 February 2009 claimant submitted medical certificate attesting her pregnancy of 13/14 weeks nevertheless the employer did not recall dismissal notice and employment relationship ended on 13 February 2009. Claimant brought a claim before the court on 3 March 2009 on unfair dismissal by contenting that it is contrary to Section 109 of the Labour Law which precludes giving a notice of dismissal to pregnant worker except in strictly defined cases not connected with a pregnancy. She claimed restatement and compensation for moral damages on account of discrimination.

The respondent – employer claimed that dismissal was lawful because notice of dismissal during probation period may be given without statement of any grounds of dismissal and that employer was not informed and was not aware of the fact of pregnancy when giving notice of dismissal on 11 February 2009. Consequently employer considered the claim to be ungrounded.

The Supreme Court like both courts of lower instance upheld the claim of the claimant and decided that she must be reinstated and provided pay arrears for work stoppage. The Supreme Court in a particular decision provided answers to two important issues regarding interpretation of the Labour Law concerning special dismissal rights during probation period taken in conjunction with protection of pregnant workers in the light of the national and the EU law.

First, the Supreme Court ruled that provision on special protection of pregnant worker against dismissal (Section 109 of the Labour Law) is special provision in the context of generally applicable norms on dismissal procedure during probation period (Sections 46 and 47 of the Labour Law). Consequently, an employer is bound to follow dismissal requirements of Section 109 in case of dismissal of pregnant worker during probation period.

Second, the Supreme Court made it clear that in the context of Article 10 of Directive 92/85 a moment of provision of notification on pregnancy is irrelevant. The main requirement is that employer was aware of the fact of pregnancy during employment relationship even if such information was provided after giving notice of dismissal. Indeed such issue under the national law was unclear on account of the fact that the decisive factor or moment in dismissal procedure is giving of notice rather than actual termination of employment relationship. Both findings of the court reflect the requirements of Directives 92/85 and 2006/54. However, the Latvian courts have 'missed' to rule on fact of discrimination and right to compensation which, according to the EU gender equality law, is indispensable element of remedies in discrimination cases.[26]

1.3 Harassment on the grounds of sex

The Latvian courts have also decided on formally new concept in the Latvian law – the concept of harassment which was implemented on account of the EU directives of gender equality and non-discrimination.[27]

On 3 October 2010 the Riga Regional Court (a court of appeal) delivered a decision in a case on discrimination on the grounds of sex with regard to access to employment. The claimant was a customer of a private employment company offering recruitment services.[28] She participated in the application procedure for the recruitment of a sales manager. After the first round in the procedure for the selection

of candidates she received an e-mail stating that she was excluded from the second round in the selection procedure because 'for the second round the employer has selected only male candidates because the employer considers a male candidate to be more appropriate for the post in question'.

The decision of the Riga Regional Court overruled the previous decision of 28 April 2010 of the Riga City Zemgales District Court.[29] On 28 April 2010 the Riga City Zemgales District Court decided that there was no direct discrimination against the claimant because she had never been in an employment relationship with the respondent. The decision of the Riga Regional Court recognized that discrimination had occurred and awarded the claimant compensation for moral damage to the amount of EUR 426 (LVL 300).

The court of appeal upheld the interpretation of legal norms suggested by the claimant. Namely, that the principle of non-discrimination on the grounds of sex provided by the Labour Law is applicable to companies providing recruitment services as explicitly provided by the Cabinet Regulation No. 458.[30] The court of appeal also provided very good argumentation on factual circumstances demonstrating an attempt to apply a reversed burden of proof and even the principle of an objective investigation (as in an administrative process) by adding argumentation not provided by the claimant. The court stressed in this decision that the recruitment company had not submitted any evidence which would logically explain why only male candidates were included in the final round and why a male candidate would be more suitable for the post in question. The court also ruled on the amount of compensation for discrimination on the basis of criteria provided by the CJEU in the case of *Colson*.[31] Namely, the decision on the amount of compensation was based on the considerations of just satisfaction and a deterrent effect. Overall, this decision demonstrates the progress of national courts in applying the EU law in general and especially the EU gender equality law. The respondent did not contest the decision and it has thus become effective.

1.4 Concept of worker under Directive 92/85 and gender equality law

In May 2009 the Supreme Court of Latvia referred to the CJEU for preliminary ruling in case *Danosa v. LKB Līzings SIA*. This was the first gender equality case where Latvian court referred for preliminary ruling to the CJEU. The questions referred to the CJEU where following: (1) whether a member of the Board of Directors of a capital company must be regarded as a worker within the meaning of Directive 92/85 and (2) whether Article 10 of Directive 92/85 and the case law of the Court of Justice preclude Section 224(4) of the Commercial Law,[32] which provides that the members of the Board of Directors of a capital company may be dismissed without any restrictions, in particular, in the case of a woman, irrespective of the fact that she is pregnant.[33] The CJEU answered to the effect that: (1) a member of a capital company's Board of Directors who carries out activities which are integral to a company under the direction or supervision of another body of a company and receives remuneration for that purpose is to be considered as having the status of a worker under Directive 92/85, and (2) Directive 92/85 precludes such a national provision (Section 224(4) of the Commercial Law) which allows unrestricted dismissal of a 'pregnant worker' on account of her pregnancy, while Directives 76/207 and 2002/73 preclude the said national provision even if a worker does not enjoy the status of a 'pregnant worker' under Directive 92/85, because it does not restrict the dismissal of a pregnant worker on account of pregnancy and thus offers no protection against direct discrimination.[34]

The Grand Chamber of the Supreme Court of Latvia delivered its final decision on 19 January 2011.[35] It rejected Danosa's claim entirely on the following grounds. Firstly, although according to the factual circumstances of the case the claimant had to be regarded as a worker, she did not have the status of a 'pregnant worker', because she had not informed her employer of her pregnancy in accordance with the national law (Section 37(7) of the Labour Law). Consequently, protection under Directive 92/85 was not applicable to the present case. Secondly, the claimant had never claimed sex discrimination, namely that she was removed from the post of Director of LKB Līzings on account of her pregnancy, thus the protection provided under Directives 76/207 and 2002/73 was not applicable to the present case.

It is true that the claimant had not informed her employer about her pregnancy and she had never claimed that she had been dismissed on the grounds of her pregnancy, consequently the decision of the Grand Chamber of the Supreme Court has correctly applied the EU law and the interpretation provided by the CJEU in this particular case.

However, the fact generally remains that Section 224(4) of the Commercial Law runs contrary not only to the gender equality directives but also to the non-discrimination directives, because it does not require giving written notice of dismissal with the grounds stated to a pregnant worker and does not offer protection against discriminatory dismissal. No legislative initiatives have been taken to amend the respective national provision so far, because the Ministry of Welfare considers that this is just a matter of correct interpretation and application of the national law, namely, that in situations like the present case Section 109 of the Labour Law would override the provisions of Section 224(4) of the Commercial Law. In this context it is worthy to mention that unclear and too complex legal regulation usually does not lead to its correct application in practice, thus the author of this article considers that it is necessary to amend the Commercial Law with respective provisions protecting board member against discriminatory dismissal.

In overall, decision in *Danosa* case is important from the perspective of general application of the EU law by the Latvian courts, because national court once again demonstrated ability to identify unclear issues related to the EU law and distinction between formally same concepts with possible substantive differences under the national and the EU law such as concept of 'worker'.

1.5 Comparable situations and 'male' and 'female' jobs

Notwithstanding progress in application of the EU gender equality law by the national courts there are still cases with serious shortcomings.

On 8 December 2010 the Supreme Court delivered a decision in a case on discrimination on the grounds of maternity.[36] The claimant had been employed as a bookkeeper by SIA JD Mārketings since 2 June 2003. From 2 March 2009 until 14 July 2009 she was on maternity leave. After her return to work on 14 October 2009 SIA JD Mārketings gave the claimant notice of dismissal as from 14 November 2009 on the ground that the undertaking is to be restructured and there consequently there will be decrease in employees. On 16 December 2009 SIA JD Mārketings recognized that the notice of dismissal was void and it reinstated the claimant retroactively from 14 November 2009. Most probably the claimant was reinstated due to the fact that she had brought an action before a court on 13 November 2009 and on account of the provision explicitly prohibiting the dismissal of an employee during the maternity period which lasts for at least one year after giving birth or for the whole period of breastfeeding. The claimant claimed before

the court that she had been discriminated on the grounds of sex. This discrimination started on 10 August 2009 when the employer informed her that she would only be employed on a part-time basis ($^1/_4$ of the normal weekly working time or 10 hours a week) and that her salary would be reduced by 93 % (from EUR 939 (LVL 660) to EUR 64 (LVL 45)). However, in practice the workload remained the same. She claimed arrears of pay – the difference between the pay for the respective period – and compensation for moral damage on account of discrimination in the amount of EUR 7114 (LVL 5000).

Courts at all instances recognized the illegality of changing the employee's employment conditions, including pay, and decided in favour of the claimant and ordered that her arrears in pay – the difference between EUR 939 and EUR 64 (LVL 660 and LVL 45) for the respective period – must be paid. The courts found that there had been no amendments to the employment agreement and thus the employment agreement had not been changed and the claimant was still entitled to a monthly salary of EUR 939 (LVL 660). However, all courts rejected the claim of discrimination.

The courts rejected the discrimination claim on the grounds of the following argumentation. Firstly, it rejected the claim alleging breach of the principle of non-discrimination on the grounds of sex based on the fact that only the claimant was subject to a pay cut of 93% while the other workers were reduced by, on average, 13%. The courts found that the claimant's situation was incomparable with the other employees on account of the fact that other workers were employed in posts which corresponded more to males, in particular, the posts of loader, fitter, driver, storekeeper. The Supreme Court fully agreed with this finding of the lower courts!

Secondly, the claimant based the amount of compensation for moral damage on the fact that she had suffered from almost total loss of the possibility to breastfeed her child. However, the courts found that she had not proven the causal link between the situation of discrimination after her return from maternity leave and the loss of the possibility to breastfeed.

Finally, the Supreme Court upheld the decisions of the lower court stating that there had been no breach of the principle of discrimination irrespective of the fact that the employer, immediately after the maternity leave, had decreased the claimant's salary to a much greater extent than the salary of other employees and also irrespective of the fact that the employer had given her an illegal notice of dismissal during the maternity protection period.

This judgment demonstrates lack of knowledge of gender equality law and, in particular, indicates the gender stereotype that judges have, resulting in their inability to identify discrimination. Such reasoning also runs contrary to the right to a fair trial which precludes assessment of the fact of case in the light of gender stereotypes such as which professional activity is more appropriate to male and which to female workers. The Supreme Court is not well aware of the possibility to contest this decision on the basis of the state liability principle under the EU law.

2 Non-discrimination

There were two decisions which had high publicity and debates in mass media regarding discrimination on the grounds of ethnic origin and sexual orientation with regard to access to employment.

The case on discrimination by reason of ethnic origin originated in situation where employer refused employment of Roma person on the grounds of formal

reason, in particular, that she speaks Latvian with an accent.[37] The court however took into account the fact that person is of Roma origin which is highly prejudiced ethnic minority in Latvia, the fact that the claimant graduated Latvian school thus her knowledge and skills in use of official language is appropriate for the position of shop assistant and the fact that even in the presence of an accent in speaking Latvian it is not a genuine occupational requirement for the post in question. The court thus found grounds of refusal of employment of a claimant only as formal pretext to actual discrimination on the grounds of Roma origin of the candidate. The court also awarded the claimant compensation for moral damage. The decision also demonstrates correct application of reversed burden of proof, namely, the court found discrimination on the basis of lack of reasonable explanation by the employer of the grounds of refusal to employ the claimant.

Another case was on the refusal to employ on the grounds of sexual orientation.[38] The claimant was refused position of teacher of history of religion at secondary school. In time of application for a position of a teacher wide public was aware of the homosexual orientation of the claimant, because he was anathematized from the Lutheran church where he had served as a priest on the grounds that he does not correspond to the ethos of such religious organisation by the reason that he disclosed the fact of his homosexual orientation. At the time of proceedings the Labour Law did not provided explicitly for the discrimination ground – sexual orientation, however, the court applied the principle of indirect effect and interpreted an open list of discrimination traits 'and other circumstances'[39] as embracing sexual orientation as required by Directive 2000/78. Besides to that the court correctly established that there were no reasonable explanation for the refusal to employ the claimant because his professional education and experience was considerably higher than that of the person who were employed for the position in question and that director of the secondary school was well aware of the homosexual orientation of the claimant which led to the establishment of the fact of discrimination on the grounds of sexual orientation. The court as well decided on compensation for moral damage to the claimant. This decision like the previous one demonstrates correct application of the principle of reversed burden of proof as well as correct application of the EU law by the use of principle of indirect effect requiring the national court to interpret the national law provisions in conformity with the aim provided by directives.[40]

3 Working Time

3.1 The loss of the rights to allowance in lieu for unused paid annual leave

On 10 November 2010 the Supreme Court of Latvia overruled the decision of the Riga Regional Court on the right of dismissed employee to the allowance in lieu for unused paid annual leave for period lasting from 15 October 1999 till 2 April 2009. The Court ruled that such claim is ungrounded on account of lapse of time period entitling to claim any rights under the Labour Law which is two years (Section 31(1)). The Court held that longer time period would run contrary the idea of the right to paid annual leave as provided by the Labour Law and, inter alia, as follows from requirements of the ILO Convention No. 132 (1970) and Directive 2003/88. The Court found that it is not only employer's obligation to provide paid annual leave but also worker's obligation to use it. It based its finding on the disposition principle of private law providing that each person is free to choose on action

which may lead to the loss of the right to claim breach of rights. In the particular case, irrespective of the fact that the employer had not acted on the requests of the claimant regarding her wish to use annual leave, the claimant has not lodged any complaints before the State Labour Inspectorate or a court thus she has not properly used her rights.

In the opinion of the author of this report, formally the finding of the Supreme Court is correct, however correctness is doubtful from the perspective of the protection of the employees right available in practice. The author fully agrees with the opinion of the Head of Department of Legal and European Affairs of the Ministry of Welfare stating that in normal circumstances it is unimaginable that an employee does not wish to use the right to paid annual leave within the respective year.[41] Provision of the full employment rights in Latvia, especially, in private sector, is not very common, but employee's protection system, including national courts, is not satisfactory. In fact, any claim of employment rights may lead to negative treatment on part of an employer and result in (unlawful) dismissal. The court should have also taken into account the fact that there is widespread phenomena of partially undeclared work which means that only part of employee's salary is declared officially, which may lead to disinclination to use such right on account of loss of part of factual income for a month. Latvian courts must take into account such important aspects before providing formal interpretation of legal norms and assessment of the facts. Moreover by not taking into account factual situation in employment in Latvia the court has failed to observe the principle of effectiveness of the EU law which requires provision of the EU rights effectively. In such circumstances the national court should have taken into account the finding of the CJEU, as correctly pointed out by the official of the Ministry of Welfare that loss of the right to paid annual leave in circumstances where worker had no actual right to use it runs contrary to the aim of such right under the EU law.[42]

3.2 Amount of pay during paid annual leave

The issues of amount of pay during paid annual leave are discussed in a number of cases of the CJEU.[43] The CJEU held in such cases that amount of pay during paid annual leave and amount of compensation for unused paid annual leave in case of termination of employment relationship must constitute normal salary of an employee, plus normal pay in such case must comprise all elements of pay which relate to personal and professional status of an employee.

In the light of such findings of the CJEU and decision of the Supreme Court in case on equal pay referred above,[44] Section 75(3) of the Labour Law providing that an employee's average pay must be calculated on the basis of statutory pay if he/she has not worked the previous 12 months is inapplicable not only from the perspective of equal pay between men and women but also from the perspective of right to paid annual leave as provided by Article 7 of Directive 2003/88.

4 Information and consultation

Legal standing of the trade unions

Number of the EU labour law directives provide for collective rights, including Directive 98/59, 2001/23, and 2002/14 stipulating for general obligation to inform and consult workers' representatives and, in particular, in case of collective redundancies and transfer of undertaking. All of directives require provision of effective

enforcement mechanisms under the principle of effectiveness of remedies[45] for protection of the breach of the rights deriving from the EU law.

Latvian court judgements however seem to apply doctrine on legal standing which does not comply with the requirement of effectiveness. In particular, in two cases on breach of obligation to inform and consult with workers' representatives (one concerning transfer of undertaking and other concerning collective redundancies), national court refused legal standing of the trade unions as a claimant. In one case the claimant – trade union claimed to declare fact of a transfer of undertaking and automatic takeover of all employment agreements by the transferee,[46] in another case the claimant – trade union claimed provision of right to information and consultation in case of reorganisation leading to collective redundancies.[47] The Supreme Court in both cases did not identify right to information and consultation as right constituting object of a claim within the meaning of Section 1 of the Civil Procedure Law.[48] It did not mention such rights at all instead the court went to elaborate on the rights to bring claims by each individual employees and the right of trade union to act as representative of employees. The court ignored provisions of the Labour Dispute Law[49] stipulating concept of collective disputes and consequent right to legal standing of workers' representatives in status of a claimant. The court did not take into account that in substance the claims were on breach of collective rights and breach of individual rights is just a result of breach of the former rights. The fact is that in the light of this, the problem is similar from the perspective of individual claims. Most likely individual claim would be dismissed on the grounds that individual rights are not breached because right to consultation and information is collective right[50] and that there is no particular remedy to claim for, because remedies are non-existent.

It follows that the Latvian court practice does not correspond neither to the national law provisions nor the EU law on collective right to information and consultation with regard to concept of collective claim and right to legal standing as a claimant to collective bodies of workers' representatives.

5 Transfer of undertakings

Identification of a fact of transfer

On 29 April 2010 court of first instance (Riga District Court) delivered decision in case where claimant insisted on unlawful termination of employment contract by reason of transfer of undertaking.[51] The claimant was an employee of Riga Airport performing tasks of client manager of business class passengers (business lounge). On 30 March 2009 she was proposed to sign agreement on voluntary termination of employment relationship with Riga Airport. She signed this agreement because the former employer persuaded her that she will be recruited by Air Baltic Corporation – the enterprise who overtakes services for business class passengers (business lounge) in Riga Airport. The facts testifying on transfer of an undertaking are following: at the beginning of year 2009 Airport Riga announced public tender for companies to provide services for business class passengers (business lounge). The winner was Air Baltic Corporation. This company started to provide business lounge services from 1 May 2009 when agreement with Riga Airport on the transfer of assets and rent of the premises (previously also used for the business lounge) was concluded.[52]

Although facts of the case demonstrate obvious case of a transfer of an undertaking, national court of first instance did not went to analyse the real cause of the

agreement on the termination of employment contract by Riga Airport but decided that the claim on unfair termination of employment contract must be rejected on the grounds that such agreement was concluded voluntarily without serious falsehood and that the fact on conclusion of agreement on business lounge services between Riga Airport and Air Baltic Corporation does not makes agreement on termination of employment contract between claimant and Riga Airport void.

Such decision clearly demonstrates lack of understanding of the national court on the concept of transfer of undertakings. The claimant has submitted appeal to this judgement.

6 Young people at work

The concept of 'a child' and working time during school holidays

On 23 January 2008 the Supreme Court ruled on the concept of 'a child' and working time during school holidays. Son of the claimant was employed in summer during school holidays by the undertaking 7 hours a day and 35 hours a week.[53] The son of the claimant was 15 years old during employment. The claimant complained about overtime employment of her son. In the context of Directive 94/33 the Labour Law provides for special requirements on working time for employment of children. The children (persons below age 18) may be employed no more than five days a week.[54] Children starting from age 13 may be employed for no more than 2 hours a day and 10 hours a week, if work is performed during study time, and no more than 4 hours a day and 20 hours a week during school holidays.[55]

The Court found that son of the claimant was already 15 years old at the time of employment, however he was subject to full-time compulsory schooling thus he was not 'an adolescent' but 'a child'. According to this finding and provision of the Labour Law (Section 132(2)(2)) which allows extending working time of a child during school holidays up to 4 hours a day and 20 hours a week the Court ruled that employer has breached norms on employment of children. Thus the court in this judgement has correctly applied the provisions of Directive 94/33.

Conclusions

1. National court practice in general demonstrates progress towards correct application of the EU labour law, at the same time some of judgements demonstrate shortcomings in identification of the main EU labour law concepts, such as discrimination on the grounds of maternity and transfer of undertakings.
2. In recent decisions national courts demonstrated understanding of existence of the same formal concepts under the national and the EU law which in their substance may be different however. It is highlighted in cases on concept of 'pay' within the meaning of equal pay and concept of 'worker' under the EU law.
3. The same finding on progress in correct application of the EU law concepts and principles regards application of the special remedies required under the EU labour law. For example, even though some court decisions demonstrate correct application of reversed burden of proof in discrimination cases, nevertheless there are still judgements which demonstrate failure in application of this special procedural rule. Such situation arises also partially on account of the lack of more detailed national legal regulation, especially under national procedural rules. Such problem also applies to the enforcement of the right to compensation in discrimination cases.

4. National courts become more and more aware of mechanisms of application of the EU law, such as, for example, indirect effect and supremacy of the EU law. It is demonstrated by number of national judgement where national legal norms were interpreted in the light of objectives of directives in question according to principle of indirect effect and where in situation of collision of the national and EU law norm the latter was given priority according to principle of supremacy of the EU law.
5. The weak point of national courts is however observance of the principle of effectiveness of remedies for the breach of the EU law. National courts sometimes fail taking into account the overall factual situation in the labour market, like, for example, possibility to use right to paid annual leave. At the same time most serious shortcoming in the view of present author is refusal to grant legal standing of trade unions as claimants in practice arising from the failure to identify right to claim breach of collective rights to information and consultation as object of a claim.

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The Right not to Incriminate Oneself as an Essential Aspect of the Right to a Fair Trial in the Application of Simplified Forms of Criminal Procedure

Irēna Ņesterova, Mg. iur.
Faculty of Law, University of Latvia
PhD Candidate
E-mail: *nesterova.irena@gmail.com*

This paper analyses the right not to incriminate oneself as a constituent element of a fair trial in the application of simplified forms of criminal procedure. The right to a fair trial is not entirely ensured to persons against whom the simplified forms of criminal procedure which do not include adjudication of a case in a court or direct and oral examination of evidence in a court hearing are applied. To prevent miscarriage of justice, i.e., that innocent persons are convicted as a result of the application of simplified forms of criminal procedure it is essential to ensure the right not to incriminate oneself, which, *inter alia*, includes the right not to be compelled to admit guilt. The author argues that to ensure the right not to incriminate oneself the prerequisite for the application of the simplified forms of criminal procedure should be their acceptance and the admission of guilt by a person. The author also explores whether the system of Latvian criminal procedure provides effective procedural safeguards to ensure that the attitude of the person is expressed knowingly and freely.

Keywords: Right to a fair trial, right not to incriminate oneself, admission of guilt, simplified forms of criminal procedure, simplification of criminal procedure, right to a defence.

Contents

Introduction

Simplification of criminal procedure has been one of the major trends in the development of criminal procedure in Latvia and other European countries. "The Criminal Procedure Law" (hereafter – the CPL)[1], which took effect in Latvia in 2005, substantially increased the importance of simplified forms of criminal procedure. When the CPL was being drafted, of key importance was Recommendation

No. R(87)18 adopted by the Committee of Ministers of Council of Europe on 17 September 1987 concerning the simplification of criminal justice, whose objective was to simplify the working of the criminal justice system, thus preventing problems which are caused by an increase in the number of criminal cases.[2] The most part of criminal procedures are terminated by application the simplified forms of criminal procedure. Statistics reveal that in Latvia in 2011 82% of criminal cases have been adjudicated in court without an examination of evidence.[3]

One of the most pressing problems which is related to the tendency to attach increasing role to the simplification of criminal procedure and to waive from the traditional principle of the adjudication of a matter in court is the risk of rising the number of wrongful convictions.[4] Therefore when simplified forms of criminal procedure are applied it is important to observe person's right to a fair trial. As Andrew Ashworth and Mike Redmayne points out: *"In truth, this is one of the central problems in criminal procedure – the need to harmonise a process which brings a case to an effective ruling with the protection of human rights and the fundamental demand that the person's right to a fair trial be observed."*[5]

The right to a fair trial is a constitutionally and internationally guaranteed fundamental human right. The first sentence of Article 92 of the Constitution of the Republic of Latvia (hereafter – the Constitution) states that *"Everyone can protect his/her rights and legal interests in a fair court"*.[6] The right to a fair trial is included in the most important international treaties on the protection of human rights – in Article 6 of the European Convention on Human Rights (hereafter – the ECHR)[7] and in Article 14 of the United Nations International Pact on Civil and Political Rights (hereafter – the ICCPR)[8].

The right to a fair trial is a general right which include a number of specific rights. Paragraph 1 of Article 6 of the ECHR enshrines the right to a fair trial as a general principle, while Paragraph 2 and 3 of Article 6 provide specific elements of the fair trial that apply in criminal cases.[9] In addition, the European Court of Human Rights (hereafter – the ECtHR) has developed rights that emerge from the general right to fair trial such as the right to equality of arms, the right to a fair presentation of the evidence, the right to a reason justice, the right not to incriminate oneself.[10]

The right to a fair trial is not fully ensured in cases when simplified forms of criminal procedure which do not include adjudication of a case in a court or direct and oral examination of evidence in a court hearing are applied. These simplified forms are termination of criminal proceedings, releasing a person from criminal liability (Article 379 of the CPL), termination of criminal proceedings, conditionally releasing from criminal liability (Article 379 (3) and Chapter 34 of the CPL), the injunction of a public prosecutor regarding a punishment (Article 420, Chapter 35 of the CPL), the process of agreement (Chapters 38, 49 and 50 of the CPL), adjudication of a matter in court without conducting examination of evidence (Article 499 of the CPL) (hereafter collectively called also – the simplified forms of criminal procedure).[11] Namely a person who agrees to these forms waives certain rights which emerge from the general principle of a fair trial – the adjudication of a case with direct and oral examination of evidence, the right to defend him or herself in this process.

By agreeing to the simplification of criminal procedure in principle a person agrees that he or she is guilty in the incriminating criminal offence. Therefore to prevent the miscarriage of justice when applying the simplified forms of criminal

procedure it is important to respect the right not to incriminate oneself, which *inter alia* include the right not to admit guilt. The article examines whether the CPL effectively ensures the right not to incriminate oneself, in particular, whether it clearly defines the prerequisites of the application of simplified forms of criminal procedure – the consent and admission of guilt.[12] Further the author examines the procedural safeguards which ensure that a person admits his or her guilt and agrees to the implementation of the simplified forms of criminal procedure knowingly and freely.

Explanatory section

The right not to incriminate oneself is internationally recognized specific aspect of the general right to fair trial applied to those who are charged with a criminal offence. Paragraph 2 (g) and 3 of Article 14 of the ICCPR sets out two main aspects of the right not to incriminate oneself – the right not to be compelled to testify against himself and the right not to confess guilt. Although the ECHR does not include the right not to incriminate oneself, the ECtHR in a number of cases has stated that it is generally recognized international standard, which lies at the heart of the notion of a fair procedure under Article 6.[13]

The Constitution does not expressly provide the right not to incriminate oneself nor it's separate elements, however it derives from the "fair trial" concept provided in Article 92 of the Constitution, since the content of the article is determined in accordance with the interpretation in the practice of international norms on human rights.[14] Although the CPL does not include the right not to incriminate oneself in the list of basic principles of criminal procedure, still the observance of that right is closely linked to other basic principles – the right to the adjudication of a matter in court (Article 15) guaranteeing of human rights (Article 12), the presumption of innocence (Article 19), and the right to a defence (Article 20).[15] Several specific norms of the CPL ensure the right not to incriminate oneself. The CPL sets out the right to testify or refuse to provide testimony (Article 66 (1) 15, 63 (1) 6, 66 (1) 15, 70 (1)). According to Article 150 of the CPL at the beginning of the first interrogation of a person which has the right to defence – a person against whom the criminal proceedings have been commenced, a detained person, a suspect, or an accused – the rights not to testify shall be explained and such person shall be notified that everything that he or she says may be used against such person. A person which has the right to defence is not liable for knowingly giving false testimony. This ensures the right not to incriminate oneself as basic human right characteristic to the criminal justice system.

A person waives his or her right not to incriminate oneself when simplified forms of criminal procedure are applied. A person is held criminally liable and punished if simplified forms of criminal procedure are applied – the injunction of a public prosecutor regarding a punishment, the process of agreement, the adjudication of a matter in court non-conducting of an examination of evidence. Negative consequences are applied to a person also by termination of criminal proceedings releasing a person from criminal liability or conditionally releasing from criminal liability, because in such cases a person shall not be exonerated (Article 380 of the CPL). It means that by applying the mentioned simplified forms of criminal procedure a person is found guilty for committing a criminal offence.

It is important to ensure that when a decision is taken on a simplified form of criminal procedure, the attitude of a person should be taken into account. "*The most*

essential element of justice is the right to be heard (..). That means that no decision which is not fully unconditional in favour of the individual can be taken if the relevant person has not been given an opportunity to express his or her position vis-a-vis the relevant issue."[16] Taking into account that by application of the simplified form of criminal procedure a person is found guilty, a person's attitude includes both consent and admission of guilt. Before analysing whether this condition is met in the norms of CPL, it is necessary to understand what is the admission of guilt.

The concept of admission of guilt has to be seen in conjunction with the concept of guilt in the criminal procedure. In criminal law "guilt" refers to the subjective aspects of a criminal offence, as related to the person's attitude toward the objective elements of the criminal offence (the criminal offence, its consequences and its causal link), whether deliberately (intentionally) or through negligence.[17] In criminal procedure, by comparison, the concept of guilt has different meaning. Emphasis is placed on proving a persons guilt that covers not just proving the existence or non-existence of all the constituent elements of a criminal offence, but also a duty to prove other circumstances referred to in the Criminal Law[18] and the CPL which are of importance in the fair regulation of criminal legal relations, for instance, whether there are circumstances which exclude criminal liability provided in the Criminal law (Article 124 (2) of the CPL). A person is innocent within the meaning of criminal procedure if he or she cannot be summoned to criminal liability even if the person's guilt could be proven as one of the constituent elements of a criminal offence.

Taking into account that the "admission of guilt" is the concept of the criminal procedure *"guilt must be seen not only as an admission related to an element of the subjective aspects of the criminal offence, but also and more broadly, the individual's admission to all circumstances on the basis of which he or she is to be summoned to criminal liability. (..) Guilt (..) includes two essential and interlinked issues – actual activities and their legal classification."*[19] Consequently the admission of guilt means the admission of the actual activities which constitute conditions of the incriminated criminal offence that are to be proven and the legal qualification of these activities.

Admission of guilt has an important role as evidence however it's use has to be restricted. The Chamber of Criminal Cases of the Supreme Court handed down a ruling in Case No. PAK-31 on June 20, 2006, ruling that *"(..) a conviction can be based on the defendant's admission of guilt only if other evidence determined during the investigation confirms the verbal admission."*[20] The admission of guilt should not be sufficient evidence to found a person's guilty.

An admission of guilt is not only one of evidence, but it is also of key importance when applying simplified forms of criminal procedure which do not include adjudication of a case in a court or direct and oral examination of evidence in a court hearing. As noted previously, the application of these forms means that the individual waives some of the rights which are a part of the principle of a fair trial, and that means that the individual's attitude toward the application of the simplified forms is of key importance.

The next question is whether the admission of guilt has to be distinguished from the consent to the application of the simplified forms of criminal procedure. According to the CPL both admission of guilt and consent is mandatory prerequisites if a simplified forms include punishment of the individual – the injunction of a public prosecutor regarding a punishment (Article 420(5)), the process of agreement

(Article 433(1), Article 541(2), Article 544(2)), adjudication of a matter in court non-conducting of an examination of evidence (Article 499(1)).

The CPL does not require admission of guilt as mandatory prerequisite for application the simplified forms, which does not include the punishment of a person, i.e., termination of criminal proceedings, releasing a person from criminal liability or conditionally releasing from criminal liability. Article 415 (4) of the CPL states that the termination of criminal proceedings conditionally releasing from criminal liability shall be allowed only with the voluntarily and clearly expressed consent of the accused. Article 379 (5) provides: *"The termination of criminal proceedings, releasing a person from criminal liability, shall not be permitted, if the person who has committed the criminal offence, or the representative thereof, objects to such termination."* The mentioned forms do not require that a person directing the proceedings has obligation to ascertain whether a person fully admit his or her guilt in the incriminating criminal offence. A question here is whether this is enough or an admission of guilt should also be declared as a prerequisite for applying them.

In Latvian legal theory it is pointed out correctly that although when a person is released from criminal liability or conditionally released from criminal liability there is no punishment, but still the person's guilt is determined.[21] Article 380 of the CPL states that a person who undergoes such a process is not exonerated. *"That means that this action relates to a determination of the person's guilt, which is legally possible only on the basis of a legally appropriate set of evidence."*[22] In addition, the termination of criminal proceedings conditionally releasing from criminal liability involves not just the determination of the person's guilt, but also a set of unfavourable legal consequences for the individual. The public prosecutor shall determine for the person a probationary period of not less than three and not exceeding eighteen months and may impose duties referred to in the Criminal Law (Article 415 (5) and 415 (6) of the CPL, Article 58 of the Criminal Law). The determination of a person' s quilt in criminal offence can cause adverse consequences also in the future, for example, by not allowing to hold certain positions in law enforcement agencies.[23]

Contrary arguments can also be provided – if a prerequisite for applying the mentioned forms is only a consent, a person is given a wider choice, namely, a person has a choice to agree to the implementation of these forms but not required to express his or her attitude toward the prosecution. At the same time a person directing the proceedings has a duty to prove person's guilt. However, this approach can not be regarded as proportionate to the possible infringement of person's rights.

Also the legislature does not intend to divide the simplified forms of criminal procedure depending on the admission of guilt. This is confirmed by Article 417 (1), that states: *"A copy of a decision shall be issued to the person in relation to whom criminal proceedings are being terminated, conditionally releasing from criminal liability, and the consequences of such termination of criminal proceedings shall be explained to such person and he or she shall be notified regarding his or her rights to familiarise with the materials of the criminal case. The person shall certify with a signature thereof that he or she agrees to the qualification of the criminal offence (..)."* Thus the CPL provides, that a person conditionally released from criminal liability certify the qualification of the criminal offence, which, as mentioned above, include the admission of guilt. This shows that deficient framework setting the preconditions of the simplified forms of criminal proceedings is a result from inadequate harmonization and evaluation of the specific norms of the CPL.

It can be concluded that the CPL has to determine a duty of a person directing the proceedings to receive both consent and admission of guilt before taking a decision on the termination of criminal proceedings, releasing a person from criminal liability and conditionally releasing from criminal liability by amending Article 379 (5) and Article 415 (4).

The next question is whether there are effective procedural safeguards ensuring that a person admits guilt and agrees to the simplification of the criminal procedure knowingly and freely. The right not to incriminate oneself determines the right not to be compelled to give evidence against oneself. The ECtHR in the case *Saunders v. United Kingdom* revealed the justification of the he right not to incriminate oneself: "*Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (..). The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.*"[24]

The innocent person can be compelled to admit his or her guilt and to agree to the application of the simplified forms of criminal procedure. Officials who perform criminal proceedings may be interested in admissions of guilt so that the procedure can be completed more quickly. Therefore it can not be excluded the possibility that the persons are compelled to admit guilt through various illegal methods.[25] Such methods are, for example, aggressive and psychologically violent interrogation or the presentation of false information about the evidence that is available in the case. One of the problems in EU member states, for instance, in Italy, Hungary, Belgium and Poland is that the decisions on pre-trial detention rely on the fact that a person has remained silent or has not confessed his or her guilt.[26] Also in Latvian practice there are cases when not admission of guilt or not testifying is evaluated as the resistance of a person to the reaching of the aim of criminal proceedings thus supporting the need for the application of arrest.[27] The use of such illegal methods creates a high risk that an innocent person confesses guilt.

There can be also other reasons why an innocent person can wrongly admit guilt and agree to the application of simplified forms of criminal procedure. A person can consider him or herself guilty even if not guilty of the incriminated criminal offence. As already noted, admission of guilt relates not just to actual activities, but also to the legal classification thereof. People without sufficient legal knowledge may agree to the classification of their activities without understanding the essence of the matter. "*Thus people may not understand that there are no causative links between their activities and the consequences (e.g., the individual has struck another person and does not deny it, the individual does not deny the relevant consequences, but does not have sufficient knowledge to make use of the fact that the consequences relate to the individual characteristics of the victim (an inborn defect, etc.). Such people may not understand circumstances which exclude criminal liability (self-defence, etc.), the relevant legal nuances etc.*"[28] It is also quite possible that people will admit guilt in the place of other close person, for example, a child.

Another essential issue is that a person may have an interest in such simplified forms. Fear of the legal system in and of itself lead persons to co-operate with prosecutors and to admit their guilt. The benefits of a simplified form of procedure include an avoidance of adjudication of a case in a court that is a long and difficult process.[29] A person can agree to the application of simplified forms, to avoid more

unfavourable consequences, for example, believing that he or she will receive a lesser punishment. Especially, it is related to the fear of a sentence of deprivation of liberty.[30] At the same time, these are only benefits for people who are guilty of a criminal offence, however *"there is no question that there are also innocent defendants who feel pressure to admit to their guilt, because they believe that there is the risk that they will not be exonerated, and so it would be better to admit to the crime in the hope of receiving a sentence that does not involve incarceration."*[31]

In order to ensure that innocent persons are not forced to agree to simplified forms of criminal procedure and admit guilt, the CPL must provide effective procedural guarantees. *"The system must ensure that as far as is possible, the person's decision on agreeing or disagreeing with a simplified criminal procedure is free and in cognisance of the relevant consequences and that where there are doubts about the person's guilt, the right to a trial is ensured. The idea of a fully voluntary decision is illusory (..), but there are ways of expanding this freedom."*[32]

It is very important to observe the presumption of innocence whenever a decision on a simplified form of criminal procedure is taken. To ensure that admission of guilt and consent is legal and to avoid the innocent person found guilty incorrectly based on the false admission of guilt, it is necessary to observe the duty to prove a person's guilt and provision that an admission of guilt is just one piece of evidence, and it is not sufficient to convict the individual.[33] As noted above, guilt must be proven whenever a simplified form of criminal procedure is implemented which do not include adjudication of a case in a court or direct and oral examination of evidence in a court hearing. Therefore these forms can not be applied only on the bases that a person admits his or her guilt, if it is not approved by other evidence.

An important procedural safeguard is the right to information that requires a duty to explain to a person the legal consequences of the application of the specific simplified forms and to inform that he or she can choose whether to agree to them or not. At the beginning of negotiations regarding the simplified forms of criminal process it is also important to explain to a person that he can also not agree to these forms and not to confess guilt. If a person is not informed about these rights, the confession can not be considered lawful and simplified forms of criminal process can not be applied.

In each case, the CPL should oblige the duty of the prosecutor to explain the consequences. The duty is in place when the issue relates to the injunction of a public prosecutor regarding a punishment (Article 422(1)), the process of agreement (Article 434(1)1 and Article 545(2)), and adjudication of a matter in court non-conducting of an examination of evidence (Article 412(4) and Article 499 (2)). The same duty should also be applied to situations in which criminal procedure is terminated releasing a person from criminal liability, and that would require supplements to Article 379 of the CPL. When criminal procedures are terminated conditionally releasing from criminal liability, this duty is in place only after a copy of the relevant decision has been presented to the individual (Article 417.1). Article 415 of the CPL should also be supplemented stating that the prosecutor must explain the consequences of the procedure before the individual has agreed to it.

One of the significant procedural safeguards that helps to ensure that a person admits guilt and state their agreement freely and knowingly is state ensured legal assistance. Legal theory rightly points out that persons must have legal aid before deciding on the application of simplified forms of criminal procedure.[34] A defence counsel can make sure that prosecutors are not relying on illegal methods to force a

defendant into an admission of guilt, also helping the individual to take the relevant decision and to understand the relevant legal consequences.

The mandatory participation of a defence counsel would be desirable in all cases in which simplified forms of criminal procedure that do not include adjudication of a case in a court or direct and oral examination of evidence in a court hearing. Article 83 (2) states that the participation of a defence counsel is mandatory in criminal proceedings that take place in accordance with the procedures of agreement proceedings from the moment when negotiations have begun with the accused regarding the entering into of an agreement. The mentioned article should be supplemented by providing mandatory participation of a defence counsel also when a criminal proceedings is terminate applying the injunction of a public prosecutor regarding a punishment, the process of agreement, releasing a person from criminal liability and conditionally releasing from criminal liability.

Another procedural safeguard which helps to ensure that the consent to the simplification of the criminal procedure and admission of guilt is obtained legally is recording procedural actions in a sound and image recording. Article 141 (2) of the CPL provides that the progress and results of an investigative action may be recorded in a sound and image recording. However in most cases they are recorded in minutes (Article 141 (1)), because the institutions are not provided with the appropriate technical equipment. An important step in improving the situation is equipping courts with video and audio recording equipment as a result of the project "Modernization of the Courts in Latvia" which ended 2012th June.[35] In the future it would be desirable that the investigation and prosecution institutions are also equipped with such technique. The recording of the investigative actions in a sound and image recordings is important taking into account that particularly in this stage there is a greater risk that improper compulsion could be used against a person.

The above mentioned procedural safeguards have important role for ensuring that persons agree to simplified forms of criminal procedure and admit their guilt freely and knowingly, thus reducing the risk of miscarriage of justice or that innocent persons are convicted for a committing of a criminal offence.

Summary

1. The right to a fair trial is not fully ensured when simplified forms of criminal procedure which do not include adjudication of a case in a court or direct and oral examination of evidence in a court hearing are applied. To prevent conviction of innocent persons when applying the simplified forms of criminal procedure it is important to respect the right not to incriminate oneself which *inter alia* includes the right not to admit guilt.
2. A person by agreeing to the mentioned simplified forms waives his or her right not to incriminate oneself and agrees that he or she is guilty in the incriminating criminal offence. Therefore a prerequisite of the application of these forms is a person's consent and also admission of guilt. In CPL both prerequisites are required in case of application of those simplified forms which include a punishment, i.e., the injunction of a public prosecutor regarding a punishment, the process of agreement and adjudication of a matter in court without conducting the examination of evidence. The CPL should determine a prerequisite – admission of guilt – in case of applying the termination of criminal proceedings releasing a

person from criminal liability and conditionally releasing from criminal liability by Article 379 (5) and Article 415 (4).

3. The criminal justice system should provide effective procedural safeguards to ensure that a person to whom simplified forms of criminal procedure are applied agrees to them and admits his or her guilt knowingly and freely. It requires the observance of the presumption of innocence that includes a duty to prove a person's guilt and provision that an admission of guilt is just one piece of evidence not sufficient to convict a person. An important procedural safeguard is the right to information that requires a duty to explain to a person the legal consequences of the application of the specific simplified forms and that he or she has a right not to agree to these forms and not to confess guilt. The duty of a person directing the proceedings to explain the legal consequences should be included in Article 379 and Article 415, which regulates termination of criminal proceedings, releasing a person from criminal liability and conditionally releasing from criminal liability. One of the significant procedural safeguards that help to ensure that a person admits guilt and state their agreement freely and knowingly is state ensured legal assistance. The mandatory participation of a defence counsel would be desirable in all cases in which simplified forms of criminal procedure that does not include adjudication of a case in a court or direct and oral examination of evidence in a court hearing take place. To ensure it amendments in Article 83 (2) of the CPL would be required. The sound and image records of the investigative actions in which the simplified forms are negotiated would significantly help to ensure that they are applied lawfully. These procedural safeguards would significantly reduce the risk of miscarriage of justice or that innocent persons by applying these forms are convicted for a committing of a criminal offence.

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[9] Paragraph 2 of Article 6 of the ECHR provides the presumption of innocence, and paragraph 3 of this Article provides the following minimum rights: to be informed of the accusation; to have adequate time and the facilities for the preparation of his defence; to defend himself in person or through legal assistance; to examine or have examined witnesses; to have the free assistance of an interpreter.

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